4-04

4-04S Link to OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu03688-03_1.html)

IN THE MATTER OF THE TENURE	:	
HEARING OF MARTIN ROSENCRANZ,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN	:	DECISION
COUNTY VOCATIONAL SCHOOL DISTRICT,	:	
BERGEN COUNTY.	:	

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent Culinary Arts teacher for allegedly exercising poor judgment during an overnight school-sponsored trip.

During the course of the hearing, respondent moved for dismissal of two of the five charges; the Board consented to their dismissal. As to the remaining charges, in light of the testimony of witnesses and the record, the ALJ found that although some photos showed respondent in a questionable position, the ALJ was convinced that respondent's action was inadvertent and, as such, did not rise to the level of unbecoming conduct constituting just cause for dismissal. As to the charge of consuming alcohol on the trip, although the testimony indicated that respondent, along with the other two chaperones, consumed wine at dinner, the District's policy on field trips does not forbid the consumption of alcohol by adult chaperones. The ALJ found that petitioner failed to sustain the burden of proof on the charges. The ALJ ordered respondent reinstated with compensation.

The Commissioner concurred with the ALJ's credibility determinations and adopted the findings and determination in the Initial Decision as his own.

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.

January 8, 2004

OAL DKT. NO. EDU 3688-03
AGENCY DKT. NO. 85-3/03

IN THE MATTER OF THE TENURE	:	
HEARING OF MARTIN ROSENCRANZ,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN	:	DECISION
COUNTY VOCATIONAL SCHOOL DISTRICT,	:	
BERGEN COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The Board's exceptions and respondent's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4.

The Board objects to the ALJ's findings and conclusions with respect to Counts 1 and 2 of the tenure charges.[1] In so doing, the Board maintains that "respondent did, in fact, 'stage' and 'pose' for photographs P1 and P9 ***." (Board's Exceptions at 3) That "the scene may not have been staged and/or prepared in the immediate presence of student[s] should not be determinative of the issue of respondent's unbecoming conduct," according to the Board. Instead, respondent's intent to be seen by the students, the Board reasons, may be *implied* from Exhibits P1 and P9 and from the context in which the photographs were taken. (*Id.* at 4)

Moreover, the Board objects to the ALJ's characterization of the event as being brief in duration. Rather, it contends that "the scene was of sufficient duration" to permit 7 students to witness it and for two of those students to take photographs. (*Id.*) Quite simply, the Board finds incredible respondent's claim that he was unaware of how he looked when the towel was positioned between his legs. (*Id.* at 5) Instead, the Board maintains that although "no student suffered physical harm, touching

[1] Notably, although Count 4 also survived respondent's motion to dismiss, the Board does not challenge the ALJ's determination that it failed to sustain this charge.

or corruption of morals ***," the photographs prove that respondent was making a sexually suggestive joke, which constituted unbecoming conduct and warrants his dismissal. (*Id.*)

In reply, respondent counters that it is "desperate to try to have [him] found guilty of something [where the Board] asks the Commissioner to *imply* intent from the record," when, in reality, the record supports no such implication. (emphasis in text) (Respondent's Reply at 3) He argues that although the students were laughing about the incident, there is no evidence that he was involved in that joking and there is no basis to conclude that their joking encouraged him to continue the humor by posing for Exhibits P-1 and P-9. (*Id* at 4)

> Although there was ample evidence that Mr. Rosencranz liked to make exaggerated faces when his picture was taken in other instances ***, a review of P-1 and P-9 shows no Cheshire grin or clowning face such as might be expected in the "posed" picture the Board alleges. If Mr. Rosencranz was as immature as the Board asserts, and if he was allegedly posing, why would he be opening his mouth to eat chocolate? *** Why wouldn't he be playing to his audience to enhance the joke?" (*Id.* at 5, 6)

Furthermore, the testimony of four of the seven student witnesses was that the duration of the incident was less than one minute. (*Id.* at 5) Respondent, therefore, views these pictures as "an unintended embarrassment, but not unbecoming conduct." (*Id.*)

Upon careful and independent review of the record, the Commissioner appreciates that this is a serious matter which turns on the credibility of the witnesses and, in particular, the credibility of respondent. In this regard, the Commissioner also recognizes that the ALJ's credibility determinations are entitled to his deference. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility. *In the Matter of Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div.) *certif. denied*, 121 *N.J.* 615 (1989)." *In the Matter of the Tenure Hearing of Frank Roberts*, 96 *N.J.A.R.* 2d (EDU) 549, 550. The Appellate Division has affirmed this principle, underscoring that "[u]nder existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor based judgments." *Whasun Lee v. Board of*

Education of the Township of Holmdel, Docket No. A-5978-98T2, decided by the New Jersey Superior Court, Appellate Division, August 7, 2000, slip op. at 14. Indeed, the Commissioner

> *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. (emphasis added) *N.J.S.A.* 52:14B-10(c).

Here, upon review of the full record, which included transcripts from four days of hearing, together with exhibits, post-hearing briefs, exception and reply arguments, the Commissioner determines that the ALJ's finding that respondent's conduct was inadvertent (Initial Decision at 10) *is* supported by sufficient, competent and credible evidence in the record and, therefore, he may not disturb this finding.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: January 8, 2004

Date of Mailing: January 9, 2004

[2] The Commissioner notes that, pursuant to a motion to seal the record, (Tr. August 26, 2003 at 50) the ALJ recommended that the record *and* Initial Decision be sealed pursuant to *N.J.S.A.* 9:6-8.10a and *N.J.A.C.* 1:1-14.1. (Initial Decision at 3) However, the record does not include any evidence of a DYFS investigation in this matter, as appears to be contemplated by *N.J.S.A.* 9:6-8.10a. Additionally, there is no articulated basis for sealing the Initial Decision. Therefore, although the Commissioner determines to seal the record in this matter pursuant to *N.J.A.C.* 1:1-14.1, he declines to seal the Initial Decision.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

6-04

6-04 Link to OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu06082-02_1.html)

CAROL MAHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

The District reduced petitioner from a $4/5^{th}$ position as a school social worker to a $1/5^{th}$ position beginning in the 2002-03 school year. Petitioner sought enforcement of her tenure and seniority rights and appointment to a $4/5^{th}$ position as a social worker or other position under her educational services certification.

The ALJ determined that the District's decision to adjust the Child Study Team's workload was made in good faith and promoted economy and efficiency. The ALJ concluded that petitioner's tenure rights were not infringed. Petition was dismissed.

The Commissioner adopted the Initial Decision as his own.

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.

January 8, 2004

OAL DKT. NO. EDU 6082-02
AGENCY DKT. NO. 228-7/02

CAROL MAHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record in this matter, which included a transcript of the hearing held at the OAL on July 17, 2003, the Commissioner concurs with the findings and conclusions of the ALJ. Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: January 8, 2004
Date of Mailing: January 12, 2004

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

5-04 Link to OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu01409-03_1.html)

BAYONNE TEACHERS' ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Association sought a determination that the Board's Regulation #3218, which prescribes the procedures to be followed when an employee is suspected of being under the influence of a substance during working hours, violated *N.J.S.A.* 18A:16-2 *et seq.* and *N.J.A.C.* 6:3-4A.1 *et seq.*, particularly as applied to the events of September 24, 2002 involving a staff member who was asked to submit to a breathalyzer test.

The ALJ upheld the Board's policy. The ALJ found that neither the statute nor regulation prohibited the Board either from adopting Regulation # 3218 or taking the action it did in this instance. In this case, two persons had observed the teacher and reasonably determined based upon the strong odor of alcohol that she was probably under the influence. Under the circumstances, prompt testing was appropriate. It would have been impractical to notify the employee, provide a statement of reasons, schedule and hold a meeting.

Citing Fair Lawn Ed. Assoc., the Commissioner adopted the Initial Decision, finding that *N.J.S.A.* 18A:16-2 *et seq.* and *N.J.A.C.* 6:3-4A.1 do not preempt the Board's authority to assure the safety of its students and faculty by adopting and applying regulations requiring an immediate medical examination of an employee who is reasonably suspected of being under the influence of drugs or alcohol at work.

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.

January 8, 2004

OAL DKT. NO. EDU 1409-03
AGENCY DKT. NO. 389-11/02

BAYONNE TEACHERS' ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were duly considered by the Commissioner in reaching his determination.

Petitioner's exceptions and the Board's reply essentially recast and reiterate their arguments advanced below which the Commissioner determines were considered and addressed by the Administrative Law Judge in his Initial Decision and, therefore, these will not be revisited herein.

Upon careful and independent review of the record, the Initial Decision, the exceptions and the reply, the Commissioner determines to adopt the Initial Decision for reasons set forth therein. The Commissioner finds that the Board's authority to adopt and administer its Regulation #3218 arises from a fair implication of the powers set out in *N.J.S.A.* 18A:11-1c, which authorizes the Board to make rules "for the employment, regulation of conduct and discharge of its employees***." *See Fair Lawn Ed. Assoc. v. Fair Lawn Bd. of Ed.,* 79 *N.J.* 574

(1979). In so determining, the Commissioner concludes that *N.J.S.A.* 18A:16-2 *et seq.* and *N.J.A.C.* 6:3-4A.1 *et seq.* do not preempt the Board's authority to assure the safety of its students and faculty by adopting regulations requiring an immediate medical examination[1] of a school employee who is reasonably suspected of being under the influence of drugs or alcohol at work.

Accordingly, the Commissioner adopts the Initial Decision for the reasons set forth therein and grants summary decision to the Board in this matter.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: January 8, 2004

Date of Mailing: January 9, 2004

[1] The Commissioner notes that Regulation #3218, C(2)b requires that an employee suspected of being under the influence of a substance during working hours is to be immediately examined by the school doctor or a doctor selected by the employee, or if such a doctor is not immediately available, then the employee is to be taken to the local hospital. In the instant matter, it is unclear whether the employee was examined by a physician and whether the breathalyzer test that was administered was ordered by and administered under the supervision of that physician. The certification by Carol Cruden, the District's Director of School Nurses, states that: "Two breathalyzer tests of the teacher were performed at a certified laboratory. Both breathalyzer tests read .042%, confirming the presence of alcohol in the teacher's system." (Certification of Carol Cruden at 2, #5) As the Commissioner found in *In the Matter of the Tenure Hearing of Joseph Graceffo, School District of the Township of Wayne*, Passaic County, Commissioner Decision, September 21, 2000, Slip Op. at 66, administration of a drug (or alcohol) test does not equate to a medical examination.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

8-04

8-04

JEAN LIZOTTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 14, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6674-01

AGENCY DKT. NO. 305-7/01

JEAN LIZOTTE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

Michael T. Barrett, Esq., for the petitioner (Bergman & Barrett, attorneys)

Thomas W. Sumners, Jr., Esq., for the respondent (Sumners, George & Dortch, attorneys)

Record Closed: November 12, 2003 Decided: November 25, 2003

BEFORE **ISRAEL D. DUBIN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 19, 2001, 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, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms 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 (45) 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 25, 2003
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

December 1, 2003
DATE

M. Kathleen Dumeau (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC. 03 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

/cad

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

AGREEMENT

2003 NOV 12 A 10:56

THIS AGREEMENT is made this 20 day of September, 2003 by and between **JEAN LIZOTTE** (LIZOTTE) and the CITY OF TRENTON, BOARD OF EDUCATION (BOARD).

WHEREAS, all parties to this Agreement wish to reach a full and final resolution of all matters presently at issue between them.

WHEREAS, the parties to this Agreement, in consideration of the mutual covenants and agreements to be performed, as set forth below, agree as follows.

1. The Board shall restore forty-three (43) days to Lizotte's bank of sick days representing a return of sick days taken between January and March, 2001.

2. The restoration of those days shall occur within thirty (30) calendar days of the date of the full execution of this Agreement and Lizotte shall be notified, in writing, of this restoration.

3. LIZOTTE, by and through counsel, shall withdraw the case presently pending in the Office of Administrative Law under caption **JEAN LIZOTTE V. TRENTON BOARD OF EDUCATION, OAL DOCKET NO. EDUOA - 06674-015B.**

Counsel for LIZOTTE shall confirm in writing, to Board counsel that the withdrawal has been effectuated.

4. The withdrawal shall occur within ten (10) days of the notification of restoration of the sick days.

5. The workers' compensation claim between the parties under Claim Petition #

2001-24065 has been settled and dismissed.

6. The parties acknowledge that this Agreement resolves any and all pending claims between the parties.

IN WITNESS WHEREOF, the parties freely and voluntarily enter into this Agreement.

Jean S. Lizotte

Jean Lizotte

Dated: September 30, 2003

Witness. Michael T. Barrett, Esq.

Witness

Trenton Board of Education

Dated:

2001-24065 has been settled and dismissed.

6. The parties acknowledge that this Agreement resolves any and all pending claims between the parties.

IN WITNESS WHEREOF, the parties freely and voluntarily enter into this Agreement.

Jean Lizotte

Dated:

Witness, Michael T. Barrett, Esq.

Merrin L. Wynn

Witness

Dated: October 27, 2003

Joyce Kersey

Trenton Board of Education

TRENTON BOARD OF EDUCATION
108 North Clinton Avenue
Trenton, New Jersey 08609
CONFERENCE BOARD MEETING MINUTES
MONDAY - SEPTEMBER 15, 2003 - 6:30 P.M.

Jean Lizotte v. Trenton Board of Education OAL Docket No. EDUOA 06674-015

A motion was made by Dr. Ali to authorize Board Attorney to reach a settlement with Ms. Lizotte restoring forty-three (43) days to her sick leave bank, seconded by Ms. Eure. Unanimously approve by the members present.

ROLL CALL	**YES**	**NO**	**ABSTAIN**
Abdul-Malik Ali	x		
Geraldine Eure	x		
Garry R. Feltus	x		
Bernard McMullan	Absent		
Noriel Peña	Absent		
Abigail Ramos	x		
Donald O. Shelton	x		
Joyce M. Kersey	x		

Motion to Adjourn at 8:45 P.M.

Moved by: Ms. Eure Seconded by: Mr. Shelton

ADJOURNMENT

Respectfully,

Patricia McNeal-Wright
Assistant Board Secretary

3d

OAL DKT. NO. EDU 6674-01
AGENCY DKT. NO. 305-7/01

JEAN LIZOTTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/04

Date of Mailing: 1/15/04

9-04

IN THE MATTER OF THE TENURE	:	
HEARING OF SEAN SIMON,	:	
NEW JERSEY JUVENILE JUSTICE	:	COMMISSIONER OF EDUCATION
COMMISSION.	:	DECISION
	:	

January 14, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4378-03

AGENCY DKT. NO. 178-6/03

IN THE MATTER OF THE
TENURE HEARING OF
SEAN SIMON, NEW JERSEY
JUVENILE JUSTICE COMMISSION

John Franzini, Deputy Attorney General, for the Board (Peter C. Harvey, Attorney General of New Jersey, attorney)

Christine DiMuzio, Esq., for the respondent, Sean Simon (Hoffman, DiMuzio & Hoffman, attorneys)

Record Closed: October 20, 2003 Decided: November 25, 2003

BEFORE **ISRAEL D. DUBIN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on June 27, 2003, 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, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms 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 (45) 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 25, 2003
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

December 1, 2003
DATE

M. Kathleen Duncan (Esq)
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC - 3 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

EXHIBITS ADMITTED INTO EVIDENCE:

For Petitioner:

None

For Respondent:

None

WITNESSES:

For Petitioner:

None

For Respondent:

None

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625
Attorney for Petitioner, Juvenile Justice Commission

By: John Franzini
Deputy Attorney General
(609) 292-8582

In the Matter of the Tenure Hearing of Sean Simon, Office of Education, Juvenile Justice Commission	:	OAL Dkt No.: EDUTH 04378-2003S
	:	Agency Dkt No.: 136-4/03
	:	STIPULATION OF SETTLEMENT
	:	

The Juvenile Justice Commission, Office of Education (JJC), with offices located at 840 Bear Tavern Road, West Trenton, New Jersey 08625, represented by Peter C. Harvey, Attorney General of New Jersey, John Franzini, Deputy Attorney General, appearing; and Sean Simon, a tenured employee of the JJC represented by Hoffman, DiMuzio and Hoffman, P.C., Christine DiMuzio, Esq., appearing; by way of this Stipulation of Settlement say:

WHEREAS, Sean Simon has been employed at the JJC's Pinelands Residential Group Center as a Teacher 2 - Physical Education since December 7, 1998; and

WHEREAS, Mr. Simon submitted an Application for Leave and Voluntary Furlough (PR-2) on or about November 15, 2002. Mr.

Simon's treating physician indicated on that application that, for medical reasons, Mr. Simon would be unable to work from October 22, 2002 through January 2, 2003; and

WHEREAS, Mr. Simon's request for a leave of absence was approved by the Department of Personnel through January 2, 2003; and

WHEREAS, Mr. Simon did not return to work following the expiration of his approved leave; and

WHEREAS, Mr. Simon did not submit the required documentation to extend his leave (PR-2) or to effect his separation from State service (PR-3). Consequently, he has been listed as on unauthorized leave since January 3, 2003; and

WHEREAS, the JJC initiated the filing of tenure charges against Mr. Simon having filed the charges with the Commissioner of Education on or about June 2, 2003; and

WHEREAS, Mr. Simon was charged with abandonment of his teaching position and excessive absenteeism constituting conduct unbecoming a public employee and other just cause under N.J.S.A. 18A:60-2 and N.J.S.A. 18A:6-10; and

WHEREAS, the JJC sought the removal of Mr. Simon on the above charges; and

WHEREAS, Mr. Simon disputed the charges, asserting that his physician had indicated that he had forwarded documentation to the

JJC indicating that Mr. Simon's disability was continued through February 25, 2003; and

WHEREAS, Mr. Simon further asserted that he thereafter sought to return to work; and

WHEREAS, on or about June 20, 2003, the matter was referred to the Office of Administrative Law for a hearing; and

WHEREAS, the parties wish to enter into an amicable resolution of the tenure charges filed against Mr. Simon prior to a hearing; and

WHEREAS, this settlement is not a reflection on Mr. Simon's performance of his teaching duties nor is it an admission of guilt on the charges made herein; and

WHEREAS, it is in the best interest of the parties and the public to enter into this Stipulation of Settlement;

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties agree as follows:

1. Mr. Simon hereby resigns from employment with the Juvenile Justice Commission, to be effective on the date that the Commissioner of Education approves settlement of this matter.

2. Upon the effective date of his resignation, the Juvenile Justice Commission shall record Mr. Simon as having resigned in good standing.

3. The Commissioner's approval of this Settlement Agreement shall constitute a withdrawal of the tenure charges brought by the JJC against Mr. Simon.

4. As a member of the CWA Professional Unit, Mr. Simon's employment is governed in part by the provisions of the Collective Negotiations Agreement for the CWA Professional Unit (CNA). Art. VIII, paragraph F of the CNA is entitled: "Policy on Unexcused Absence." That provision states:

> Absence without notice and approval for five (5) days or failure to return from any leave of absence shall be considered a resignation.

Settlement of this matter is justified and in the public interest because it obtains Mr. Simon's resignation and implements the provisions of the CNA and JJC policy with regard to leaves of absence and sick leave without the need for the parties to devote substantial resources to a contested tenure hearing with an uncertain result. This settlement provides the relief that the JJC sought by bringing the charges.

5. This Agreement constitutes a final and complete resolution of the disciplinary action in this matter and fully disposes of all issues in controversy between the parties hereto. Mr. Simon agrees not to appeal the terms of this Agreement in any administrative, arbitral or judicial forum.

6. This Agreement shall not constitute a precedent in any other matter involving Mr. Simon or any other employee.

yd

7. Should the Commissioner fail to approve this Agreement, the parties shall make every reasonable effort to reform their Agreement to meet his objections.

8. Mr. Simon 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 of certificate.

9. This Agreement shall only become effective when the Commissioner of Education approves it. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter further.

This Agreement is made in good faith. The parties have read the Agreement and freely and voluntarily agree to its provisions.

For the Employee

Sean Simon — Dated: 10/9/03

Christine DiMuzio, Esq. — Dated: 10/9/03

For the Juvenile Justice Commission:

Jack Amberg
Director of Education, JJC — Dated: 10/16/03

John Franzini
Deputy Attorney General — Dated: 10/16/03

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OAL DKT. NO. EDU 4378-03
AGENCY DKT. NO. 178-6/03

IN THE MATTER OF THE TENURE	:	
HEARING OF SEAN SIMON,	:	
NEW JERSEY JUVENILE JUSTICE	:	COMMISSIONER OF EDUCATION
COMMISSION.	:	DECISION
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/04

Date of Mailing: 1/15/04

10-04

ANTHONY ARNONE, JOSEPH DUTKO, AND WALTER BITTNER,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HOPEWELL REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning residents and taxpayers contended that, notwithstanding the defeat of a ballot question authorizing the expenditure of $53,500 for the establishment of a football program at the April 17, 2001 school election, the Board began the process of initiating a football program which will ultimately require District funding in contravention of the will of the public at the election. The Board accepted a grant of funds and entered into a related grant agreement with HIKE, Inc., a 501(c)(3) corporation, for the purpose of funding said football program.

The ALJ found that the HIKE grant agreement, by its very terms, did not implement an extracurricular program at Central High School consisting of a new freshman football team in the 2001-02 school year; that the administrative time, resources and overhead which may have been expended in the 2001-02 school year also did not implement an extracurricular program at the high school consisting of a new freshman football team in the 2001-02 school year; and that the legal services and fees, the administrative time, resources and overhead which were expended in the 2001-02 school year perfecting the HIKE grant agreement, were for the purpose of implementing an extracurricular program at the high school for the 2002-03 school year. The ALJ concluded that the Board's actions did not contravene the results of a public vote taken on April 17, 2001, on a proposal to fund football in the School District's 2001-02 budget since this proposal, by its own terms, was only applicable to the 2001-02 school year. The petition was dismissed.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

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.

January 14, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4999-02

AGENCY DKT. NO. 218-7/02

ANTHONY ARNONE, JOSEPH DUTKO AND WALTER BITTNER,

Petitioners,

v.

BOARD OF EDUCATION OF HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY,

Respondent.

David B. Rubin, Esq., for petitioners

Robert P. Martinez, Esq., for respondent

Record Closed: July 15, 2003 Decided: December 1, 2003

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By petition dated July 11, 2002, four residents and taxpayers of the Hopewell Valley Regional School District objected to and challenged the actions of the school district in accepting a grant of funds and entering into a related grant agreement with HIKE, Inc., a 501(c)(3) corporation, for the purpose of funding a football program. The petition stated three causes for

complaint: (1) the school district's actions contravene the results of a public vote taken on April 17, 2001, on a proposal to fund football in the school district's 2001-2002 budget; (2) the school district's actions commit it to funding all or part of a football program during the 2004-2005 school year, in contravention of the public vote taken on April 17, 2001 and the law governing same; and (3) the school district's actions violate Title IX of the United States Code relating to required standards of equality of opportunity between genders.

The school district filed an answer to the petition on August 5, 2002, asserting that its actions conformed to the results of the April 17, 2001 vote in that no public funds were expended in the 2001-2002 school year to implement football in that year; that the disability created by the vote ended at the close of the 2001-2002 school year; and that the school district lawfully accepted a grant of private funds in the 2002-2003 school year to implement football in that year without the expenditure of public funds in the 2002-2003 school year and, contingent on future school board approval, during the 2003-2004 school year. The school district denied that it accepted any obligation to fund football, in whole or in part, thereafter. The school district further denied that it its actions violated Title IX.

An order was entered without objection on March 13, 2003, granting the request of petitioner Mary Ellen Curtin to withdraw from the pending litigation. During the hearing of this matter on May 27, 2003, the remaining petitioners withdrew the Title IX count. Following the hearing but prior to this decision petitioner Joseph J. Dutko passed away. At the conclusion of the hearing, provision was made for the submission of post-hearing memoranda.

Upon receipt of the post-hearing submissions of the parties, the record was closed on July 15, 2003. By two Orders of Extension, the time limit for filing the Initial Decision was extended until November 28, 2003. Because, November 28, 2003, was declared to be a public holiday, the Initial Decision is being filed on December 1, 2003.

FACTUAL DISCUSSION

1. Introduction

Virtually all of the facts in this matter are undisputed. In his submission dated June 16, 2003, attorney for petitioners recited and summarized all of the essential facts in this matter with references to an item in the record. In his submission dated July 8, 2003, respondent's attorney took no exception to petitioners' proffered Statement of Fact insofar as each proposition is referenced to an item in the record. The only exception was that respondent objects to a statement on page 4 of petitioner's recitation of facts as not attributed to any element of the record and as not supported by the record, and seeks that it be stricken. That particular statement is the following:

> Nevertheless, over the course of the 2001-2002 school year, the school district proceeded with plans to implement a football program for the 2002-2003 school year in a manner corresponding to Alternative B outlined in the feasibility study.

While I, as the fact finder, may ultimately conclude that this statement is true, I will disregard this statement for the purpose of reciting the undisputed facts in this matter.

2. Findings of fact

I hereby **ADOPT** the following as my **FINDINGS OF FACT** in this matter:

Petitioners are citizens and taxpayers residing in the municipalities served by the Hopewell Valley Regional School District in Mercer County. The April 17, 2001 ballot for the school district's annual school election sought voter approval of a proposed $36,980,216 tax levy to support the school district's general fund for the 2001-2002 school year. In addition, two separate questions appeared on the ballot seeking approval of additional programs not contained in the school district's base budget. One of these questions, identified as "Public Question No. 3", read as follows:

> RESOLVED, That there should be raised an additional $74,027 for GENERAL FUNDS in the same school year (2001-2002). These

taxes will be used exclusively for:

Extra - Curricular Programs
Timberlane: Lacrosse coach & equipment for new team $11, 971

Central High School: New Girls softball team $8,556

Central High School: New Freshman football team $53, 500
Introduction of football at Central High School in August, 2001. This allocation represents the first year's cost for the program. The feasibility study recommends that football be phased in over the next three years to a varsity level sport. Therefore, increases will occur until the program is fully implemented.

Total $74,027

(P-6)

The "feasibility study" referred to in the ballot question was prepared by Raymond Geneske and Anthony Simonelli, athletic consultants engaged by the school district to explore the pros and cons of establishing a football program at the High School. (P-10.) The board Secretary/School Business Administrator John Nemeth, the author of the interpretive statement on the ballot, acknowledged that the reference to "feasibility study" would have been understood by the community to refer to this document.

The feasibility study outlined three alternative plans for building a varsity football program, identified as Alternatives A, B and C. Alternative A called for the initiation of the program in August 2001 (P-10 at p. 15). The first year would feature a freshman schedule in the fall 2001 season, with participation by the District's eighth and ninth graders. The anticipated cost for that year was $53,494 (P-10 at p. 19), which corresponded to the $53,500 figure stated on the ballot. The authors of the feasibility study then "calculated the cost of the program on a yearly basis for a period of three years. Recurring costs necessary to maintain the program into the future have also been included." (P-10 at pp. 15-16) In the second year, there would be two teams competing at the freshman and junior varsity levels. Varsity competition would begin in the third year of the program. (P-10 at p. 15) Costs were estimated at $44,930.50 for the second year, (P-10 at p. 22), and $78,126.00 for the third year (P-10 at p. 26).

Alternative B was described by the authors as follows:

> Another option for the Board to consider would be to delay the implementation of the program outlined [in Alternative A] for one year, until the Fall of 2002. This new scenario would permit additional time to organize and fund the program.
>
> The cost figures outlined in Alternative A would, for the most part, remain the same. This Alternative would extend from three to four years the development of a three level, full scale program.
>
> (P-10 at p. 30.)

Alternative C, which could be combined with Alternative A or B, was as follows:

> . . . In the first year of Varsity competition, this option calls for playing all games at our opponents' field, or at the local Pop Warner field if adequate seating and other facilities are available.
>
> If games were to be played at the opponents' site, an overall savings of approximately $5,200.00 could be realized for the year.
>
> If Alternative C were to be employed it would provide the Board with an additional year to budget for athletic field expenditures. From three to four years in the case of using this option with Alternative A and from four to five years when used with Alternative B.
>
> (P-10 at p. 30.)

Public Question No. 3 was defeated by a margin of approximately 2 to 1.

The minutes of the November 12, 2001 school board meeting (P-2A) reflect a comment from a member of the public, George Helmstetter, on "the interest of the public for starting a football program at Central High School[,]" and from Board member Michael Bruno "on the need for discussion regarding a football program for the high school." Dr. Robert Sopko, Superintendent of Schools, reported "on administrative issues that should be discussed by the Board Football Committee at a future meeting." Another member of the public, Mr. Myers, "commented that he would like to have a football program included in the high school program.

He stated that football would provide additional sports programs for kids who currently don't have enough opportunities for participation."

The minutes of the November 19, 2001, school board meeting reflect a comment by a Mrs. Kley "that she would like to have a football program included in the budget. She stated that students should have the right to participate in football like other students in New Jersey." (P-2B at 84.) Dr. Sopko then "reported that he committed to Mr. Clements to hold a meeting of the Board Football Committee (President of the Board, Board Chairpersons of Finance, Facilities, and Curriculum Committees) before the new year." (P-2b at p. 84).

At the November 27, 2001 school board meeting, Dr. Sopko reported that the Football Committee would meet on December 18, 2001 (P-2C). At the December 10, 2001 school board meeting, in response to an inquiry from Mr. Foster, a member of the public, "about the status of the football program[,]", Dr. Sopko "reported on a meeting of the Football Committee scheduled for December 18, 2001, to discuss the status [of] the football program[.]" (P-2D at p. 107.)

At the January 14, 2002 school board meeting, board member Kim Newport "inquired on the status of the Football Committee meeting held in December." Dr. Sopko reported that "due to budget constraints this year, the community's reaction to the ballot question last year, and the lack of fields, there was no support in the proposed budget for football. The committee agreed to continue to discuss the issue of a football program in the district." (P-2E at p. 113.) At the January 22, 2002 school board meeting, Mrs. Kley "commented on the positive discussion at a recent football committee meeting. She inquired about the results of a vote by a ten-member board which could wind up five to five." In response, Mr. Nemeth "reported that, in the case of a tie vote by the Board, the question would be defeated." Dr. Sopko then "reported that the lack of fields restricts and limits student opportunities for participation in sports." (P-2F at p. 128.) At the February 19, 2002 school board meeting, a Mrs. Morris from the public "read from her son's DARE graduation letter in which he wrote that he knew drugs could prevent him from being a football player and that was what he wanted to be. She requested that the Board provide an opportunity for high school students to play football by forming a team." (P-2H at pp. 146-47.)

By the April 23, 2002 school board meeting, the first meeting following the school

election earlier that month, a local community group known as HIKE, Inc., had come forward with a proposal to partially underwrite a football program with private funds. The minutes of that meeting reflect the following public comments on the proposal:

> Mrs. Kley commented on the HIKE proposal to support a football team as a means of increasing student opportunities at Central High School.
>
> Mr. Foster reviewed the HIKE proposal funding plan. He stated that practice can be held at the Pop Warner field at the municipal complex.
>
> Mr. Clements distributed the HIKE proposal (copy attached) and requested that the Board fast track the question of offering a team in September, 2002.
>
> Mr. Helmstetter commented that the HIKE proposal addresses the funding and field problems and local high schools have volunteered their stadiums for games.
>
> Mr. Boyle commented on the budget process and the difficulty of initiating new sports programs and stated that the HIKE proposal addresses this matter.
>
> Mrs. Schetler, HVEA President, ... commented on the HIKE proposal and program control issues.
>
> Dr. Sopko reported on a May 1 meeting with Mr. Bach. Mr. Murphy, and HIKE representatives to review the proposal and issues related to the proposal.
>
> Mr. Meyers commented that HIKE funding could be provided in May.
>
> (P-21 at p. 198.)

At the May 13, 2002 school board meeting, Dr. Sopko gave a PowerPoint presentation, entitled "Game Plan", outlining a proposal to implement a football program for the fall of 2002 (P-2K at p. 208; P-7). The program would be fully funded in the first two years by a grant from HIKE. HIKE's financial responsibility in the third and fourth years would be 75% and 50% respectively. (P-7)

The football program was discussed extensively at the May 16, 2002 school board meeting. The minutes of the meeting reflect the following:

> Dr. Sopko distributed copies of the following documents (copies attached)
>
> - May 15, 2002, HIKE By-Laws
> - May 16, 2002, HIKE Funding Plan
>
> Mr. Martinez [Board Attorney] commented that the preceding documents are part of the Board review process.
>
> Dr. Sopko commented that in addition to HIKE funding, there will be no football program in September, 2002 without the proper coach in place and a CVC (Colonial Valley Conference) schedule. He requested Board direction to:
>
> a) Develop a contract with HIKE and receive the first year's funds.
> b) Advertise and conduct interviews for a football coach.
> c) Prepare a games schedule in the CVC.
>
> Dr. Sopko and Mr. Murphy, Athletic Director, reviewed the following documents (copies attached):
>
> a) Survey of area high school fields
> b) Central High School athletic participation
> c) May, 2002, sports participation survey
>
> Mrs. Turner summarized prior Board activities preceding the submission of a second question to the public:
>
> a) Feasibility study by outside consultants
> b) Title IX compliance review of existing athletic programs
> c) Cost estimates
> d) Montgomery Township Board of Education report on football
> e) Central High School athletic program needs
>
> Dr. Sopko commented that July 15, 2002 would be the latest date to complete activities necessary to operate a football program in September, 2002.
>
> Board members commented as follows:
>
> • Based upon data presented, without football students are being denied opportunities to participate in athletic activities.

- The feasibility study and the data support the value of starting a football program

- With only two Fall sports for male athletes, football provides a good opportunity for more students to participate in sports, and the Board should take the next step.

- Although there is the conflict with field storages, football addresses student needs.

- There is the concern regarding the "football mentality" but based upon the data provided by the high school principal, football can be good for the school and the students.

Dr. Sopko reviewed the football program cost estimates and plans to evaluate the program in January, 2003, and January, 2004.

Mrs. Turner opened the meeting to the public for thirty minutes and requested that the pro and con speakers alternate.

* * *

Mr. Bickner [1]commented that the question was voted down and should not be started.

Dr. Boyle commented that HIKE addressed the funding and field issues and recommended that the Board address student needs and start a program.

Mrs. Ternoey commented on the ballot defeat, the tax impact of the schools and stated that a football program should not be started.

Mr. Bartlett commented on the HIKE commitment, the need of students, and his support for a program.

Dr. O'Boyle commented on the funding of programs by outside groups, the need for a photography course, and an unbiased student survey.

Mrs. Kley requested that Mr. Martinez review the legal matters concerning the vote.

- Mr. Martinez commented that the defeated ballot question specifically dealt with the full funding by the Board for football,

[1] Petitioners believe this is, in actuality, petitioner Walter Bittner.

> lacrosse and softball teams. He further stated that the Board is permitted to pursue alternate funding proposals to operate the football program.
>
> A CHS student commented on other needs in the high school such as a theatre class, newer textbooks and maps, additional science equipment, additional field trips, and repairs to leaky roofs.
>
> Mr. Bickner commented on injuries to students and insurance costs.
>
> Mr. Hart commented on his concern for increasing taxes and the need for different activities for high school students.
>
> Mrs. Curtin commented on concern for the defeated referendum, the need to improve communication with the public and to support programs and opportunities for male and female athletes.
>
> Mrs. Morris commented on her son's interest in playing football and the importance of additional student opportunities.
>
> Mr. Ramsey commented on his concern for the safety of the neighbors' water, flooding, and traffic.
>
> • Mrs. Turner commented that the neighbors' concerns were discussed in detail during the Hopewell Township Planning Board review and approval of the Back Timberlane Athletic Field project.
>
> Mrs. Solomon commented on concerns for future costs of the instructional program due to anticipated student increases.

The public comment portion of the meeting was then closed, and a motion was made "to authorize the Administration to develop a contract with HIKE, to pursue interviews for a football coach, and prepare a CVC schedule for the Fall." The motion passed with all eight of the ten board members who were present voting in the affirmative. (P-2L at pp. 214-216.)

At the June 24, 2002, school board meeting, the following discussion occurred in closed session:

> Dr. Sopko reported that HIKE has indicated that they have raised $50,000, not the $72,000 budget estimate for the cost of the first year of a football program at Central High School. The budget difference is due in part to the services of a trainer and a five percent contingency fee included in the budget. He stated that he is

> not sure what the true meaning of this is. HIKE and Mr. Murphy will continue to develop the projected budget as part of the formal agreement.
>
> Dr. Sopko also reported that we have interviewed some excellent coaching candidates but have been hampered in hiring them by not having an appropriate teaching position available. He reported that we would continue to work towards resolution of this problem.
>
> (P-20)

In mid-July, 2002, the petition in this matter was filed with the Commissioner of Education by petitioners Arnone, Dutko and Bittner, and Ms. Mary Ellen E. Curtin, acting *pro se,* challenging the school district's attempt to thwart the will of the voters by proceeding with the football program, and seeking the Commissioner's intervention. By the next school board meeting on July 22, 2002, the school district attorney and HIKE had concluded drafting a grant agreement, and it was anticipated that the school board would take action to approve it at that meeting. Over one hundred members of the public were in attendance to observe the proceedings and voice their concerns (P-2P at p. 2). The petition was discussed by the school board and Mr. Martinez in closed session during the meeting. Mr. Martinez also reviewed with the school board at that time the final version of a Grant Agreement with HIKE, which the school board agreed to consider approving during the public portion of the meeting, notwithstanding the pending petition before the Commissioner (P-2P at p. 17).

The Grant Agreement (attached to P-5) identified HIKE as a Section 501(c) charitable gift giving organization "dedicated to the purpose of providing financial and/or material support of a high school football program within the Hopewell Valley Regional School District". The Agreement obligated HIKE to provide $69,044 in school year 2002-2003 and $68,350 in school year 2003-2004, should the school board determine to continue the program for a second season. Attached to the Grant Agreement was a line item budget for each of the two school years, ostensibly representing the entirety of all costs associated with the football program as had been represented in Dr. Sopko's "Game Plan" presentation at the May meeting.

Immediately after the closed session, the school board entertained the following motion:

Motion by Mr. Bruno, seconded by Mr. Hills, to accept the Grant Agreement between HIKE, Inc. and the Hopewell Valley School District, including the Grant Budget.

• Dr. Sopko reported that the agreement addresses the following:

- transportation to offsite fields
- part-time trainer
- stipend for coach
- cost for security and officials
- insurance
- 5% contingency

He stated that the agreement meets the standards established by the Administration and the Board committee. He also reported on the establishment of an advisory committee to evaluate the implementation of the football program.

Board members commented on the following football related issues:

- Divisive issue between the community and the Board
- Provides opportunities for additional student participation
- Supports the district's Strategic Plan
- Political mistake to ignore the results of the vote
- Negative impact to gain support for the needs of athletic fields
- Extensive dialog regarding pros and cons of the program
- Right decision for students
- Hard decision to choose in favor of students
- Low percent of registered voters
- Other items defeated in elections must be provided without electoral support
- The Board is not perfect, but needs to make decisions to support students.

The motion passed 9-1, and "Mrs. Kley, a HIKE member, presented the school board with a check in the amount of $69,044 for the 2002-2003 program."

Hopewell Valley fielded a freshman football team for the fall 2002 season, underwritten by HIKE's $69,044 grant funds. The school board's budget records as of November 25, 2002 (P-8), showed $54,725.45 of that amount had already been expended, with the expectation that the balance would be necessary for remaining expenses. As it turned out, the grant was insufficient

to cover the entire cost of the program, and it was necessary for the school district to solicit an additional $270.20 from HIKE in January, 2003, to cover an anticipated charge from game officials (P-9, P-12). Petitioners point out that HIKE was under no legal obligation to contribute these funds to the school district.

Following the 2002 football season, the school board's Football Advisory Committee issued a report analyzing the school district's first year's experience with the program in terms of athletic, budgetary, academic, social and safety concerns (P-13). The report acknowledged the "controversy that football has brought to Hopewell Valley[,]" (P-13 at p. 6), but recommended continuation of the program. In a section of the report entitled "Actual Cost of Operating the Program", the committee made the following observations:

> The athletic director and members of Hike have met on several occasions this past fall to review the 2002 budget. After careful calculations, the budget that was proposed for 2002 was accurate, even with the 4 additional participants. If and when approval is given by the Board of Education, Hike and the athletic director will meet again to evaluate the 2003 budget. The committee has discussed the future of the program and the budgetary concerns that develop with any additional school programs. The committee agrees that building a football program involves much more than just building a football team. The question remains, "Are we ready to take a closer look at the funds involved in building a football program?"
>
> Some future considerations to the budget include:
>
> - Coaching Positions
> - Home/Away Uniforms for 2004
> - Editing System
> - Professional Development (clinics)
> - Added Equipment
> - Scoreboard
> - Storage for player and team equipment
> - Field Development for Varsity Status
> - Athletic Training Supplies (P-13. at p. 5)

On May 9, 2003, HIKE issued a certification to the school board accepting an adjusted football budget amount of $67,760.40, and representing its intention to pay that amount in full by July 1, 2003. (P-15) At its May 12, 2003 meeting, the school board adopted a resolution

authorizing continuation of the football program for the 2003-2004 school year, contingent on receipt of the funds from HIKE by the date stated. (P-14)

At the hearing of this matter scheduled for May 27, 2003, petitioners' and respondent's exhibits were entered into evidence by stipulation without the necessity of formal proof or authentication. In addition, it was stipulated by petitioners that there is no Title IX issue in this matter.

The sole witness to testify at the hearing was John Nemeth, Board Secretary/Clerk for respondent. He testified that he reviewed his deposition taken on November 25, 2002 (P-19) and it is accurate.

Mr. Nemeth identified the district budget expenditure report for fiscal year 2003 (P-16) and the encumbrance and expense ledger by account code for the period of July 1, 2002 (P-17). He identified special revenue funds consisting of a HIKE grant as Fund No. 20 (P-16). These documents (P-16 and P-17) are the final expenditure reports for fiscal year 2003. He admitted that there are other expenditures which are not reflected in these documents. For example, prior to the football season there is administrative time and other unallocated expenditures. There is also an expenditure of $2,100 in legal fees. Not included in these expenditure costs are energy costs, such as lighting costs and other costs such as supplies. He also identified vouchers from the school board attorney reflecting time spent by the attorney regarding the football program (P-3, P-4).

Mr. Nemeth identified the resolution and grant agreement with respect to the HIKE grant (P-14) and HIKE's acceptance of the grant agreement (P-15). His understanding as to years 3 and 4 is that the HIKE grant would not cover all expenditures for the football program. He indicated that each year is separate, but in year 3, HIKE would be responsible for 75% of the expenditures relating to the football program and the school district would be responsible for 25%. In year 4, the responsibility would be shared 50% each by HIKE and the school district. It is up to future boards, to determine the percentage of increase.

Mr. Nemeth identified Public Question No. 3 contained on the school election ballot of

April 17, 2001 (P-6). He also identified the feasibility study that was referred to in this public question (P-10). H explained that there were a number of public sessions on the feasibility study and this was the plan presented to the public. He explained that this was a concept. There was also a game plan (P-7), but he is not sure if this was presented to the public before or after the referendum.

Mr. Nemeth testified that for the 2003 football season, there were extra expenses totaling $270 which exceeded the budget and the amount provided by HIKE. HIKE paid this additional amount and, for the next year, he feels that HIKE would be obligated for any overexpenditures. He admitted that in year 4 the plan is for the board to pay 25% of the cost of the football program.

On cross-examination, Mr. Nemeth testified that the ballot question (P-6) applied to fiscal year 2001-2002 only. This ballot question was defeated and the board did nothing to implement football in that school year. He admitted that there were indirect or unallocated expenditures for football in the 2001-2002 school year. During that year, there was consideration of inclusion of football for 2002-2003. The board did not include any funds for football in the 2001-2002 proposed budget because the issue was raised, but rejected. It was in 2002 that HIKE approached the board to fund football and Dr. Sopko presented a four-year plan on May 13, 2002. The board did not adopt this game plan and eventually the board held HIKE to a two-year commitment. The board reserved the right to evaluate the program every year and has conducted a program evaluation. He identified this evaluation (P-13) and indicated that there was an enthusiastic favorable recommendation.

Mr. Nemeth testified that as of the date of the hearing there is no board of education obligation to run a football program in the school year 2004-2005. There is nothing in the agreement between the board and HIKE, which covers the 2004-2005 school year.

On redirect examination, Mr. Nemeth indicated that in 2002 the high school football team played on a municipal field. There were no payments by the board of education to the municipality and no funds were expended for this purpose. For the 2003 school year, the same municipal field was used. He did indicate there was a cost for field maintenance of $700 (P-14,

exhibit B). For the 2004 school year there were no plans for separate fields, and it is his understanding that the municipal field would be available.

LEGAL DISCUSSION AND ANALYSIS

New Jersey school districts are permitted to place on the ballot at their annual school elections "separate proposals" for general fund tax levies over and above their adjusted spending growth limitations in order to fund specific programs not strictly necessary to meet their minimum legal mandate. *See N.J.S.A.* 18A:7F-5(d) (9). Any such proposal rejected by the voters is to be submitted to the governing body for a determination as to the amount, if any, that should be expended notwithstanding voter rejection, and the governing body's decision is final and unappealable. *Id.*

In the event that a separate proposal is defeated by the voters, the district is prohibited from using any of its funds for the purpose identified in the rejected proposal, except as provided by *N.J.A.C.* 6A:23-8.5(j). This provision states:

> Purposes for amounts not restored by the municipal governing body or bodies after rejection by the local voters may be implemented in the budget year through a donation or contribution from an external source, other than the district board of education, only if such implementation will not require funding by the district board of education in subsequent budget years.

The issue in this matter, as identified by attorney for petitioners, is whether the school board's actions contravened this regulation, or were otherwise arbitrary, capricious or unreasonable.

For purposes of identifying the precise legal issues in this matter, I will attempt to summarize the legal arguments of the parties.

Petitioners' legal position

Attorney for petitioner argues that in interpreting a statute, the Commissioner must look to the fundamental purpose for which it was enacted and its meaning is to be gathered from the mischief to be eliminated as well as the proposed remedy. Petitioners assert that it is clear that during the 2001-2002 school year, the Board expended funds to "implement" the "purposes of the defeated question." It acknowledges while a football team did not take to the practice field until the following school year, respondent has conceded that at least $2,100 in counsel fees were expended prior to the end of the 2001-2002 school year perfecting the HIKE grant agreement (P-1, at pp.1-2). Mr. Nemeth, the school district clerk/administrator also testified that in addition to the legal fees, an indeterminate amount of administrative time, resources and overhead were devoted to this question. Petitioners argue that these activities corresponded to one of the alternatives in the feasibility study (P-10 at p. 30).

Petitioners argue that if respondent takes the position that if school board expenditures were slight and that the Board remains free to discontinue the program in the future, that these are literalisms and technisms the Supreme Court had in mind in its decision in *Jersey City Chapter of Property Owner's etc. Ass'n v. City Council,* 55 *N.J.* 86, 101 (1969), and would serve to obscure the common sense of the situation.

Petitioner contends that the fact that respondent may have spent only a small amount of its funds in the 2001-2002 school year in furtherance of the football program is not dispositive and that it is a violation to take ***any*** steps to "implement" a "purpose" which has been disapproved at the polls. Petitioners contend that a good portion of the 2001-2002 school year was devoted to planning, discussing and otherwise laying the ground work in furtherance of the "purpose" which the voters voted against.

Petitioners also argue that HIKE's two-year funding commitment will "require funding by the district Board of Education in subsequent budget years." It argues that this is a violation of *N.J.A.C.* 6A:23-8.5(j) which prohibits implementing a rejected program through a donation or contribution from an external source if such implementation will require funding by the district

board of education in subsequent budget years. It argues that the regulation should not be interpreted to interpret the word "require" to mean an enforceable legal duty, but that it should be accorded its everyday meaning in ordinary conversation. Petitioners point out that the Grant Agreement (P-5) only obligates HIKE to provide total funding in the first two years, and that in the third and fourth years, the school district is required to provide funding for the continuation of the program. In addition, even if these funding levels are minimal, increased funding will be necessary in the future for a proper football program.

Petitioners argue that the intent of *N.J.A.C.* 6A:23-8.5(j) is that when the voters disapprove a program by referendum, that program is off the table for a reasonable amount of time to the extent that any school district funds are involved, absent a compelling and material change in circumstances. Petitioners rely on *Durgin v. Brown*, 37 *N.J.* 189, 197-198 (1962). In that case, a referendum to fund a school construction project passed, but the school board determined not to move forward with the project. The Supreme Court ruled that the school board had no right to disobey the will of the voters absent extraordinary circumstances. Petitioners argue that in the present matter, the school district has embarked upon an obvious course of frustration of the will of the voters of the school district.

Petitioners contend that the appropriate remedy in this matter and one which balances the equities involved, is the suggestion that the school board be compelled to place the public question on the ballot in the April 2004 school election seeking the sentiments of the voters on whether to continue the football program with school district funds.

Respondent's legal position

Respondent denies petitioners' assertions that it took steps during the 2001-2002 to implement a football program. It points out that there is no mention of the football program until November 2001, and no activity relating to football until the school board meeting of April 23, 2002 when a new *ad hoc* football committee was formed to deal with a grant proposal from HIKE. Thus, respondent contends that it did absolutely nothing about implementing a football program until the possibility of a grant was raised. In May 2002, the new school board identified football as a critical issue but did not indicate that it would be implementing football as a goal for

the year. At the May 13, 2002 school board meeting, the board received legal advice and at the May 16, 2002 special meeting, the board authorized a grant agreement to be developed. On July 22, 2002, the board approved the grant agreement.

Respondent refers to the *Durgin* case and contends that the Supreme Court established the general rule that a school board may not abandon a referendum project in its entirety unless extraordinary and unexpected circumstances nullified the premise upon which the vote was taken. Respondent relies upon a number of other court cases which establish that a board of education has an ongoing power and duty to consider changed circumstances justifying reconsideration. Respondent also points out and emphasizes that these cases have developed in disputes involving major capital projects previously approved by referendum and, specifically, the application and use or non-use of public funds authorized and raised by referendum. Respondent argues that none of these cases involve the question whether the same principles should apply to annual decisions to accept grants to fund a program that was, in one fiscal year, not funded by local taxation.

Respondent asserts that the negative vote on the referendum question did not bar the school board from discussing the possibility of implementing football in future years, or bar it from paying for legal advice, or even bar meetings to listen to public debate on the subject. Respondent contends that this prior restraint of public discussion is inappropriate.

Respondent also argues that *N.J.A.C.* 6A:23-8.5(j) likewise does not forever bar respondent from accepting private funds to run a sport program because at some future time such programs could become a tax burden. Respondent also points out that the grant agreement accepted by the school district contained unequivocal language that nothing in the agreement obligates the school district to continue the program, and that any such continuation is subject to approval of the future board according to law. The 2003-2004 school board continue the program for that year by accepting the second year of the grant on the same terms as the original grant. Respondent contends that nothing in these documents creates any legal, moral or other right or entitlement, nor any reasonable expectation that the program would be extended beyond the 2003-2004 school year. Respondent points out that the result of petitioners' argument is that any program established using grant funds would violate the regulation if such a program "could"

become a candidate for future tax-based funding. Respondent contends that the language of the regulation means exactly what it says, that is, presently incurring a future obligation to fund something is not permissible.

Respondent argues that the regulation was not intended to extend the legal reach of failed proposals beyond the reasonable limits of its terms. In this case, the regulation deals with a simple budgetary issue.

Finally, the respondent argues that if *Durgin* applied, the sudden availability of private funds, a circumstance not known to the voters in the April referendum, is a material change of circumstance. Thus, under *Durgin*, supervening events may justify a policy change.

Analysis

The critical issue in this matter is the legal effect of the defeat of Public Question No. 3 on respondent's April 17, 2001 school district annual school election ballot. Public Question No. 3 asked the voters to decide whether there should be raised additional sums of money for general funds in the school year 2001-2002 to be used exclusively for a number of items, including a new freshman football team for Central High School. The amount allocated for this particular program and purpose was stated to be $53,500. This allocation was stated to be the first year's cost for the program. In the vote on this question, a majority voted against this resolution.

As with any public question on a referendum, the legal effect of the decision of the electorate is limited to the question on the ballot. In perusing Public Question No. 3, it is clear that the electorate of the school district decided against raising any additional funds, including $53,500 for a new freshman football team for Central High School, during school year 2001-2002.

Petitioners argue that the legal effect of this vote should extend beyond the specific terms of the public question. Their legal position is based on the provisions of *N.J.A.C.* 6A:23-8.5(j) and the holding in *Durgin v. Brown, supra,* 37 *N.J.* 189.

I disagree with petitioners' position. First of all, *N.J.A.C.* 6A:23-8.5(j) sets forth an exception to the general rule that proposed expenditures which are rejected by local voters may not be restored to the budget pursuant to *N.J.A.C.* 6A:23-8.9. The exception set forth in subparagraph (j) of this regulation permits the implementation of rejected purposes in that same budget year if the funding source is a donation or contribution from an external source. However, this section makes it clear that this may be done only if such implementation will not ***require*** funding by the district board of education in subsequent budget years. Thus, under the terms of this subsection, respondent could have implemented a football program at Central High School within the 2001-2002 school year through a donation from an external source provided that the school district was not required to fund the football program in subsequent budget years. Since that is clearly not the situation in the present matter, I **FIND** that the provisions of *N.J.A.C.* 6A:23-8.5(j) have no applicability in the present matter.

Even if the provisions of *N.J.A.C.* 6A:23-8.5(j) are deemed to be applicable to the present situation, it is also clear that by the terms of the Hike, Inc., grant agreement, respondent has no legal obligation to fund the football program in future years. Obviously, if a future board of education desires to continue the football program in the future, it may be required to fund it if no benefactor comes forward with the necessary funds. However, that future board is under no legal obligation which may be found in the record in this matter to include such funding in a future school district budget. Therefore, I **FIND** that petitioners have not established any violation of the provisions of *N.J.A.C.* 6A:23-8.5(j) so as to invalidate respondent's actions with respect to the Hike, Inc., grant agreement.

I also disagree with petitioners' reliance on the *Durgin* case. In *Durgin*, the school board adopted a proposal to build new schools, the cost of which was to be financed by a bond issue. Under the statutory provisions applicable to such a proposal, the school board exercised its power to deal with the problem of classroom space by adopting a specific plan. Necessary consents regarding debt limitations were then obtained from the State Commissioner of Education and Local Government Board. The specific plan was then placed on the school ballot and received the voters' stamp of approval. The Supreme Court held that under these circumstances, the Legislature committed the final judgment on this plan to the voters and ordered the school board to carry out the proposal approved by the referendum vote.

The facts in *Durgin* differ significantly from those in the present matter. In *Durgin*, the voters approved a plan which was to be implemented over a period of years. In the present matter, Public Question No. 3 called upon the voters to decide whether to spend a specific amount of money within a specific school year. By its very terms, the proposal in *Durgin* extended well beyond a specific school year. In the present matter, Public Question No. 3 was limited to a specific school year. Thus, the holding in *Durgin* is clearly distinguishable from that in the present matter.

Petitioners assert that it is clear that during the 2001-2002 school year, the school board expended funds to "implement" the "purposes of the defeated question." Petitioners acknowledge that while a football team did not take to the practice field until the following school year, at least $2,100 in counsel fees were expended prior to the end of the 2001-2002 school year perfecting the HIKE grant agreement (P-1, at pp. 1-2). In addition, an indeterminate amount of administrative time, resources and overhead were devoted to this question. Petitioner contends that it is a violation to take any steps to "implement" a "purpose" that has been disapproved at the polls.

It bears repeating that the defeated question resolved that there should be raised an additional $74,027 for general funds in the 2001-2002 school year, $53,500 of these [funds] to be used exclusively for an extra-curricular program at Central High School consisting of a new freshman football team. It is clear to me from the record in this matter that the $2,100 in counsel fees expended prior to the end of the 2001-2002 school year involved legal services perfecting the HIKE grant agreement (P-1, at pp. 1-2). I **FIND** that the Hike grant agreement, by its very terms, did not implement an extra-curricular program at Central High School consisting of a new freshman football team in the 2001-2002 school year. In addition, I **FIND** that the administrative time, resources and overhead which may have been expended in the 2001-2002 school year also did not implement an extra-curricular program at Central High School consisting of a new freshman football team in the 2001-2002 school year. I **FIND** that the aforesaid legal services and resulting legal fees, the administrative time, resources and overhead which were expended in the 2001-2002 school year perfecting the HIKE grant agreement, were for the purpose of implementing an extra-curricular program at Central High School consisting football team in the

2002-2003 school year. I **CONCLUDE** that this did not violate the defeated Public Question No. 3. since it was only applicable, by its terms, to the 2001-2002 school year.

DECISION AND ORDER

For the reasons stated above, I FIND that respondent's actions do not contravene the results of a public vote taken on April 17, 2001, on a proposal to fund football in the school district's 2001-2002 budget. Therefore, it is hereby **ORDERED** that petitioner's petition is hereby **DENIED** and **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 (45) 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 (13) 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, 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 1, 2003
DATE

JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

12/1/03
DATE

Mailed to Parties:

DEC. 05 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX

LIST OF WITNESSES:

For petitioner:

None

For respondent:

John Nemeth

LIST OF EXHIBITS:

For petitioner:

P-1 Attorney for petitioner letter, dated August 22, 2002

P-2 Attorney for respondent letter, dated September 4, 2002

P-2A Respondent minutes of November 12, 2001

P-2B Respondent minutes of November 19, 2001

P-2C Respondent minutes of November 27, 2001

P-2D Respondent minutes of December 10, 2001

P-2E Respondent minutes of January 14, 2002

P-2F Respondent minutes of January 22, 2002

P-2G Respondent minutes of February 11, 2002

P-2H Respondent minutes of February 19, 2002

P-2I Respondent minutes of April 23, 2002

P-2J Respondent minutes of May 7, 2002

P-2K Respondent minutes of May 13, 2002

P-2L Respondent minutes of May 16, 2002

P-2M Respondent minutes of May 20, 2002

P-2N Respondent minutes of June 10, 2002

P-2-0 Respondent minutes of June 24, 2002

P-2P Respondent minutes of July 22, 2002

P-2Q Respondent minutes of June 24, 2002

P-3 Voucher for legal services for April 2002

P-4 Invoice for legal services, dated June 4, 2002

P-5 Executed Grant Agreement

P-6 School Election Sample Ballot, April 17, 2001

P-7 "Game Plan" presentation

P-8 District Budget Expenditure Report for 2003 – Fund 20

P-9 Attorney for respondent letter, dated January 27, 2003, with attachments

P-10 Feasibility study

P-11 Attorney for respondent letter, dated May 21, 2003

P-12 HIKE check, dated January 7, 2003

P-13 2002-2003 Football Advisory Report

P-14 School District Resolution, dated May 12, 2003

P-15 HIKE, Inc., Certification, dated May 9, 2003

P-16 District Budget Expenditure Report for 2003 – Fund 20

P-17 Encumbrance and Expense Ledger, July 1, 2002

P-18 2003-04 Budget, January 2003

P-19 Deposition of John Nemeth, dated November 25, 2002

For respondent:

R-1 Pledge – petition submitted to respondent on July 11, 2002

R-2 Pledge – petition submitted to respondent on June 20, 2002

R-3 Commissioner letter, dated July 24, 2002

R-4 Deposition of Anthony P. Arnone

R-5 Deposition of Walter G. Bittner

R-6 Deposition of Joseph Dutko

OAL DKT. NO. EDU 4999-02
AGENCY DKT. NO. 218-7/02

ANTHONY ARNONE, JOSEPH DUTKO, AND WALTER BITTNER,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HOPEWELL REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the Board's reply thereto were filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioners' exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ) below. In that it is determined that such arguments were fully considered and addressed in the Initial Decision, they will not be revisited herein.

Upon his full and independent consideration of the record, the Commissioner concurs with the ALJ that the Board's actions herein were not violative of the results of the public vote taken on April 17, 2001 with respect to the proposal to fund a football program in the District's 2001-02 budget.

Accordingly, the Initial Decision of the OAL is adopted for the reasons clearly articulated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/04

Date of Mailing: 1/15/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

11-04

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTOINETTE CLIFTON,	:	
SCHOOL DISTRICT OF ORANGE	:	COMMISSIONER OF EDUCATION
TOWNSHIP, ESSEX COUNTY.	:	DECISION
	:	

January 16, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5794-03
AGENCY DKT. NO. 155-5/03

IN THE MATTER OF THE TENURE HEARING OF ANTOINETTE CLIFTON, SCHOOL DISTRICT OF ORANGE TOWNSHIP, ESSEX COUNTY.

Marvin L. Comick, Esq., for the School District of Orange Township
(Love and Randall, attorneys)

Gail Oxfeld Kanef, Esq., for Antoinette Clifton
(Oxfeld, Cohen, attorneys)

Record Closed: November 14, 2003 Decided: December 2, 2003

BEFORE **RICHARD McGILL,** ALJ:

The School District of Orange Township filed charges of incapacity and excessive absenteeism against Antoinette Clifton (respondent), whom it employs as a tenured administrative secretary. The matter was transmitted to the Office of Administrative Law on June 27, 2003, for determination as a contested case.

On the hearing day, the parties agreed to an amicable resolution of the matter and subsequently submitted a written Stipulation of Settlement. The terms thereof satisfactorily address the standards set forth in *N.J.A.C.* 6A:3-5.6 concerning settlement of tenure charges. The main provision of the settlement is that respondent will resign in good standing from her tenured position of administrative secretary. In addition to signing the Stipulation of Settlement, respondent stated on the record that she understood the settlement agreement and that she entered into it voluntarily. The settlement is in the public interest in that it allows both parties to move forward with certainty regarding their status and relationship and avoid the cost and delay of protracted litigation and possible appeals.

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.

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 (45) 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.

Dec. 2, 2003
DATE

RICHARD MCGILL, ALJ

Receipt Acknowledged:

12-5-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 8 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2003 NOV 14 A 9:35

LOVE & RANDALL, ESQS.
57 Washington Street
East Orange, New Jersey 07017
#(973) 674-6000
ATTORNEY(S) FOR PETITIONER, ORANGE BOARD OF EDUCATION

ORANGE BOARD OF EDUCATION	:OFFICE OF ADMINISTRATIVE LAW :OAL DOCKET NO.: EDUTH 05794-2003N :AGENCY REFERENCE NO.: 155-5/03
Petitioner,	:TRANSMITTING AGENCY: :DEPARTMENT OF EDUCATION
vs.	:
	: **STIPULATION OF SETTLEMENT**
ANTOINETTE CLIFTON	:
Respondent,	:

THE ABOVE CAPTIONED MATTER having been amicably adjusted by and between the parties, both represented by counsel, Marvin L. Comick, appearing for Petitioner and Gail Oxfeld Kanef, representing Respondent, it is hereby stipulated and agreed that the subject tenure dismissal proceedings based on excessive leave are hereby settled, based on the following terms and conditions:

1. Antoinette Clifton shall resign in good standing from her tenured position of Administrative Secretary with the Orange Board of Education.

2. Pursuant to *N.J.S.A. 18A:6-14*, the "120 day rule", Ms. Clifton shall receive her statutorily required, full salary payment from September 11, 2003 until September 25, 2003, i.e. 11 work days, weekends excluded.

3. Respondent shall further receive salary payment from April 2, 2003, when she offered to return to her duties and responsibilities with Petitioner, until May 13, 2003,

when the Orange Board of Education certified tenure charges, i.e. 30 days, weekends excluded.

4. In recognition of the genuine dispute between the parties concerning Antoinette Clifton's alleged entitlement to additional vacation and sick leave, it is stipulated and agreed that she will receive 20 days' salary, in full satisfaction of any and all contractual and statutory claims against the Orange Board of Education.

5. On September 25, 2003, the scheduled hearing date for the matter sub judice, Antoinette Clifton, with the assistance of counsel, stated on the record, before the Honorable Richard McGill, A.L.J. that she entered this settlement voluntarily with a full understanding of her rights.

6. The parties mutually agree that the herein resolution is fair, reasonable and in the public interest as it allows both to move forward with certainty regarding their status and relationship and avoid the cost and delay of protracted litigation and possible appeals.

7. The herein settlement is subject to the approval of the Orange Board of Education and will be formally considered at its October 14, 2003 meeting.

By: _____
Marvin L. Comick
Attorney for Petitioner

Dated: 10-23-03

By: _____
~~**Gail Oxfeld Kanof**~~
~~**Attorney for Respondent**~~
Antoinette Clifton

Dated: 10/16/03

RESOLUTION

WHEREAS, Antoinette Clifton is a tenured employee of the Orange Township Board of Education, serving in the position of Administrative Secretary; and

WHEREAS, on or about May 16, 2003 tenure charges, certified by the Board, and evidence supporting same were referred to the Commissioner of Education; and

WHEREAS, after protracted negotiations that included participation by Administrative Law Judge Richard McGill, the parties reached an amicable settlement, subject to Board approval, that will obviate the need for costly and time consuming litigation; and

WHEREAS, Board counsel recommends the approval of the settlement based on attendant facts and applicable law

NOW THEREFORE BE IT RESOLVED, the Orange Township Board of Education hereby accepts Antoinette Clifton's resignation in good standing, pursuant to the terms and conditions of the Stipulation of Settlement, attached hereto and made a part hereof; and

IT IS FINALLY RESOLVED, that Board counsel is hereby authorized to execute the subject Stipulation of Settlement.

OAL DKT. NO EDU 5794-03
AGENCY DKT. NO. 155-5/03

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTOINETTE CLIFTON,	:	
SCHOOL DISTRICT OF ORANGE	:	COMMISSIONER OF EDUCATION
TOWNSHIP, ESSEX COUNTY.	:	DECISION
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/16/04

Date of Mailing: 1/16/04

13-04

13-04 (Link to OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu00470-03_1.html)

OAL DKT. NO. EDU 470-03
AGENCY DKT. NO. 51-2/03

D.T. AND M.T., on behalf of minor child, N.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions were submitted by petitioners in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

In their exceptions, petitioners object to the dismissal of their petition and request that the matter be remanded for a trial before another Administrative Law Judge (ALJ). (Exceptions at 1 and 4) Moreover, petitioners accuse the ALJ and the Board's counsel in this matter of numerous violations of alleged unethical conduct (*Id.* at 1-3), and request the Commissioner to investigate "the treacherous actions of how this decision was unlawfully malfeasance orchestrated (sic)" by the ALJ and the Board's counsel. (*Id.* at 4)

Initially, with respect to petitioners' request that the Commissioner investigate alleged unethical conduct by the ALJ and the Board's counsel, the Commissioner does not have jurisdiction to entertain this request. To the extent that petitioners seek an investigation of the

conduct by the ALJ and the Board's counsel in this matter, such requests are appropriately directed to the Director of the OAL, pursuant to *N.J.A.C.* 1:31-3.1 *et seq.*, and/or the Office of Attorney Ethics.

Turning next to the question of whether this matter should be remanded for hearing, as petitioners assert, it is noted that this matter was filed on February 7, 2003 as an emergent relief petition. Therein, petitioners sought to stay a five-day school bus suspension until the merits of their challenge to the Board's decision to impose a five-day suspension on their son could be heard. By letter of February 14, 2003, the Board notified the ALJ that the District "will agree to voluntarily stay the 5 day bus suspension, thereby obviating any hearing on the stay motion." (Board's letter, dated February 14, 2003) Subsequently, by letter of October 30, 2003, the Board notified the ALJ that the Board had: 1) nullified the five-day bus suspension, which is the subject of the petition in this matter; 2) removed all reports and other documentation underlying the five-day bus suspension from N.T.'s file; 3) withdrawn all unresolved disciplinary matters involving N.T. during the 2002-03 school year; and 4) removed all reports and other documentation underlying any and all unresolved disciplinary matters during the 2002-03 school year from N.T.'s file. (Board's Letter, dated October 30, 2003) By letter of November 25, 2003, the Board, referring to its October 30 letter summarized above, moved to dismiss the petition in this matter as moot.

Accordingly, upon careful and independent review of the record, the Commissioner finds that a hearing in this matter is not required and agrees with the conclusion of the ALJ that this matter is moot in that the Board has granted petitioners the relief requested in their petition, *i.e.*, the Board voluntarily stayed the bus suspension imposed on N.T. and,

subsequently, nullified the suspension and removed all documentation underlying the bus suspension from N.T.'s file. Therefore, the Initial Decision is adopted for the reasons expressed therein and the petition is dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: January 20, 2004

Date of Mailing: January 21, 2004

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

January 28, 2004

Stephen J. Edelstein, Esq.
Schwartz, Simon, Edelstein, Celso & Kessler, LLP
Ten James Street
Florham Park, New Jersey 07932

David C. Dixon, Esq.
Scangarella, Feeney & Dixon, LLP
563-565 Newark Pompton Turnpike
P.O. Box 216
Pompton Plains, New Jersey 07444

Dear Counsel:

I have reviewed the Application for Emergent Relief and underlying papers filed on January 21, 2004 in the matter entitled *Board of Education of the Borough of Lincoln Park, Morris County, v. Borough of Lincoln Park, Morris County*, Agency Dkt. No. 20-1/04, wherein the Board seeks an Order voiding the March 6, 1998 Lease Agreement between it and the Borough, so that Lanes Field will be returned to the Board to be used as the site for construction of a new school. In its papers, the Board argues that the lease must be found void *ab initio* because it was not properly approved pursuant to *N.J.S.A.* 18A:20-8.2(b), and that relief must be immediate because a new school will be needed to educate the children of Lincoln Park upon the impending severance of the district's current sending-receiving relationship with Boonton. I have further reviewed the responsive papers submitted by the Borough, wherein it is argued that I do not have jurisdiction over this matter, that the lease in question did not require approval pursuant to *N.J.S.A.* 18A:20-8.2(b), and that emergent relief is not warranted in any event.

Upon such review, I have first determined to deny the Board's request for emergent relief. Even assuming, *arguendo*, that I have jurisdiction to hear the underlying appeal, the Board's application clearly fails to meet the standard established pursuant to *N.J.A.C.* 6A:3-1.6 and *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), wherein an applicant for such relief must demonstrate irreparable harm, settled legal rights, a likelihood of prevailing on the merits, and a balancing of equities and interests in its favor. In this matter, the Board's application is premised in its entirety on the assumption that I will

grant Boonton's request for severance, now pending before me as *Board of Education of the Town of Boonton, Morris County, v. Board of Education of the Borough of Lincoln Park, Morris County,* Agency Dkt. No. 251-8/02, and, further, that such grant will be conditioned on immediate construction of a new school. Neither of these assertions can be viewed as anything but speculative in light of the present posture of the severance request, which is still open for public comment pursuant to *N.J.A.C.* 6A:3-6.1 and must yet be reviewed by me under the standards of *N.J.S.A.* 18A:38-13. Additionally, as the Borough's submission makes clear, threshold legal issues arising from the Board's claim are far from settled.

As to the underlying appeal, I have determined that the Borough's Cross-Motion to Dismiss Petition and Application for Emergent Relief shall be deemed a motion to dismiss in lieu of answer, filed in accordance with *N.J.A.C.* 6A:3-1.5(g), and that this matter shall forthwith be transmitted to the Office of Administrative Law (OAL) for hearing and disposition of the Borough's motion and such further proceedings as may be appropriate thereafter.

Accordingly, the Board's request for emergent relief is DENIED and the petition on the merits shall proceed at the OAL as set forth above.

Sincerely,

William L. Librera, Ed.D.

c: County Superintendent

18-04

S.E., on behalf of minor child, B.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VOORHEES, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

January 23, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2934-03

AGENCY DKT. NO. 127-4/03

S.E. ON BEHALF OF B.E.,

Petitioner,

v.

VOORHEES TOWNSHIP BOARD OF EDUCATION,

Respondent.

S.E., petitioner, *pro se*

Howard S. Mendelson, Esq., for respondent (Davis & Mendelson, L.L.C., attorneys)

Record Closed: November 26, 2003 Decided: December 2, 2003

BEFORE **CARIDAD F. RIGO**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 29, 2003, 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 Memorializing Terms of Settlement 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 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 (45) 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.

12/2/03
DATE

CARIDAD F. RIGO, ALJ

Receipt Acknowledged:

12/9/03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 12 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cmo

HOWARD S. MENDELSON, ESQ.
DAVIS & MENDELSON, L.L.C.
20 Brace Road – Suite 112
Cherry Hill, New Jersey 08034
(856) 616-2922
Attorneys for Respondent, Voorhees
Township Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

2003 AUG 29 P 12: 25

BEFORE THE NEW JERSEY
COMMISSIONER OF EDUCATION:
BUREAU OF CONTROVERSIES
AND DISPUTES

S.E., on behalf of minor child, B.E.,

Petitioner,

vs.

VOORHEES TOWNSHIP BOARD OF EDUCATION,

Respondent,

CONSENT ORDER MEMORIALIZING TERMS OF SETTLEMENT

Re: Residency Appeal – S.E., on behalf of minor child, B.E., v. Board of Education of Voorhees Township, Camden County

Agency Docket No. 127-4/03

THIS MATTER having come before the Office of Administrative Law for a Due Process Hearing requested by the Petitioner, S. E., on behalf of the minor child, B. E. (hereinafter referred to as "Stacy Evans"), said petition seeking relief from the determination made by the Respondent, Board of Education of Township of Voorhees (hereinafter "Voorhees School District") that Stacy Evans is responsible for the payment of all tuition for the period of time Stacy Evans' daughter attended the Voorhees Middle School, and Stacy Evans having subsequent to the filing of her petition agreed to pay a portion of the tuition sought by the Voorhees School District in accordance with the settlement terms reached by and between Stacy Evans and the Voorhees School District; as placed upon the record before Administrative Law Judge Rigo on August 6, 2003, and Stacy Evans and the Voorhees School District wishing to memorialize the terms of said settlement within the instant Consent Order, and for good cause shown;

IT IS on this _____ day of _____, 2003, ORDERED AND ADJUDGED as follows:

1. The petition filed by Stacy Evans is withdrawn;

2. Stacy Evans shall pay to the Voorhees School District the full principal sum of $2,650.48, plus agreed interest computed at the rate of three percent (3%) per annum, pursuant to monthly payments of at least $200.00 per month to be received by the Voorhees School District on or before the 6th day of each month, commencing July 6, 2003. Attached hereto as Exhibit "A" is a true copy of an amortization schedule showing the allocation between principal and interest and term of the agreed payment plan.

3. Should, for whatever reason, Stacy Evans fail to make a required monthly payment to the Voorhees School District on or before the agreed grace period of the 15th day of any month, the Voorhees School District shall be entitled to the entry of a judgment for the full principal sum originally sought by the Voorhees School District; $3,833.73, plus applicable interest, minus any principal payments actually received from Stacy Evans in accordance with this Consent Order and incorporated amortization schedule.

HONORABLE CARIDAD F. RIGO

The undersigned hereby consent to form, substance and entry of the within Order.

Stacy Evans

Stacy Evans, Petitioner

DAVIS & MENDELSON, L.L.C.
Attorneys for Voorhees Township Board of Education, Respondent

By: _____
Howard S. Mendelson, Esq.

Compound Period .....: Monthly

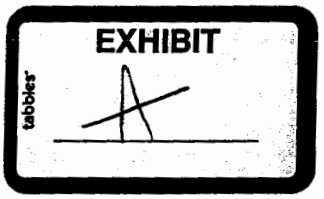
Nominal Annual Rate ... :	3.000	%
Effective Annual Rate .. :	3.042	%
Periodic Rate ..... :	0.2500	%
Daily Rate ..... :	0.00822	%

CASH FLOW DATA

	Event	Start Date	Amount	Number	Period	End Date
1	Loan	07/06/2003	2,650.48	1		
2	Payment	07/06/2003	200.00	13	Monthly	07/06/2004
3	Payment	08/06/2004	91.74	1		

AMORTIZATION SCHEDULE - Normal Amortization

	Date	Payment	Interest	Principal	Balance
Loan	07/06/2003				2,650.48
1	07/06/2003	200.00	0.00	200.00	2,450.48
2	08/06/2003	200.00	6.13	193.87	2,256.61
3	09/06/2003	200.00	5.64	194.36	2,062.25
4	10/06/2003	200.00	5.16	194.84	1,867.41
5	11/06/2003	200.00	4.67	195.33	1,672.08
6	12/06/2003	200.00	4.18	195.82	1,476.26
2003	Totals	1,200.00	25.78	1,174.22	
7	01/06/2004	200.00	3.69	196.31	1,279.95
8	02/06/2004	200.00	3.20	196.80	1,083.15
9	03/06/2004	200.00	2.71	197.29	885.86
10	04/06/2004	200.00	2.21	197.79	688.07
11	05/06/2004	200.00	1.72	198.28	489.79
12	06/06/2004	200.00	1.22	198.78	291.01
13	07/06/2004	200.00	0.73	199.27	91.74
14	08/06/2004	91.74	0.00	91.74	0.00
2004	Totals	1,491.74	15.48	1,476.26	
Grand Totals		2,691.74	41.26	2,650.48	



OAL DKT. NO. EDU 2934-03
AGENCY DKT. NO. 127-4/03

S.E., on behalf of minor child, B.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VOORHEES, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Consent Order of Settlement 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 review, the Commissioner approves the settlement terms and adopts the settlement agreement as the final decision in this matter. In so holding, however, the Commissioner observes that the settlement included with the Initial Decision sets forth terms that were to be effectuated prior to approval of the settlement terms by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. The ALJ and the parties are cautioned against effectuating terms of a settlement agreement in controverted matters that have been duly transmitted to the OAL prior to its submission to, and approval by, the Commissioner.

The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/23/04

Date of Mailing: 1/23/04

13-04

D.T. AND M.T., on behalf of minor child, N.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

January 20, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION –
DISMISS AS MOOT
OAL DKT. NO. EDU 470-03
AGENCY DKT. NO. 51-2/03

D.T. AND M.T. ON BEHALF OF MINOR CHILD, N.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,

Respondent.

D.T. and M.T., petitioners, *pro se*
Daniel Soriano, Esq., for respondent

Record Closed: December 1, 2003 Decided: December 3, 2003

BEFORE **STEVEN C. REBACK,** ALJ:

This matter arose as a result of the petitioners' challenge of respondents' decision to uphold a five-day bus suspension for their son effective commencing February 10, 2003. The matter was essentially nullified by letter of October 30, 2003 submitted by counsel for the Board. He notes that the Board has "nullified the five-day suspension" and is also noted "any and all unresolved disciplinary matters involving N.T. which arose during the 2002-2003 school year ending June 30, 2003 have been withdrawn by the school district, and all reports and other

documentation underlying these matters shall be removed from N.T.'s file." Letter from Daniel C. Soriano, Jr., October 30, 2003.

As a result of the foregoing, I met with the parties and counsel on September 26, 2003 and, as a result of in camera conferences and placing the matter on the record, irrespective of my clear explanation to D.T. that once the matter has been withdrawn there is nothing pending before OAL, the petitioner's father has failed to submit any letter of withdrawal. This was reaffirmed because on November 14, 2003, I wrote him another letter advising him that the appeal was over and OAL no longer retained jurisdiction.

In lieu of any withdrawal and contrary to what I advised him, D.T., rather than submitting any withdrawal, on or about December 1, 2003, submitted a number of motions (including among those was a motion seeking my disqualification based on bias and a "secretive ex parte communication with respondent." The above assertion is false. Irrespective of those motions and rather than pursue the matter any further, I am entertaining the motion submitted by Mr. Soriano to dismiss the matter as moot pursuant to his letter motion of November 25, 2003. There is nothing pending before me regarding any appeals of D.T. and M.T. on behalf of their minor child. All matters concerning disciplinary actions taken against N.T. for the 2002-2003 school year have been withdrawn. While D.T. asserts that there may be another appeal "coming to" the OAL concerning a disciplinary action taken for the school year 2003-2004, that matter to the best of my knowledge has not been transmitted to the OAL nor has it been transmitted to my office. Accordingly and based upon the foregoing, the above-entitled matter be and is hereby **DISMISSED** with prejudice as moot. In the event that the matter referred to by D.T. involving a subsequent disciplinary action in this school year (2003-2004) is transmitted to the Office of Administrative Law, and in the event that it is transmitted to my office, I shall entertain any motion instituted on his behalf in good faith which relates directly to that appeal.

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 (45) 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 (13) 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, 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.

12/5/03
DATE

STEVEN C. REBACK, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

12/3/03
DATE

Mailed to Parties:

DEC. 10 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

OAL DKT. NO. EDU 470-03
AGENCY DKT. NO. 51-2/03

D.T. AND M.T., on behalf of minor child, N.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions were submitted by petitioners in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

In their exceptions, petitioners object to the dismissal of their petition and request that the matter be remanded for a trial before another Administrative Law Judge (ALJ). (Exceptions at 1 and 4) Moreover, petitioners accuse the ALJ and the Board's counsel in this matter of numerous violations of alleged unethical conduct (*Id.* at 1-3), and request the Commissioner to investigate "the treacherous actions of how this decision was unlawfully malfeasance orchestrated (sic)" by the ALJ and the Board's counsel. (*Id.* at 4)

Initially, with respect to petitioners' request that the Commissioner investigate alleged unethical conduct by the ALJ and the Board's counsel, the Commissioner does not have jurisdiction to entertain this request. To the extent that petitioners seek an investigation of the

conduct by the ALJ and the Board's counsel in this matter, such requests are appropriately directed to the Director of the OAL, pursuant to *N.J.A.C.* 1:31-3.1 *et seq.*, and/or the Office of Attorney Ethics.

Turning next to the question of whether this matter should be remanded for hearing, as petitioners assert, it is noted that this matter was filed on February 7, 2003 as an emergent relief petition. Therein, petitioners sought to stay a five-day school bus suspension until the merits of their challenge to the Board's decision to impose a five-day suspension on their son could be heard. By letter of February 14, 2003, the Board notified the ALJ that the District "will agree to voluntarily stay the 5 day bus suspension, thereby obviating any hearing on the stay motion." (Board's letter, dated February 14, 2003) Subsequently, by letter of October 30, 2003, the Board notified the ALJ that the Board had: 1) nullified the five-day bus suspension, which is the subject of the petition in this matter; 2) removed all reports and other documentation underlying the five-day bus suspension from N.T.'s file; 3) withdrawn all unresolved disciplinary matters involving N.T. during the 2002-03 school year; and 4) removed all reports and other documentation underlying any and all unresolved disciplinary matters during the 2002-03 school year from N.T.'s file. (Board's Letter, dated October 30, 2003) By letter of November 25, 2003, the Board, referring to its October 30 letter summarized above, moved to dismiss the petition in this matter as moot.

Accordingly, upon careful and independent review of the record, the Commissioner finds that a hearing in this matter is not required and agrees with the conclusion of the ALJ that this matter is moot in that the Board has granted petitioners the relief requested in their petition, *i.e.*, the Board voluntarily stayed the bus suspension imposed on N.T. and,

subsequently, nullified the suspension and removed all documentation underlying the bus suspension from N.T.'s file. Therefore, the Initial Decision is adopted for the reasons expressed therein and the petition is dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/20/04

Date of Mailing: 1/21/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

21-0E

21-04E

B.F., on behalf of minor child, O.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

January 28, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

DENYING EMERGENT RELIEF

OAL DKT. NO. EDU 67-04

AGENCY DKT. NO. 8-1/04

B.F. ON BEHALF OF A MINOR CHILD, O.N.,

Petitioner,

v.

BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

B.F. and H.W., parents of O.N., a Minor Child, petitioners, *pro se*

Martin M. Barger, Esq., for respondent

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner seeks emergent relief to stay the expulsion of her daughter from school for allegedly assaulting a teacher. Petitioner submitted a petition to the Commissioner of

Education, dated January 9, 2004, seeking relief in this matter. The matter was transmitted without an answer to the Office of Administrative Law (OAL) for hearing as a contested case on January 12, 2004. The matter was scheduled oral argument on January 16, 2004. On that date, oral argument was held and some limited testimony was taken. At the conclusion of the hearing, the record closed with respect to the application for emergent relief.

FACTUAL DISCUSSION

For purposes of deciding the application for emergent relief, the following facts are determined to be undisputed.

O.N. is in her junior year at Monmouth Regional High School. Her parents indicated that they moved to the area in August 2003. O.N. has a twin sister who also attends Monmouth Regional High School.

It is undisputed that on December 18, 2003, O.N. was involved in an altercation with one or more other students. Once the altercation broke out, Mr. Teeple, who is the Principal, grabbed O.N.'s twin sister, A.N., and a gym teacher, Mr. Pingitore, who was facing O.N., grabbed her by the arms in an effort to restrain her. The parents contend that Mr. Pingitore used excessive force in holding O.N.'s arms, and was hurting her, thus compelling O.N. to flail her arms in an attempt to break free from his grip. As a result of this flailing action, O.N. struck Mr. Pingitore. The parents contend that this striking was inadvertent, and that Mr. Pingitore acknowledges that it was an accident and not intentional.

The parents contend that they met with Principal Teeple, Assistant Principal Nagle, and Mr. Pingitore, and that the Principal decided to impose a 10-day suspension for this incident. They also contend that O.N. apologized to the teacher and that the teacher and O.N. shook hands.

The parents contend that what occurred next was that the school district's Board of Education became aware of this matter, and became angry that only a 10-day suspension was imposed on O.N. for this incident. Thus, a notice was issued to the parents that a hearing before

the Board of Education was scheduled for January 6, 2004, to consider the suspension or expulsion of O.N.

The parents contend that at the hearing before the Board, the teacher expressed that he did not believe that O.N. intentionally struck him. They also indicated that the Principal and Vice-Principal did not think it was intentional. They claim that the Board of Education heard that there was no intentional assault. However, the Board decided that if a student touches a teacher, it is an assault. The parents contend that there was no assault in this matter. They point out that after the incident, a police officer stationed in the high school took O.N. by the hand to calm her down. They contend that this incident was a mishap and O.N. was simply trying to get loose from the teacher's excessive force in gripping her and that she flailed her arms trying to get loose. They contend that based on the definition of an assault that there must be intent to harm. However, O.N. did not intend to harm the teacher.

Mr. Barger, attorney for respondent, asserts that the testimony before the Board of Education was to the effect that the teacher was struck by O.N. when she was being restrained from engaging in an altercation with other students, and that in resisting his efforts to hold her, she struck the teacher. He indicated that the policy of the Board of Education is zero tolerance for striking a teacher. He represented that at the hearing the testimony was to the effect that the two students repeatedly struck the teacher, and that they had both been expelled.

Mr. Barger indicated that the school district is aware of the Bergenfield decision and has offered to O.N. Monmouth Adult School where, if she completes the course of study, she will be given a diploma from Monmouth Regional High School.

The parents contend that adult school is not the same as a high school and it is a four-hour per week self-learning program. It is does not have a high school atmosphere. People attend it in order to get a GED degree. There is no high school atmosphere and O.N. will completely miss out on the high school experience.

LEGAL DISCUSSION AND ANALYSIS

N.J.A.C. 1:1-12.6(a) provides for the granting of emergency relief where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case. In such circumstances, emergency relief pending a final decision may be ordered upon the application of a party. Subparagraph (f) of this section provides that temporary relief may be granted if there is a finding that immediate and irreparable harm will probably result, if there is the likelihood that the moving party will prevail, and if the relief is as limited in scope and as temporary as possible.

The foregoing regulation embodies the principles of law announced by the court in *Crowe v. DeGioia,* 90 *N.J.* 126, 132- (1982). These legal principles may may be summarized as follows:

1. Emergency relief should not issue except when necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be redressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Pecuniary damages may be inadequate because of the nature of the injury or of the right affected.

2. Emergency relief should be withheld when the legal right underlying the claim of the requesting party is unsettled.

3. Emergency relief should not issue where all material facts are controverted. Thus, to prevail on an application for emergency relief, the party requesting the relief must make a preliminary showing of a reasonable probability of ultimate success on the merits. That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. The point of emergency relief is to maintain the parties in substantially the same condition when the final decision is issued, as they were when the litigation began.

4. The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief. The relief granted should be no broader than necessary to preserve the status quo pending a full hearing on the merits.

In the present matter, as to the first requirement for a showing of irreparable harm, as I stated at the hearing, the loss of educational opportunity consisting of a high school education, together with the social benefits of attending high school and the hands-on teaching of a student by high school teachers is irreparable, in my opinion. The loss of the high school experience cannot be redressed adequately by any monetary damages. It is clear to me that expulsion from the high school environment and the loss of the opportunity to experience a high school education satisfies the requirement for a showing of irreparable harm, if there is insufficient justification for such expulsion.

With respect to the requirement that the right underlying the claim of a requesting party must be settled, it is clear to me that it cannot be disputed that if expulsion is not justified and appropriate under the circumstances, petitioner's legal right underlying the claim is settled.

As was indicated at the hearing in this matter, the most difficult requirement for the moving party to establish is the third factor. In order to prevail on their application for emergency relief, the party requesting the relief, the parents in this matter, must make a preliminary showing of a reasonable probability of ultimate success on the merits. If the point of emergency relief is to maintain the parties in substantially the same condition of the final decision as when this matter began, it must be established by the moving parties that they will probably win on the merits. It is with respect to this that petitioners have the greatest difficulty.

N.J.S.A. 18A:37-2.1 provides for the suspension or expulsion of a pupil for assault and provides:

> a. Any pupil who commits an assault, as defined pursuant to *N.J.S.* 2C:12-1, upon a teacher, administrator, board member or other employee of a board of education, acting in the performance of his duties and in a situation where his authority to so act is apparent, or as a result of the victim's relationship to an institution of public education of this State, not involving the use of a weapon or firearm, shall be immediately suspended from school consistent with procedural due process pending suspension or expulsion proceedings before the local board of education. Said proceedings shall take place no later than 30 calendar days following the day on which the pupil is suspended. The decision of the board shall be

made within five days after the close of the hearing. Any appeal of the board's decision shall be made to the Commissioner of Education within 90 days of the board's decision. The provisions herein shall be construed in a manner consistent with 20 *U.S.C.* s.1400 et seq.

b. Whenever a teacher, administrator, board member, other employee of a board of education or a labor representative on behalf of an employee makes an allegation in writing that the board member or employee has been assaulted by a pupil, the principal shall file a written report of the alleged assault with the district's superintendent of schools. The superintendent to whom the alleged assault is reported or, if there is no superintendent in the district, the principal who received the allegation from the board member, employee, or labor representative shall report the alleged assault to the board of education of the district at its next regular meeting; provided that the name of the pupil who allegedly committed the assault, although it may be disclosed to the members of the board of education, shall be kept confidential at the public board of education meeting.

Any person who fails to file a report of an alleged assault as required pursuant to this subsection may be liable to disciplinary action by the board of education of the district.

N.J.S.A. 2C:12-1, which is referred to above, sets forth the definition of assault as follows:

A person is guilty of assault if he:

(1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or

(2) Negligently causes bodily injury to another with a deadly weapon; or

(3) Attempts by physical menace to put another in fear of imminent serious bodily injury.

In the present matter, it is undisputed that O.N. was involved in an altercation with another student. This is acknowledged by the parents in the papers they submitted with their petition. It is also undisputed that a teacher, acting in the performance of his duties, and in a situation where his authority was apparent, stepped in and attempted to restrain O.N. during this altercation. The parents contend that the teacher's use of force was excessive and that in an

attempt to get away from the excessive use of force by the teacher, O.N. flailed her arms and accidentally struck the teacher. *N.J.S.A.* 2C:12-1 provides that a person is guilty of assault if he (or she) attempts to cause or purposely, knowingly, or recklessly causes bodily injury to another.

In the present matter, there is no dispute that a teacher was struck by the flailing arms of O.N. There is also no dispute that O.N.'s flailing of her arms was for the purpose of escaping the actions of the teacher in restraining her from continuing to engage in an altercation with other students. Even if it is accepted that O.N.'s striking of the teacher was unintentional, O.N.'s actions in flailing her arms could be viewed as being reckless since she flailed about without considering that someone might be struck. Even accepting the parents' self-serving description of the incident, it is clear that the Board of Education could have made the finding that O.N. was guilty of assaulting the teacher. Since the actions of the Board are entitled to a presumption of validity, and since the Board could have made a finding that O.N. was guilty of assaulting the teacher, I **FIND** that the petitioners herein have failed to make a preliminary showing of a reasonable probability of ultimate success on the merits.

The final test in determining whether to grant or deny emergency relief is the relative hardship to the parties in doing so. Certainly, it is a greater hardship to petitioners to have O.N. miss a substantial period of her high school career than it is to the school district to have O.N. attend classes, and I so **FIND**.

Despite my positive findings with respect to three of the factors to be considered in determining whether to grant emergency relief, I **FIND** that the petitioners have failed to establish their entitlement to such emergency relief. I **FIND** that they have failed to establish that there is a reasonable probability of their ultimate success on the merits of this matter. Therefore, their request for emergency relief is hereby **DENIED.**

ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioner's request for emergency relief seeking to have her daughter O.N. reinstated at Monmouth Regional High School is hereby **DENIED**. It is further **ORDERED** that the matter is hereby scheduled for a

full hearing to be held on March 30, 2004, commencing at 9:00 am at the OAL, 9 Quakerbridge Plaza, Trenton, New Jersey.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER 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 (45) days following the entry of this order. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) 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 20, 2004
DATE

JOSEPH F. MARTONE, ALJ

mph

OAL DKT. NO. EDU 67-04
AGENCY DKT. NO. 8-1/04

B.F., on behalf of minor child, O.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL) on January 16, 2004, and the Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner determines to adopt the ALJ's Order denying emergent relief in this matter as he concurs with the ALJ that petitioner has not satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Notwithstanding that the Commissioner is compelled to deny petitioner's emergent application requested relief, *i.e.,* O.N.'s immediate return to Monmouth Regional High School, he, nonetheless, must be assured that O.N. receives an "appropriate" alternative education program during the pendency of this matter. It is unclear from the existing record whether the Monmouth Adult Education Commission Program offered by the Board and, presumably, currently attended by O.N., which, apparently, encompasses educational instruction

for only two hours a day, two days per week, is one which meets O.N.'s alternative educational needs and satisfies New Jersey's Core Curriculum Content Standards as required by the State Board in *P.H. and P.H., on behalf of minor child, M.C. v. Board of Education of the Borough of Bergenfield, Bergen County*, Decision on Motion, September 5, 2001. As such, the Commissioner determines that this matter must be remanded to the OAL for supplementary testimony, on an emergent basis, as to whether the Monmouth Adult Education Commission Program satisfies the requisites dictated by *P.H.* and, if not, identification of a compliant program of instruction for O.N. pending the resolution of this matter on its merits.

Accordingly, the recommended decision on motion of the OAL is adopted. This matter is hereby remanded to the OAL for supplementation of the record, and a determination on an emergent basis, as detailed above.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/28/04

Date of Mailing: 1/29/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

20-04

20-04E

D.M. and T.M., on behalf of minor child, A.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, MERCER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

January 22, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 10129-03

AGENCY DKT. NO. 469-12/03

D.M. and T.M. o/b/o A.M.,

Petitioner,

v.

BOARD OF EDUCATION OF
THE TOWNSHIP OF WASHINGTON,
MERCER COUNTY

Respondent.

Kevin H. Main, Esq., for Petitioner (Spadaccini Main, LLC, attorneys)

Matthew J. Giacobbe, Esq., for Respondent (Scarinci & Hollenbeck, LLC, attorneys)

BEFORE **ISRAEL D. DUBIN, ALJ**:

This matter arises under the *Interdistrict Public School Choice Program*, *N.J.S.A.* 18A:36B-1 *et seq.* and *N.J.A.C.* 6A:12-1 *et seq.* Petitioner, D.M., is the father of a tenth grade student, A.M. II, attending the Allentown High School through the *Choice Program,* and an eighth grade student, A.M., who is currently attending respondent's Pond Road Middle School. He seeks on order compelling respondent to allow A.M. to join her sister, A.M. II, at Allentown High School as a *Choice Program* student.

By resolution adopted September 23, 2003, and readopted November 24, 2003, respondent restricted the number of students who may attend a *Choice* district to 2% of the number of students per grade level per year. By November 3, 2003, respondent had received approximately ten applications from eighth grade students, including A.M., seeking to enroll in the *Choice* program offered at Allentown High School. Based on the 2% restriction, only three students in the class of 137 were going to be able to participate in the program. Therefore, pursuant to *N.J.A.C.* 6A:12-3.1(a)4, respondent conducted a lottery to determine which students would be permitted to participate. Respondent did not give preference for enrollment to students such as A.M. who already had siblings attending the high school and A.M. was not one of the three students selected. In fact, her name was one of the last names selected, leaving several students ahead of her on the waiting list.

On December 29, 2003 D.M., on behalf of his daughter, filed a Petition for Emergent Relief seeking an expedited hearing to establish that respondent had "palpably abused its discretionary authority and [that] the action taken with respect to the School Choice Program was in all regards arbitrary, capricious, unreasonable and otherwise wrongful, specifically by refusing to waive the 2% cap and by refusing to give siblings preference." On December 30, 2003, the matter was transmitted to the Office of Administrative Law (OAL) by the Commissioner of Education who requested that an Administrative Law Judge be assigned to hear oral argument and, if deemed necessary, conduct a hearing. The Director of the OAL in turn assigned the case to this ALJ. *N.J.S.A.* 52:14B-2(b) and *N.J.S.A.* 52:14F-15(o).

Oral argument was scheduled for Monday, January 5, 2004. Upon their arrival, counsel agreed to discuss this matter in chambers in an attempt to amicably resolve their differences or more narrowly define the issues. As a result of that conference, the parties agreed that since there were few, if any, contested facts, it would be better to dismiss the petition for emergent relief and proceed in the underlying matter by way of cross-motions for summary decision. Consequently, it is on this 7th day of January, 2004, **ORDERED**:

1. The petition for emergent relief is **DISMISSED** and the substantive matter shall proceed through the filing of cross-motions for summary decision, *N.J.A.C.* 1:1-12.5(b).
2. The parties shall submit a joint Stipulation of Facts by January 26, 2004.

3. Petitioner shall submit his brief in support of his Motion for Summary Decision within thirty days of the filing of the Stipulation of Facts and certainly by no later than February 23, 2004.
4. Respondent shall submit its brief in support of its Cross-Motion for Summary Decision within thirty days of receipt of petitioner's brief and certainly by no later than March 22, 2004.

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 (45) days following the entry of this order. If the Commissioner does not adopt, modify or reject this order within forty-five (45) 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.

DATE

ISRAEL D. DUBIN, ALJ

IDD/lam

OAL DKT. NO. EDU 10129-03
AGENCY DKT. NO. 469-12/03

D.M. and T.M., on behalf of minor child, A.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, MERCER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter and the Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner adopts the ALJ's Order recommendation, which was agreed to by the parties at hearing, that the motion for emergent relief be dismissed and this matter proceed to resolution by way of cross-motions for summary decision on the merits.

Accordingly, the within application for emergent relief is hereby dismissed. This matter on the merits shall proceed at the Office of Administrative Law as contemplated by the ALJ.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/22/04

Date of Mailing: 1/28/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

24-04

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

PETITIONER,

V.

MATTHEW SWARTZ,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board sought immediate return of pupil records in possession of former employee, who served as Athletic Director and Supervisor of Health and Physical Education, as well as identification of any persons/organizations to which the records may have been shown or provided. Respondent contended the records were not pupil records subject to confidentiality protections.

The ALJ concluded that the documents were pupil records and that respondent's retention and prior distribution of these records to NJSIAA technically constituted a violation of the regulations, which are intended to protect the confidentiality of pupil records. The ALJ determined that since the information was already provided the NJSIAA, it cannot be taken back. Further distribution or use of these records, however, would constitute a further violation of the regulations. Thus, the ALJ concluded that the Board's complaint for emergent relief met the requisite standards. (*Crowe v. DeGioia*) The ALJ granted the motion for emergent relief and ordered respondent to return all copies and originals of pupil records he has in his possession and further ordered him to identify all persons and organizations to which he has shown or provided any pupil records.

The Commissioner adopted the recommended order of the ALJ as his own. Moreover, since the parties agreed that there were no other issues remaining once the emergent application was determined, the Commissioner deemed this decision to be the final resolution of the 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.

January 29, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 11338-03

AGENCY DKT. NO. 427-11/03

ENGLEWOOD BOARD OF EDUCATION,

Petitioner,

v.

MATTHEW SWARTZ,

Respondent.

Brian J. Aloia, Esq., for petitioner (Weiner Lesniak, attorneys)

David B. Beckett, Esq., for respondent (Szaferman, Lakind, Blumstein, Blader, Lehmann & Goldshore, attorneys)

Record Closed: December 12, 2003 Decided: December 15, 2003

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE

The petitioner, Englewood Board of Education (Board), has filed a complaint with the Commissioner of Education (Commissioner) contending that respondent, Matthew Swartz (Swartz), has refused to identify and return confidential pupil records he has in his possession which he has no right to retain and has refused to provide the Board with the identity of all people or organizations he provided with any student information, all in violation of the School Law including *N.J.S.A.* 18A:36-19 and *N.J.A.C.* 6:3-6.1 *et*

seq., as well as the Board's policy on distribution of student records. The Board requests the return of all student records in Swartz's possession; the identity of all people or organizations to which he has shown or provided any student records; the suspension of Swartz's teaching certification; and the payment of its legal fees.

PROCEDURAL HISTORY

On November 18, 2003, the Board filed the instant Complaint with the Commissioner in care of the Director of the Bureau of Controversies and Disputes (Director) requesting interim relief. The Director transmitted the matter to the Office of Administrative Law pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13, where, on November 24, 2003, it was filed for determination as a contested case. In transmitting the matter, the Director noted that, in light of the requests for relief set forth in the Petition and Application, the matter may well conclude upon entry of the Commissioner's final order granting or denying interim relief. The Director noted that the only relief requested on a non-emergent basis is suspension of Swartz's certificate which is in the sole discretion of the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.4 *et seq.*, and award of attorney fees and costs of suit, which it is well established the Commissioner of Education is not authorized to grant. Therefore, only the first two prayers for relief are before the undersigned. The matter was heard on December 2, 2003, at which time each party presented its respective position through oral argument to supplement certifications and briefs that had been submitted. Both parties waived the presentation of testimony. At the conclusion of the hearing, the parties agreed to leave the record open for the submission of additional briefs relative to questions raised by the undersigned at the oral argument. On December 8, 2003 Swartz submitted a supplemental brief. On December 12, 2003 the Board filed a supplemental brief and certification, at which time the record closed.

FINDINGS OF FACT

All of the essential and relevant facts are undisputed, and I **FIND** them to be the **FACTS** of this case. Swartz served as the Athletic Director and Supervisor of Health

and Physical Education for the Board from July 30, 2002 through June 30, 2003. His contract was not renewed for the following year.

In October-November 2002 Swartz reported to the New Jersey State Interscholastic Athletic Association (NJSIAA) what he perceived to be a violation of its rules and regulations by the boys' basketball program at Dwight Morrow High School. The NJSIAA subsequently found a violation of its rules. In 2003 Swartz became aware of what he perceived to be additional violations of NJSIAA rules by the boys' basketball team and girls' softball team. Since his concerns were not resolved internally before the expiration of his contract on June 30, 2003, he filed a complaint (prepared on May 19, 2003) on August 19, 2003 with the NJSIAA to ensure, he asserts, that these violations were reported and also because of a concern that he would be blamed if they were not reported. His complaint to the NJSIAA alleged that three student athletes wrongfully participated in practices, games or scrimmages.

Attached to the August 19, 2003 complaint to the NJSIAA were three documents. There was a memorandum to Swartz from a registered nurse dated January 2, 2003, indicating that pupil J.D. had a physical examination in the high school's health office and was not cleared to play basketball because he had suffered a broken wrist. The memorandum indicated that J.D. had been told that he would not be able to participate in basketball until he was cleared by the orthopedist. The second document was an e-mail from Swartz dated April 8, 2003 protesting to the high school's principal that allowing J.F. to play (softball) in violation of NJSIAA rules would cause consequences. He requested that the principal contact a NJSIAA representative. The third attachment was a typewritten document, prepared by Swartz, entitled "Winter 2002-2003 Approved Athletes." It lists approximately 200 pupils by sport, name, grade, age and telephone number. Next to certain names are notations such as "complete," "practice only until 2/1/03," "must give permission slip and health questionnaire," "needs new physical," and "needs new medical clearance." The document also provides, "Questions Call Mr. Swartz ... " and includes several telephone numbers for him. In addition to providing this document to the NJSIAA, Swartz had previously shared it with coaches in the athletic department.

By letter dated September 18, 2003, counsel for the NJSIAA advised counsel for the Board, in response to the Board's concern over the privacy of the documents, in relevant part as follows:

> It is often times necessary for schools or administrators to provide confidential information about students so that the NJSIAA can do its job in enforcing the rules of the Association. None of those materials are shared with the public and the Association has always utilized initials for identifying minor students ... the student record information will not be sent to the Controversies Committee unless the identification of those students is placed in issue at the Controversies Committee hearing ....

By letter dated October 6, 2003 to Swartz, counsel for the Board ordered him to return all copies of any student records in his possession including student lists, telephone numbers, medical records, addresses, and grade. He was also ordered to provide the names and addresses of all people or organizations that he provided with any student information since the date of his separation from employment. By letter dated October 9, 2003, to counsel for the Board, counsel for the NJSIAA indicated that Swartz had assured the NJSIAA that he has destroyed all extra copies of information and would maintain the confidentiality of all originals in his possession and that the only information he released to anyone was that transmitted to the NJSIAA. The hearing before the NJSIAA regarding the complaint filed with it by Swartz was conducted.

Swartz did not obtain permission from the Board or any other school official to retain or release the documents in question. There has been no representation that Swartz received permission from any of the students, or their parents, mentioned in any of the documents to retain or release the information relative to that student contained in any of the documents.

DISCUSSION AND CONCLUSIONS OF LAW

In order to prevail on an application for interim relief before the Commissioner pursuant to *N.J.A.C.* 6A:3-1.6, a petitioner must demonstrate that:

1. It will suffer irreparable harm if the requested relief is not granted.

2. The legal right underlying its claim is settled.

3. It has a likelihood of prevailing on the merits of the underlying claim.

4. When the equities and interests of the parties are balanced, it will suffer greater harm than respondent will suffer if the requested relief is not granted.

The State Board of Education is required to provide, by regulation, for the creation, maintenance and retention of pupil records with the requisite security to protect the privacy rights of pupils and parents. *N.J.S.A.* 18A:36-19. Such regulations have been duly promulgated. *N.J.A.C.* 6:3-6.1 *et seq.* The Board contends that Swartz has violated these regulations by removing, retaining and disseminating confidential pupil records without authorization and while no longer an employee of the Board in contravention of the privacy rights of the pupils. Swartz, in turn, argues that the documents in question are not pupil records within the meaning of the regulations and that, even if they were, he acted appropriately to disseminate them only to an end source (NJSIAA) authorized to receive such otherwise confidential records.

Obviously, an analysis of this issue must commence with a determination of whether the records were pupil records subject to confidentiality protections. If the documents are not pupil records, then the Board's arguments fall. *N.J.A.C.* 6:3-6.1 defines "pupil record" to mean

> Information related to an individual pupil gathered within or outside the school system and maintained within the school system, regardless of the physical form in which it is maintained. Essential in this definition is the idea that any information which is maintained for the purpose of second party review is considered a pupil record. Therefore, information recorded by any certified school personnel solely as a memory aid, not for the use of a second party, is excluded from this definition.

I **CONCLUDE** that the three documents are pupil records. Undisputedly, these documents contain information related to individual pupils. The school nurse's memorandum is regarding the physical condition of a named pupil and relates to a school activity. The e-mail refers to a named pupil and deals with her participation in a school activity. The list of names identifies specific students in the context of school sports activities and provides grade, age, telephone number and participation eligibility

information. All three documents are maintained within the school system since one originated from the school nurse and the other two originated from the athletic director, and all relate to school activities. Additionally, all of the information was maintained for second party review. The school nurse's memorandum was directed to the athletic director as the second party. The e-mail was generated by the athletic director and transmitted to the school principal. The list of names with telephone numbers, although generated by Swartz, was admittedly not solely as a memory aid for him. At oral argument, Swartz's counsel acknowledged that it was disseminated to other members of the athletic department and therefore to second parties for review. This fact is most evident since the document, although prepared by Swartz, invites questions to be directed to him and provides several of his telephone numbers. Additionally, the NJSIAA became a second party when the documents were sent to it.

I reject Swartz's argument that the pupil list was a "student information directory" within the meaning of *N.J.A.C.* 6:3-6.1 rather than a "pupil record." It was not a publication. It was distributed only to members of the athletic department. Moreover, there is no showing that the document was published by the district board of education within the meaning of the definition. Principal Satterfield's certification of December 11, 2003, that the Board does not publish a student directory may be a contested fact. However, I need not make such a finding of fact in view of my analysis above.

Having concluded that the information in question constitutes pupil records, one must determine if Swartz's retention and use of them is violative of Department of Education regulations. The Department of Education requires a district board of education to regulate access, disclosure and communication of information from pupil records in a manner that assures the security of such records. *N.J.A.C.* 6:3-6.2. The chief school administrator shall be responsible for the security of pupil records and shall devise procedures for assuring that access to such records is limited to authorized persons. *N.J.A.C.* 6:3-6.4. Only authorized organizations, agencies or persons as defined in the regulations shall have access to pupil records. *N.J.A.C.* 6:3-6.5(a). These include certified school district personnel who have assigned educational

responsibility for the pupil, *N.J.A.C.* 6:3-6.5(c)4, and accrediting organizations in order to carry out their accrediting functions, *N.J.A.C.* 6:3-6.5(c)8.

Upon Swartz's departure as an employee of the Board on June 30, 2003, he was no longer part of the certified school district personnel and therefore had no right or authority under the regulations to retain or use these pupil records without complying with the provisions of *N.J.A.C.* 6:3-6.6 regarding access to pupil records by a person outside the school who lacks independent authority of access. Therefore, I **CONCLUDE** that his retention and prior distribution of the pupil records technically constitutes a violation of the regulations, which are intended to protect the confidentiality of pupil records. He lacked the authority of certified school district personnel and was not otherwise granted such authority by a designee of the Board. However, this entire matter is really a tempest in a teapot since the end recipient of the information, the NJSIAA, is an accrediting organization entitled to receive such information, albeit from authorized sources, under *N.J.A.C.* 6:3-6.5(c)8. Despite the disputed authority of Swartz to forward this information to the NJSIAA, the NJSIAA assured the Board that it would protect the confidentiality of the information while carrying out its mandate to review athletic practices in school districts throughout New Jersey. Arguably, the NJSIAA could have exercised its authority to obtain these pupil records from the Board rather than from Swartz if it deemed them to be relevant to the complaint, which Swartz filed in August 2003. Swartz has certified, and the Board has not disputed, that he has not distributed any of the records to anyone outside the NJSIAA. Accordingly, although there has been a technical violation of the regulations, there has been no demonstration that the privacy expectations of the pupils and their parents have actually been compromised since Swartz, prior to June 30, legitimately had access to the records and knew of the information in them, and the NJSIAA has subsequently protected their confidentiality. The level of the Board's concern over the alleged confidentiality breach therefore appears to be overstated. Nevertheless, Swartz's argument, that he is blameless because the destination of the records was valid and his basis for submitting them to the NJSIAA was salutary, begs the question of whether he, as an ex-employee of the Board, had the authority to deliver the information to the NJSIAA or to thereafter retain the information. The regulations do

not provide for an exception to the confidentiality rules, under such circumstances, for an ex-employee. Moreover, Swartz's contention that the instant action is in retaliation for his bringing a complaint before the NJSIAA and is intended for litigational advantage in the NJSIAA matter, even if true, is unsupported by any statutory or regulatory authority for relieving an ex-employee (a person from outside the school as referenced in *N.J.A.C.* 6:3-6.6(a)2) from the requirement to seek proper authorization to retain or use pupil records. Swartz identifies himself as a whistleblower and makes an emphatic argument in support of a potential claim under the Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 *et seq.* that he suffered retaliation for trying to address improper conduct in the athletic department. However, the regulatory scheme at issue here provides no relief from or relaxation of its requirements in the face of such a claim. Such a claim must be brought in a different forum.

As discussed above, Swartz's reliance on *N.J.A.C.* 6:3-6.2(j) to legitimize his actions is misplaced. That regulation provides that no liability shall be attached to any member, officer or employee of any district board of education permitting access or furnishing pupil records in accordance with the rules of the Department of Education. Again, Swartz was not a member, officer or employee of the Board when he attached pupil records to his complaint to the NJSIAA in August 2003.

Since this information has already been provided to the NJSIAA, the toothpaste cannot be put back into the tube. However, Swartz's retention of originals or copies of this information or any further distribution or use of these pupil records would constitute a further violation of the above regulations.[1]

[1] By letter dated December 4, 2003, to counsel for the Board, counsel for Swartz indicated that the documents, which were the subject of this complaint, were enclosed with said letter. Counsel also indicated that the documents, which were the subject of this application, were only submitted to NJSIAA and were not disclosed to any other person or entity. Swartz therefore contends that the entire action is moot. However, Principal Satterfield certifies that, at the NJSIAA hearing of November 18, 2003, Swartz tendered additional pupil records not attached to his NJSIAA complaint relating to student attendance and participation in athletic programs. Although I am not in a position to find this as a fact in this interim relief proceeding, it raises a sufficient basis to issue the instant determination rather than dismiss the complaint as moot. Moreover, I am nevertheless issuing the instant Order because I have determined that it may conclude the entire proceeding upon entry of the Commissioner's final order granting or denying interim relief as suggested by the Director of the Bureau of Controversies and Disputes when the matter was transferred to the OAL.

I **CONCLUDE** that the Board's complaint for interim or emergent relief has met the requisite standards. Harm is irreparable if it cannot be addressed adequately by monetary damages. *Crowe v. DeGioia,* 90 *N.J.* 126, 133 (1982). Any further distribution of these pupil records contrary to the Board's obligation to its pupils and their parents to insure their confidentiality will cause irreparable harm. For the reasons set forth above, the legal right underlying the Board's claim is settled, and there is a likelihood of success on the merits. Finally, when the equities and interests of the parties are balanced, the Board will suffer greater harm than Swartz will suffer if the relief is not granted. As Swartz has no right to retain the pupil records, an order that he return the records and disclose the identity of persons or entities to which he has already disclosed the records causes him to suffer no harm. On the other hand, the Board faces greater harm if there is any subsequent distribution of the records because of the danger that such distribution might compromise the privacy rights of its pupils and their parents, which the Board is charged to protect. In view of the Director's determination, as indicated above, that the Commissioner will not entertain any request for counsel fees or the punitive remedy of license suspension, those factors need not be considered in balancing the equities in this application.

Accordingly, the complaint for emergent relief shall be granted.[2]

It is hereby **ORDERED** that Matthew Swartz return all copies and originals of pupil records he has in his possession; and it is further **ORDERED** that Matthew Swartz shall identify all people and organizations to which he has shown or provided any pupil records.

The parties have advised me that no other issues remain once the emergent relief matter is resolved.

[2] The Board's request, made in its brief, that Swartz be ordered not to have contact with any Englewood students is rejected. The Complaint sets forth neither a prayer nor basis for such relief.

This order on application for emergency relief may be adopted, modified or rejected by **DEPARTMENT OF EDUCATION**, 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 (45) days following the entry of this order. If the **DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) 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.

December 15, 2003
DATE

JESSE H. STRAUSS, ALJ

md

OAL DKT. NO. EDU 11338-03
AGENCY DKT. NO. 427-11/03

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
MATTHEW SWARTZ,	:	
RESPONDENT.	:	

The recommended Order of the Administrative Law Judge (ALJ), which included a summary of the evidence presented at the emergent hearing conducted at the Office of Administrative Law on December 2, 2003, has been reviewed. Upon such review, the Commissioner concurs that the Board has satisfied the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) necessary to warrant emergent relief.

Accordingly, the recommended Order of the ALJ is adopted for the reasons expressed therein. Inasmuch as the parties have agreed that there are no other issues remaining once the emergent application is determined (Initial Decision at 9), this decision shall be deemed the final resolution of this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/29/04

Date of Mailing: 1/30/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*

23-04

#23-04

IN THE MATTER OF THE TENURE HEARING :

OF ELLEN KENNY, SCHOOL DISTRICT OF :

THE TOWN OF HACKETTSTOWN, WARREN :

COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent school nurse for allegedly releasing a student's confidential medical information, pressuring parents, making inappropriate comments, failing to notify the parents of students C.K and D.U. that the results of their scoliosis examinations revealed deviations, and failing to notify the parents of 19 students about the results of their scoliosis examinations, which also showed deviations. The Board sought her dismissal from employment.

In light of the whole record, the ALJ found that respondent's behavior did not rise to the level of conduct unbecoming such that it destroyed public respect for school employees and confidence in the operation of the Board. Her conduct did not justify the imposition of major discipline. Moreover, the Board failed to prove that respondent violated school procedures regarding the results of scoliosis screening of C.K. and D.U. and 19 other students. Respondent had been suspended prior to the time she usually sent the notices of the screening results. Charges were dismissed.

The Commissioner adopted the findings and determination in the Initial Decision as his own with modification. Upon review of the entire record, including transcripts from five days of hearing, and citing relevant statutes, regulations and Board policy, the Commissioner concurred with the ALJ that respondent's behavior did not rise to the level of unbecoming conduct and did not warrant dismissal from her position. On each charge, the Commissioner was not convinced that the Board demonstrated its allegations by a preponderance of credible evidence.

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.

January 23, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

I/M/O THE TENURE HEARING OF ELLEN KENNY, SCHOOL DISTRICT OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY.	OAL DKT. NO. EDU 1217-03 and OAL DKT. NO. EDU 1825-03 Agency Dkt. No. 405-12/02 and Agency Dkt. No. 56-2/03 **CONSOLIDATED**

Robert Merryman, Esq., for Petitioner,
(Apruzzese, McDermott, Mastro & Murphy, attorneys)

Nancy I. Oxfeld, Esq., for Ellen Kenny, respondent
(Oxfeld Cohen, P.C. attorneys)

Record Closed: July 26, 2003 Decided: December 8, 2003

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Hackettstown School District, Warren County ("District" or "Board"), certified charges of conduct unbecoming against Ellen Kenny, a tenured school nurse. The District submits that Kenny's conduct warrants dismissal from employment. Respondent denies any charges of wrongdoing.

On January 15, and February 3, 2003, the Commissioner of Education transmitted the matters to the Office of Administrative Law ("OAL") for determination as contested cases pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. On January 24, 2003, I consolidated the petitions and denied the parties' cross-motions to dismiss the matters. On February 19, 2003, I conducted a prehearing conference. Hearings were held on April 7, 8 and 9, 2003, and on May 13 and 14, 2003. The parties filed post-hearing briefs and the record closed on July 26, 2003. The statutory period within which to file the initial decision with the Department of Education expired on September 9, 2003. 1996. Based on an administrative oversight, an expansive backlog, and a high volume of cases, the ALJ requested extensions of time, *nunc pro tunc*, to complete the initial decision by December 9, 2003. *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8.

CHARGES

In Docket EDU 1217-03, the Board contends that Ellen Kenny released a student's confidential medical information; pressured the parents to make a decision, which they believed were not in the best interest of their child; and, uttered comments intended to undermine the authority of the high school principal. (See Prehearing Order, March 14, 2003).

In Docket EDU 1825-03, the Board contends that Ellen Kenny failed to notify the parents of C.K. and D.U. that the results of their scoliosis examinations revealed deviations. Further, Kenny failed to notify the parents of 19 students about the results of their scoliosis examinations, which also showed deviations. (See Prehearing Order, March 14, 2003).

SUMMARY OF EVIDENCE

Based on a review of the relevant evidence, I **FIND** the following as **FACT**:

1. In September 1994, the Board employed Ellen Kenny as the school nurse.

2. J.S., a pupil enrolled in the District, is diagnosed with several medical disorders including spina bifida, incontinent bowel, congenital recital stenosis, anterior myleomengocele, and a latex allergy. Her routine care requires a daily enema, bladder catheterization every 3 to 4 hours, and irrigation every 12 hours.
3. J.S. is eligible for special education under the Individual With Disabilities Education Act, 20 *U.S.C.A.* §§ 1400 to 1487.
4. J.S. attended Great Meadows Middle School and received home schooling from mid-year seventh grade to eighth grade.
5. In Spring 2001, prior to entering high school, J.S.' mother, K.S., met with Ellen Kenny to discuss J.S.' medical care. J.S. required private toilet facilities to catheterize her bladder. Kenny prearranged a separate bathroom for J.S to use and store her medical supplies.
6. In response to J.S.' latex allergy, Kenny replaced all latex gloves with non-latex materials. J.S.' curriculum excluded art and physical education because those classes used latex products.
7. In September 2001, J.S. entered Hackettstown High School as a ninth grade student. K.S. met with the teachers and staff to discuss J.S.' medical regimen.
8. K.S. also spoke with Chris Steffner, school principal, concerning J.S.' medical condition and latex allergy. Steffner warned K.S. that the students decorated the building with balloons for school events such as homecoming and dances.
9. Steffner testified that K.S. "didn't have a problem" about the balloons; however, it was agreed that J.S. would avoid the areas where balloons where were exposed.
10. The parents agreed to accommodations that would minimize J.S.' exposure to latex items. Eleanor Henry, Director of Special Services drafted the list of accommodations.
11. IEPs, dated February 8, 2003 and January 16, 2003, stated in part that "[J.S.] has been diagnosed with a latex allergy and according to medical records she needs to avoid exposure to paints, rubber bands, latex balloons, etc." (R-15).

12. On October 18, 2002, J.S. suffered a latex reaction from a popped balloon in her classroom. Kenny immediately treated J.S. in the nurse's office: administering Benadryl, placing ice on her swollen eyes and monitoring her breathing. When Kenny determined that the symptoms had subsided, she informed J.S.' father of the incident. Thereafter, J.S. made her usual commute home by the school bus.

13. On October 21, 2002, Kenny sent a memorandum to Steffner, which stated in part:

> Chris,
> Attached are articles, which relate to latex allergy, people at risk (Spina Bifida) for latex allergies, and protecting oneself from a lawsuit. I can appreciate your feeling that the school should not be changed for one person, but I believe we are setting ourselves up for a lawsuit as well as endangering [J.S.]. This issue is strictly motivated by my medical belief that we are responsible to protect this student from a severe latex response. In lieu of the fact that she had a latex reaction on Friday, I believe we should revisit this issue. I realize the parents have signed off regarding their concerns about balloons, but I feel we need to remove them from the school and pursue solutions to decorating.
>
> [R-3}.

14. On October 22, 2003, Steffner responded to Kenny's letter, which stated in part:

> I am in receipt of your two correspondences...concerning student J.S.... Thank you for your literature you supplied regarding latex allergies. I have read the information and I am confused about your request that the removal of balloons will safeguard this child and fulfill our responsibility to her. It is clear through the literature...that prolonged, continuous exposure to latex is a serious concern...Therefore I question why you have not addressed the issues that I have highlighted. In addition, I think we should explore all precautions that we can take to protect this child. As we have discussed in the past, I have concern of co-curricular activities, which no medical help is immediately available. It is my recollection that the medical note regarding this situation is several years old and was not issued by an immunologist. Have you followed-up with the parent or the physician to have a new note sent as was discussed last year?
>
> I have expressed your concerns to the Director of Special Education and the Superintendent. Please provide me with a detailed list of all recommended accommodations to ensure the safety of this child. Please include the areas I have indicated above by the end of the week. We will then meet to discuss this matter further.
> [R-4]

15. Kenny's reply stated in part:

> You inquired what I have done to address additional sources of latex with regard to J.S. As a school nurse, I am responsible to assure that the school environment is safe for all children and especially for those children who have severe allergies that could potentially lead to anaphylaxis. If an unsafe medical condition exists in the building it is my duty to report that condition to the principal, and make a recommendation. Since September of 2002, I have been making recommendations.
>
> In addressing your concern with regard to co-curricular activities, a letter drafted and sent to K.S. by Eleanore Henry, Director of Special Services, on May 14, 2002, indicates that the administration was to recruit staff to be trained in epi-pen use and then act as chaperones at school functions.
>
> In addressing outdated medical notes, J.S. has a current doctor's note in her file for the 2002 school year. There is no Dr.'s note from an immunologist. In her letter to the parent, Mrs. Henry strongly suggests that J.S. be seen by an immunologist. The parent felt that the school district should pay for the consult with an immunologist. While it is true the mother has "back pedaled" on the issue of latex balloons in the school, I believe this may, in part, be due to the mother's fear that J.S. might be placed out of district due to her allergy.
>
> [R-5}

DISCUSSION AND CONCLUSIONS

State law provides that no tenured teacher shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct or other just cause. *N.J.S.A.* 18A:6-10. Thus, tenured employees are protected "in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control." *In re Maratea*, 1966 *S.L.D.* 77, 106. Additional procedural safeguards, including the right to a list of charges, a sworn statement of evidence and an impartial hearing, are required under the law to protect tenured teachers from arbitrary dismissal for unfounded or flimsy reasons. *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 73 (1982). Moreover, charges against a tenured employee may not be examined in a vacuum, but must be considered in any events leading up to the allegations made against the employee that may help to explain the situation. *In re Romanoli*, 1975 *S.L.D.* 352.

The District has the burden of proof to establish the charges against Kenny by a preponderance of the credible evidence. *In re Polk License Revocation*, 90 *N.J.* 550, 560 (1982). Preponderance is the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. *State v. Lewis,* 67 *N.J.* 47 (1975). The evidence must be such as to lead a reasonable cautious mind to a given conclusion. *Bornstein v. Metropolitan Bottling Co.*, 26 *N.J.* 263 (1958). Where the standard is reasonable probability, that is, preponderance of the evidence, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." *Loew v Union Beach*, 56 *N.J. Super.* 93, 104 (App. Div 1959).

Proof of the charges against Kenny depends in part on the credibility of the witnesses. In an administrative proceeding, testimony may be disbelieved, but it may not be disregarded. *Middletown Township v Murdoch,* 73 *N.J. Super.* 511 (App. Div. 1962). Moreover, the trier of fact is not bound to believe the testimony of any witness and may accept or reject, in whole or in part, the testimony. *Application of Howard Savings Bank,* 143 *N.J. Super.* 1 (App. Div. 1976). One factor to consider in determining which party's version of the incident has the "reasonable probability of truth" is that the "interest, motive, biases or prejudice of a witness may affect his credibility and justify [the trier of fact], whose providence 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). Further, "[a] trier of fact may reject testimony because it is inherently incredible, or because it is overborne by other testimony." *Congleton v Pura-Tex Stone Corp.,* 53 *N.J. Super.* 282, 287 (App. Div. 1958). I have carefully considered the testimony and demeanor of the witnesses presented by the parties.

In September 1994, the Hackettstown School District employed Ellen Kenny, a Registered Nurse and a certified school nurse. Kenny holds credentials as a psychiatric nurse, public health nurse and psychological counseling. Kenny's duties include administering the immunization, anti-tobacco, and blood drive programs. She conducts scoliosis screening and health counseling. Kenny must work under the direction of a licensed physician. Hackettstown has charged Ellen Kenny with several acts of

unbecoming conduct. The Board claims she released a student's confidential medical information; pressured the parents to make a decision, which they believed were not in the best interest of their child; and, uttered comments intended to undermine the authority of the high school principal. Additionally, the Board contends that Ellen Kenny failed to notify the parents of C.K. and D.U. of the results of their scoliosis examinations, which revealed deviations. Further, Kenny failed to notify the parents of 19 students about the results of their scoliosis examinations, which also showed deviations. I have considered carefully the evidence presented by the parties to determine whether the Board has provided a preponderance of the credible evidence to support the charges.

The Board's evidence that Kenny disclosed confidential information to Renay Gill about J.S. is unpersuasive. Here, Kenny and Gill are the only witnesses to the allegations that Kenny disclosed confidential information to Gill about J.S. The parents, A.S. and K.S. and Gill are the only witnesses to support the Board's claim that Gill repeated the information to A.S. and K.S. Steffner testified that K.S. told her that, "Gill approached her family" at a church bazaar, and that "Gill had spoken to Ellen and knew everything that was going on". Steffner further testified, "She shared with her knowledge of J.'s problems and her needs to use the bathroom facilities for specific medical needs, she understood about the latex allergy. Mrs. S. said she knew everything about my daughter, and she would have no reason to know those things." Steffner maintained that Gill uttered the statements in the presence of J.S., who was "shooed away with her other children." At the hearing, however, K.S. and A.S. testified that J.S. was not present when the discussion occurred.

Kenny denied disclosing information to Gill about J.S. Moreover, the Board presented the testimony of Gill, who denied having any discussion with K.S. and A.S. concerning Kenny's disclosure to Gill about J.S.' medical condition. In fact, Gill claimed that she did not attend the event at which the alleged incident occurred. The Board appeared to be surprised by Gill's denial.

"[T]estimony 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." *Spagnuolo v. Bonnet*, 16 *N.J.* 546, 554-55 (1954). Thus, I have carefully considered the presentation of the testimony including the testimony of Renay Gill. She maintained that no discussions occurred with the parents concerning J.S'. Further, Gill maintained that she did not discuss the student with Kenny. To the contrary, petitioner claimed it happened.

Gill was employed as the school's library assistant for 20 years. She has known the S. family for many years. Indeed, A.S. testified that Gill, his wife and he attended Hackettstown High School. "I knew her [Gill] formerly at the school as part of the library, but I also knew her when my wife and I starting dating because my wife would, like, hang out in the library, things like that she was friends with the family." The Board presented no evidence that Gill had cause to fabricate her testimony. Moreover, it appeared that an amicable relationship existed between Gill and the parents.

I have considered the inconsistencies in the parents' testimony whether their daughter was present when Gill made the alleged comments. As with any witness, testimony need not be flawless to be believable. Indeed, some inconsistencies in a witness's testimony do not warrant an automatic discounting of that testimony as incredible. *United Stations of N.J. v. Getty Oil Co.*, 102 *N.J. Super.* 459 (Ch. Div. 1968). The testimony must be such that the trier of fact can reasonably conclude that the witness is wholly unworthy of belief. Accordingly, the trier of fact must carefully weigh the evidence before rejecting testimony, even if not directly contradicted, when it is contrary to the circumstances. Here, I am persuaded by respondent's argument that, "No parent would be confused as to whether their child was present when extremely personal medical information was revealed by a stranger to the child." Respondent's Brief at 20-21.

Additionally, I have carefully considered the demeanor of the witnesses over several days of the proceedings. The relationships among several witnesses appeared strained and unprofessional. For example, the parent, K.S. testified that she was

pressured to sign a letter, which was prepared by Kathy Mahoney, CST case manager and social worker. (P-1). K.S. assumed the letter had been drafted by Kenny but acknowledged that the contents were essentially accurate. K.S. also believed that she and her daughter had been placed "in the middle" of a disagreement between Kenny and the administration. K.S. was uncomfortable with the situation. A.S., J.S.' father, testified that he never met with Kenny. However, during a telephone discussion about J.S.' latex reaction, Kenny told A.S. that the parents "could have a case against the high school". A.S. further testified that Kenny told him she filed a labor grievance against Steffner concerning a disciplinary matter.

Kenny's demeanor was assertive. She acknowledged having discussions with the parents about J.S.'s medical problems but denied pressuring the parents to make decisions concerning their daughter. Kenny divulged to the parents Steffner's anger with her over the latex issue and that she filed a grievance against Steffner. Kenny, however, denied telling the parents they could sue the school or that she hired two attorneys to file charges against the school. She did, however, refer the parents to agencies that might assist them in advocating for their daughter.

Kenny's comments to the parents about the principal were inappropriate. However, major discipline is not warranted, as the behavior does not constitute conduct unbecoming. More importantly, Kenny's concern over J.S.' medical condition was genuine. Indeed, she placed into action several accommodations to meet the child's medical needs. Her fervor, however, may have seemed overbearing and perhaps "pushy" to the administration and to the parents. Indeed, the tenor of the memorandum between Kenny and Steffner seemed confrontational. (R-3, R-4, R-5). At the hearing, the demeanors of Steffner and Kenny revealed two strong-minded persons. The parents sensed conflict between Kenny and Steffner. K.S. felt as if she had been placed in the middle of their conflict. Moreover, when asked to describe Kenny's "references to Chris Steffner", the parent, A.S. testified, "Just that she was having problems with Ms. Steffner, you know, with being in school." A.S. concluded that Kenny and Steffner were "butting heads." The circumstances underlying the labor grievance filed by Kenny evidences on-going conflict. The core of the grievance is Steffner's

charge of insubordination and "disrespectful treatment of the office of the principal". (Award of the Arbitrator, dated June 16, 2003.). Thus, it is not unforeseeable that opinions might clash and spill over into tenure charges.

I have also considered the contents of the charges in light of Kenny's ten-year employment by the Board. Revealing confidential information about a student's medical condition appeared to be contrary to the manner in which Kenny has conducted herself as a professional school nurse during her employment by the Board. Charges that Kenny pressured the parents to make decisions, which they believed were not in the best interests of their child is contrary to Kenny's professional deeds as the school nurse. Kenny's overall performance since 1994 has been exemplary. (R-16 to R-44). Thus, the credible evidence does not support that Kenny "released confidential pupil records" about J.S. or that she pressured the parents to make decisions, which they believed were not in the best interests of their child.

Docket EDU 1217-03

Based on the whole of the record, I **CONCLUDE** that the Board failed to prove by a preponderance of the credible evidence that respondent Ellen Kenny released a student's confidential medical information. I further **CONCLUDE** that the Board failed to prove respondent Ellen Kenny pressured the parents to make a decision, which they believed were not in the best interest of their child.

I **FIND** and **CONCLUDE** that respondent Ellen Kenny discussed with the parents of a student personnel matters regarding her grievance against school administrators. Kenny's comments to the parents about the high school principal consitutued inappropriate behavior. I **CONCLUDE** however, that the behavior does not rise to the level of conduct unbecoming such that it had a tendency to destroy public respect for the school employees and confidence in the operation of the Board.

Nevertheless, Kenny's behavior should be addressed. In determining whether she should be sanctioned, I have considered Kenny's conduct in context with its

relationship to the nature of her job, her past record and any mitigating circumstances. *West New York v. Bock*, 38 *N.J.* 500 (1962). Kenny's concern over the student's health is evident in her efforts to make the administrators aware of the dangers should J.S. be exposed to latex. Her professional manner and mind-set outweigh the feelings of those who might have been personally offended by her commitment. Based on the totality of the circumstance, I **CONCLUDE** that Ellen Kenny's conduct does not justify the imposition of major discipline.

Docket EDU 1825-03

Based on a review of the relevant evidence, I **FIND** the following as **FACT**:

On November 19, 2002, Hackettstown Board of Education suspended respondent Ellen Kenny. Prior to the suspension, she initiated the mandated scoliosis tests. Kenny further testified that she administers the tests bi-annually to the students in blocks. Generally, Kenny begins the screening in October and notifies the parents of the results after the screening is completed, usually at semester's end. Kenny would retest students whose tests showed mild, sight curves or if, in her professional opinion, she believed the result was a questionable. J-4. One of the student's, P-13, test results showed a "mild upper ® curve". Therefore, Kenny did not send a letter; instead, she twice called the parent and left messages. Kenny also called the mother of another student, P-14, whose test results showed a slight curve. Kenny further testified that she was suspended before she completed the screenings. Consequently, Brenda Lightcap, substitute nurse found Kenny's notes and mailed the notices in mid-December.

Although the Board recently revised its policy requiring the school administrator to formulate regulations for scoliosis screening and other physical examinations, Steffner and Calabro had no knowledge of specific policies regarding screening and notice to parents. (J-2). The evidence support's respondent's argument that during Kenny's employment, the Board accepted the practice to notify parents of screening results at the conclusion of the semester. "In her 10 years of employment with the district, [Kenny] had never been told to alter this procedure." Respondent's Brief at 25.

The practice was not altered. Kenny's suspension in November occurred prior to the time she usually sent the notices of the screening results. The substitute employee mailed the notices in December, during the time period Kenny would have sent them had she not been suspended. The circumstances presented do not support tenure charges against Kenny.

Based on the whole of the record, I **CONCLUDE** that the Board failed to prove respondent Ellen Kenny violated school procedures regarding the results of the scoliosis screening of C.K. and D.U., and 19 other students.

ORDER

It is **ORDERED** that tenure charges in Docket EDU 1217-03, that Ellen Kenny released a student's confidential medical information; pressured the parents to make a decision, which they believed were not in the best interest of their child; and, uttered comments intended to undermine the authority of the high school principal be **DISMISSED**.

It is **ORDERED** that tenure charges in Docket EDU 1825-03 that Ellen Kenny failed to notify the parents of C.K. and D.U. and 19 other students that the results of their scoliosis examinations revealed deviations 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 (45) 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 (13) 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, 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 8, 2003
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

12/10/03
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 10 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses:

Presented on behalf of Petitioner

Elinor Henry McClymont
K.S.
A.S.
Cynthia Klocioski
Brenda Lightcap
Christine Steffner
Joanne Calabro
Rene Gill

Presented on behalf of Respondent

Ellen Kenny

Exhibits:

Presented by Petitioner and Respondent Jointly

J-1 Hackettstown Board of Education Police No. 5141; HEALTH

J-2 Hackettstown Board of Education Police No. 5141.3 Examination and Immunizations

J-3 Hackettstown Board of Education Police No. 5125: Pupil Records

J-4 School Health Services Guidelines – New Jersey Department of Education

Presented by Petitioner

P-1 Letter from S. to Coyle, dated April 19, 2002

P-2 Letter from E. Henry to S., dated May 7, 2002

P-3 Form Letter regarding S., dated April 24, 2002

P-4 Letter from E. Henry to S., dated May 14, 2002

P-5 E-Mail, dated December 31

P-6 Letter from School Nurse, dated October 21, 2002

P-7 Letter from C. Steffner to E. Kenny, dated November 5, 2002

P-8 Notes, dated November 13, 2002

P-9 Memo from C. Steffner to J. Calabro, dated November 15, 2002

P-10 Notes, dated November 18, 2002

P-11 Letter from S. to "Whom it May Concern", dated November 18, 2002

P-12 Letter from M. Deehan, M.D., to C. Steffner, dated November 18, 2002

P-13 Letter from E. Kenny to parents, dated June 18, 2002

P-14 Envelope from Hackettstown High School to Parents, dated January 1, 2003

P-15 Letter from E. Kenny to parents, dated January 12, 2003

P-16 Job Description of School Nurse

P-17 Documents regarding E. Kenny

P-18 Petitioner's First Set of Interrogatories

P-19 Regulations regarding School Districts

Respondent

R-1 Job Description of School Nurse

R-2 Sign-In Sheet (Nurse)

R-3 Memo to C. Steffner

R-4 Letter to E. Kenny, dated October 22, 2002

R-5 Letter to C. Steffner, undated

R-6 Letter to E. Kenny, dated October 30, 2002

R-7 Letter, dated November 6, 2002

R-8 Letter to E. Kenny, dated November 6, 2002

R-9 Letter to E. Kenny, dated November 19, 2002

R-10 Respondent's Answers to Interrogatories

R-11 Revised Job Description

R-12 Board Minutes, dated June 26, 2002

R-13 Job Description

R-14 Tenure Charges, dated January 27, 2003

R-15 IEP Packet

R-16 Performance Report, dated October 4, 1994

R-17 Performance Report, dated December 16, 1994

R-18 Performance Report, dated March 30, 1995

R-19 Performance Report, dated March 30, 1995

R-20 Performance Report, dated April 24, 1995

R-21 Performance Report, dated June 25, 1995

R-22 Performance Report, dated November 28, 1995

R-23 Performance Report, dated March 4, 1996

R-24 Performance Report, dated March 25, 1986

R-25 Performance Report, dated March 27, 1996

R-26 Performance Report, dated October 30, 1996

P-27 Letter, dated December 17, 1996

P-28 Memo, dated December 18, 1996

P-29 Performance Report, dated March 27, 1997

P-30 Performance Report, dated April 7, 1997

R-31 Memo, dated April 1, 1997

R-32 Memo to E. Kenny, dated March 23, 1998

R-33 Letter to E. Kenny, dated February 8, 1999

R-34 Performance Report, dated April 19, 1999

R-35 Letter to E. Kenny, dated April 22, 1999

R-36 Letter to E. Kenny, dated May 3, 1999

R-37 Performance Report, dated May 4, 1999

R-38 Performance Report, dated March 20, 2000

R-39 Performance Report, dated June 11, 2000

R-40 Performance Report, dated March 22, 2001

R-41 Performance Report, dated June 15, 2001

R-42 Performance Report, dated January 14 and 15, 2002

R-43 Memo to E. Kenny, dated January 18, 2002

R-44 Performance Report, dated March 28, 2002

R-45 Memo, dated September 7, 2001

R-46 Memo to C. Steffner, dated November 6, 2002

R-47 E-mail to C. Steffner, dated December 31, 2002

OAL DKT. NO. EDU 1217-03 AND 1825-03
AGENCY DKT. NOS. 405-12/02 AND 56-2/03
(CONSOLIDATED)

IN THE MATTER OF THE TENURE HEARING :
OF ELLEN KENNY, SCHOOL DISTRICT OF :
THE TOWN OF HACKETTSTOWN, WARREN :
COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and respondent's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record, which included transcripts from five days of hearing,[1] together with exhibits, post-hearing briefs, exception and reply arguments, the Commissioner determines to adopt the Initial Decision, with modification, as set forth herein.

Initially, the Commissioner concurs with the ALJ that "[p]roof of the charges against Kenny depends in part on the credibility of the witnesses." (Initial Decision at 6) In this connection, the Commissioner acknowledges that the ALJ has "carefully considered the testimony and demeanor of the witnesses***" (Initial Decision at 6) and her credibility determinations are entitled to his deference. *See In the Matter of the Tenure Hearing of Frank Roberts*, 96 *N.J.A.R.* 2d (EDU) 549, 550 *citing In the Matter of Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div.) *certif. denied*, 121 *N.J.* 615 (1989). The Appellate

[1] Hereinafter, transcripts shall be referenced as follows: Tr. 1 - April 7, 2003; Tr. 2 – April 8, 2003; Tr. 3 – April 9, 2003; Tr. 4. – May 13, 2003 and Tr. 5 – May 14, 2003.

Division has affirmed this principle, underscoring that "[u]nder existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor based judgments." *Whasun Lee v. Board of Education of the Township of Holmdel*, Docket No. A-5978-98T2, decided by the New Jersey Superior Court, Appellate Division, August 7, 2000, slip op. at 14. Indeed, the Commissioner

> *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. (emphasis added) *N.J.S.A.* 52:14B-10(c).

The Board charged respondent with four counts of unbecoming conduct. Count I alleges, in pertinent part:

> 10. In derogation of her legal duty [to safeguard and ensure the confidentiality of medical records and information about a student's medical condition and health needs] Ms. Kenny disclosed the details of J.S.'s medical condition and medical needs to an individual not employed by the Hackettstown School District, Renee Gil, who had no legitimate reason for access to confidential medical information concerning J.S.
> 11. Ms. Kenny's disclosure of confidential medical information about J.S. was done without the required permission of J.S. or her parents.
> 12. The release of this information has caused significant distress to the student and her parents and has seriously undermined the integrity of the student health services provided by the Hackettstown School District.
> 13. The School District administration concluded Ms. Kenny had violated known procedural, legal and ethical requirements for the maintenance of confidential student medical records and information.
> 14. This improper disclosure of student medical records and information by Ms. Kenny constitutes conduct unbecoming a teaching staff member. (Tenure Charges, OAL EDU Dkt. No. 1217-03 at 2)

For the reasons fully explicated in her Initial Decision, the Commissioner agrees with the ALJ that "[t]he Board's evidence that Kenny disclosed confidential information to Renay [sic] Gil about J.S. is unpersuasive." (Initial Decision at 7)[2] In so doing, the Commissioner finds that the ALJ's conclusion is supported by sufficient, competent and credible evidence in the record and, therefore, he may not disturb it. Moreover, even setting aside the issue of the inconsistencies in the testimony of K.C.S. and A.S., as noted by the ALJ (Initial Decision at 8), the Commissioner finds that in light of a categorical denial from both respondent and Ms. Gil that the alleged conversation ever occurred, the Board simply has not proven its allegation by a *preponderance* of credible evidence. Charge I, therefore, cannot be sustained.

In Count II of the tenure charges, the Board alleges:

1. In her communications with the parents of the classified student[s], K.S. and A.S., Ms. Kenny has improperly pressured the parents to take actions that they feel are not in the best interests of their daughter.
2. These efforts on the part of Ms. Kenny were made after the parents advised Ms. Kenny that they felt that the program and services provided for their daughter at Hackettstown High School were appropriate to meet their daughter's needs.
3. Ms. Kenny's conduct resulted in J.S. being reluctant to report to the school nurse for necessary medical care for fear that Ms. Kenny would overact to the situation.
4. Ms. Kenny's repeated contacts and efforts to pressure the parents to obtain additional services for their daughter, which the parents did not feel were in the best interests of their daughter, forced K.S. to contact the School District Superintendent, Joanne Calabro, to intervene in this matter.
5. K.S. requested that the Superintendent take action to prevent Ms. Kenny from having any direct contact with the parents.
6. Such actions on the part of Ms. Kenny have placed the student in unnecessary distress over her own medical care, have forced the parents of a High School student to essentially give up their right to receive necessary medical information from the School Nurse; and have created the risk that a student who requires medical

[2] To the extent the Board urges the Commissioner to consider testimony regarding the release of information to someone other than Ms. Gil, the Commissioner finds that he cannot properly do so since the charges herein are specific to Ms. Gil.

services will be reluctant to go to the school nurse to seek necessary medical care.

7. The School District administration concluded that Ms. Kenny had violated her duties and responsibilities as School Nurse by putting her own interests and needs above the interests of a student.
8. The above conduct on the part of Ms. Kenny constitutes conduct unbecoming a teaching staff member. (Tenure Charges, OAL EDU Dkt. No. 1217-03 at 3-4)

On this charge, the Commissioner is similarly not convinced that the Board has demonstrated its allegations by a preponderance of credible evidence. As its central piece of evidence, the Board offered Exhibit P-1, a letter sent by J.S.'s parents to the District in May 2002 requesting that the District revisit the issue of their daughter's latex allergy. Although *signed* by K.C.S. and A.S, apparently, the letter was drafted by someone else. (Exhibit P-3) The Board, however, failed to establish on this record that the letter was drafted by, or even at the behest of, respondent. (Tr. 1 at 45; Tr. 3 at 72; Tr. 4 at 22; Tr 5 at 24, 25) Indeed, any allegation that J.S.'s parents were pressured to take action against their will was undercut by the testimony of K.C.S., who indicated that, upon receipt of the draft letter, she found it to be "perfect," and she did not need to change anything before signing and sending it to the District. (Tr. 4 at 22) K.C.S. further admitted that she only *assumed* respondent was the writer (Tr. 4 at 88); respondent, however, persuasively testified that she did not draft the letter. (Tr. 5 at 24) Indeed, even Ms. Steffner admitted that, up until October 2002, when respondent wrote to Steffner revisiting the issue of the latex allergy (Initial Decision at 4), she did not have a problem with respondent's behavior. (Tr. 2 at 48) Neither has the Board shown that respondent's actions placed J.S. in "unnecessary distress over her own medical care."[3] (Count II) Consequently, Charge II cannot be sustained.

[3] It is not clear on this record whether J.S. still attends Hackettstown High School. K.C.S. testified that, as of January 2003, J.S. was placed under custody of the Division of Youth and Family Services and is still living in New Jersey, although she and her husband are not. (Tr. 4 at 111-112)

In Count III of the tenure charges, the Board alleges:

1. In communicating with the parents of J.S., Ms. Kenny has discussed matters that are unrelated to the provision of student health services and are inappropriate discussions with parents.
2. Ms. Kenny has discussed with the parents a personnel action taken against her by the High School administration for Ms. Kenny's own misconduct.
3. Ms. Kenny has discussed with the parents her own intention to legally challenge the personnel action taken against her and her intention to take legal action against the school district.
4. Ms. Kenny has been critical of the High School principal in her conversations with the parents, A.S. and K.S., and has revealed to the parents information about Ms. Kenny's own disagreements with the High School principal that the parents feel are not the proper subject of discussion between the School Nurse and parents.
5. Ms. Kenny's discussions with the parents were inappropriate and undermined the credibility of the High School Principal and the High School administration as a whole.
6. Ms. Kenny's criticism's of the High School Principal and of the personnel actions taken against her were not related to the health or well being of the student, J.S., nor intended to provide necessary medical information to her parents. Instead, Ms. Kenny's comments were intended to undermine the authority of the High School Principal and to further her own personal interests.
7. The above conduct on the part of Ms. Kenny constitutes conduct unbecoming a teaching staff member. (Tenure Charges, OAL EDU Dkt. No. 1217-03 at 4-5)

For the reasons set forth in her Initial Decision at pages 9 and 10, and accepting the testimony of respondent as summarized by the ALJ, the Commissioner concurs that although respondent's comments to J.S.'s parents about her principal were inappropriate, such comments do not rise to the level of unbecoming conduct.

In Count IV[4] of the tenure charges, the Board alleges, in pertinent part:

4. Pursuant to New Jersey statute, regulations, Department of Education Guidelines, and School District policies and procedures the High School Nurse performs scoliosis screenings for Hackettstown High School students each year.

[4] This charge was brought separately from the prior three counts. For the purposes of this decision, it shall be considered Count IV.

5. The results of such screenings must be documented and placed in the student's health file.
6. Where the results of the scoliosis screening deviate from the norm, the school nurse is required to notify the parents in writing of the results and advise them of the need for additional evaluation by the family health care provider.
7. During the 2001-2002 school year scoliosis screenings were conducted by Ms. Kenny beginning in October 2001.
8. A number of students screened by Ms. Kenny, including the students C.K. and D.U., showed deviations from the norm.
9. Ms. Kenny failed to notify the parents of C.K. and D.U. in writing of the results of the scoliosis examinations which demonstrated deviations.
10. The failure of Ms. Kenny to send out written notices to the parents of C.K. and D.U. was not discovered until January 2003 when a substitute nurse assigned to the High School discovered that the results of the scoliosis screenings of the two students had not been provided to the parents.
11. The parents of C.K. and D.U. were not notified of their child's scoliosis screening results and the need to follow up with their family physician until notices were sent out by the substitute nurse in January 2003.
12. During the 2002-2003 school year scoliosis screenings were conducted by Ms. Kenny beginning in October 2002.
13. Those screenings revealed nineteen (19) freshman students who showed deviations from the norm.
14. Ms. Kenny failed to send written notice to the parents of the results of the scoliosis screenings.
15. Written notices of the results of the scoliosis screenings for the nineteen freshman students were sent out by the substitute nurse in January 2003.
16. The actions of Ms. Kenny in failing to provide the required written notice to the parents of the scoliosis screening results and the recommendation for a follow-up examination has unnecessarily delayed the process for insuring proper detection of scoliosis at the earliest stage.
17. Ms. Kenny's failure to provide the required written notice of scoliosis screenings to parents in a timely manner constitutes conduct unbecoming a teaching staff member. (Tenure Charges, OAL EDU Dkt. No. 1825-03 at 1-3)

Respondent testified that in the absence of specific guidance from the District regarding when and how to notify parents pursuant to a scoliosis screening, she developed her own procedures and made it her practice to complete all screenings first, then notify parents,

when she had detected a "positive screening". (Tr. 5 at 49, 50, 56) She further testified that she never received any directions to the contrary. (Tr. 5 at 56) Indeed, Principal Steffner testified that she never established any specific policies with respect to scoliosis screens and she had no involvement with the screening. (Tr. 1 at 84) Superintendent Calabro also testified that she was not familiar with the procedures for scoliosis screening in the high school. (Tr. 3 at 30-31) Neither was she aware whether there was a timetable for sending out the notices, if any, or what the high school's past practice had been in this regard. (Tr. 3 at 31-32)

There does not seem to be any dispute on this record that respondent initiated the scoliosis screenings for the 2002-03 school year in October 2002, and was suspended soon thereafter. Furthermore, as the ALJ noted, "The evidence support[s] respondent's argument that during Kenny's employment, the Board accepted the practice to notify parents of screening results at the conclusion of the semester.*** Kenny's suspension in November occurred prior to the time she usually sent the notices of the screening results." (Initial Decision at 11) The Commissioner finds, therefore, that, under these circumstances, respondent should not be held accountable for failing to notify the parents of the 19 students for whom deviations were detected in October 2002.

Respondent completed the scoliosis screenings for the 2001-02 school year in the Spring of 2002. With respect to the student C.K., respondent testified:

> [H]er curve was so mild, that it was probably negative. In fact, I have to say I over screen. This curve I felt it was negative, but because it was at the end of the year, I didn't have the opportunity to screen her again. So, rather than send this form [Exhibit P-13] home, I called the parent, and I got her answering machine. So, I waited a couple of days – it might have been a day or two days later, and I called again, and I got the answering machine again. So, what I said is I said, you know, "I screened your child for scoliosis. It looks fine to me, but you may want to have your

> pediatrician look at it over the summer." And I didn't send the letter. (Tr. 5 at 53-54)

C.'s mother denied that she ever received a call or message from respondent. (Tr. 2 at 83-84)

Similarly, with respect to the second student, respondent testified that D.U. was a twin whose sister had already been screened and was found to have a mild curve; a letter indicating the same was sent home in December 2001. At that time, respondent spoke with the twins' mother, and, in response to her concern about a scoliosis screening for D.U., respondent explained that D.U. would not be screened until later in the 2001-02 school year. Respondent testified that the girls' mother told her that she would have *both* girls checked out by their doctor. Therefore, respondent testified, although D. had a mild curve, "I didn't send a letter, because the mother had told me she was going to take them both to the doctor." (Tr. 5 at 55) The next school year, the girls' mother confirmed with respondent that she had done so. (*Id.*)

Initially, the Commissioner notes that the relevant statute provides:

> Every board of education shall provide for the biennial examination of every pupil between the ages of 10 and 18 for the condition known as scoliosis in accordance with standards jointly established and promulgated by the Departments of Health and Senior Services and Education. Such examination shall be carried out by a school physician, school nurse, physical education instructor or other school personnel properly trained in the screening process for scoliosis. **Every board of education shall further provide for the notification of the parents or guardian of any pupil suspected of having scoliosis. Such notification shall include an explanation of scoliosis, the significance of treating it at an early stage, and the public services available, after diagnosis, for such treatment.** (emphasis added) *N.J.S.A.* 18A:40-4.3.

Additionally, the Board has a policy regarding health examinations and immunizations, revised February 13, 2002, which provides, in pertinent part:

> In order to protect the health of the children and staff in district schools, all regulations of the state department of education, the

> state department of health and the local board of health shall be scrupulously observed, particularly those dealing with contagious/infectious diseases or conditions. ***
>
> The chief school administrator shall formulate regulations for this policy and for regular pupil health examinations at appropriate grade levels *** for *** scoliosis *** and other physical examinations required by law. Any health defects revealed by any examination given by the school health services must be reported to the parent/guardian. The board shall review the regulations and adopt those required by law. (Policy 5141.3, Exhibit J-2)

Here, even assuming that there was sufficient cause to notify the parents of C.K. and D.U that their children may have scoliosis, it is undisputed that respondent did not do so *in writing*.[5] The ALJ, however, found that respondent *did* telephone C.K.'s mother on two occasions to provide her notification (initial decision at 11); that finding is supported by sufficient, competent and credible evidence in the record. Furthermore, the Board offered no evidence to dispute respondent's testimony with respect to the notification of D.U.'s mother.

Although the Board seeks to invoke guidelines promulgated by the New Jersey Department of Education to establish that parental notification regarding scoliosis screenings must be in writing, and, therefore, respondent was remiss in failing to send P-13 and P-15 to the parents of C.K. and D.U. (Board's Exceptions at 7-9), under these particular circumstances, where it has not been clearly established that notifications were warranted; where, if warranted, neither statute nor code requires that such notification be in writing; and where the record is devoid of evidence that the Board developed procedures consistent with direction provided by

[5] Respondent argues, in this connection, "that the two students for whom notes were found by the substitute nurse had mild curvatures and, given her tendency to over screen, she wanted to re-screen the students before notifying the parents.*** [She] was the only witness with any type of medical background, who testified with regard to the significance of the findings she made for the two students. *The only other witness with any type of medical background, the substitute nurse, never checked to see if the results on the notices were accurate, or, if any documentation existed which showed the students had actually been screened.****" (emphasis in text) Respondent's reply at 34)

the Department's *School Health Services Guidelines,*[6] the Commissioner cannot sustain Charge IV.

Accordingly, the Initial Decision is adopted for the reasons expressed therein, and amplified above.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 1/23/04

Date of Mailing: 1/29/04

[6] The *School Health Services Guidelines* underscore that the goal of the mass screening program mandated by law is early identification, and, therefore, "Students diagnosed with scoliosis should be under the care and supervision of a family healthcare provider or clinic. ***" (*Guidelines* at 32, Exhibit J-4) Additionally, as an "accompanying critical issue," the guidelines state, "When screening results deviate from norm, notify the parent/guardian in writing of these results and of the need for additional evaluation by the family healthcare provider." (*Id.* at 33)

[7] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

27-04

27-04

GRETA WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY, NEW JERSEY STATE DEPARTMENT OF EDUCATION AND CALLA CHARTER SCHOOL,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner sought tenure as an elementary school teacher at Plainfield School District retroactive to 1996-97 school year and reinstatement to employment at Calla Charter School. She had been terminated from her principal position at the charter school for failure to obtain the necessary Supervisor's Certificate.

The ALJ determined that petitioner was eligible for the standard certificate following successful completion of the provisional teacher program in 1993-1994 and she would have attained tenure after the completion of the 1995-96 school year. The ALJ noted that it is the "primary responsibility" of the teacher to obtain appropriate certification, however, it was only due to the failure of the school district in processing her paperwork that petitioner did not receive her standard certificate. Thus, the ALJ concluded that petitioner did attain tenure. The ALJ further found that petitioner, though tenured, relinquished her tenure rights in June 2001 when she voluntarily resigned her position. Conversations that she had with school officials, which led her to believe that she could return to Plainfield if the charter school did not work out, could not overcome her voluntary resignation. Petition was dismissed.

The Commissioner agreed with the ALJ's conclusion that petitioner's voluntary, unequivocal resignation terminated any employment rights she may have had in the District. The Commissioner declined to reach to the ALJ's discussion as to whether petitioner acquired tenure status in the District, as resolution of this issue has no bearing on the compelled outcome in this matter. 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.

January 30, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO.: EDU 1902-03

AGENCY DKT. NO. 95-3/02

GRETA WILLIAMS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY, NEW JERSEY STATE DEPARTMENT OF EDUCATION AND CALLA CHARTER SCHOOL,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner
(Oxfeld Cohen, attorneys)

Victor E.D. King, Esq., for Plainfield City Board of Education, respondent
(King, King & Goldsack, attorneys)

Sarah Crowley, Deputy Attorney General, for New Jersey State Department of Education
(Peter C. Harvey, Acting Attorney General of New Jersey, attorney)

Record Closed: October 10, 2003 Decided: December 16, 2003

BEFORE **JEFFREY A. GERSON**, ALJ:

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law for hearing as a contested case. The matter was heard on October 10, 2003.

The following facts were stipulated to by the involved parties:

1. From September 1989-June 1993 Petitioner Greta Williams was employed by the Plainfield Board of Education as a school based substitute.

2. Commencing September 1993 Petitioner Greta Williams became employed by the Plainfield School District as a classroom teacher in Grade 4. Ms. Williams held a Certificate of Eligibility with Advanced Standing as an elementary school teacher. (Exhibit A)

3. At or around the time Ms. Williams was hired, she completed the required paperwork to allow her to be enrolled in the provisional teacher program. Ms. Williams paid the required fee and a mentor was assigned to her.

4. Ms. Williams was advised by Curtis Brown, Director of Human Resources at the time Ms. Williams was hired, that the district would take care of all the necessary paperwork. Ms. Williams completed her obligations under the provisional teacher program in a timely fashion. (Exhibit D)

5. Mrs. (sic) Williams's employment was continuously renewed each school year through June 2001.

6. Sometime after April 17, 1996, Ms. Williams received a "Notice to Tenured Employees" indicating Ms. Williams' salary for the 1996-1997 school year. The notice also explained that once an employee is tenured, it is unnecessary for the district to provide an employee with an annual employment contract. (Exhibit B)

7. Deleted by the parties.

8. Approximately June 30, 2001, Ms. Williams submitted her resignation from Plainfield to accept the position of school principal at the Calla Charter School for the 2001-2002 school year.

9. Ms. Williams applied for a Supervisor's Certification as required by The Calla Charter School.

10. Approximately July 2001, Ms. Williams learned she did not have a valid teaching certificate as Plainfield failed to submit the appropriate paperwork. Consequently she was not eligible for the Supervisor's Certificate. (Exhibit C)

11. On January 15, 2002, Ms. Williams was terminated from her position with Calla for failure to obtain the Supervisor's Certificate. (Exhibit E)

12. On November 29, 2002, the State Board of Examiners granted Ms. Williams both the teaching certificate and a Supervisory Certificate. (Exhibit F)

DISCUSSION AS TO WHETHER PETITIONER'S ELIGIBILITY FOR STANDARD CERTIFICATES IS SUFFICIENT TO OBTAIN TENURE

A. Tenure Law

The tenure of educational personnel is authorized by the Education Tenure Act, N.J.S.A. 18A:28-1 to –18. Tenure is a status in a particular position created by statute, not the agreement of the parties, therefore, it is a "statutory right imposed upon a teacher's contractual employment" ... that "may not be forfeited or waived." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 77 (1982) (citing, Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962); Red Bank Educ. Ass'n v. Red Bank Bd. of Educ., 78 N.J. 122, 141 (1978)).

Educators who are employed in public schools must hold a valid certificate "to teach, administer, direct or supervise the teaching, instruction or educational guidance of ... pupils in such public schools." N.J.S.A. 18A:26-2. The State Board of Examiners has implemented the certification requirement by authorizing three certificates that an educator may hold: (1) Instructional; (2) Administrative; and (3) Educational Services. N.J.A.C. 6:11-2.3. In order to obtain tenure, an educator must hold the appropriate certificate for his or her position. N.J.S.A. 18A:28-4. An educator may hold more than one type of certificate.

In addition to the three types of certificates an educator may hold, the State Board of Examiners has designated special endorsements under each type of certificate. N.J.A.C. 6:11-2.3. An educator must hold the appropriate certificate and endorsement for his or her position. N.J.A.C. 6:11-6.1.

Therefore, in order to obtain tenure, an educator must hold the appropriate certificate issued by the State Board of Examiners and maintain employment in a position for:

> (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; 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.
>
> [N.J.S.A. 18A:28-5.]

B. Underlying Arguments Of The Parties

1. Petitioner Williams' Arguments

Petitioner Williams argues she is entitled to statutory tenure as an elementary teacher retroactive to the 1996-1997 school year because she performed all the tasks required to receive her teaching certificate. She claims it is solely due to Plainfield Board of Education failing to properly register her in the provisional teacher program that prevented her from receiving her standard instructional certificate. As support, Petitioner quotes this language used by the State Board of Examiners when it issued Petitioner her teaching and supervisory certificates on November 29, 2002:

> If the school district had enrolled her in the provisional teacher program in 1993 when she was first hired, Ms. Williams would already hold the standard Elementary School teacher certificate. The only difference between the experience completed and the required experience is the

> fact that the district did not enroll Ms. Williams in the provisional teacher program. This is not a substantive difference that should preclude certification at this time.
>
> [Respondent's Brief, Exhibit 3, New Jersey Department Of Education State Board Of Examiners' Decision.]

2. Respondent School District's Arguments

Concerning Petitioner's tenure status, Respondent, quoting Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 74 (1982), argues that Petitioner is entitled to tenure if "(1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time." Here, because Petitioner did not obtain the appropriate certifications from the State until November 2002, Respondent claims she cannot claim any rights under the tenure laws. As support, Respondent references N.J.S.A. 18A:28-4:

> No teaching staff member shall acquire tenure in any position in the public schools in any school district or under any board of education, who is not the holder of an appropriate certificate for such position, issued by the State Board of Examiners, in full force and effect.

Respondent cites several cases for support, such as Ahrensfield v. State Bd. of Educ., 126 N.J.L. 543, 544 (1941), which held "[i]t is axiomatic that the right of tenure does not come into being until the precise condition laid down in the statute has been met."

Next, Respondent argues that not only is proper and appropriate certification from the state a prerequisite to obtaining tenure, but Petitioner's years of service without such certification cannot count towards the tenure laws' length of service requirement. As support, Respondent references several cases, including Driscoll v. Bd. of Educ. Of City of Clifton, Passaic County, 165 N.J. Super. 241, 246 (App. Div. 1977), aff'd, 79 N.J. 126 (1979), which held that a board cannot convert substitute teacher's status to regular teacher for purposes of adding time served as substitute to be counted as time served as regular teacher in order to attain tenure status.

C. Actual Possession Of Standard Certificate Is Not Required For Petitioner To Attain Tenure Status

The regulations governing the Provisional Teacher Program to certification are N.J.A.C. 6:11-5.1 to –5.6. Under this program, candidates who have not taken required education courses in order to become certified teachers are permitted to receive a one-year probational certificate and a temporary appointment to the teaching staff in a school approved by the Commissioner of Education. These teachers receive intensive instruction, supervision, and evaluation from a Professional Support Team (PST) at the participating school.

At the end of the one-year period, the provisional certificate lapses. Pursuant to N.J.A.C. 6:11-5.5 (b), those who successfully complete the program are granted a standard teacher certificate by the State Board of Examiners. Those evaluated "insufficient" are permitted an additional year of training and supervision. Those evaluated "disapproved" may not continue in the program.

In this matter, it is undisputed that Petitioner completed the provisional teacher program. (See #3 and #4 of the Stipulated Facts). Also, Curtis Brown, who was the Director of Human Resources at the time Petitioner was hired, told Petitioner that the district would take care of all the necessary paperwork. (#4 of the Stipulated Facts). The State Board of Examiners, when issuing to Petitioner the standard instructional and supervisory certificates[1], said that were it not for the failure of the school district to properly enroll Petitioner in the provisional teacher program, she would have had the instructional certificate following her completion of the provisional teacher program in 1993-1994. Also, the school district's failure to properly enroll Petitioner in the program and handle the paperwork as promised is a violation of N.J.A.C. 6:11-5.5, which provides:

> (a) Sixty days after the conclusion of the State-approved district training program, the building principal or an appropriately certified school administrator shall prepare a final evaluation report on the provisional teacher's performance. This report shall be submitted by the building principal or an appropriately certified school administrator directly to the Office of Licensing and Credentials and shall

[1] Although N.J.A.C. 6:11-23 does not list "supervisory" certificates as one of the three certificates an educator may hold, this is the language used by The State Board of Examiners in its decision.

> contain a recommendation as to whether or not a standard certificate should be issued to the provisional teacher.
>
> [N.J.A.C. 6:11-5.5(a).]

It is the "primary responsibility" of the teacher to obtain appropriate certification. 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). Therefore, even though school officials share some responsibility for checking that teachers are properly certified, it remains the teacher's obligation to obtain any necessary certificates. Sydnor v. Englewood Bd. of Educ., 1976 S.L.D. 113, 117. Nonetheless, it seems unfair to find that a teacher can be harmed for reasonably relying on the promises of the school district that it will properly do its job—a job set out in New Jersey's regulations.

Respondent argues that Jennings v. Highland Park Bd. Of Educ., 1989 S.L.D. 1097 (St. Bd.) overrules Saad v. Dumont Bd. Of Educ., 1976 S.L.D. 440,[2] and other cases that held eligibility for a certificate was sufficient for seniority and tenure. Respondent asserts that Jennings has ushered in a new line of thinking that has retreated from a "balancing of equities" in favor of a more objective analysis. However, Jennings involves a completely different situation. In Jennings, the Petitioner was an athletic trainer for a school—he did not hold a position recognized as an official teaching position. In this matter, Petitioner Williams held an officially recognized position—she was an English teacher. Furthermore, in Jennings, the Petitioner knew he did not have the proper certification and took no steps to remedy it. Here, Petitioner Williams took the necessary steps to remedy her lack of appropriate certification. The only reason Petitioner Williams did not receive her standard instructional certificate was because of the school district's inaction. Consequently, the line of reasoning espoused in Jennings is inapplicable to this case.

There is also case law to lend support to Petitioner's argument that she had tenure following the 1995-1996 school year even though she did not actually possess a standard instructional certificate.[3] For example, in Givens v. Bd. Of Educ. of Newark, 1974 S.L.D. 906, the Commissioner of Education held that Ms. Givens applied in a

---

[2] Saad held that retroactive seniority credit was based on eligibility for a certificate, rather than actual possession.

[3] The following are two decisions by the Commissioner of Education which announce the rule that eligibility for, not actual possession of, a certificate is sufficient for employment as a teaching staff member: Kane v. Bd. of Educ. of the City of Hoboken, 1975 S.L.D. 12; and Givens v. Bd. Of Educ. of Newark, 1974 S.L.D. 906.

timely fashion for the required certification, that she possessed the necessary requirements for a permanent certificate, and her inability to obtain the certificate was not of her own doing. Because of these facts, the Commissioner made this determination:

> [P]etitioner's service as a teaching staff member ... during which she was eligible for and had applied but had not received her teaching certificate, shall be counted in determining whether her total service meets the precise conditions laid down in the statute, N.J.S.A. 18A:28-5, for the acquisition of a tenure status. Ahrensfield v. State Bd. of Education et al., 126 N.J.L. 543 (E. & A. 1941)
>
> [Givens v. Bd. Of Educ. of Newark, 1974 S.L.D. 906, 910.]

Also, it is undisputed that Petitioner completed the application and forwarded it to the school district so that they could "take care of all the necessary paperwork." (#3and #4 of the Stipulated Facts). In Phillips v. New Jersey State Dep't of Educ., State Bd. Of Examiners, 96 N.J.A.R.2d (EDU) 1006, 1996 WL 784596, ALJ Masin noted form should not prevail over substance in those situations where someone has taken the steps they needed to receive the certificate, are eligible to receive it, and have not received it. In ALJ Masin's denial of Ms. Phillips' application for a certificate he stated:

> While there have been cases where the Commissioner has recognized that form should not prevail over substance and that someone who was eligible for and/or initiated the process to obtain a certificate, but could not produce it in hand at a later date, should nevertheless be given credit for having it, Kane v. Hoboken Bd. of Educ., 1975 S.L.D. 12, 17; Givens v. Newark Bd. of Educ., 1974 S.L.D. 906, 908, these cases have involved situations where the proofs regarding the initiation of an actual application to the State have been more conclusive than the proof herein, which involves only the unsupported testimony at hearing of the teacher that she gave the district the initial paperwork.
>
> [Id. at 1008.]

In addition, in Hansen v. Runnemede Bd. Of Educ., 1993 S.L.D. 1240, adopted, Comm'r of Educ., Id. at 1256, ALJ McKeown rejected Mr. Hansen's request that the period of time he taught without proper certification—1977-78 through 1981-82—be counted toward his tenure status because Mr. Hansen was not eligible for the standard certificate during that period. In his decision, ALJ McKeown stated:

> Clearly, one of the precise conditions required to be met by those who claim a tenure status is the possession of an appropriate certificate ... I recognize that the Commissioner has held on prior occasions that *eligibility for a certificate is the essential ingredient in respect of possessing an appropriate certificate, as opposed to the actual physical possession of such certificate.* However, in this case, petitioner did not become eligible for a certificate until ... sometime during the summer 1982
>
> [Id. at 1253-54 (emphasis added).]

Therefore, because petitioner was eligible for the standard certificate following her successful completion of the provisional teacher program in 1993-1994, it follows that she would have attained tenure status after the completion of the 1995-1996 school year. As pointed out by the State Board of Examiners, it is only due to the failure of the school district in processing her paperwork that Petitioner did not receive her standard certificate.

The purpose of the provisional teaching program is to allow teachers to attain their standard certificate, yet it is also beneficial to the school districts because it eases their burden when searching for qualified teachers. In this matter, it is undisputed that Petitioner did what was required of her to earn a standard certificate. It is also undisputed that the school district failed to handle her paperwork properly, which constitutes a violation of state regulations. It seems unfair to find that a teacher did not attain tenure because of a mistake made by her employer. In addition, it is unfair to hold teachers responsible for making sure that the school districts follow the regulations imposed on them by the state.

DISCUSSION AS TO WHETHER PETITIONER'S RESIGNATION WAS A VOLUNTARY RELINQUISHMENT OF HER TENURE RIGHTS

A. Underlying Arguments Of The Parties

1. Petitioner Williams' Arguments

Petitioner Williams argues she should be reinstated to full-time employment as a teaching staff member at a salary commensurate with her retroactive tenure and seniority entitlement, with all retroactive back pay and employment benefits. In support of this, Petitioner asserts that she did not voluntarily relinquish her tenure because she

was told she could "always come back" to the Plainfield school district. Therefore, Petitioner argues that based on that statement she believed she maintained her tenure in the Plainfield school district when she left to go to the charter school.

2. Respondent School District's Arguments

Respondent argues that even assuming Petitioner did acquire tenure with the school board, she cannot claim any tenure rights because she voluntarily resigned from her position in June 2001. Respondent cites several cases, including Cleffi-Miller v. Randolph Bd. of Educ., 97 N.J.A.R.2d (EDU) 213, 1996 WL 813849), in which the ALJ determined that "Ms. Cleffi-Miller voluntarily resigned from her employment and, thereby, relinquished whatever tenure rights she might possess."[4] For that reason, Respondent asserts that Petitioner's voluntary resignation terminates any tenure rights that might have otherwise accrued.

B. Petitioner's Resignation Is A Voluntary Relinquishment Of Her Tenure Rights

The Commissioner has held that "...resignation effectively terminate[s] ... previous tenured employment with the Board on th[e] date [accepted] and barred all service prior to such date from subsequently accruing to a new tenure entitlement." Solomon v. Princeton Regional School District, BOE, 1977 S.L.D. 650, 655-656, aff'd, St. Bd., Id. at 657. Furthermore, the voluntary resignation of a teacher equals an abandonment of their tenure rights. Kimless v. Township of Woodbridge BOE, 1978 S.L.D. 651, 656 (citations omitted)[5] ("...Such [a] holding is consistent with previous rulings of the Commissioner wherein it was held petitioners voluntarily resigned teaching positions which constituted abandonment of their rights to a tenure claim.").

In Solomon, the petitioner resigned on October 6, 1971 and was re-employed on October 3, 1972. Solomon, supra, 1977 S.L.D. at 651. In Kimless, the petitioner "voluntarily terminated" her employment on November 17, 1972, with the Woodbridge Board of Education and resumed working for it "shortly after the commencement" of the following school year. Kimless, supra, 1978 S.L.D. at 652. In yet another case, the Commissioner held that once a Board accepts a resignation, even if the teacher is rehired the very next day, her service stopped. Tomlin v. Township of Downe, Bd. Of

[4] The initial decision was adopted by the Commissioner of Education.
[5] The appeal of this decision to the State Board was withdrawn on January 6, 1982.

Educ., OAL DKT. EDU 1994-84 (Aug. 3, 1984), adopted, Comm'r of Educ. (October 11, 1984), aff'd, St. Bd. (February 6, 1985). The Tomlin decision cited to David Misek v. Township of Willingboro, BOE, 1980 S.L.D. 98, as follows:

> Misek argued that the length of break of his service after his resignation was so short as to render the resignation voidable. The Commissioner adopted the initial decision filed by the administrative law judge in Misek where the judge stated as follows:
>
> ... A resignation, once tendered and accepted as herein, has the same paralyzing effect on prior service for tenure claim purposes on future employment with the same Board even if the period of resignation lasts for one day or for one year. [Id. at 100]
>
> [Tomlin, supra, EDU 1994-84 at 6.]

In this matter, it is undisputed that Petitioner resigned from the Plainfield school district. (#8 of the Stipulated Facts). Thus, the school district has no obligation to reinstate her to her previous position or any other position for that mater. Case law lends support to this proposition. For example, in Walsh v. Bd. Of Educ. of Middlesex Co. Vocational and Technical High Schools, 97 N.J.A.R.2d (EDU) 53, 1995 WL 912553, ALJ Thomas determined that upon the acceptance of Ms. Walsh's resignation letter, the school district was not obligated to reinstate her to any teaching position:

> [P]etitioner tendered an ordinary resignation letter. Therefore, when her resignation was accepted, the Board had no further obligation to re-employ her [because] ... there was no obligation to petitioner pursuant to terms set forth in a negotiated bargaining agreement ... and ... there was no duress or "extraordinary concatenation of events" which caused her termination.
>
> [Id. at 54.]

Petitioner advances the argument that based on a conversation with Ms. Bryant-Tinley, the human resources director in 2001, she believed she maintained her tenure in the Plainfield school district and could return to the school district after working at the charter school. For this reason, Petitioner argues that she did not voluntarily relinquish her tenure and is entitled to reinstatement to her former position. This argument has no basis in law. Petitioner's resignation was not done impulsively, but was a conscious

and deliberate choice on her part because she left to become vice-principal at a charter school. In other words, she voluntarily quit her job to take another one. It is not reasonable to argue that the voluntary leaving of one job for another does not equal the voluntary relinquishment of one's tenure rights. In fact, this seems to be a clear example of a voluntary relinquishment of one's tenure rights. Therefore, when Petitioner voluntarily resigned from her employment, she relinquished whatever tenure rights she might have possessed.

CONCLUSION

Petitioner, though tenured, relinquished her tenure rights in June 2001 when she voluntarily resigned her position. Conversations she had with school officials, which led her to believe she could return to Plainfield if the charter school did not work out cannot overcome her voluntary resignation. Petitioner's case is **DISMISSED**.

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

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 (45) 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 (13) 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, 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 16, 2003

DATE

JEFFREY A. GERSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

AGENCY DKT. NO. 95-3/02

GRETA WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY, NEW JERSEY STATE DEPARTMENT OF EDUCATION AND CALLA CHARTER SCHOOL,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Plainfield Board's reply thereto were filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioners exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ) below. In that it is determined that such arguments were fully considered and addressed in the Initial Decision, they will not be revisited herein.

Upon his full and independent consideration of the record,[1] the Commissioner agrees with the conclusion of the ALJ that petitioner's voluntary, unequivocal resignation (*see* letter dated June 15, 2001 from Greta Grace Williams to Dr. Larry Leverett, Superintendent of Schools, Exhibit 1, Board's Letter Memorandum, September 18, 2003), which was subsequently accepted by the Board, terminated any employment rights she may have had in the Plainfield School District. In so determining, the Commissioner declines to reach to the ALJ's discussion

[1] It is noted that the record did not contain transcripts of the hearing conducted at the OAL.

as to whether petitioner acquired tenure status in the District, as resolution of this issue has no bearing on the compelled outcome in this matter.

Accordingly, the Initial Decision of the OAL is adopted, as modified above, and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/30/04

Date of Mailing: 1/30/04

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

25-04

25-04

E.C.L., on behalf of minor child, M.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MATAWAN-ABERDEEN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY ET AL.,	:	DECISION
RESPONDENTS.	:	

January 29, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL FOR MOOTNESS
OAL DKT. NO. EDU 6585-03
AGENCY DKT. NO. 290-8/03

E.C.-L. o/b/o M.L.,

Petitioner,

v.

BOARD OF EDUCATION OF MATAWAN-ABERDEEN REGIONAL HIGH SCHOOL DISTRICT, ET ALS.,

Respondents.

E.C.-L., petitioner, *pro se*

Michael Gross, Esq., for respondents (Kenney, Gross, Kovats, Campbell & Pruchnik, attorneys)

Record Closed: December 3, 2003 Decided: December 12, 2003

BEFORE **ISRAEL D. DUBIN, ALJ**:

CONSOLIDATED PROCEDURAL HISTORY AND DISCUSSION OF FACTS

This matter arises out of a complaint petitioner filed with the Commissioner of Education on August 13, 2003. Among other things, she has alleged that respondents Matawan-Aberdeen

Regional High School Board of Education, Superintendent Bruce Quinn, Principal George Hart, and teacher Franklin Wagner failed to provide her daughter, M.L., with an appropriate education and a safe environment in which she would be protected from "bullying" and exposure to inappropriate sexual material and topics during the prior school year. She has asked that the Board be ordered to provide an independent educational assessment of her daughter's needs and ultimately place her in an out-of-district school.

Respondents filed their answer on September 9, 2003, and the matter was transmitted to the Office of Administrative Law as a contested case on September 18, 2003. *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing telephone conference was scheduled for and conducted on October 14, 2003. At that time, petitioner demanded in-home instruction for her daughter, who was suffering from stress-induced asthma, and her niece, A.B., who was soon to be enrolled in the district and had a fractured "ankle/foot." The Board indicated that it would not and could not consider providing in-home instructional services until it received doctors' notes confirming the need for such services.

By letter dated November 20, 2003, the Board advised this court that Ms. C.-L. and her family had moved out of district and enrolled M.L. in the Pleasant Valley Intermediate School in Kunkletown, Pennsylvania. In fact, the Board had already received a request for M.L.'s records from the Intermediate School and was about to forward them. Consequently, the Board requested that this matter be dismissed as moot.[1]

On December 3, 2003, petitioner faxed her objection to the Board's request on personal letterhead with a Kresgeville, Pennsylvania address. While acknowledging that she had, in fact, enrolled her daughter in a new school district, she asked that the district be held in "contempt of court" for having failed to provide in-home instructional services despite having been provided with the necessary doctors' notes. She also asserted that if this matter were dismissed "without first considering the consequences to the next child/victim or family, Matawan-Aberdeen will

[1] In an effort to bring this matter to a conclusion as expeditiously as possible and not put the Board of Education to any further expense, I have relaxed *N.J.A.C.* 1:1-12(a)2 and accepted counsel's letter of November 20, 2003, as if it had been a formal Motion for Dismissal.

literally hold a license in the State of New Jersey to run amuck with reckless disregard for the affects to children in it's (*sic*) district."

DISCUSSION OF THE LAW

An issue is moot when a decision that is being sought in a particular matter will, when rendered, have no practical effect on the existing controversy. *In re Conroy*, 109 *N.J. Super.* 453, 458 (App. Div. 1983). In such cases, the issues "that have become moot or academic prior to judicial scrutiny" are generally considered to be ... improper subject[s] for judicial review." *Anderson v. Sills*, 143 *N.J. Super.* 432, 437 (Ch. Div. 1976). Therefore, when there has been a change in circumstances that raises doubt concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot, regardless of the stage to which the litigation has progressed. *Ibid.*

Here, petitioner is no longer domiciled in Matawan and her daughter is no longer enrolled in its schools. Consequently, she has no basis upon which to demand, and respondent cannot possibly provide, in-home instructional services or any of the other relief she was seeking. There being no remedy or change in the relationship between petitioner and respondent that could possibly result from proceeding with this matter, a hearing would serve no practical purpose.

DECISION AND ORDER

Based upon the foregoing, I **CONCLUDE** that this matter has been rendered moot by the family's relocation to Pennsylvania and M.L.'s enrollment in a school district in that state. Accordingly, it is **ORDERED** that this petition 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 (45) 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 (13) 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, 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 15, 2003

DATE

ISRAEL D. DUBIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

EXHIBITS

For Petitioner:

P-1 Correspondence dated November 20, 2003

For Respondent:

R-1 Motion to Dismiss with attached Exhibits "A" through "F"

OAL DKT. NO. EDU 6585-03
AGENCY DKT. NO. 290-8/03

E.C.L., on behalf of minor child, M.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MATAWAN-ABERDEEN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY ET AL.,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his full and independent review of the record, the Commissioner concurs with the Administrative Law Judge that, as petitioner is no longer domiciled in Matawan and her child is no longer enrolled in the District's schools, this matter is appropriately dismissed as moot.

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/29/04

Date of Mailing: 1/30/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

28-04

28-04

J.R. and J.R., on behalf of minor child, A.R., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

RIDGEWOOD HIGH SCHOOL AND : DECISION
BOARD OF EDUCATION OF THE VILLAGE
OF RIDGEWOOD, BERGEN COUNTY, :

RESPONDENTS. :

_____:

February 2, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3108-03
AGENCY DKT. NO. 57-2/03

J.R. and J.R. ON BEHALF OF MINOR CHILD A.R.,

Petitioners,

v.

RIDGEWOOD HIGH SCHOOL AND RIDGEWOOD BOARD OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioners

Lester Aron, Esq., for respondent (Sills, Cummis, Radin, Tischman, Epstein and Gross, attorneys)

Record Closed: December 11, 2003 Decided: December 16, 2003

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

On February 13, 2003, petitioners J.R. and J.R. on behalf of A.R. filed a Verified Petition of Appeal against Ridgewood High School and Ridgewood Board of Education (the Board) challenging certain disciplinary action against A.R. The Board filed an Answer and Affirmative Defenses on March 4, 2003 and the Department of Education transmitted the matter to the Office of Administrative Law (OAL) where, on March 19, 2003, it was filed for determination as a contested case. A hearing was scheduled for November 12, 2003. By letter dated November 6, 2003, counsel for petitioners advised that an amicable agreement had been reached. Subsequently, counsel for the Board submitted, under letters dated November 12 and December 9, 2003, respectively, the attached Settlement Agreement, along with an excerpt from the minutes of the Board's

meeting on November 24, 2003 approving the aforesaid settlement which the undersigned received on December 11, 2003.

Having reviewed the record and the terms of the settlement, 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 agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the 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 (45) 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 16, 2003
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

December 19, 2003
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DEC 22 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

SILLS CUMMIS RADIN TISCHMAN EPSTEIN & GROSS

A PROFESSIONAL CORPORATION
ONE RIVERFRONT PLAZA
NEWARK, NEW JERSEY 07102-5400
(973) 643-7000
FAX (973) 643-6500

LESTER ARON
MEMBER OF THE FIRM
DIRECT DIAL NUMBER
(973) 643-5789
E-MAIL:

[redacted]

November 7, 2003

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2003 NOV 17 A 8:55

VIA FACSIMILE & REGULAR MAIL

Richard E. Shapiro, LLC
5 Mapleton Road
Princeton, NJ 08540

Re: J.R. and J.R. o/b/o A.R. v. Ridgewood Board of Education

Dear Mr. Shapiro:

This serves as a revised Settlement Agreement between Mr. J.R. and Ms. J.R. o/b/o A.R. and the Ridgewood Board of Education ("Board") in the above-captioned case.

1. Without admitting or denying liability, the Board shall direct Ridgewood High School to remove immediately and expunge from all files at the High School the record of suspensions dated November 15, 2002 to December 3, 2002 and any notices, report, record or any other document relating to that suspension.

2. The Board of Education and High School agree that they will not disclose any of the information specified in Paragraph 1. A.R. shall be treated by the Ridgewood High School as if this disciplinary action had never been taken against him.

3. The Board and Ridgewood High School shall respond to any inquiries relating to A.R. as if this disciplinary action had never been taken against him.

4. Mr. J.R. and Ms. J.R. o/b/o A.R. shall withdraw the petition pending before the Office of Administrative with prejudice and waive any legal or equitable claims against the Board and High School relating to the matters specified in Paragraph 1.

On Behalf of the Ridgewood Board of Education

Lester Aron
Attorney for the Ridgewood Board of Education

Mr. J.R.

Ms. J.R.

Richard E. Shapiro
Attorney for Mr. and Ms. J.R.

Very truly yours,

LESTER ARON

LA/vd

cc: Robert Weakley (via facsimile & regular mail)

EXCERPT FROM THE MINUTES OF THE RIDGEWOOD BOARD OF EDUCATION REGULAR PUBLIC MEETING HELD ON MONDAY, NOVEMBER 24, 2003, AT 7:30 P.M. AT THE EDUCATION CENTER.

XX. SETTLEMENT

Mr. Reilly moved approval of the student discipline settlement in the matter of A.R. as reviewed in Executive Session.

Mr. Bombace seconded the motion, which carried by the following roll-call vote:

AYES: Mr. Bombace, Ms. Brogan, Ms. Gilman, Mr. Hutton. Mr. Reilly

NAYS: None

I certify that this is a true and correct excerpt from the Ridgewood Board of Education minutes.

Catherine T. Dwan

Catherine T. Dwan, Assistant Board Secretary

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2003 DEC 11 P 1:22

OAL DKT. NO. EDU 3108-03
AGENCY DKT. NO. 57-2/03

J.R. and J.R., on behalf of minor child, A.R.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
RIDGEWOOD HIGH SCHOOL AND BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/02/04

Date of Mailing: 2/02/04

29-04

29-04

GREG STIER,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

February 2, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 902-02

AGENCY DKT. NO. 52-3/02

GREG STIER,

Petitioner,

v.

STATE BOARD OF EXAMINERS,

Respondent.

Brian Fehey, Jr., Esq., for petitioner (Fehey & Fehey, attorneys)

Sarah G. Crowley, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: December 5, 2003 Decided: December 17, 2003

BEFORE **STEVEN C. REBACK,** ALJ:

This matter was transmitted to the Office of Administrative Law on March 14, 2002, 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.

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 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 (45) 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.

12/17/03
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

12-22-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 30 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

2003 DEC -5 A 11: 37

PETER C. HARVEY
Attorney General of New Jersey
Attorney for Department of Education
State Board of Examiners
Richard J. Hughes Justice Complex
P.O. Box 112
25 Market Street
Trenton, NJ 08625
By: Sarah G. Crowley, Deputy Attorney General
(609) 633-8197

IN THE MATTER OF GREG STIER	:STATE OF NEW JERSEY :OFFICE OF ADMINISTRATIVE LAW :DOCKET NO. :EDE-00902-02S :AGENCY REFERENCE NO. 52-3/02

STIPULATION OF SETTLEMENT

Respondent, New Jersey Department of Education, State Board of Examiners["Respondent"], through its attorney, the Hon. Peter C. Harvey, Attorney General of the State of New Jersey (Sarah G. Crowley, Deputy Attorney General, appearing) and Petitioner, Greg Stier,(through his attorney, Brian W. Fahey, Jr.) hereby stipulate to the following terms of settlement:

1. In December 17, 2001, the State Board of Examiners denied the petitioner the issuance of a standard teaching certificate through the alternate route program. The Petitioner filed an appeal of this decision with the Commissioner of Education. The respondent filed an answer on March 4, 2002.

2. The matter is currently pending in the Office of Administrative Law before the Honorable Steven Reback.

3. Based on discussions between the parties and in the interest of amicable resolution, the respondent has agreed to

allow the petitioner another opportunity to obtain certification through the alternate route program. The respondent will return to the mentoring process for the alternate route program at Our Redeemer Lutheran School. The resolution is predicated on the provisions set forth in N.J.A.C. 6:11-5-5(f).

4. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party and this agreement shall not constitute a precedent in any other matter.

PETER C. HARVEY
Attorney General of New Jersey
Attorney for Petitioner

BY: Sarah G. Crowley
SARAH G. CROWLEY, DAG

Dated: 11/14/03

Greg Stier
Petitioner

BY: B. W. Fahey Jr.
Brian W. Fahey, Jr., Esq.

Dated: 11/19/03

IT IS SO ORDERED, on this _____ day of _____, 2003

_____
HON. STEVEN REBACK, A.L.J.

OAL DKT. NO. EDU 902-02
AGENCY DKT. NO. 52-3/02

GREG STIER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/02/04

Date of Mailing: 2/02/04

31-04

31-04

B.J. AND C.J., ON BEHALF OF MINOR CHILDREN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

February 4, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3335-03
AGENCY DKT. NO. 62-2/03

B.J. and C.J. o/b/o Minor Children,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY,

Respondent.

David R. Bruins, Esq., for petitioners
(Segreto, Bruins & Segreto, attorneys)

Mark G. Sullivan, Esq., for respondent
(Sullivan & Sullivan, attorneys)

Record Closed: December 3, 2003 Decided: December 17, 2003

BEFORE **ELINOR R. REINER**, ALJ:

On or about February 24, 2003, petitioners, B.J. and C.J., filed a petition of appeal with the Commissioner of Education, alleging that respondent's determination that petitioners' children are not eligible for transportation services or payment of aid in lieu of transportation was arbitrary, capricious and unreasonable. On March 11, 2003,

respondent filed its answer, contending that it has no obligation to provide petitioners with busing or aid in lieu thereof, since petitioners reside less than two miles from the school that their children attend. Respondent sought dismissal of the petition. On March 27, 2003, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) as a contested case for hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned judge on May 23, 2003, and a telephone prehearing conference held on June 23, 2003. During the conference, the issues were isolated, and a hearing scheduled for October 17, 2003 at the OAL. Prior to the hearing, the undersigned was informed that the matter had been settled, and thus the hearing was adjourned. A telephone conference was held with counsel, at which time the parties indicated that Board approval of the settlement would be requested at the Board meeting on November 17, 2003. As a result of settlement conferences held between the parties, a settlement was reached and approved by the Board of Education.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement, indicating the terms of settlement.

I have reviewed the record and settlement terms and **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 (45) 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 17, 2003
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

12-23-03
DATE

M. Kathleen Duncan/CR
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DEC 29 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

al

Segreto, Bruins & Segreto
565 High Mountain Road
North Haledon, NJ 07508
1-973-427-9771
Attorneys for Petitioners

BRUCE JACOBS and CAROLE JACOBS
Petitioners

vs.

WYCKOFF BOARD OF EDUCATION
Respondent

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

OAL Docket No.: 03335-2003N
Agency Docket No.: 62-2/03

Hon. Elinor R. Reiner, ALJ

STIPULATION OF SETTLEMENT

The parties having amicably settled the within matter, it is hereby agreed by and between the parties as follows:

1. Aid in lieu of busing for petitioners' eligible children attending the Eastern Christian Middle School shall immediately be reinstituted, effective as of September 2003.

2. Petitioners complaint for the (Fall) 2002 - (Spring) 2003 school year and all other claims of the parties shall be withdrawn. with prejudice.

M/S

3. This settlement is subject to Eastern Christian Middle School erecting an impediment on the current path through the woods off of Kennedy Court onto the school property and prohibiting authorized access via such path for school children within thirty (30) days hereof. Accordingly, the above reinstitution of aid and the withdrawal of the previous year complaint shall be without prejudice pending the satisfaction of this condition at which time same shall both be with prejudice.

OAL Docket No.: 03335-2003N
Agency Docket No.: 62-2/03

4. Absent a change in the law and so long as an impediment to the path through the woods off Kennedy Court is maintained and authorized access prohibited by the school, Respondent agrees to continue providing aid in lieu of busing to petitioners' eligible children.

5. This settlement is further subject to approval to by Respondent Board of Education within thirty (30) days.

Approved by Respondent 10/16/03

Segreto, Bruins & Segreto
Attorneys for Petitioners
Bruce and Carole Jacobs

By: _____
David R. Bruins

10/16/03

_____
Mark G. Sullivan, Attorney for
Wyckoff Board of Education

Dated: 10/15/03

OAL DKT. NO. EDU 3335-03
AGENCY DKT. NO. 62-2/03

B.J. AND C.J., ON BEHALF OF MINOR CHILDREN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/04/04

Date of Mailing: 2/05/04

34-04

34-04

J.C., on behalf of minor child, J.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, parent of high school pupil J.C., challenged J.C.'s former District's refusal to expunge certain items from J.C.'s pupil record pursuant to *N.J.A.C.* 6:3-6.1 *et seq.* The District contended the items at issue were disciplinary records within the scope of applicable rules.

The ALJ concluded that there was no genuine issue as to any material fact challenged; J.C. was entitled to prevail as a matter of law; and the records should be expunged. The ALJ found that the Board failed to provide a reason for it to maintain the disciplinary records of a former student, particularly once it has fulfilled its statutory obligation to provide a thorough and efficient educational system for J.C. or to its other pupils because J.C. was no longer the Board's responsibility. The ALJ ordered the documents destroyed.

The Commissioner rejected the ALJ's analysis and conclusions. Pursuant to *N.J.A.C.* 6:3-6.8(c), the pupil record of a pupil who departs a school system may be destroyed only in accordance with the Destruction of Public Records Law, *N.J.S.A.* 47:3-15 *et seq.*, which specifies that a student's Confidential Disciplinary File is to be retained for "two years after graduation or termination from school system or age 23, whichever is longer." The Commissioner granted summary decision to the Board. 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.

February 5, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 9575-03

AGENCY DKT. NO. 284-8/03

J.C. o/b/o J.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOL DISTRICT, BERGEN COUNTY,

Respondent.

Sherry Chachkin, Esq., for petitioner (Loughlin & Latimer, attorneys)

William C. Soukas, Esq., for respondent (Nowell, Amoroso, Klein, Bierman, P.A., attorneys)

Record Closed: December 4, 2003 Decided: December 24, 2003

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE

Petitioner J.C. o/b/o J.C., a minor child (J.C.) has petitioned the Commissioner of Education (Commissioner), pursuant to *N.J.A.C.* 6A:3-1.1 *et. seq.*, for an order that the Bergen County Vocational School District Board of Education (Board) expunge

documents from J.C.'s pupil record, which it has retained. The sole issue is whether the Board has the right to retain or maintain the documents in question.

PROCEDURAL HISTORY

On August 6, 2003 J.C. filed a petition with the Commission to consider a controversy between him and the Board. On September 2, 2003 the Board filed an answer to the petition and affirmative defenses. On October 10, 2003 the Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter to the Office of Administrative Law pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13, where, on October 10, 2003, it was filed for determination as a contested case.

On October 29, 2003 J.C. filed a motion for summary decision with a supporting letter memorandum and certifications. On November 20, 2003 the Board filed a cross motion for summary decision with certifications and a letter memorandum in support of the cross motion and in opposition to J.C.'s motion for summary decision. On December 4, 2003 J.C. filed a reply to the Board's opposition to summary decision and his opposition to the Board's motion for summary decision.

FACTS

The relevant facts are not in dispute and I **FIND** them to be the **FACTS** of this case.

During the 2002-03 school year, J.C., a minor child, was enrolled in tenth grade of the Bergen County Academies (Academies) in Hackensack, part of the Bergen County Vocational School District. In or about January 2003 five Academies students reported to the school administration their concerns about certain curious conduct and statements made by J.C. regarding his anticipated and planned violent conduct against two faculty members by stabbing them. His intentions were communicated to fellow students both orally and through e-mail. They also expressed a belief that J.C. had a

weapon or sharp object in his bag. The fellow students also reported that J.C. was displaying signs of suicidal ideation including the preparation of a last will and testament and song lyrics expressing despondence and suicidal thoughts and verbal comments made to fellow students.

Associate Dean Linda Eickmeyer met with each of the five students on January 15, 2003 and had them write down the facts of J.C.'s conduct underlying their concerns. This information was thereafter transcribed by a member of the Dean's staff into statements on January 16. Upon learning of this information on January 15, Dean Eickmeyer and a security officer met with and spoke with J.C. at which time he appeared nervous. When she asked J.C. to empty his pockets, he produced what appeared to be a last will and testament as well as some song lyrics, which expressed suicidal ideation. The Dean contacted J.C.'s mother to come to school, and she also contacted a crisis intervention organization. A representative of the crisis intervention organization recommended an evaluation of J.C. at the Bergen Regional Medical Center (BRMC), and, with the consent of his parents, he was admitted for a psychiatric evaluation. J.C. was given a prescription for therapy at Hi Focus in Paramus. Since J.C. had been accused of making terroristic threats against faculty members, the police investigated and arrested him. He was returned to BRMC for further treatment and was released on or about January 29, 2003.

On February 5, 2003 Academies Principal Patricia Cosgrove met with J.C. and his mother. When J.C. was given the choice of withdrawing from Academies or facing suspension and probable expulsion, he chose to withdraw. On or about February 19, 2003, J.C. pled guilty to harassment and was placed on probation for one year. He thereafter enrolled in the Bogota public schools. On April 4, 2003 Principal Cosgrove forwarded to Bogota High School the entire disciplinary record of J.C. regarding the alleged terroristic threats in compliance with Bogota's request and pursuant to *N.J.S.A.* 18A:36-19a. This record consisted of the following: An April 4, 2003 letter from Principal Cosgrove to Bogota High School Interim Principal Tonnes Stave indicating the enclosure of J.C.'s entire disciplinary record; e-mail from J.C. to students dated January 11, 2003; five student interview statements memorializing statements and conduct by

J.C. and observations of J.C.; song lyrics written by J.C. expressing suicidal ideation; a last will and testament written by J.C., and a series of letters from Principal Cosgrove to the parents of J.C. written between January 15, 2003 and February 6, 2003. By letter dated June 24, 2003 to the superintendents of the Bergen County Vocational School District and Bogota Public Schools, counsel for J.C. requested the expungement of these records. At a meeting of July 21, 2003, Academies confirmed that it maintained a pupil file for J.C., which contained the documents, which had been sent to Bogota High School and for which J.C. sought expungement. By letter dated July 28, 2003, the Board refused to expunge the documents except for one letter from Principal Cosgrove to J.C.'s parents. By letter dated August 27, 2003, counsel for the Bogota Board of Education advised counsel for J.C. that the documents sought to be expunged would be removed from the Bogota student file for J.C.

LEGAL ANALYSIS

Neither party contends that each other's respective applications for summary decision should be defeated because disputed facts exists except that the Board argues that the certification and purported opinion of Evelyn Wilson, a licensed psychotherapist and marriage and family therapist, should be stricken.

At issue is the right of the Board to maintain pupil records of a student who is no longer attached to its district. The Board contends that there is no basis for expungement of J.C.'s records because they constitute permitted pupil records gathered and maintained within the school system for the purpose of second party review under the purview of the regulations of the Department of Education. The applicability of the regulations upon which the Board relies (*N.J.A.C.* 6:3-6.1 *et. seq.*) flows from the statute upon which they are predicated.

N.J.S.A. 18A:36-19 entitled "Pupil records, creation, maintenance and retention, security and access ...." provides in relevant part as follows:

> The State Board of Education shall provide by regulation for the creation, maintenance and retention of pupil records and

> for the security thereof and access thereto, to provide general protection for the right of the pupil to be supplied with necessary information about herself or himself, the right of the parent or guardian and the adult pupil to be supplied with full information about the pupil, except as may be inconsistent with reasonable protection of the persons involved, the right of both pupil and parent or guardian to reasonable privacy as against other persons and the opportunity for the public schools to have the data necessary to provide a thorough and efficient educational system for all pupils.

Since J.C. seeks the expungement of the documents in question and the Board has already provided a set of records to Bogota, the following statutory purposes for the creation, maintenance and retention of documents by the Board are not served. J.C., by this expungement petition by his parents on his behalf, is waiving his right to be supplied with necessary information about himself. Additionally, the right of both pupil and parent to reasonable privacy as against other persons is not served by the Board's retention of these records. Instead, the retention of these records could only potentially jeopardize their right of privacy. That leaves as the only possible germane purpose for the Board's retention of these documents "the opportunity for the public schools to have the data necessary to provide a thorough and efficient system for all pupils." [emphasis supplied]

The Board may make a compelling argument as to why the records and documents in question, in the abstract, are pupil records within the meaning of *N.J.A.C.* 6:3-6.1. They comprise information related to an individual pupil, J.C. They were gathered and maintained within the school system as part of the investigation and evaluation of J.C.'s school-related conduct relative to legitimate concerns over the protection of school personnel, to support J.C.'s well-being and to consider appropriate disciplinary action. Also, they were procured by the school district for the purpose of second party review by Principal Cosgrove in the course of handling the J.C. disciplinary matter.

However, *N.J.A.C.* 6:3-6.2(c) requires that pupil records shall contain only such information as is relevant to the education of the pupil and is objectively based on the personal observations or knowledge of the certified school personnel who originate the record. Pursuant to the requirement that a district board of education establish written policies and procedures for pupil records, the Board issued such a policy on December 12, 2001, which was revised on May 21, 2003. *N.J.A.C.* 6:3-6.2(g). Subsection 3 of this regulation requires the Board's policy statement to enumerate and describe the pupil records collected and maintained. Aside from mandated pupil records which are those required by statute, regulation or authorized administrative record, the only other records which may be compiled in accordance with N.J.A.C. 6:3-6.3 are "permitted pupil records." "Permitted pupil records" are those which a district board of education has authorized by resolution to be collected in order to promote the educational welfare of the pupil. Such permitted pupil records must also comply with the regulatory requirements as to relevance and objectivity. *N.J.A.C.* 6:3-6.3(a)2. The Board's published Student Records Regulation provides that "[t]he collection of the following permitted records is authorized to promote each student's educational welfare:"

1. Personally authenticated observations, assessments, ratings, and anecdotal reports recorded by teaching staff members in the regular course of performing their professional responsibilities and intended for review by another person;

4. Any correspondence with the adult student and/or the minor student's parent...;

8. Withdrawal or transfer form;

10. Records of disciplinary infractions, penalties, and disciplinary hearings; (petition, Exhibit F)

School districts are required to conduct an annual review of all permitted pupil records of currently enrolled pupils to determine the education [sic] relevance of the material and to delete material, which is no longer educational. *N.J.A.C.* 6:3-6.2(i). Section IX. A. of the Board's Student Records Regulation is consistent with this regulation in that it requires the removal and destruction of information for currently

enrolled students which is no longer descriptive of the student's educational situation or necessary to provide educational services to the student. (petition, Ex. F) Even mandated pupil records of currently enrolled pupils may be destroyed after the information is no longer necessary to provide educational services to the pupil. *N.J.A.C.* 6:3-6.8(b). Finally, Section X of the Board's Student Records Regulation requires that, upon the permanent departure of a pupil from the school system, records other than those permanently retained, will be destroyed. Even the permanently retained records, which consist of just basic information, are not retained where records are transferred to another New Jersey school district. (petition, Ex. F)

N.J.S.A. 18A:36-19a provides that the administrator of any school district, which enrolls a new student shall request the student's records from the school district of last attendance. "The school district of last attendance shall provide to the receiving district all information in the student's record related to disciplinary actions taken against the student by the district." Id. This statute refers to the "transfer" of this information. The Board indeed duly provided such information to the Bogota district. However, the Board erroneously contends that this statute obligates it both to provide such disciplinary records to Bogota and also maintain them. The statute has no such maintenance of records requirement once they have been provided to the receiving district. In fact, Section VI of the Board's own Student Records Regulation requires its custodian of records to "transfer" and "forward" the records to the receiving district. It does not provide for the retention of records by it after transferring them. (petition, Ex. F)

Absent a requirement by this statute to maintain such records once they have been provided to the receiving district, an independent basis for retaining them must be established. The Board's arguments that these records must or may be maintained by it because they meet the criteria of the "pupil records" and "permitted records" regulatory definitions as well as the criteria established by Board policy might be persuasive if J.C. were still a student at the Academies. But, he is not, and, given his age and the circumstances of his departure, there is little likelihood that he might attempt to return. The Board has failed to provide a reason for it to maintain the

disciplinary records of a former student, particularly once it has fulfilled its statutory obligation to provide the student's new district with the record. These records are no longer necessary to provide a thorough and efficient educational system for J.C. or other pupils because J.C. is no longer the Board's responsibility. *N.J.S.A.* 18A:36-19. The records in dispute no longer constitute such information as is relevant to the education of the pupil because the Board is no longer charged with educating former student J.C. *N.J.A.C.* 6:3-6.2(c) and (i). Since J.C. is not a student at Academies, these records serve no present purpose to promote the educational welfare of or provide educational services to J.C. *N.J.A.C.* 6:3-6.3(a)2; *N.J.A.C.* 6:3-6.8(b), and the Board's Student Records Regulation. Simply put, all of the Board's bases for maintaining these records, although arguably valid for a current or non-transferred student, fail with regard to a former student whose records have been provided to the receiving district, because these bases fail the "necessary," "relevance" and "promotional" tests under the applicable statutes and regulations as well as its own Student Records Regulation. If a school district is required annually to destroy pupil data which is no longer educationally relevant for currently enrolled pupils (*N.J.A.C.* 6:3-6.2(i)), it surely must be required to destroy records of a formerly enrolled pupil which no longer serve an educationally relevant purpose by virtue of the severance of the relationship between the district and that pupil.[1] Finally, the retention of these documents violates the Board's own Student Records Regulation which required the destruction of the documents in issue when J.C. permanently left the district and transferred to another district

I **CONCLUDE** that, in accordance with *N.J.A.C.* 1:1-12.5(b), there is no genuine issue as to any material fact challenged, and J.C. is entitled to prevail as a matter of Law. The Board's retention of the records in question is improper in that it violates the education statute as well as the regulations thereunder. I further **CONCLUDE** that the records should be expunged.[2]

---

[1] Although it has not so argued, the Board would not succeed on a claim that it is necessary to maintain these records in the event that J.C. were to revisit his former school district at some future date and engage in improper conduct. Such circumstances would constitute a criminal rather than educational matter.

[2] In view of my **CONCLUSION** and the basis for it, I need not address the issue of the admissibility of the Evelyn S. Wilson certification

ORDER

It is hereby **ORDERED** that summary decision is granted to J.C.; and it is further **ORDERED** that the Board shall immediately remove the documents at issue from J.C.'s pupil record and destroy them; and it is further **ORDERED** that the Petition and Exhibits P-2, P-3, R-1 and R-2 are hereby sealed; provided, however, that this order shall not prevent inspection or copying of these documents by the Office of Administrative Law, the Commissioner of Education, the State Board of Education or any reviewing court; and it is further **ORDERED** that any other person or entity shall have access to these sealed exhibits only by order of a court of competent jurisdiction.[3]

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 (45) 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.

[3] It would be counterintuitive, on one hand, to order that the documents in issue be removed from J.C.'s pupil record and, on the other hand, permit those documents, copies of which have been attached to the instant Petition and referred to in the certifications, to become part of the public record in this case.

Within thirteen (13) 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, 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 24, 2003
DATE

JESSE H. STRAUSS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

12/24/03
DATE

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DEC 29 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Exhibits

For Petitioner:

P-1 Certification of Sherry Chachkin, 10/27/03

P-2 Certification of Evelyn S. Wilson, 10/5/03

P-3 Certification of Sherry Chachkin, 12/3/03

For Respondent:

R-1 Certification of Patricia Cosgrove, 11/19/03

R-2 Certification of Linda Eickmeyer, 11/19/03

OAL DKT. NO. EDU 9575-03
AGENCY DKT. NO. 284-8/03

J.C., on behalf of minor child, J.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

Upon careful and independent review of this matter, the Commissioner has determined to reject the Administrative Law Judge's analysis and conclusions for the reasons set forth below.

N.J.A.C. 6:3-6.8(c) provides that:

> (c) *Upon graduation or permanent departure of a pupil from the school system:*
>
> 1. The parent or adult pupil shall be notified in writing that a copy of the entire pupil record will be provided to them upon request.
>
> 2. *Information in pupil records, other than that described in (e) below,*[1] *may be destroyed, but only in accordance with the Destruction of Public Records Law, N.J.S.A. 47:3-15 et seq.*

[1] (e) provides that:

> The New Jersey public school district of last enrollment, graduation or permanent departure of the pupil from the school district shall keep in perpetuity a permanent record of a pupil's name, date of birth, sex, address, telephone number, grades, attendance record, classes attended, grade level completed, year completed, name of parent(s) and citizenship status.

> Such destruction shall be accomplished only after written parental or adult pupil notification and written parental or adult pupil permission has been granted, or after reasonable attempts at such notification and reasonable attempts to secure parental or adult pupil permission have been unsuccessful. (emphasis supplied)

In the instant matter, J.C. withdrew from the Bergen County Vocational School District to attend school at Bogata High School and, thus, pursuant to *N.J.A.C.* 6:3-6.8(c)2, the destruction of his pupil records are governed by the Destruction of Public Records Law, *N.J.S.A.* 47:3-15 *et seq.*, which specifies that the destruction of public records are to be in accordance with the Records Retention and Disposition Schedules found at http://www.njarchives.org/links/recman.html.

With respect to a student's Confidential Disciplinary File, Record Series No. 0012-0001, the Records Retention and Disposition Schedule for school districts specifies that such file is be retained for "two years after graduation or termination from school system or age 23, whichever is longer." The Commissioner cannot, therefore, grant petitioner the relief he seeks as the Board is prohibited from removing the documents at issue from J.C.'s disciplinary file and destroying them until such time as two years have passed or until J.C. turns 23, whichever is longer.

Accordingly, summary decision is granted to the Board and the petition is hereby dismissed, with prejudice.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 2/05/04

Date of Mailing: 2/06/04

[2] The Commissioner observes that neither petitioner nor the Board moved to seal any part of the record during the proceedings in this matter. Although the ALJ sealed the petition and certain exhibits on his own volition as a result of his conclusion that the documents at issue were to be destroyed, given the Commissioner's rejection of the ALJ's analysis, there is no basis on which to seal any portion of the record in this matter.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4 1.1 *et seq.*,

36-04

JOSEPH GRAZIOSI, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, MERCER COUNTY, :

DECISION

:

RESPONDENT.

:

February 5, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4882-03
AGENCY DKT. NO. 132-4/03

JOSEPH GRAZIOSI,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, MERCER COUNTY,
Respondent.

Michael B. Berman, Esq., for petitioner

John E. Collins, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: October 9, 2003 Decided: January 8, 2004

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE

In this matter, petitioner, a custodian in respondent's school district, seeks restoration of his sick leave pursuant to *N.J.S.A.* 18A:30-2.1 because his absences were due to a work-related injury. On July 25, 2003, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. The transmittal from the Commissioner indicates that the threshold issue of whether or not the Commissioner has jurisdiction over the matter absent a petition having been filed with the Division of Workers' Compensation, must be heard first in light of the decision in *Schmidtke v. Board of Education of Woodbridge,* decided by the Commissioner November 8, 2000 (#361-00). The transmittal

further recommends bifurcation with partial initial decision on the threshold issue returned to the agency for review prior to any proceedings on the merits of the claim.

The matter was assigned to me on August 11, 2003, and a telephone conference was scheduled for September 11, 2003, to discuss the status of the matter. This was adjourned at the request of attorney for respondent for medical reasons and the telephone conference was rescheduled for September 23, 2003. This was adjourned because of a power failure and rescheduled for October 8, 2003. At the conclusion of the telephone conference on October 8, 2003, the record closed with respect to submissions on the threshold issue identified above. I requested additional time to complete the Initial Decision in the instant matter because of an extensive caseload and heavy hearing schedule, and a number of other complex, completed cases with earlier deadlines. By an Order of Extension entered on November 25, 2003, the time limit for filing the Initial Decision was extended until January 8, 2004.

FACTUAL DISCUSSION

A careful review of the pleadings and submissions of the parties in this matter reveals that the essential facts relating to the issues to be addressed herein are not in dispute. For the purpose of deciding the pending motion, the facts set forth as follows are determined to be the facts in this matter for the purpose of deciding the threshold issue.

It is undisputed that petitioner is a custodian employed by respondent. In his Petition of Appeal, petitioner asserts that on, or prior to April 2, 2003, he was so harassed, mistreated and/or maligned by the employer, its agent, servants or employees so as to produce psychological and physiological manifestations of stress. Petitioner asserts that his physician has recommended that he not return to work at this time. Petitioner asserts that respondent has taken the position that the Petitioner must either use his accumulated sick, vacation and personal days or take a leave of absence. Petitioner acknowledges that he has not filed an Employee Claim Petition with the Division of Workers' Compensation.[1] Petitioner further asserts that he has requested that

[1] By letter dated October 15, 2003, attorney for respondent requested that if it is decided that the filing of a workers' compensation claim is necessary, this matter be placed on the inactive list pending the filing and disposition of the

respondent reconsider its position, but respondent has not agreed to this request at the time of the filing of the Petition of Appeal. As a result, petitioner is seeking an Order requiring the Lawrence Township Board of Education to restore to his sick day bank the days he was absent from school and to charge such days as absences arising out of and relating to his employment. Respondent either denies the foregoing assertions or neither admits or denies the assertions, but leaves plaintiffs to his proofs.

LEGAL DISCUSSION AND ANALYSIS

The transmittal from the Commissioner of Education states that the threshold issue of whether or not the Commissioner has jurisdiction over the matter absent a petition having been filed with the Division of Workers' Compensation, must be heard first in light of the decision in *Schmidtke v. Board of Education of Woodbridge,* decided by the Commissioner November 8, 2000 (#361-00). The transmittal further recommends bifurcation with a partial initial decision on the threshold issue returned to the agency for review prior to any proceedings on the merits of the claim.

Upon the Department's receipt of the Petition of Appeal in this matter, the petitioner was requested to submit a memorandum of law or letter brief setting forth his legal arguments as to why, in the absence of a claim having been filed with the Division of Workers' Compensation, the matter is properly before the Commissioner, given the determination of the Commissioner in *Schmidtke v. Bd. of Ed. of Woodbridge.* Respondent was also given an opportunity to submit a response. The legal arguments of the respective parties are summarized hereinafter.

Petitioner's argument

Petitioner relies on language in *Schmidtke v. Bd. of Ed. of Woodbridge,* decided November 8, 2000, Commissioner's Decision No. 361-00, wherein the Commissioner wrote at page 10 "except for the limited cases such as when the Division of Workers' Compensation has

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workers' compensation claim because any outright dismissal of the application before the Commissioner would result in a bar to further litigation before the Commissioner based on the statute of limitations.

no jurisdiction or when there is the settlement of a Workers' Compensation case" the matter must go before the Division of Workers' Compensation first for a determination whether or not there was a work related accident. Petitioner also relies on *Hern v. Board of Education of Union City,* an unreported decision of the Appellate Division, A-339-91T3, October 23, 1992. Petitioner asserts that in *Hern*, the Appellate Division stated that it could "perceive no valid reason to require Petitioner to engage in a futile gesture or to manufacture an unfounded workers' compensation claim". *Hern, supra,* slip op. at 4.

Petitioner asserts that this is true in the present matter. Petitioner argues that he is not alleging, nor is there any medical evidence of, any permanent significant injury which is the threshold criterion under Title 34, and that at this point in time there is no determination that petitioner would not be able to return to work without any permanent significant injury if the harassment were to end. Under *Hern* petitioner could not proceed to the Division of Workers' Compensation with a viable claim. Therefore, petitioner argues that the matter is ripe to be heard by the Commissioner and not by the Division of Workers' Compensation.

Petitioner relies on *Dorfman v. Bd. of Educ. of the Township of Neptune, etc.,* 97 *N.J.A.R.2d* (EDU) 512, wherein the ALJ wrote, after reviewing both the *Forgash* and the *Hern* cases,

> In circumstances where a workers' compensation claim has not been filed, the provisions of *N.J.S.A.* 18A: 30-2.1 are not suspended, but remain in full force and effect and gives certain rights to any employees of a school district. Where an employee has not filed a worker's compensation case but seeks certain rights under the statutory provision, and a dispute arises as to whether the employee's absence is the result of a personal injury caused by an accident arising out of and in the course of his or her employment, this issue clearly must be decided by the Commissioner of Education.
>
> [97 *N.J.A.R.2d* (EDU) at 517.]

Based on the above, petitioner requests that this matter be decided by the OAL.

Respondent's argument

In response, respondent argues that a close reading of *Schmidtke* and the prior decision in *Dorfman* does not support petitioner's right to bring the instant action without filing a workers' compensation claim petition. Respondent argues that the *Schmidtke* decision identified only two scenarios where the Commissioner has jurisdiction to determine whether an employee has been absent as a result of a personal injury caused by an accident arising out of and in the course of his employment, pursuant to *N.J.S.A.* 18A:30-2.1. The first is when the Division of Workers' Compensation has no jurisdiction, since the employee's absence is less than the seven-day waiting period of *N.J.S.A.* 34:15-14. The second is when a settlement of the workers' compensation case has occurred, leaving open the issues of work-relatedness and causation.

Respondent argues that, contrary to the petitioner's assertion, the holding in *Dorfman,* adds nothing to the *Schmidtke* decision. Although the petitioner has quoted a broad statement by the ALJ in his initial decision, respondent points out that the final decision of the Commissioner in *Dorfman,* is much more restrictive. Respondent refers to the Commissioner's statement in the final decision in *Dorfman* as follows:

> The Commissioner finds it appropriate, in this circumstance, to be guided by the Appellate Division's reasoning in *Hern, supra,* which would not require petitioner to file a workers' compensation claim wherein that claim, on the basis of the length of sick leave involved, would clearly be dismissed. To do so, as noted in *Hern,* would force petitioner to engage in the futile gesture of pursuing a workers' compensation claim that would not satisfy the minimum seven-day waiting period required by *N.J.S.A.* 34:15-14. Consequently, the Commissioner agrees that, based on the circumstances herein, he has exclusive jurisdiction to decide the sick leave claim under *N.J.S.A.* 18:30-2.1. [Emphasis supplied by respondent.]
>
> [97 *N.J.A.R.2d* (EDU) 518.]

Respondent argues that it is clear that the *Dorfman* case fell into the seven-day waiting period exception, an exception which was later recognized by the Commissioner in *Schmidtke.* Respondent then contends that in the present case, the petitioner seeks to create another

exception to the general rule that requires the filing of a workers' compensation petition as a prerequisite to receipt of benefits under *N.J.S.A.* 18A:30-2.1 by asserting that he is not seeking workers' compensation permanent disability benefits. Respondent points out that petitioner's argument ignores the fact that the Division of Workers' Compensation also has jurisdiction to award medical benefits and temporary disability benefits after finding the necessary work-relatedness and causation requirements, pursuant to *N.J.S.A.* 34:15-16, and that *N.J.S.A.* 18A:30-2.1 provides for a set-off against board of education salary payments for temporary disability benefits received by the employee. Respondent thus contends that the filing of a workers' compensation case by the petitioner herein would not be a "futile gesture" as that term was used in the *Dorfman* and *Hern* decisions.

Discussion

Petitioner herein is seeking the restoration of his sick leave pursuant to *N.J.S.A.* 18A:30-2.1 alleging that his absences were due to a work-related injury. *N.J.S.A.* 18A:30-2.1a provides:

> Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in *N.J.S.*18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.

As may be seen from the foregoing, this legislation contemplates a relationship between its provisions and those of the Workers' Compensation Act. This relationship was defined and clarified by the State Board of Education in *Verneret v. Bd. of Educ. of the City of Elizabeth,* 95 *N.J.A.R.2d* (EDU) 134. In that case, the State Board stated:

> The question of whether an injury "arose out of and in the course of employment" within the meaning of *N.J.S.A.* 18A:30-2.1 is controlled by the standards established under the Workers' Compensation Act. *See Theodore v. Dover Bd. of Ed.,* 183 *N.J. Super.* 407 (App. Div. 1982). In those instances where entitlement to relief under *N.J.S.A.* 18A:30-2.1 is dependent upon whether the injury arose out of and in the course of employment within the meaning of *N.J.S.A.* 34:15-7 of that Act, the State Board has held that the Commissioner of Education should refrain from exercising his jurisdiction pending a determination of that issue by the Division of Workers' Compensation. *Amos v. Board of Education of the Borough of Red Bank,* decided by the State Board, February, 3, 1988; *Tomkins v. Board of Education of the Township of Hamilton,* decided by the State Board, December 2, 1987. *See City of Hackensack v.Winner,* 82 *N.J.* 1 (1980); *Forgash v. Lower Camden County School,* 208 *N.J. Super.* 461 (App. Div. 1985). *But see Hern v. Board of Education of the City of Union City,* Docket #A-339-91T3 (App. Div. 1992).
>
> * * *
>
> We reiterate that it is the Commissioner who must determine whether or not the particular facts underlying a claim filed with him for benefits pursuant to *N.J.S.A.* 18A:30-2.1 are such that he should refrain from considering the matter until a determination has been made by the Division of Workers' Compensation. *Hackensack v. Winner, supra.*
>
> [95 *N.J.A.R.2d* (EDU) at 134-135.]

The foregoing language from *Verneret* makes it clear that the State Board has held in those instances where entitlement to relief under *N.J.S.A.* 18A:30-2.1 is dependent upon whether the injury arose out of and in the course of employment within the meaning of *N.J.S.A.* 34:15-7, the Commissioner of Education should refrain from exercising jurisdiction pending a determination of that issue by the Division of Workers' Compensation.

Subsequent cases have also made it clear that, with certain exceptions, the Division of Worker's Compensation is the proper forum for the resolution of whether a work-related accident is the cause of an injury, and the failure to pursue such a claim is fatal to a request for restoration of sick leave pursuant to *N.J.S.A.* 18A:30-2.1. *See, Schmidtke v. Bd. of Educ. of the Twp. Of*

Woodbridge, OAL Dkt. No. EDU 10756-98 (Sept. 25, 2000), Final Decision by the Commissioner (Nov. 8, 2000). In *Schmidtke,* the Commissioner relied on *Russo v. Burlington Twp. Bd. of Educ.*, OAL Dkt. No. EDU 6470-96 (Aug. 8, 1997), Commissioner decision (Sept. 29, 1997), as authority. The Commissioner explained that the petitioner in *Russo* filed a Workers' Compensation claim but subsequently failed to prosecute it while, in *Schmidtke*, the petitioner simply chose not to file such a claim with the Division of Workers' Compensation. The Commissioner quoted with approval the language of the ALJ from *Russo*, *supra*, which held that:

> Both the statutory provisions and the decision in *Verneret* envision that a petitioner seeking an award pursuant to *N.J.S.A.* 18A:30-2.1 will in fact present a Workers' Compensation claim and prosecute same. Petitioner cannot be awarded any damages under 18A:30-2.1 until the compensation claim has been determined because under the statute the Board is entitled to a reduction for the Workers' Compensation award made for temporary disability and because under *Vernet* [sic] the question of whether the injury arose out of and in the course of his employment is to be determined by a proceeding in the Division of Workers' Compensation. As petitioner has voluntarily chosen not to pursue his Workers' Compensation claim, his claim under the school law sick leave statute will be dismissed with prejudice. (*Russo* Initial Decision at 3)

It should be noted that in the Final Decision in *Russo*, the Commissioner stated in a footnote that:

> Awards under *N.J.S.A.* 18A:30-2.1 are not necessarily conditioned upon presentation of a Workers' Compensation claim, as, for example, when the duration of the absence is insufficiently long to be eligible for such presentation. See *Steven B. Hern v. Board of Education of the City of Union City, Hudson County,* decided by the Commissioner May 8, 1991, affd State Board of Education August 7, 1991, rev'd and remanded Appellate Division, A-339-91T3, October 23, 1992, remanded State Board of Education March 3, 1993.

As indicated in the foregoing footnote from *Russo*, one of the exceptions to the general rule is found in *Hern v. Board of Education of the City of Union City, Hudson County,* Superior

Court, Appellate Division, Dkt. No. A-339-91T3, (decided Oct. 23, 1992). In *Hern*, the Appellate Division noted that if Hern had filed a workers' compensation claim it would have been dismissed for failure to satisfy the seven-day waiting period required by the Workers' Compensation Act. The Appellate Division stated that it could perceive no valid reason to require petitioner to engage in a futile gesture or to manufacture an unfounded workers' compensation claim, *Hern, supra,* slip op. at 4. In such circumstance, the Appellate Division concluded that the Commissioner of Education has jurisdiction to decide the teacher's request for benefits under *N.J.S.A.* 18A:30-2.1 including a determination as to whether the claim arose out of and in the course of employment.

The other exception to the rule is found in *Marino v. Willingboro Bd. of Educ.,* State Board of Education (decided March 1, 2000). In the *Marino* case, the State Board of Education held that a settlement in *Marino's* workers' compensation case did not preclude Marino from pursuing his claim for benefits under *N.J.S.A.* 18A:30-2.1.

The Commissioner in *Schmidtke* held that the facts therein did not present circumstances, such as were found in the *Hern* and *Marino* cases, which would create an exception to the legal requirement that the Commissioner refrain from exercising jurisdiction in matters alleging entitlement/damages under *N.J.S.A.* 18A:30-2.1 due to an injury/illness arising out of and in the course of employment until the Division of Workers' Compensation makes a determination of a work-related injury/illness pursuant to *N.J.S.A.* 34:15-1.1 et seq.

Petitioner herein relies on language of the ALJ in a prior decision related to this issue in *Dorfman v. Bd. of Educ. of the Township of Neptune, etc.,* 97 *N.J.A.R.2d* (EDU) 512. In *Dorfman,* the petitioner sought to have two days absence charged not against her sick leave, but as and in accordance with *N.J.S.A.* 18A:30-2.1. In the Final Decision, the Commissioner, in reliance on the *Hern* case, specifically found it appropriate in the circumstance of that matter not to require petitioner to file a futile workers' compensation claim because petitioner failed to satisfy the minimum seven-day waiting period required by *N.J.S.A.* 34:15-14. The result in *Dorfman* is entirely consistent with *Hern,* and creates no other exception to the general rule enunciated in *Schmidtke.*

In the present matter, petitioner seeks an additional exception to the general rule. He asserts that he is not alleging, nor is there any medical evidence of, any permanent significant injury which is the threshold criterion under Title 34, and that at this point in time there is no determination that petitioner would not be able to return to work without any permanent significant injury if the harassment were to end. Therefore, he argues that, as in *Hern* he cannot proceed to the Division of Workers' Compensation with a viable claim. However, this scenario is not one of the exceptions to the general rule found in any prior cases. In addition, as pointed out by respondent, petitioner's argument ignores the fact that the Division of Workers' Compensation also has jurisdiction to award medical benefits and temporary disability benefits after finding the necessary work-relatedness and causation requirements, pursuant to *N.J.S.A.* 34:15-16. Also, *N.J.S.A.* 18A:30-2.1 provides for a set-off against board of education salary payments for temporary disability benefits received by the employee. Thus, the filing of a workers' compensation claim petition by the petitioner herein would not be a "futile gesture" as in *Dorfman* and *Hern*.

Based on the foregoing discussion, I **FIND** that both the statutory provisions and the decision in *Verneret* envision that a petitioner seeking an award pursuant to *N.J.S.A.* 18A:30-2.1 will in fact present a Workers' Compensation claim and prosecute same. I **FIND** that a petitioner cannot obtain the restoration of sick leave under *N.J.S.A.* 18A:30-2.1 until the Workers' Compensation claim has been determined because under the statute the local board is entitled to a reduction for the Workers' Compensation award made for temporary disability and because under *Verneret* the question of whether the injury arose out of and in the course of employment is to be determined by a proceeding in the Division of Workers' Compensation. I **FIND** that the only exceptions to this requirement are when the Workers' Compensation claim would be futile because a petitioner fails to satisfy the minimum seven-day waiting period required by *N.J.S.A.* 34:15-14, and when there is a settlement in a workers' compensation case which does not preclude the pursuit of the claim for benefits under *N.J.S.A.* 18A:30-2.1. I **FIND** that petitioner herein does not fall under either of these exceptions.

For the reasons stated above, I **FIND** as to the threshold issue that the Commissioner lacks jurisdiction in this matter in the absence of a petition having been filed with the Division of Workers' Compensation. Accordingly, I **CONCLUDE** that because petitioner herein has voluntarily chosen not to pursue his Workers' Compensation claim, his claim under the school law sick leave statute should be dismissed with prejudice. Because I have reached this conclusion, it is unnecessary to bifurcate this matter or issue a partial initial decision on the threshold issue and have it returned to the agency for review prior to any proceedings on the merits of the claim.

However, by letter dated October 15, 2003, attorney for respondent requested that if it is decided this matter merits the filing of a workers' compensation claim, that this matter be placed on the inactive list pending the filing and disposition of such claim. He pointed out that any outright dismissal of the application before the Commissioner would result in a bar to further litigation before the Commissioner because of the statute of limitations. This is not an unreasonable request and I recommend to the Commissioner that this request be granted in the interests of fairness and justice. It is based on this recommendation that I have crafted the language of the Decision and Order to afford to petitioner the opportunity to file a claim petition with the Division of Workers' Compensation.

DECISION AND ORDER

Based on the foregoing, it is hereby **ORDERED** that in the absence of the filing of a claim petition by or on behalf of the petitioner herein with the Division of Workers' Compensation prior to the issuance of a final decision herein, the petition is hereby **DISMISSED** based on a lack of jurisdiction.

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 (45) 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 (13) 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, 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.

January 8, 2004
DATE

JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

1/8/04
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 13 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

mph

OAL DKT. NO. EDU 4882-03
AGENCY DKT. NO. 132-4/03

JOSEPH GRAZIOSI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were considered by the Commissioner in reaching his decision.

In his exceptions, petitioner submits a copy of an Employee Claim Petition, case #2003-40231, which was filed with the Division of Workers' Compensation on December 22, 2003. (Petitioner's Exceptions at 1-2) Petitioner, therefore, requests that the Initial Decision of the Administrative Law Judge be modified or rejected and that the matter be placed on the inactive list pending disposition of his claim before the Division of Workers' Compensation. (*Id.* at 1)

Upon careful and independent review of the record, the Initial Decision and petitioner's exceptions in this matter, and in recognition that petitioner filed a claim with the Division of Workers' Compensation prior to the issuance of the Commissioner's decision as provided for in the Initial Decision, the Commissioner hereby remands this matter to the OAL to

be placed on the inactive list pending the disposition of petitioner's Workers' Compensation claim.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/05/04

Date of Mailing: 2/06/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

37-04

ELLEN M. SIZEMORE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

February 6, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT

OAL DKT. NO. EDU 2794-03

AGENCY REF. NO. 89-3/03

ELLEN M. SIZEMORE,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

Respondent.

Arnold Mellk, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Dennis M. DSantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee O'Donnell, attorneys)

Record Closed: December 23, 2003 Decided: January 8, 2004

BEFORE **ANA C. VISCOMI,** ALJ:

STATEMENT OF THE CASE

Petitioner appeals from Boards charging sick leave and the matter was transmitted to the Office of Administrative Law (OAL) on May 15, 2003 for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –13. The matter was scheduled for a prehearing conference for September 3, 2003. At that time the parties advised that they were in settlement negotiations.

The parties have agreed to a settlement and prepared a written agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1)

I have reviewed the record and the terms of the 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 **CONCLUDE** that this agreement meets the requirement 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 (45) 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 9, 2004
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

Receipt Acknowledged:

January 13, 2004
DATE

M. Kathleen Duncan (Co)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 14 2004

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/tmp

EXHIBITS

Jointly Submitted

J-1 Settlement Agreement

STIPULATION OF SETTLEMENT and DISMISSAL

This Agreement made this 12th day of November, 2003, by and between Ellen M. Sizemore (hereinafter "Sizemore") and The Board of Education of Hamilton Township, Mercer County (hereinafter "Board");

RECEIVED
2003 DEC 23 P 2:20
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

WITNESSETH

WHEREAS, Sizemore filed a petition requesting that the Commissioner of Education enter an Order compelling the Board to restore and reinstate three sick days against Sizemore's sick leave allocation pursuant to *N.J.S.* 18A:30-1 and *N.J.S.* 18A:40-10; and

WHEREAS, Sizemore and the Board engaged in settlement discussions in order to amicably resolve this dispute; and

WHEREAS, the Board has agreed to restore and reinstate two sick days to Sizemore in compromise of Sizemore's claims; and

WHEREAS, Sizemore has agreed to accept those two days as a full and complete resolution of her claim for sick days against the Board;

IT IS THEREFORE, agreed and settled by and between the parties that the Board will restore and reinstate two sick days to Sizemore and that Sizemore, upon such reinstatement and restoration of sick days withdraws her petition with prejudice.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

WITNESS:

Ellen M. Sizemore (L.S.)
Ellen M. Sizemore

BOARD OF EDUCATION OF HAMILTON TOWNSHIP, MERCER COUNTY

By: Attorney for Respondent

~~ATTEST:~~

jlh/c:njea/sizemore/settlemn.agr

OAL DKT. NO. EDU 2794-03
AGENCY DKT. NO. 89-3/03

ELLEN M. SIZEMORE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/06/04

Date of Mailing: 2/09/04

35-04

#35-04

IN THE MATTER OF JOEL PABON, SR.,	:	
PERTH AMBOY BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
MIDDLESEX COUNTY.	:	DECISION
	:	

February 5, 2004

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D28-03**
JOEL PABON, SR. PERTH AMBOY BOARD OF EDUCATION MIDDLESEX COUNTY	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, Mr. Joel Pabon is a member of the Perth Amboy Board of Education and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at is October 28, 2003 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official did not provide any reason why he failed to comply with the requirement under N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is a reprimand.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Joel Pabon violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of a reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

AGENCY DKT. NO. 15-1/04

IN THE MATTER OF JOEL PABON, SR.,	:	
PERTH AMBOY BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
MIDDLESEX COUNTY.	:	DECISION
	:	

Whereas, *N.J.S.A.* 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and *N.J.S.A.* 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 24, 2003 directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official filed the completed disclosure statement thereafter; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official did not provide any reason why he failed to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend reprimand of the above-named school official for failure to file a disclosure statement within the designated timeline, pursuant to *N.J.S.A.* 18A:12-25 and 26; and

Whereas, by letter dated January 9, 2004 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending reprimand; and

Whereas, no comments were received from the above-named school official; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission, and further admonishes the school official for his failure to timely file the requisite statement, in that such delay has caused administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named Board member be reprimanded as a school official found to have violated the School Ethics Act.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/05/04

Date of Mailing: 2/06/04

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

47-04

47-04R

IN THE MATTER OF THE DISTRIBUTION :
OF LIQUID ASSETS UPON DISSOLUTION :
OF THE UNION COUNTY REGIONAL HIGH :
SCHOOL DISTRICT NO. 1, UNION COUNTY :

COMMISSIONER OF EDUCATION

DECISION ON REMAND

SYNOPSIS

Mountainside sought distribution of the liquid assets of the Union County Regional High School District No. 1 upon its dissolution according to the feasibility report prepared by Dr. Fitts in 1995 rather than in accordance with the statutory plan. Under the Fitts report, the regional district's four school buildings and accompanying real estate would be deeded to the school districts in which they were located while the liquid assets would be shared exclusively by Mountainside and Garwood, which did not have any of the regional district's school buildings within their boundaries. The Commissioner dismissed Mountainside's petition citing the absence of that proposed distribution in the referendum; the State Board affirmed the dismissal with modification; the N.J. Appellate Division affirmed the State Board's decision; and the N.J. Supreme Court reversed the Appellate Division's decision and remanded the matter to the State Board. The Supreme Court stressed that the overriding goal of the statutory scheme is to distribute equitably the regional district's assets and liabilities and ordered that Mountainside and Garwood be awarded that sum of the liquid assets in the Fitts report.

The State Board on remand determined that the amount of liquid assets to be distributed to Mountainside and Garwood pursuant to the N.J. Supreme Court's remand includes the entire amount of those assets, not just the $3.3 million identified in Dr. Lobman's 1997 report as available for distribution at that time. The State Board noted $6.9 million of the $8.6 million already distributed needs to be redistributed and another $2 million is now available for distribution, subject to certain contingencies. The State Board remanded this matter to the Commissioner to establish the amount to be distributed, to effectuate the distribution so that 76% of the total liquid assets are received by Mountainside and 24% by Garwood and to establish a payment schedule within a 5-year period. The Commissioner transmitted the matter to OAL for determination in accordance with the State Board's directives.

The ALJ concluded that since the State Board's directives reflect the law of the case, there was no judicial function to be applied and there was no genuine issue of material fact, the matter could be resolved by summary decision. In light of the financial information proffered by the parties and the fiscal agent, the ALJ set up the amount and schedule of the distribution of assets in conjunction with the State Board's directives.

The Commissioner adopted the Initial Decision in its entirety, concurring with the ALJ's conclusions in determining the amounts of liquid assets to be distributed to Mountainside and Garwood and finding the plan for distribution consistent with the State Board's remand.

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.

February 5, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 3863-02

AGENCY DKT. NO. 581-12/96

IN THE MATTER OF THE
DISTRIBUTION OF LIQUID ASSETS
ON DISSOLUTION OF UNION COUNTY
REGIONAL HIGH SCHOOL DISTRICT NO. 1

Robert A. Goodsell, Esq., for Borough of Mountainside (Post Polak Goodsell MacNeill & Strauchler, attorneys)

David Rubin, Esq., for Mountainside Board of Education

Allison C. Eck, Deputy Attorney General, for the Commissioner of Education and the New Jersey State Board of Education (Peter C. Harvey, Attorney General of New Jersey, attorney)

Vito A. Gagliardi, Jr., Special Counsel (Porzio, Bromberg & Newman, attorneys)

James P. Granello, Esq. for Kenilworth Board of Education

Harvey Fruchter, Esq., for Borough of Kenilworth

Douglas J. Kovats, Esq., for Clark Board of Education (Kenney, Gross, Kovats, Campbell & Pruchnik, attorneys)

Cherie L. Adams, Esq., for Springfield Board of Education (Sills Cummis Radin Tischman Epstein & Gross, attorneys)

Robert M. Tosti, Esq., for Berkeley Heights Board of Education (Wilson Elser Moskowitz Edelman & Dicker, attorneys)

Linda Ganz Ott, Esq., for Garwood Board of Education (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Robert F. Renaud, Esq., for Borough of Garwood (Palumbo & Renaud, attorneys)

Record Closed: August 26, 2003 Decided: November 24, 2003

BEFORE **ROBERT J. GIORDANO**, ALJ:

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Union County Regional High School District No. 1 (District) was established in 1935 by the municipalities Berkeley Heights, Clark, Garwood, Kenilworth, Mountainside and Springfield (constituent districts). In 1993, the majority of the constituent districts applied to the Union County Superintendent of Schools pursuant to *N.J.S.A.* 18:13-51 *et seq.* (the Act) to "make an investigation into the advisability of the dissolution of the Regional District." Thereafter, Dr. Leonard Fitts, then the Union County Superintendent, issued a report recommending against dissolution. However, in the event of dissolution, Dr. Fitts recommended that Berkeley Heights, Clark, Springfield and Kenilworth Districts retain the buildings, grounds, furnishings and building equipment located in the respective municipalities. Those constituent districts would assume all remaining debt service and liabilities of the former regional high schools. Mountainside and Garwood alone would share all liquid assets of the regional school district as calculated for the school year of dissolution, such as free balances, excess transportation, equipment and other non-building equipment. If the calculation was to be made based on the October 1, 1994 equalized valuation of property, Mountainside would receive 76% and Garwood 24% of all liquid assets. The Fitts report indicated that the replacement cost of the four high school buildings was $110,608,444.[1]

[1] Although the Fitts report referred to the amount of $110,608,444 as the replacement cost of the four school buildings, this was technically incorrect. The replacement cost of the four school buildings was actually $98,108,444. The Fitts report included the value of the grounds as $12,500,000 (Fitts report, IX (B), p. 44), as well as the amount being attributed to the replacement costs for furnishings, equipment, or additions thereto, thus the amount of $110,608,444 was the total replacement cost for buildings, grounds, furnishings, equipment and additions thereto for the purpose of calculation of the amount of indebtedness to be assumed. *N.J.S.A.* 18A:13-53.

Despite Dr. Fitts' recommendation to the contrary, the municipalities that favored dissolution petitioned the Commissioner of Education for permission to submit to the voters of each constituent municipality the issue of whether the regional school district should be dissolved.

The Commissioner of Education submitted the dissolution petition to the Board of Review. In November 1995, the Board of Review issued an opinion granting the petition to dissolve on the condition that Kenilworth agreed to accept Garwood High School students in a sending-receiving relationship, if Garwood chose to enter that relationship. The Board of Review also determined that liquid assets would be distributed to each of the six municipalities in accordance with their proportionate property valuations pursuant to *N.J.S.A.* 18A:8-24.

On March 8, 1996, Acting Union County Superintendent of Schools, David Livingston, informed the municipalities that the liquid assets would be distributed proportionately to each municipality. However, if the constituent districts desired a different allocation of the liquid assets, it would be necessary for the constituent districts to agree to include this provision in the referendum question. On May 14, 1996, the referendum for dissolution, which included no mention of the distribution of liquid assets, was passed by a majority of the voters in the entire District.

In July 1996, Mountainside wrote to the Commissioner of Education to request that the liquid assets be distributed only to Mountainside and to Garwood, as recommended in Dr. Fitts report. This request was declined, citing the absence of that proposed distribution in the referendum. Assistant Commissioner Peter Contini further declined to follow Dr. Fitts recommendation because the Board of Review never specifically adopted authorized implementation of that recommendation. By decision dated May 5, 1997, the Commissioner of Education denied Mountainside's formal petition to distribute the liquid assets only to it and to Garwood, reaffirming the substance of Contini's letter ruling. Mountainside appealed to the State Board of Education.

The Union County Regional High School District No. 1 was dissolved, effective June 30, 1997. The real property assets, *i.e.*, the four school buildings and grounds were distributed to the four districts in which the buildings are located: Berkeley Heights, Clark, Kenilworth and Springfield.

By decision dated July 1, 1998, the State Board of Education modified and affirmed the Commissioner's decision dismissing Mountainside's petition. Mountainside thereafter appealed the State Board's decision to the Appellate Division, which rejected Mountainside's claims in an unpublished opinion dated October 1, 1999. The Supreme Court granted certification.

In an opinion dated January 30, 2001, the Supreme Court reversed the judgment of the Appellate Division and remanded the matter to the State Board of Education with the direction that Mountainside and Garwood be awarded that sum of the District's liquid assets allotted to them in Dr. Fitts' report. The Court further directed that since the liquid assets of the District have been distributed to each of the municipalities, the State Board was instructed on remand to formulate appropriate payment schedules.

The matter was held in abeyance on February 16, 2001 to allow the parties to attempt to resolve the matter. With the parties being unable to reach an agreement as to the distribution of the liquid assets, the fiscal agent advised the State Board that there were differences among the parties as to the definition of liquid assets and the total amount to be paid to Mountainside and Garwood. The parties submitted supplemental briefs on the question of what constitutes the liquid assets that are to be distributed pursuant to the Supreme Court decision.

Mountainside and Garwood maintained that the liquid assets to be distributed include all assets held by the regional district as of June 30, 1997 other than those assets subject to *N.J.S.A.* 18A:13-62 and *N.J.S.A.* 18A:8-24 and which were distributed pursuant to *N.J.S.A.* 18A:13-61. The State Board indicated that the amount distributed to Mountainside and Garwood would total approximately $10.6 million.

Berkeley Heights, Clark, Kenilworth and Springfield maintained that the liquid assets at issue are limited to approximately $3.3 million,[2] which was the amount of assets included in the June 30, 1997 report submitted by Dr. Francis Lobman as Union County Superintendent of Schools, and the amount set forth in the tables referenced by the Court in its decision.

The State Board of Education determined that the threshold issue is what constitutes the liquid assets subject to distribution under the Supreme Court decision. The State Board found the position of Mountainside and Garwood to be correct, stating that the thrust of the Supreme Court opinion was the achievement of equity. Further, the Court stressed that the overriding goal of the statutory scheme is to distribute equitably the regional district's assets and liabilities and that the principal tool for achieving such equity is the shifting of debt. The Court held that when there is little or no debt, and the property is valuable, equalization among constituent municipalities cannot be achieved simply by shifting debt.

The State Board interpreted this to show that the Supreme Court's review was focused on the method by which the District's liquid assets should be distributed, not the amount of those assets. The State Board held that the amount of liquid assets to be distributed to Mountainside and Garwood pursuant to the Supreme Court remand includes the entire amount of those assets and not just the $3.3 million identified in the Lobman report as available for distribution at that time. The State Board indicated that the amount included approximately $8.6 million in liquid assets that had been distributed among the six municipalities, approximately $6.9 million of which would need to be redistributed, and that approximately another $2 million was now available for distribution subject to certain contingencies. The State Board was unable to ascertain on the record the exact amount to be distributed. The matter was remanded to the Commissioner of Education to establish that amount and to effectuate its distribution so that 76% of the total liquid assets are received by Mountainside and 24% by Garwood. The State Board directed that, upon verification by the fiscal agent of the amount of the liquid assets remaining and available for distribution, the Commissioner order the immediate distribution of those assets to Mountainside and Garwood. The State Board

[2] The actual amount reflected in the Lobman report is $3,267,315.95.

further directed that, once the Commissioner established the amount of the liquid assets already distributed, he establish a payment schedule whereby 76% of that amount is redistributed to Mountainside and 24% to Garwood within a five-year period.

The Commissioner of Education transferred the matter to the Office of Administrative Law for the purpose of making determinations in accordance with the decision of the State Board of Education. The Commissioner requested a determination of the amount of all liquid assets in accordance with the directives of the State Board decision, which includes all liquid assets of the former District as of June 30, 1997; a determination of the amount of such liquid assets in possession of the fiscal agent available for immediate distribution to Mountainside and Garwood, 76% to Mountainside and 24% to Garwood; to ascertain the total amount of all liquid assets already distributed to the constituent districts of the former District; and to establish a five-year plan for redistribution of all liquid assets from the districts that received them to Mountainside and Garwood, 76% to Mountainside and 24% to Garwood.

The matter was assigned to the undersigned Administrative Law Judge. In a conference held on June 1, 2002 a schedule was established for the submission of documentation addressing those issues. Thereafter, another conference was held on January 1, 2003 wherein it was determined that Mountainside and Garwood[3] would move for summary decision. A motion for summary decision was filed on behalf of the Borough of Garwood, on February 18, 2003. Garwood Board of Education filed a motion for summary decision on February 20, 2003. The Borough of Mountainside filed a motion for summary decision on February 24, 2003. The Mountainside Board of Education joined in that motion by letter dated February 27, 2003.

The Boards of Education of Berkeley Heights, Clark, Kenilworth and Springfield filed briefs in opposition by March 24, 2003. Thereafter, the undersigned received correspondence from the parties regarding an issue as to what comprised the motion record. The undersigned entered an order on May 27, 2003 directing the moving parties to file individual statements of material facts for the purpose of the motions. The

[3] The Borough of Garwood and the Garwood Board of Education are referred to as Garwood herein. The Borough of Mountainside and the Mountainside Board of Education are referred to as Mountainside herein.

parties opposing these motions were directed to file responding statements admitting or disputing each of the facts and the movants' statements. The opposing parties were directed to respond by affidavits setting forth specific facts showing that there is a genuine issue for hearing. The record was to close by June 23, 2003. After various requests to extend the time for submissions, the record closed on August 26, 2003. By Order of Extension, the time by which to file an initial decision was extended to November 24, 2003

JURISDICTION OF THE OAL

While the primary goal of the OAL is to "bring impartiality and objectivity to agency hearings and ultimately to achieve higher levels of fairness in administrative adjudication" by placing judges within a separate agency that is not functionally part of any other agency, *see, Unemployed-Employed Council of New Jersey, Inc. v. Horn,* 85 *N.J.* 646, 649-51 (1981), it has not been the Legislature's intent to alter the basic regulatory authority of various agencies. *See, In re Uniform Admin. Procedure Rules,* 90 *N.J.* 85, 91 (1982). The New Jersey Supreme Court explained that:

Administrative adjudication continues to be the agency's responsibility, although it is still usually effectuated through a bifurcated process in which the hearing and decisional phases are handled separately. Having replaced the former hearing examiners, administrative law judges now perform the functions previously assumed by such examiners in administrative adjudications. Hence, the ALJ primarily conducts hearings only in contested cases. The agency head retains the exclusive right to decide these cases. The Administrative Procedure Act gives the agency head the power to "adopt, reject or modify the recommended report and decision [of the Administrative Law Judge]." *Id.* at 91.

Agencies are empowered by the Legislature to administer laws in accordance with the statutory duties that have been selectively delegated to them. The adjudicative functions of administrative agencies are actually an aspect of their regulatory powers and, in essence, do not embrace or constitute an exercise of judicial authority." 90 *N.J. supra at* 93. In creating an independent Office of Administrative Law, the Legislature

intended no alteration of the regulatory authority or basic decisional powers of administrative agencies. The reference to the "independence" of the OAL is directed to that agency's ability to conduct administrative hearings in order to make recommended factual findings and determinations in contested cases. In the Act that established the OAL, the Legislature expressly reserved to the agency heads the power to decide contested cases. In most matters, administrative law judges have no independent decisional authority and an attempt to exercise such authority would constitute a "serious encroachment upon an agency's ability to exercise its statutory jurisdiction and discharge its regulatory responsibilities." 90 *N.J. supra.* at 94.

The Supreme Court recognized the importance of agency review in holding that an agency's decisional authority over contested cases is "directly and integrally related to its regulatory function." *In re Kallen*, 92 *N.J.* 14, 20-22 (1983) (explaining that (1) the Legislature's intent to give agency heads final decision-making power is embodied in at least three statutory provisions and (2) the agency head must be given discretion in implementing the most efficient and effective use of public resources in carrying out an agency's responsibility). The Supreme Court also held that when an agency has taken timely final action, but it came to its decision imperfectly because of a non-substantive error, that matter should be remanded to the agency for correction, and the ALJ's initial decision should not become final because of the defect. *King v. New Jersey Racing Comm'n* 103 *N.J.* 412, 423 (1986). Furthermore, the Supreme Court ruled that the agency has the sole power to decide whether it will transmit a case to the OAL as a contested matter. *See In re Carberry*, 114 *N.J.* 574, 584-85 (1989).

The Supreme Court's jurisdictional mandate is embodied in both the New Jersey Statutes and the UAPR. While agencies are required to send all contested matters to the OAL, *see N.J.S.A.* 52:14B-10(c), " jurisdiction," which is defined as "the legal power to hear or decide a case," *N.J.A.C.* 1:1-2.1, is acquired by the OAL only "after it has been determined to be a contested case by an agency head and has been filed with the [OAL], or as otherwise authorized by law, except as provided by *N.J.A.C.* 1:1-17." *N.J.A.C.* 1:1-3.2(a). But even before the OAL can obtain jurisdiction over a case, a case "shall be commenced in the State agency with appropriate subject matter jurisdiction." *N.J.A.C.* 1:1-3.1; *see also Upper Freehold Reg'l Sch. Dist. Bd. of Ed. v.*

State Health Benefits Comm'n, 314 *N.J. Super.* 486, 494-95 (App. Div. 1998) (explaining that the judiciary should not assert jurisdiction over a regulatory matter until there has been an exhaustion of remedies by the agency invested with subject matter jurisdiction). In fact, the agency must inform the OAL of the legal authority and jurisdiction upon which it sends each case to be contested. *See, N.J.A.C.* 1:1-8.2(a)5. Under these provisions, an ALJ is granted the same limited jurisdiction the transmitting agency had when it first acquired a contested matter.

In the instant matter, the State Board of Education remanded the matter to the Commissioner of Education for the limited purpose of establishing the entire amount of liquid assets to be distributed and to effectuate its distribution so that 76% of the total liquid assets are received by Mountainside and 24% by Garwood, that upon verification by the fiscal agent of the amount of the liquid assets remaining and available for distribution, ordering the immediate distribution of those assets to Mountainside and Garwood, and that once he determines the amount of the liquid assets already distributed, establishing a payment schedule whereby 76% of that amount is redistributed to Mountainside and 24% to Garwood within a five-year period.

The Commissioner in turn transmitted the matter to the OAL for determination in accordance with the directives of the State Board of Education. The transmittal identified the matter as a determination of the amount of liquid assets of the former Union County Regional High School District No. 1, and a plan for distribution of same 76% to Mountainside and 24% to Garwood. The transmittal matter further provided that the "remand proceedings" should be conducted in accordance with the letter from Deborah Antanaitis to Robert A. Goodsell, Esq., dated April 29, 2002.

REQUIREMENT OF A HEARING

The State Board of Education is reposed with the authority to promulgate rules and adopt policies, subject to the Administrative Procedure Act (*N.J.S.A.* 52:14B-1 *et seq.*), make all determinations and exercise such powers as are necessary for the proper administration of the school laws of the State of New Jersey, including those necessary to effectuate the provisions of the law regarding dissolution of a limited

purpose regional school district. *N.J.S.A.* 18A:13-51; *N.J.A.C.* 6:3-7.1 *et seq.* The APA, originally enacted in 1968, *L.*1968, *c.* 410, provides in relevant part that "[i]n a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice," *N.J.S.A.* 52:14B-9(a), and that "[o]pportunity shall be afforded all parties to respond, appear and present evidence and argument on all issues involved." *N.J.S.A.* 52:14B-9(c). The APA was amended and supplemented in 1978 by the enactment of legislation creating the OAL. *L.*1978, *c.* 67; *see generally, In re Uniform Admin. Procedure Rules,* 90 *N.J.* at 89-91, 447 *A.2d* 151. The 1978 amendments specifically authorized the Director of the OAL to "[d]evelop uniform standards, rules of evidence, and procedures, including but not limited to standards for determining whether a summary or plenary hearing should be held to regulate the conduct of contested cases and the rendering of administrative adjudications." *N.J.S.A.* 52:14F-5(e). The Director exercised this authority by adopting uniform administrative procedure rules, 12 *N.J.R.* 362(a) (1980), including a rule authorizing ALJs to make "summary decision[s]" in "contested case[s]" which do not involve disputed material issues of fact. *N.J.A.C.* 1:1-12.5. Our Supreme Court has sustained the validity of this rule, noting that it is "related to and, indeed, essential to the proper conduct of administrative hearings in contested cases." *Id at* 106.

The Court further concluded in that case that the direction in *N.J.S.A.* 18A:7A-14(e) that a "plenary hearing" be conducted "pursuant to the [APA]" encompasses the summary decision procedures authorized by *N.J.S.A.* 52:14F-5(e) and *N.J.A.C.* 1:1-12.5. *In re Uniform Admin. Procedure Rules, supra,* 90 *N.J. at* 107, 447 A. 2d 151.

It is clear that the right to an evidentiary hearing in the OAL provided by *N.J.S.A.* 18A:6-20 is subject to the APA and the regulations adopted there under. *N.J.S.A.* 52:14F-5(f). The State Board's regulations governing "controversies and disputes" expressly state that proceedings in contested cases transmitted to the OAL shall be governed by the Uniform Administrative Procedural Rules, *N.J.A.C.* 1:1 *et seq.*, which include the summary decision rule. As such, the statutory right to a hearing in the OAL is subject to the summary decision procedures of the APA.

SUMMARY DECISION

The New Jersey Supreme Court has recently redefined the standard for determining motions for summary judgment in *Brill v. The Guardian Life Insurance Company of America,* 142 *N.J.* 520 (1995). In *Brill,* 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, as before, a motion for summary decision [summary judgment] 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 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, supra, at* 75 (citations omitted). The *Brill* decision focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." *Brill, supra. at* 530. The Court concluded that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision [summary judgment] 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 v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 251-52, 106 *S. Ct.* 2505, 2512, 91 *L.Ed.*2d 202, 214.

In reviewing 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 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.

Mountainside and Garwood now move for summary decision, asserting that there is no genuine issue of material fact and that the movants are entitled to prevail as a matter of law. An examination of the motion record, as defined by the Order entered May 27, 2003, is essential.

REVIEW OF THE RECORD

For purposes of discussion of the salient facts of this matter, the entire motion record has been reviewed. Of particular significance to the determinations made herein, were the excerpts from the report of the Union County Superintendent of Schools, Dr. Leonard Fitts, dated April 7, 1995 (Exhibit F, Mountainside motion for summary decision), the report of Union County Superintendent of Schools Dr. Francis Lobman, dated June 30, 1997(Exhibit D, Mountainside motion for summary decision), the Fiscal Agents report, August 16 2002 (Exhibit B, Mountainside motion for summary decision), the Fiscal Agents supplemental report, November 5, 2002 (Exhibit C, Mountainside motion for summary decision), and the Comprehensive Annual Financial Report for the Fiscal Year ended June 30, 2002, prepared by the Berkeley Heights Board of Education in its capacity as Fiscal Agent.

The Fitts report identified the manner by which the replacement cost of buildings, grounds, furnishings and equipment was made. The David Brearly School was calculated to have a total replacement cost of $24,519,284. This reflected the construction cost of $17,749,200, cost for furniture and equipment in the amount of $1,419,936, fees in the amount of $1,150,148, and value of land appraised at $4,200,000. The Jonathan Dayton School was calculated to have a total replacement cost of $25,755,082. This reflected the construction cost of $20,968,800, the cost for

furniture and equipment in the amount of $1,677,504, the cost of fees in the amount of $1,358,778 and the value of land appraised at $1,750,000. The Arthur L. Johnson School was calculated to have a total replacement cost of $30,119,535. This reflected the construction cost of $22,466,400, the cost for furniture and equipment in the amount of $1,797,312, the cost of fees in the amount of $1,455,823 and the value of land appraised at $4,400,000. The Governor Livingston School was calculated to have a total replacement cost of $30,214,543. This reflected the construction cost of $24,514,800, the cost for furniture equipment in the amount of $1,961,184, the cost of fees in the amount of $1,588,559 and the value of land appraised at $2,150,000. Although these were the figures submitted as of April 7, 1995 and the dissolution was not approved until June 30, 1997, these are the only figures available, and are those apparently relied on by the State Board of Education, as well as the Supreme Court.

The Lobman report dated June 30, 1997, identified the total physical assets located on the properties of the regional district to be valued at a total of $3,228,808.45. These "physical assets" included items such as fuel, supplies, foodservice inventories, pupil transportation vehicles, other vehicles, maintenance equipment, schoolbooks and personal property (Exhibit D, p. five). The "physical assets" remained in place at the property on which they were located. These various "physical assets" were thereafter identified for each of the properties of the regional schools (Exhibit D, pp. 6-8). The total value of the "physical assets" located at the Governor Livingston Regional High School in Berkeley Heights was $883,615.56. The total value of the "physical assets" located at the Arthur L. Johnson Regional High School in Clark was $823,136.37. The total value of the "physical assets" located at the David Brearly Regional High School in Kenilworth was $369,372.50. The total value of the "physical assets" at the Jonathan Dayton Regional High School and Clifton Manor, both in Springfield was $1,152,684.02. The Lobman report further identified shared or rotated equipment and furnishings in the total amount of $38,507.50. Of this amount, $5,999.90 was located at the David Brearly School and $32,507.60 was located at the Jonathan Dayton School.

The Fiscal Agent report dated August 16, 2002 identified distributions from the fund balance at June 30, 1998 in the total amount of $3,770,353. Of this amount, distributions were made to Berkeley Heights in the amount of $1,017,070.96, to Clark in

the amount of $830,104.79, to Garwood in the amount of $175,702.52, to Kenilworth in the amount of $482,075.32, to Mountainside in the amount of $558,486.05, and to Springfield in the amount of $706,913.36.

That Fiscal Agent report further identified distributions from the fund balance and capital reserve at June 30, 2000 in the total amount of $1,566,330. Of this amount, distributions were made to Berkeley Heights in the amount of $422,525.09, to Clark in the amount of $344,853.13, to Garwood in the amount of $72,992.67, to Kenilworth in the amount of $200,270.12, to Mountainside in the amount of $232,013.67 and to Springfield in the amount of $293,675.32.

Total distributions from the fund balance and capital reserve to date have been made to Berkeley Heights in the amount of $2,323,211.61, to Clark in the amount of $1,998,094.29, to Garwood in the amount of $248,695.19, to Kenilworth in the amount of $1,057,717.84, to Mountainside in the amount of $790,499.72 and to Springfield in the amount of $2,185,780.30, for a total assets distribution to date in the amount of $8,603,998.95.

The Comprehensive Annual Financial Report for the Fiscal Year ended June 30, 2002, prepared by the Berkeley Heights Board of Education Fiscal Agent, reflected at page 10 a cash balance as of June 30, 2002 in the amount of $4,183,626. Of this amount, $93,247 was designated as special revenue. The special revenue line item identified in the Fiscal Agent report dated August 16, 2002, exhibit B, has attached thereto as exhibit F the combined balance sheet as of June 30, 2001 and 2000. The line item for special revenue reflects cash reserves due to the State of New Jersey in the amount of $94,415. This balance sheet also reflects a reserve for total refunds for tuition payable in the amount of $903,469. After deducting the tuition receivables in the amount of $51,331 the net reserve for tuition refunds payable amounts to $852,137.87. As of June 30, 2002 the cash in general account is $4,090,379. Additional liabilities and reserves are reflected as amounts due other districts for an unemployment reserve in the amount of $609,699 and a reserve for settlement pending lawsuits in the amount of $2,477,211. There also is a reserve for close out expenses in the amount of $100,000. The fiscal agent report dated August 16, 2002 identified the reserve for

settlement to be $1,900,000. As reflected therein, the balance of the total reserve for settlement pending lawsuits exceeding that amount is available for immediate distribution.

The assets available, cash and cash equivalents total the amount of $4,090,379. Deducting from that amount the reserves for tuition refunds in the amount of $903,469, unemployment reserves due other districts, in the amount of $609,699, reserves for settlement of lawsuits in the amount of $1,900,000 and a reserve for closeout expenses in the amount of $100,000, leaves a total of $577,211 available for distribution.

Under cover of letter dated April 29, 2002, the Director of Controversies and Disputes, Department of Education, outlined the parameters of the proceeding to take place at the OAL. The proceedings were to determine the amount of the liquid assets in accordance with the directives of the State Board of Education, in its March 6, 2002 decision. This was to include all liquid assets of the former district as of June 30, 1997. Additionally, there was to be a determination of the current amount of such liquid assets in the possession of the fiscal agent available for immediate distribution to Mountainside and Garwood, 76% to Mountainside and 24% to Garwood. Further, the proceedings were to ascertain the total amount of all liquid assets already distributed to the constituent districts of the former district, and to establish a five-year plan for the redistribution of all liquid assets from the districts that have received them to Mountainside and Garwood, 76% to Mountainside and 24% to Garwood.

FINDINGS OF FACT

For the purpose of the within motion, I make the following **FINDINGS** of **FACT**:

1. The replacement cost of the David Brearly Regional High School building located in Kenilworth, as calculated by the Bureau of Facility Planning, Office of Finance, Division of Information, Management and Financial Services, New Jersey Department of Education (Bureau) as of April 7, 1995 was $17,749,200 for construction and $1,150,148 for fees, for a total of $18,899,348.

2. The replacement cost of the Jonathan Dayton Regional High School building, located in Springfield, as calculated by the Bureau as of April 7, 1995 was $20,968,800 for construction and $1,358,778 for fees, for a total of $22,327,578.

3. The replacement cost of the Arthur L. Johnson Regional High School building located in Clark, as calculated by the Bureau as of April 7, 1995 was $22,466,400 for construction and $1,455,823 for fees, for a total of $23,922,223.

4. The replacement cost of the Governor Livingston Regional High School building located in Berkeley Heights, as calculated by the Bureau as of April 7, 1995 was $$24,514,800 for construction and $1,588,559 for fees, for a total of 26,103,359.

5. The appraised value of the grounds on which the David Brearly Regional High School is located was $4,200,000 as of April 7, 1995.

6. The appraised value of the grounds on which the Jonathan Dayton Regional High School is located was $ 1,750,000 as of April 7, 1995.

7. The appraised value of the grounds on which the Arthur L. Johnson Regional High School is located was $4,400,000 as of April 7, 1995.

8. The appraised value of the grounds on which the Governor Livingston Regional High School is located was $2,150,000 as of April 7, 1995.

9. The replacement cost of the furniture and equipment located at the David Brearly Regional High School was $1,419,936 as of April 7, 1995.

10. The replacement cost of the furniture and equipment located at the Jonathan Dayton Regional High School was $1,677,504 as of April 7, 1995.

11. The replacement cost of the furniture and equipment located at the Arthur L. Johnson Regional High School was $1,797,312 as of April 7, 1995.

12. The replacement cost of the furniture and equipment located at the Governor Livingston Regional High School was $1,961,184 as of April 7, 1995.

13. The total replacement cost of the building, grounds, furnishings and equipment therein located at the David Brearly Regional High School as of April 7, 1995 was $24,519,284.

14. The total replacement cost of the building, grounds, furnishings and equipment therein located at the Jonathan Dayton Regional High School as of April 7, 1995 was $25,755,082.

15. The total replacement cost of the building, grounds, furnishings and equipment therein located at the Arthur L. Johnson Regional High School as of April 7, 1995 was $30,119,535.

16. The total replacement cost of the building, grounds, furnishings and equipment therein located at the Governor Livingston Regional High School as of April 7, 1995 was $30,214,543.

17. The value of the assets retained by Berkeley Heights at the time of dissolution was $883,615.56.

18. The value of the assets retained by Clark at the time of dissolution was $823,136.37.

19. The value of the assets retained by Kenilworth at the time of dissolution was $369,372.50. The shared and rotated furnishings and equipment retained by Kenilworth was valued at $5,999 at the time of dissolution.

20. The value of the assets retained by Springfield at the time of dissolution was $1,152,684.02. The shared and rotated furnishings and equipment retained by Springfield was valued at $32,507.50 at the time of dissolution.

21. The total value of the assets retained by the constituent districts at the time of the dissolution was $3,228,808.45 and the total value of the shared and rotated furnishings and equipment was $38,507.50.

22. The assets distribution by the fiscal agent to Berkeley Heights in 1998 was $1,017,070.96.

23. The assets distribution by the fiscal agent to Clark in 1998 was $830,104.79.

24. The assets distribution by the fiscal agent to Garwood in 1998 was $175,702.52.

25. The assets distribution by the fiscal agent to Kenilworth in 1998 was $482,075.32.

26. The assets distribution by the fiscal agent to Mountainside in 1998 was $558,486.05.

27. The assets distribution by the fiscal agent to Springfield in 1998 was $706,913.36.

28. The assets distribution by the fiscal agent to Berkeley Heights in 2000 was $422,525.09.

29. The assets distribution by the fiscal agent to Clark in 2000 was $344,853.13.

30. The assets distribution by the fiscal agent to Garwood in 2000 was $72,992.67.

31. The assets distribution by the fiscal agent to Kenilworth in 2000 was $200,270.12.

32. The assets distribution by the fiscal agent to Mountainside in 2000 was $232,013.67.

33. The assets distribution by the fiscal agent to Springfield in 2000 was $293,675.32.

34. The total of assets distributed to Berkeley Heights to date is $2,323,211.61.

35. The total of assets distributed to Clark to date is $1,998,094.29.

36. The total of assets distributed to Kenilworth to date is $1,057,717.84.

37. The total of assets distributed to Springfield to date is $2,185,780.30.

38. The total of assets distributed by the fiscal agent to the constituent districts in 1998 was $3,770,353.

39. The total of assets distributed by the fiscal agent in 2000 was $1,566,330.

40. The total of assets distributed to date to the constituent districts amounts to $8,603,998.95.

41. The cash balance for the fiscal year ending June 30, 2002 was $4,090,379.

42. There are reserves for tuition refunds in the amount of $903,469,[4] unemployment reserves in the amount of $609,699,[5] reserves for pending lawsuits in the amount of $1,900,000 and reserves for closeout expenses in the amount of $100,000.

43. The assets available for immediate distribution amount to $577,211.

DISSOLUTION OF LIMITED PURPOSE REGIONAL SCHOOL DISTRICT

Statutory Authority

Notwithstanding the limited purpose for which the instant matter was transmitted to the OAL, an overview of the underlying statute is appropriate to place the matter in its proper context. It is noteworthy that this matter has progressed through a lengthy procedural history, having first been decided by the Commissioner of Education on May 5, 1997 and followed by no less than six subsequent determinations made by the State Board of Education, the Appellate Division of the Superior Court, and the Supreme Court of the State of New Jersey.

The dissolution of a regional school district is governed by the provisions of *N.J.S.A.* 18A:13-51, *et seq*. To that end, the Legislature provided in pertinent part that:

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[4] There are tuition receivables in the amount of $51,331. The November 4, 2002 Fiscal Agent report indicates that these amounts have been netted against the payables for a net payment of $852,137.87. However, since the receivables have not been collected, it is prudent to reflect the total amount of the tuition refunds payable. The Fiscal Agent has stated that the amounts payable will be paid upon finalization of the Fiscal Agent's responsibilities. Likewise, receivables may be distributed upon collection, by the Fiscal Agent.

[5] The New Jersey Department of Labor advised the Union County Superintendent regarding the distribution among the constituent districts of the unemployment compensation insurance trust fund. As per the recommendation of Dr. Lobman, the employer contributions are to be distributed as all the other assets. The employee contributions shall be distributed on a pro rata basis considering the number of former regional employees employed at each of the former regional schools.

> The...constituent districts shall take title to and control of all school grounds and buildings, and the furnishings and equipment therein, other than those which had been rotated or shared among the regional schools, situated in their respective districts on the effective date of the ... dissolution as established by the Commissioner. The County Superintendent shall allot a fair proportion of the shared or rotated furnishings and equipment to ... each of the constituent districts in the event of dissolution.
>
> Upon the assumption of title, each board shall also assume such amount of the indebtedness of the original regional school district as shall have been determined by the board of review .... In the event of a dissolution, the county superintendent and board of review, in determining the amount of indebtedness to be assumed by each constituent district, shall give due regard to the value of school buildings and grounds being conveyed to the constituent district in which those buildings and grounds are located.
>
> [*N.J.S.A.* 18A:13-61.]

The County Superintendent of Schools is charged with dividing the assets and liabilities among the constituent districts pursuant to *N.J.S.A.* 18A:13-63, which provides in pertinent part as follows:

> If all of the local districts withdraw from the regional district, such regional district shall be dissolved upon the effective date of the last withdrawal, and its assets and liabilities shall devolve upon the respective withdrawing districts in accordance with the division made by the county superintendent as provided in ... [*N.J.S.A.* 18A:13-62].

The County Superintendent of Schools shall make a division of the assets and liabilities among the constituent districts in the same manner as provided in *N.J.S.A.* 18A:8-24, which provides in pertinent part that:

> The county superintendent in a written report filed by him at the end of the school year preceding that in which the new district is created shall make a division of the assets, except school buildings, grounds, furnishings and equipment, and of the liabilities, other than the bonded indebtedness of the original district, between the new district and the remaining district on the basis of the amount of the ratables in the respective districts on which the last school tax was levied, and in determining the amount of assets to be divided, he shall take into account the present value of the school books, supplies, fuel, motor vehicles and all personal property other than furnishings and equipment. In the case of any vehicle used for the transportation of school children, the original cost of the vehicle, less any state aid appropriated therefor, shall be deemed to be the present value.
>
> [Emphasis added.]

Against this backdrop, Dr. Frances Lobman, the Union County Superintendent at the time of dissolution, prepared the report on the division of the assets among the constituent districts. The division of assets contemplated to be facilitated by Dr. Lobman specifically excepted school buildings, grounds, furnishings and equipment, other than the shared or rotated furnishings and equipment. The assets subject to distribution in accordance with *N.J.S.A.* 18A:8-24 would include all assets except school buildings, grounds, furnishings and equipment. This would include the proportionate distribution of the shared and rotated furnishings and equipment. *See N.J.S.A.* 18A:13-61. On its face, the Lobman plan for distribution of assets comported with the statutory scheme of the Act. Equally, each of the decisions initially addressing the issue of distribution of assets, from the Commissioner of Education, to the State Board of Education, to the Appellate Division, would seem to have supported this application of the Act.

The Act provides in simple terms that the real property and appurtenances are deeded to the constituent district in which the property is situated. Included in the distribution of the real property is the furnishings and equipment thereon. The legislature contemplated that in the event of a dissolution where a constituent district receives no real property, the indebtedness of that district may be reduced to adjust for the value of the real property received by the other constituent districts. However, the legislature also contemplated the situation where the district receiving no real property would actually be required to assume a share of the indebtedness. The shifting of debt, presumably the bonded indebtedness of the district related to the construction of the facilities, is a reasonable method of equalizing the burden placed on the constituent districts. In the event of a dissolution, the county superintendent and board of review, in determining the amount of indebtedness to be assumed by each constituent district, shall give due regard to the value of school buildings and grounds being conveyed to the constituent district in which those buildings and grounds are located. *N.J.S.A.* 18A:13-61. The county superintendent shall calculate the amount of indebtedness relating to buildings, grounds, furnishings, equipment and additions thereto so to be assumed on the basis of the proportion which the replacement cost of the buildings, grounds, furnishings, equipment, and additions thereto of the regional district situated in

the withdrawing district, or in each of the constituent districts in the event of a dissolution, bears to the replacement cost of the buildings, grounds, furnishings, equipment and additions thereto situated in the entire regional district. *N.J.S.A.* 18A:13-53.

Inasmuch as school buildings do not fit into any of the typical structures generally valued for appraisal purposes, the traditional methods of valuation may not strictly apply. Since the special purpose and design characteristics of this kind of property make it difficult to identify clearly comparable market data, the use of the cost approach would generally be considered reasonable. Replacement cost is but one factor in the appraisal of properties when utilizing the cost approach. Other factors include land valuation, depreciation, and entrepreneurial profit. *Best Foods v. Englewood Cliffs Borough*, 19 *N.J. Tax* 266, 2001. Although there is no mention of depreciation in the Act, it is clear that the language of the Act includes the two distinct terms, "value" and "replacement cost". The shifting of debt would in some measure provide for the depreciation of a school building. Presumably, with the passage of time, the reduction in debt (increase in equity) would be in direct inverse proportion to the depreciation (decrease in value) of the property. In a situation involving the dissolution of a regional district with new buildings and greater debt, the shifting of debt to the constituent district wherein the buildings are located would have virtually the same effect. The withdrawing district with no buildings situated therein would still be left with no building. The debt assumed would bear a reasonable relationship to the value of the building.

Liquid Assets

The parties to the instant matter have raised the issue of what is the definition of liquid assets as such pertains to the dissolution of a regional school district. The provisions of *N.J.S.A.* 18A:8-24 and *N.J.S.A.* 18A:13-61, previously noted herein, give guidance in examining that issue.

The Act provides, in part, that the constituent districts shall take title to and control of all school grounds and buildings, and all the furnishings and equipment therein, other than those which had been rotated or shared among the regional schools,

situated in their respective districts on the effective date of dissolution. A fair proportion of the shared or rotated furnishings and equipment shall be allotted to each of the constituent districts. *N.J.S.A.* 18A:13-61.

Alternatively, the statutory scheme to be utilized in the distribution of assets is found at *N.J.S.A.* 18A:8-24. The County Superintendent is to make a division of the assets, "except school buildings, grounds, furnishings and equipment, ... on the basis of the amount of the ratables in the respective districts on which the last school tax was levied, and in determining the amount of assets to be divided, he shall take into account the present value of the school books, supplies, fuel, motor vehicles and all personal property other than furnishings and equipment." (Emphasis added.)

Additionally, the Lobman report as well as the Fitts report was reviewed in order to afford a broad perspective as to the definition of assets. It is noted that the Lobman report identified assets in categories. These included fuel, supplies, food service inventories, pupil transportation vehicles, other vehicles, maintenance equipment, school books and personal property (Lobman report, III(A), p. 5). In addressing the allotment of shared or rotated equipment and furnishings, pursuant to *N.J.S.A.* 18A:13-61, the Lobman report explained that these "shared and rotated" furnishings and equipment will be distributed by the same methodology as the other assets (Lobman report, III(D), p. 9). The Fitts report referenced furniture and equipment in the section of that report addressing the replacement cost of buildings, grounds, furnishings and equipment (Fitts report, IX(A), pp. 43 and 44). Dr. Fitts alluded to the distinction between equipment in general and "building equipment" in the section regarding the distribution of assets. He recommended that in the event of dissolution, Berkeley Heights, Clark, Kenilworth and Springfield districts would assume the buildings, grounds, furnishings and building equipment.[6] The Garwood and Mountainside districts would receive all liquid assets of the regional school district such as free balances, excess transportation equipment and other non-building equipment (Fitts report, XI(B), p. 47).

[6] There has been no explanation found as to the rationale for including shared and rotated furnishings in the total of assets, when the other furnishings and equipment at the various sites were included in the replacement cost. *N.J.S.A.* 18A:8-24 distinguishes assets from furnishings and equipment.

Ultimately, the Supreme Court adopted the method for defining distributable assets from the Lobman report. The division of assets included the value attributed to the assets physically located on the properties of the District including the shared and rotated furnishings and equipment in arriving at the $3,267,315.95 figure.

REDISTRIBUTION PLAN

To the extent that monies are to be redistributed, the Commissioner has directed that a five-year plan for the redistribution of all liquid assets from the four constituent districts, 76% to Mountainside and 24% to Garwood. The various proposals submitted include plans for payouts of sums in excess of those identified in the Supreme Court decision; a payout over thirty years (Berkeley Heights); a payout over fifteen years (Clark); a payout over fifteen years (Springfield); and a payout over five years for the undisputed amounts only (Kenilworth). The responsive proposals all contained similar suggestions along the lines of two equal semi-fiscal year payments.

Since redistribution under the directive of the State Board of Education includes the value attributed to the "physical assets" distributed at the time of dissolution and the liquid cash assets distributed in 1998 and 2000, it is reasonable to conclude that those funds are not readily available in the respective budgets of the four constituent districts. A five-year repayment schedule that commences during the second half of the school budget year would extend over six school budget years.

CONCLUSIONS OF LAW

Clearly, the Supreme Court has directed a divergence from the strict application of the statutory distribution scheme in *N.J.S.A.* 18A:8-24, finding that such strict application of the statute would leave Mountainside and Garwood with a shortfall and the other four districts with a windfall, of the District's assets based on the proportions of the District's operating budget that each municipality contributed. The Court directed the State Board to formulate payment schedules so that Mountainside and Garwood

receive their fair share of the District's liquid assets from the other constituent districts in a timely manner.

In turn the State Board directed the Commissioner to carry out that directive. The matter was transmitted to the OAL for implementation of that directive, in establishing the amount of assets previously distributed, and to formulate a payment schedule for the redistribution of those previously distributed assets, 76% to Mountainside and 24% to Garwood over a five-year period. Additionally, there was to be a determination of the current amount of such liquid assets in the possession of the fiscal agent available for immediate distribution to Mountainside and Garwood, 76% to Mountainside and 24% to Garwood.

I **CONCLUDE** that I am constrained to follow the directive prescribed by the agency in transmitting the matter to the OAL. There is no independent basis to consider the matter. The procedural history of the case is such that the directive from the State Board of Education reflects the law of the case. There is no judicial function to be applied here. The task is simply to identify the assets distributed and available to be distributed, and to formulate a plan for redistribution of the assets. In that regard, I **CONCLUDE** that there is no genuine issue of material fact as it relates to the task at hand. The parties have proffered all the financial information available that would shed light on the issues of what constitutes those assets contemplated by the Supreme Court and thereafter the State Board of Education. The four constituent districts seek a hearing to relitigate the underlying issues of value, the definition of assets, and the applicability of the statutory scheme in fulfilling the legislative intent. That is not the function here. I **CONCLUDE** that the matter is one that can be properly resolved by way of summary decision.

From the documentary evidence reviewed and considered and in accordance with the law of the case, I **CONCLUDE** that the amount of assets previously distributed and now subject to redistribution, 76% to Mountainside and 24% to Garwood includes the value of the assets, including the shared and rotated furnishings and equipment, distributed upon dissolution in the amount of $3,267,315.95. Additionally, those assets distributed in 1998 and 2000, in the amount totaling $5,336,683 are also to be

redistributed, 76% to Mountainside and 24% to Garwood. Of the assets still remaining in the possession of the Fiscal Agent, the amount of $577,221 is immediately available for distribution, 76% to Mountainside and 24% to Garwood. The amounts remaining in the possession of the Fiscal Agent, including the amount of $903,469 for tuition refunds payable, $100,000 for closing cost and $1,900,000 for pending litigation are not subject to release by the Fiscal Agent at this time. The Fiscal Agent is charged with the responsibility to distribute the surplus of any of those reserves, after all current liabilities and reserves for contingent liabilities have been taken into account, as it may become available for distribution, 76% to Mountainside and 24% to Garwood. The employee contribution for unemployment insurance is properly distributed to the constituent districts employing the respective employees, in accordance with the provisions of the New Jersey Department of Labor. The employer contribution is an asset subject to the distribution scheme outlined herein, 76% to Mountainside and 24% to Garwood.

I further **CONCLUDE** that there is no basis to deviate from the directive of the State Board of Education regarding the formulation of a redistribution plan for the previously distributed assets. The payments from the four constituent districts shall reflect the total of assets previously distributed at the time of dissolution and thereafter in 1998 and 2000, over a five-year period. To fulfill the requirements imposed by the State Board of Education regarding redistribution, I **CONCLUDE** there should be ten semi-yearly payments in accordance with the fiscal year. To accommodate the districts' budget cycles, the first payment shall be made April 15, 2004. Thereafter payments shall be made in equal amounts on October 15, 2004, April 15, 2005, October 15, 2005, April 15, 2006, October 15, 2006, April 15, 2007, October 15, 2007, April 15, 2008 and October 15, 2008. Each of the four constituent districts shall make ten equal payments from the total amount of assets previously distributed, 76% to Mountainside and 24% to Garwood.

ORDER

It is hereby **ORDERED** that the Fiscal Agent release immediately the sum of $577,211 to Mountainside and Garwood, $438,680.36 to Mountainside and $138,530.64 to Garwood.

It is further **ORDERED** that the four constituent districts, Berkeley Heights, Clark, Kenilworth and Springfield, hereby initiate the redistribution of assets over five years, commencing April 15, 2004 as follows:

A. Berkeley Heights to Mountainside: ten equal payments of $176,564.08 commencing April 15, 2004, every six months until the last payment due on October 15, 2008.

B. Berkeley Heights to Garwood: ten equal payments of $55,757.08 commencing April 15, 2004, every six months until the last payment due on October 15, 2008.

C. Clark to Mountainside: ten equal payments of $151,855.17 commencing April 15, 2004, every six months until the last payment due on October 15, 2008.

D. Clark to Garwood: ten equal payments of $47,954.26 commencing April 15, 2004, every six months until the last payment due on October 15, 2008.

E. Kenilworth to Mountainside: ten equal payments of $80,386.56 commencing April 15, 2004, every six months until the last payment due on October 15, 2008.

F. Kenilworth to Garwood: ten equal payments of $25,385.23 commencing April 15, 2004, every six months until the last payment due on October 15, 2008.

G. Springfield to Mountainside: ten equal payments of $166,119.30 commencing April 15, 2004, every six months until the last payment due on October 15, 2008.

H. Springfield to Garwood: ten equal payments of $52,458.73 commencing April 15, 2004, every six months until the last payment due on October 15, 2008.

It is further **ORDERED** that the Fiscal Agent shall continue to account for the current liabilities and reserves for contingent liabilities, and accumulate accounts receivable until those have been fully accounted for. Thereafter, upon completion and

acceptance of the final audit, the Fiscal Agent shall disburse the remaining funds, 76% to Mountainside and 24% to Garwood.

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 (45) 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 (13) 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, 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.

11/24/03
DATE

Robert J. Giordano
ROBERT J. GIORDANO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

11/25/03
DATE

Mailed to Parties:

NOV 26 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NO. EDU 3863-02
AGENCY DKT. NO. 581-12/96

IN THE MATTER OF THE DISTRIBUTION :
OF LIQUID ASSETS UPON DISSOLUTION :
OF THE UNION COUNTY REGIONAL HIGH :
SCHOOL DISTRICT NO. 1, UNION COUNTY. :

COMMISSIONER OF EDUCATION

DECISION ON REMAND

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions by the Berkeley Heights, Clark, Kenilworth and Springfield Boards of Education and reply arguments by the Garwood and Mountainside Boards of Education and the Borough of Garwood were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

In its exceptions, the Berkeley Heights Board (Berkeley Heights) claims that the State Board of Education (State Board) misread the Supreme Court's Order; that the State Board's decision was inappropriate because it significantly altered the Supreme Court's Order; and that the Initial Decision restricted the Board's ability to demonstrate the inequities involved. (Berkeley Heights' Exceptions at 1) Berkeley Heights further claims that the Administrative Law Judge (ALJ) erred "when he refused to hold that Mountainside and Garwood are judicially estopped from asserting that the *res* of this litigation is anything other than $3,267,316" (*Ibid.*), and when he foreclosed Berkeley Heights from proceeding in an evidentiary hearing to establish the inequities that have developed in light of the erroneous interpretation of the Supreme Court's decision by the State Board. (*Id.* at 2) Moreover, Berkeley Heights argues that the ALJ's determination is inequitable because it presumes Berkeley Heights' ability to make a substantial

payment to Mountainside and to Garwood in the current budget year. (*Ibid.*) Finally, Berkeley Heights sets forth its position that no payments should be made until all appeals in this matter have been exhausted.[1] (*Ibid.*)

Like Berkeley Heights, the Clark Board (Clark) maintains that the Supreme Court's decision was based upon the value of liquid assets in the amount of $3,267,216, less prior disbursements, and excepts to the ALJ's consideration of values in excess of those considered by the Supreme Court without affording the parties the opportunity to present testimony. (Clark's Exceptions at 1) Clark also asserts that, in failing to provide the parties an opportunity to present equitable considerations through testimony, the ALJ failed to create an adequate record for appellate review. (*Ibid.*) Moreover, Clark claims, the arbitrary fixing of a five-year payout, slated to begin in the current budget year, jeopardizes its ability to provide a thorough and efficient education. (*Id.* at 2) Finally, Clark argues that the ALJ's failure to approve Clark's proposed 15-year payout, without considering the financial impact on the District and/or an opportunity to present testimony, is in error. (*Ibid.*)

The Kenilworth Board (Kenilworth) filed eight exceptions, summarized as follows:

> 1) Kenilworth argues that the ALJ's conclusion that he "had no independent basis to consider the issues raised by the respondents" (Kenilworth's Exceptions at 1) is incorrect because the State Board's decision entrusted any decision regarding conducting of a hearing to the Commissioner, and that, in the Commissioner's letter transmitting this matter to the ALJ, "was the recognition that the Respondents herein could 'present evidence/testimony to contest the figures presented.'" (Kenilworth's Exceptions at 1-2)

[1] Berkeley Heights states that, in support of its exceptions, it is relying on its Brief in Opposition to the Motions of the Garwood Board of Education and the Mountainside Borough for Summary Decision attached to its exceptions and filed during proceedings before the OAL. (*Ibid.*)

2) Kenilworth excepts to the ALJ's use of replacement costs as a way of measuring the value of the four school buildings, arguing, *inter alia,* that "[t]here is a significant difference between the replacement cost to rebuild the David Brearley High School of $17,749,200 which was reflected in the Fitts Report and the book value of the actual building transferred to the Kenilworth Board of Education in June, 1997." (*Id.* at 3-4) Kenilworth points to evidence presented to the ALJ documenting that the David Brearley High School was built in 1964 at a cost of $3,192,100 and, at the time of appraisal by the American Appraisal Associates, Inc. for the Lobman Report, the high school had an accumulated depreciation of $2,376,341.12 and, therefore, carried a book value of $815,759. (*Id.* at 3) Kenilworth further claims that the ALJ overlooked the Annual Financial Report from the fiscal year ending June 30, 1997, which found that only $21,351,026 in land, buildings, machinery and equipment were transferred as of June 30, 1997 to the constituent districts. (*Id.* at 4) Kenilworth also avers that the Lobman Report and the Annual Financial Report for the fiscal year ending June 30, 1997, which set forth the depreciated book value of the assets transferred, "are the figures which should be [used as the] actual value received by the four (4) constituent districts." (*Id.* at 5)

3) Contrary to the findings of the ALJ, Kenilworth argues, Garwood and Moutainside "were to receive all liquid assets of the regional school district *as calculated for the school year of dissolution*," and the only liquid asset which existed as of June 30, 1998, Kenilworth avers, was the undesignated free balance of $3,770,353, which was distributed to all six districts based on the tax ratable formula in the Lobman Report. (emphasis in text) (*Id.* at 5-6)

4) Kenilworth disputes the ALJ's failure to find that the physical assets in the Lobman Report did not constitute liquid assets, and, therefore, not subject to distribution. (*Id.* at 6) In support of this argument, Kenilworth avers that "[t]he Supreme Court was erroneously led to believe that the *only* 'liquid' assets at issue was the approximate $3.3 million in physical assets described in the Lobman Report." (emphasis in text) (*Id.* at 7) Kenilworth claims that the common understanding of liquid assets means cash and assets which can quickly be turned into cash and that the value of physical assets referred to in the Lobman Report are not readily ascertainable. (*Id.* at 8) As examples, Kenilworth points out that, although it was credited

with receiving athletic supplies in the amount of $42,029.16, the athletic supplies transferred to Kenilworth were determined to be unusable. Kenilworth further claims that $65,340 worth of books transferred to Kenilworth were worthless. (*Ibid.*)

5. Kenilworth points out that the ALJ did not exclude the interest earned on the funds belonging to the Union County Regional High School District from the date of dissolution to present from the redistribution plan and claims that all six districts should share in the distribution of the interest earned as well as the principal which remained after June 30, 1997 held in reserve for liabilities or contingent liabilities, which is now no longer needed for that purpose. (*Id.* at 9)

6. Kenilworth asserts that all appeals in this matter should be exhausted before any payments are due, claiming that the ALJ did not take into consideration Kenilworth's need to preserve its current expense budget in order to maintain the schools' thorough and efficient education program and its need to enter into debt financing in order to meet its obligations under the five-year repayment plan.[2] (*Ibid.*) Kenilworth submits that "[m]inimally, the first payment needs to be extended into the 2004-2005 school year." (*Id.* at 11)

7. Kenilworth takes issue with the ALJ's finding that $577,211 is available for immediate distribution to Garwood and Mountainside, arguing that the fiscal agent's report, setting aside $1,900,000 for pending litigation predates the latest school audit report by one month and was not reviewed by the school auditor. (*Id.* at 11-12) The financial report (school audit report) for the year ending June 30, 2002, Kenilworth submits, is the only audited report issued by the fiscal agent and there are no free balance funds available for distribution at this time according to the latest audit report. (*Id.* at 12)

8. Kenilworth asserts that the Initial Decision does not achieve equity, repeating its argument that the use of replacement costs for an existing structure does not represent the true value of the structure/building in that no consideration was given to depreciation to determine current market value. (*Ibid.*) Moreover, Kenilworth reasserts, when the matter was before the Supreme Court, petitioners' claim was limited to the cash value of the physical assets set forth in the Lobman Report,

[2] The five-year payment plan submitted by Kenilworth at the ALJ's request provided that no payout schedule be implemented until all appeals were exhausted and the funds needed to satisfy Kenilworth's obligations had been identified and set aside by Kenilworth. (*Ibid.*)

> neither the annual financial reports nor the fiscal agents report were provided to the Court so that the cash funds available for distribution were not addressed, and because the appraisal by American Appraisal, an attachment to the Lobman Report, was not made a part of the record on appeal, the belief that the four constituent high school districts received $110,000,000 worth of land, building, equipment and machinery persuaded the Court to order the distribution of $3.3 million to Garwood and Moutainside only. (*Id.* at 13-14) Moreover, Kenilworth points out, it had the unique circumstance of reopening a high school building that had been closed for four years and, thus, required over $3.0 million for repair and maintenance and over $1.1 million in start-up costs. (*Id.* at 15) Kenilworth concludes by stating that "[t]he manner in which this OAL "hearing" was conducted precluded any ability to address the issues related to an equitable distribution of assets belonging to the Union County Regional High School District." (*Ibid.*)

The Springfield Board (Springfield) argues that the ALJ failed to conduct the required factual determinations, such as factfinding as to the nature of the assets at issue, and the various issues faced by each District which have had an impact on budgets necessitated by the consideration of funds not previously identified as distributable liquid assets, including the value of physical assets. (Springfield's Exceptions at 2) Moreover, Springfield claims, the assets received by Springfield were overvalued, noting that Springfield, as the central location where the vehicles of the regional district were registered and where inventory and computer equipment were listed were attributed as assets of Springfield and were overstated in value.[3] (*Ibid.*) Noting that the Supreme Court directed that Mountainside and Garwood receive the $3.2 million allotted by Dr. Fitts in his report, Springfield asserts that "[t]he ALJ's determination to broaden this decision without the development of an adequate factual record as to the equities affecting each of the constituent districts was inappropriate and outside the scope of the Court's remand." (*Id.*

[3] Springfield notes that it initiated an appeal of the overstatement of its asset valuation, but that Springfield settled its appeal in reliance upon the statutory formula being utilized for distribution at that time and with the understanding that the only remaining distribution issue was the $3,267,315.95. (*Id.* at 3) Springfield claims that it would not have entered into a resolution of its litigation to its own detriment if it had been aware that Mountainside and Garwood would be seeking to recoup the value of additional assets. (*Ibid.*)

at 3) Springfield also takes issue with the ALJ's use of replacement costs to determine the value of the school buildings in this matter, and asserts that the Annual Financial Report of June 30, 1997, which placed a lower value on the assets at issue and accounted for depreciation, was not given proper consideration. (*Id.* at 4) Additionally, Springfield claims that the expansion of the assets included in the reimbursement formula is contrary to the Supreme Court's directive, averring that the Supreme Court awarded specific sums to Mountainside and Garwood as allocated by Dr. Fitts in his April 1995 report and there was no discussion of additional assets at issue or that the liquid assets were not, in fact, liquid. (*Id.* at 4-5) Finally, noting that repayments are to begin during the existing budget year, Springfield claims that, since repayments are not a currently budgeted item, repayment would seriously and adversely impact Springfield's ability to maintain its current educational program and, thus, suggests that payments should commence in the next budget year. (*Id.* at 5) Since Springfield maintains that debt financing will be needed to fulfill the repayment obligations, it requests that the Commissioner determine that this financing would be outside the cap on current expense budgets. (*Ibid.*)

In reply to the Kenilworth arguments, the Borough of Garwood (Borough) avers that the State Board determined all the issues which Kenilworth now seeks to relitigate, identifying for distribution to Mountainside and Garwood the $3.3 million of liquid assets in the Lobman Reprt of June 1997, concluding that approximately $6.9 million of the $8.6 million in liquid assets already distributed were to be redistributed to Mountainside and Garwood, concluding that an additional approximately $2 million is available for immediate distribution to Mountainside and Garwood and directing the Commissioner to establish the exact amounts of the identified assets and to set a five-year payment schedule. (Borough of Garwood Reply at 1-

2) Thus, the Borough submits, the issues to be decided by the ALJ upon the matter being referred to the OAL by the Commissioner to implement the State Board's decision were very limited. (*Id.* at 2) Moreover, the Borough notes that the amounts previously distributed to the constituent districts by the Fiscal Agent and the amounts currently held were supplied to both the parties and the ALJ and were undisputed. (*Ibid.*)

With respect to Kenilworth's assertion that the ALJ should have rejected replacement costs as a way of measuring the value of the four buildings, the Borough claims that the ALJ did not value the school buildings but, rather, the Supreme Court considered the value of the buildings in reaching its decision regarding the distribution of liquid assets. (*Ibid.*) The Borough further avers that this was a decision made by the Supreme Court, not the ALJ. (*Ibid.*) Moreover, the Borough asserts that Kenilworth's exceptions, which criticize the ALJ for not rejecting the decisions of the Supreme Court and the State Board with respect to the distribution of assets set forth in the Lobman Report, suggests that the ALJ should have, in effect, reversed the Supreme Court, which is absurd. (*Ibid.*) With respect to the distribution of interest earned, the Borough notes that neither the Supreme Court, nor the State Board excluded interest earned subsequent to the year of dissolution and that the State Board directed the determination of funds held by the Fiscal Agent that were available for immediate distribution. (*Ibid.*)

Turning to Kenilworth's argument that the ALJ failed to take into consideration the current expense budget when setting the payment schedule, the Borough points out that Kenilworth has known since the State Board's decision of March 2, 2002 that it was required to complete payments within five years. (*Id.* at 3) The Borough also avers that, when Garwood and Mountainside opposed the initial distribution of assets, the district "claimed that repayment of monies in the future would not be a problem if so ordered." (*Ibid.*) Thus, the Borough

argues, the "respondents'' are equitably estopped from claiming hardship at this time. (*Ibid.*) Moreover, the Borough asserts that Kenilworth's suggestion that the amount to be immediately distributed is not the correct amount should not be considered because the claim is erroneous and, additionally, this issue cannot be raised in its exceptions since Kenilworth did not raise the issue previously. (*Ibid.*)

In its reply to Kenilworth's exceptions, the Garwood Board (Garwood) avers that the ALJ correctly concluded that he could not consider arguments outside the Commissioner's directive, that "[a]ny plenary hearing could only deal with 'evidence/testimony to contest the figures presented' by the fiscal agent, not to relitigate issues that should have been or were settled years ago." (Garwood Board's Reply at 1-2) With respect to the use of the replacement costs set forth in the Fitts Report, Garwood submits that the time to have disputed that manner of valuation was in 1995, not after this matter made its way all the way to the Supreme Court and remanded to the Commissioner for a final accounting of the monies due Garwood and Mountainside. (*Id.* at 2) Turning to Kenilworth's allegations that the liquid assets to be distributed are to be limited to the amount calculated for the school year of dissolution, Garwood points out that this contention was rejected by the State Board; that the State Board made it clear that the distribution of assets was not limited to $3,770,353; and that the ALJ correctly did not allow for relitigation of this issue. (*Ibid.*) Likewise, Garwood asserts that the time to contest the value of the physical assets has long past and that the issue of what constitutes liquid assets was settled by the State Board. (*Ibid.*) Garwood further asserts that liquid assets are defined by examining *N.J.S.A.* 18A:13-61, 62 and *N.J.S.A.* 18A:8-24, not the terminology used in the business environment.

Garwood additionally argues that the ALJ correctly included the interest earned in the amounts to be distributed to Garwood and Mountainside, pointing out that the only reason there is interest accrued is because this matter has taken so long to be resolved. (*Ibid.*) With respect to the five-year payment plan, Garwood avers that it was not within the mandate of the ALJ to alter the directive of the State Board to establish a five-year payment plan and that Kenilworth was well-aware that this issue was on appeal in 1998 and 2000 when it received cash distributions, and was also aware of the January 2001 and March 2002 decisions of the Supreme Court and State Board, respectively. (*Id.* at 3) Moreover, Garwood asserts, Kenilworth and the other three districts opposed a stay of the monies which were distributed in 1998 and 2000 proposed by Mountainside, arguing that the money could always be repaid to Garwood and Mountainside should they prevail. (*Ibid.*)

Garwood further asserts that the ALJ correctly determined that $577,211 is immediately available for distribution based on the Fiscal Agent's 2002 Report. (*Ibid.*) Turning to Kenilworth's arguments of inequity in the valuation of assets, Garwood submits that this matter was transferred to the OAL "for the limited purpose of establishing the exact amount of monies due to Garwood and Mountainside, not to permit relitigation of stale issues" and that "[a]ny alleged 'inequities' in valuations should not be at issue more than six years after the dissolution of the Regional District." (*Ibid.*) Finally, responding to the arguments advanced by the Berkeley Heights, Clark and Springfield Boards of Education, Garwood reiterates its arguments set forth above in response to Kenilworth's exceptions and emphasizes that the OAL is not the appropriate place to challenge the State Board's decision, asserting that the Supreme Court and the State Board have already determined that the equities in this matter lie with Garwood and Mountainside. (*Id.* at 4-5)

In its reply, the Mountainside Board (Mountainside) avers that the exceptions filed by the dissatisfied parties in this matter are not truly exceptions to the ALJ's decision but, rather, are continued expressions of dissatisfaction with the State Board's decision of March 8, 2002. (Mountainside Board's Reply at 2) With respect to Kenilworth's exceptions, Mountainside agrees with the Borough and Garwood that the ALJ correctly concluded that he did not have the authority to address the issues raised by Kenilworth and claims that Kenilworth's dispute is not with the figures presented by the fiscal agent and the plenary hearing it sought would have been one on issues far removed from those incontrovertible figures. (*Id.* at 3) Mountainside avers that there was no basis for the ALJ even to entertain any consideration of the value of the school buildings and grounds, noting that the Supreme Court and the State Board were well aware when they made decisions that all liquid assets should be distributed to Mountainside and to Garwood and that the Fitts Report valuation of the buildings, grounds, furnishing and equipment at $110,000,000 was based on replacement costs. (*Ibid.*) Moreover, Mountainside contends, the ALJ properly rejected Kenilworth's position that the liquid assets should be much more limited because the State Board expressly adopted the position of Garwood and Mountainside as to what should be included as liquid assets for the purposes of distributing the value of those assets to Mountainside and Garwood. (*Id.* at 4)

With respect to the five-year repayment schedule and Kenilworth's claim that the ALJ failed to consider its need to preserve its current expense budget in order to maintain a thorough and efficient educational program, Mountainside points out that Kenilworth received $482,075.32 in 1998 and $200,270.12 in 2000, when it knew that Mountainside and Garwood were asserting that those were monies due to them. (*Id.* at 4-5) Moreover, Mountainside submits, Kenilworth was fully aware of the amounts that were to be redistributed, including the

value of the physical assets it had received and the five-year payment schedule as a result of the March 2002 State Board decision, so that "Kenilworth has had plenty of time to figure out how to pay $80,386.56 to Mountainside and $25,385.23 to Garwood by April 15 of 2004." (*Id.* at 5)

Mountainside further asserts that there is absolutely no basis for taking exception to accepting the fiscal agent's express representation that he now only needs to hold $1,900,000 of the $2,477,211 in reserve for a pending piece of litigation, thus freeing up $577,211 for immediate distribution. (*Id.* at 6) Moreover, Mountainside claims that the ALJ did not err in refusing to accede to Kenilworth's efforts to expand the proceeding far beyond the limited issue transferred to the OAL. (*Ibid.*)

In responding to Springfield's exceptions, Mountainside repeats its assertions that: 1) the directive to the ALJ was not to reexamine the question as to what categories were to be included as liquid assets because the State Board made that determination in its March 2002 decision, in which it expressly adopted Mountainside's position with respect to that issue (*ibid.*); 2) the ALJ properly did not permit Springfield to expand the scope of this matter when he denied Springfield the opportunity to present evidence as to what it asserts was the true value of the physical liquid assets which it retained, and which were valued in the 1997 Lobman Report (*ibid.*); 3) the ALJ was correct in not allowing the four districts to reargue the valuation of the buildings and grounds set forth in Dr. Fitts' 1995 Report (*id.* at 7); 4) with respect to Springfield's assertion that the value of the physical assets should be excluded, Mountainside points out that the State Board's decision specifically directed that the liquid assets to be distributed to Mountainside and Garwood were to include the entire amount of assets, not just the $3.3 million identified in the Lobman Report (*ibid.*); and 5) given the history of the matter, Springfield has had ample time to ensure that it would be in a position to make repayments that it

knew it would be required to make, so that the fault lies with Springfield, not the ALJ, if it failed to do so (*ibid.*).

Finally, in responding to exceptions submitted by Berkeley Heights and Clark, whose arguments parallel those made by Kenilworth and Springfield, *i.e.*, that physical assets should not be included in the calculation of liquid assets, that the ALJ used replacement value to place a value on the physical assets rather than conducting a hearing to allow the presentation of testimony and evidence in determining the value of the physical assets, that the five-year payment schedule is unjust and affects the ability to deliver a thorough and efficient education, and so forth, Mountainside reiterates its replies set forth above in response to Kenilworth's and Springfield's exceptions, emphasizing that the issues raised are really an expression of dissatisfaction with the State Board's decision. (*Id.* at 8-9)

Upon a thorough and independent review of the record in this matter, the Initial Decision, the exceptions and the replies thereto, the Commissioner concurs that this matter is one that can be properly resolved by summary decision in that there are no genuine issues of material fact in dispute and the Commissioner is constrained to follow the directive of the State Board's limited purpose remand in this matter. Although Berkeley Heights, Clark, Kenilworth and Springfield object to this conclusion and seek to re-litigate the underlying issues of value, the definition of assets, and the applicability of the statutory scheme in fulfilling the legislative intent, the Commissioner finds that the State Board's remand provides no basis to re-litigate these issues. Notwithstanding the arguments advanced by the four Districts in which the school buildings were located (and retained by these Districts) that the replacement value of the buildings, grounds, furnishings and equipment of approximately $110 million, set forth in the 1995 Fitts Report, does not represent the true value of these assets in that no consideration was

given to depreciation to determine current market value, the Commissioner points outs that the State Board's remand has nothing to do with the distribution or redistribution of the buildings and/or building-related assets,[4] nor does the State Board direct that the Commissioner disturb the established *value*[5] of the liquid assets that were set forth in the 1997 Lobman Report. *In the Matter of the Distribution of Liquid Assets Upon Dissolution of the Union County Regional High School District No. 1, Union County,* State Board Decision March 6, 2002, slip op. at 8. Rather, the State Board's remand directs the Commissioner solely to: 1) determine the exact *amounts*[6] of the *liquid assets* that were distributed among the six municipalities which comprised the regional district and need to be redistributed solely to Mountainside and Garwood; 2) establish a payment schedule whereby 76% of that amount is redistributed to Mountainside and 24% to Garwood within a five-year period; and 3) determine the exact amount of additional *liquid assets* which are now available for distribution upon verification by the Fiscal Agent, and order the immediate distribution of these additional liquid assets with 76% of that amount being distributed to Mountainside and 24% to Garwood. *Union County, supra,* at 8-9.

With respect to the arguments put forward by Berkeley Heights, Clark, Kenilworth and Springfield seeking to limit the distribution of liquid assets to the figure of the $3.3 million identified in Dr. Lobman's report of June 1997, the determination by the State

[4] In his Findings of Fact, the ALJ included a listing of all the assets and their previous distribution including the building and building-related assets retained by Berkeley Heights, Clark, Kenilworth and Springfield and the liquid assets that had been previously distributed among the six constituent Districts. (Initial Decision at 15-19)

[5] "Value" is defined as: 1. An amount considered to be a suitable equivalent for something else. 2. Monetary or material worth. (*The American Heritage Dictionary of the English Language, New College Edition*, 1979, p. 1414)

[6] "Amount" is defined as: 1. The total of two or more quantities; aggregate. 2. A number; sum. (*The American Heritage Dictionary of the English Language, New College Edition*, 1979, p. 44)

Board in its decision of March 6, 2002 reflects the law of the case.[7] The State Board specifically found that:

> the amount of the liquid assets to be distributed to Mountainside and Garwood pursuant to the New Jersey Supreme Court's remand *includes the entire amount of those assets and not just the $3.3 million identified in Dr. Lobman's report of June 1997 as available for distribution at that time.* It appears that this amount includes approximately $8.6 million in liquid assets that has been distributed among the six municipalities which comprised the regional district, approximately $6.9 million of which will need to be distributed, and that approximately another $2 million is now available for distribution subject to certain contingencies.*** (emphasis supplied) (State Board's Decision of March 6, 2002, slip opinion at 8)

Moreover, the Commissioner is compelled to comment on the protestations of Berkeley Heights, Clark, Kenilworth and Springfield that the five-year payment schedule set forth in the Initial Decision is unreasonable and will affect their ability to provide a thorough and efficient educational program.[8] Initially, the Commissioner points out that the State Board specifically directed the Commissioner to establish a payment schedule whereby the redistributions to Mountainside and Garwood would be completed within a five-year period. Given the history of this matter where these Districts received significant liquid asset distributions in 1998 and 2000, knowing that Mountainside and Garwood were challenging these distributions, and given that these Districts knew full well by March 2002, as a result of the State Board's decision, that the liquid assets were to be redistributed and that payments for the redistribution to Garwood and Mountainside were to be made in a five-year payment schedule, the Commissioner finds that the Districts have had ample opportunity to plan for the payments

[7] It is noted that the Districts did not file an appeal of the State Board's March 6, 2002 decision.

[8] The ALJ provided an opportunity for the Districts to submit proposals for repayment. The responses included a proposal from Berkeley Heights for a payout over 30 years, proposals from Clark and Springfield for payouts over 15 years, and a proposal from Kenilworth for payouts over five years for the undisputed amounts only.

now due to Garwood and Mountainside. The Commissioner, therefore, finds that the payment plan set forth in the Initial Decision is reasonable and consistent with the State Board's directive.

In a thorough and independent review of the entire matter, therefore, the Commissioner agrees with the ALJ's well-reasoned conclusions in determining the amounts of liquid assets that are to be distributed to Mountainside and Garwood and finds that the plan for the distribution of such assets is consistent with the State Board's remand. Accordingly, the Commissioner has determined to adopt the Initial Decision, in its entirety, for the reasons expressed therein.

IT IS SO ORDERED.[9]

COMMISSIONER OF EDUCATION

Date of Decision: 2/5/04

Date of Mailing: 2/9/04

[9] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

48-04E

B.F., on behalf of minor child, O.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

February 9, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
GRANTING EMERGENT
RELIEF AS TO PLACEMENT
OAL DKT. NO. EDU 67-04
AGENCY DKT. NO. 8-1/04

B.F. ON BEHALF OF A MINOR CHILD, O.N.,

Petitioner,

v.

BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

B.F. and H.W., parents of O.N., a Minor Child, petitioners, *pro se*

Martin M. Barger, Esq., for respondent (Reussile, Mausner, Carotenuto, Barger, & Steel, attorneys)

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner sought emergent relief to stay the expulsion of her daughter from school for allegedly assaulting a teacher. Petitioner submitted a petition to the Commissioner of Education, dated January 9, 2004, seeking O.N.'s reinstatement in the general education program. The matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case on January 12, 2004, and oral argument was heard and some limited testimony was taken on January 16, 2004. After the conclusion of the hearing, the ALJ entered an Order on January 20, 2004, concluding that petitioner did not satisfy the requirements for granting of emergent relief and denying petitioner's request.

By a Decision on Motion dated January 28, 2004, the Commissioner of Education concurred with the ALJ denying reinstatement, but indicated that he must be assured that O.N. receives an "appropriate" alternative education program during the pendency of this matter, and required the OAL to supplement the record and determine on an emergent basis that this requirement is complied with. Accordingly, the matter was rescheduled for a second emergent hearing which was held on February 2, 2004. Following this emergent hearing, the within Order was entered.

FACTUAL DISCUSSION

I will not reiterate the facts and discussion set forth in my prior Order Denying Emergent Relief dated January 20, 2004, or in the Commissioner's Decision on Motion. For purposes of deciding the application for emergent relief, the following additional facts are determined to be undisputed.

It is undisputed that after reviewing the Monmouth Adult Education Commission (MAECOM) Program offered by the Board of Education, the parent refused to accept that as an appropriate alternate program and requested that O.N. be provided with home instruction. By letter dated January 23, 2004, the school district agreed to provide home instruction as an alternate educational service pending the outcome of this matter.

At the hearing, Patrick R. Collum, Superintendent of respondent school district, testified that he is familiar with this matter and indicated that O.N. is now receiving home instruction. He indicated that she was offered MAECOM Program as an alternate placement, but the parent rejected this. O.N. was started on home instruction on Friday, January 30, 2004. He indicated that the home instruction includes instruction in compliance with the Core Curriculum Contents Standards in the subject areas of English, Chemistry, Social Studies, Mathematics, and assistance preparing for the High School Proficiency Assessment. He explained that the home instructor would coordinate this instructional program in its entirety with O.N.'s teachers. The instructor will bring the assignments from the individual subject matter teachers to O.N. and will return the completed assignments, tests, quizzes and other examinations performed by O.N. to the classroom teachers. O.N. will be tested and otherwise examined and she will follow the curriculum of Monmouth Regional High School in all respects. The subject matters will cover all subjects covered in the classroom with the exception of health and physical education, for which the school district is giving a waiver or excuse. It was represented to me that the home instruction program need only amount to five hours per week for non-classified students. The home instructor will also coordinate the teaching schedule with the mother.

On cross-examination by the parent, Mr. Collum indicated that one hour per day is sufficient for home instruction because it is intensive and it is one-on-one. He also indicated that O.N. would get the same credit as being in high school.

O.N. testified that she is age 16. She indicated that the home instructor, who she referred to as a tutor, came on Friday, January 30, 2004, and said to her that she would get all of the work from her teachers. However, the home instructor also stated that if the teachers did not give the work to her, she would not be able to pass the work on to O.N., and it would not be necessary for her to come and provide home instruction. The next scheduled home instruction date is February 3, 2004. The home instructor also indicated that she has not taught mathematics for quite a while, but will teach O.N. the best she could.

LEGAL DISCUSSION AND ANALYSIS

N.J.S.A. 18A:37-2.1 provides for the suspension or expulsion of a pupil for assault on a district board of education member or employee. *N.J.A.C.* 6A:16-5.7 is the regulation adopted to specify the procedure to be used when there has been such a student assault on a district board of education member or employee. However, unlike other similar provisions, *N.J.A.C.* 6A:16-5.7 does not specify the requirements for the placement of students removed for assaulting a teacher. For example, an analogous provision found at *N.J.A.C.* 6A:16-5.6 deals with the removal of students for assaults with weapons offenses. *N.J.A.C.* 6A:16-5.6(d) of that section provides that any student that is removed from the general education program pursuant to the above shall be placed in an alternative education program, according to the requirements of *N.J.A.C.* 6A:16-8. *N.J.A.C.* 6A:16-5.6(d)1 goes on to provide that if placement in an alternative education program is not available, the student shall be provided home or other out-of-school instruction, according to *N.J.A.C.* 6A:16-9, until placement is available. Curiously, no similar provision is found in *N.J.A.C.* 6A:16-5.7.[1]

N.J.A.C. 6A:16-8.3 provides for mandatory student placements, but is also silent as to students removed for teacher assaults pursuant to *N.J.A.C.* 6A:16-5.7. *N.J.A.C.* 6A:16-8.3(a) states that the district shall provide placement for a student in an alternative education program for a student removed from general education for a firearms offense, pursuant to *N.J.A.C.* 6A:16-5.5, and a student removed from general education for an assault with weapons offense, pursuant to *N.J.A.C.* 6A:16-5.6. *N.J.A.C.* 6A:16-8.3(b) provides that if placement in an alternative education program is not available, the student shall be provided instruction at home or in another suitable facility until placement is available, pursuant to *N.J.A.C.* 6A:16-9.

N.J.A.C. 6A:16-9.1(a) provides that the district is responsible for providing general education students with an appropriate program of home or other out-of-school instruction when placement in an alternative education program is not immediately available for violations of

[1] Another curious difference is that *N.J.A.C.* 6A:16-5.6(g) provides that the chief school administrator shall make the final determination on when the student is prepared to return to the general education program or whether the student shall remain in an alternative education program or receive home or other out-of-school instruction based the nature and severity of the offense, the district board of education removal decision, the results of any relevant testing,

N.J.A.C. 6A:16-5.5 and 5.6, and when home or other out-of-school placements have been ordered by the courts.

N.J.A.C. 6A:16-8.3(b) provides that in all instances, the school district in which a student resides is responsible for the costs of providing the home or out-of-school instruction. *N.J.A.C.* 6A:16-8.3(c) states that in any instance in which a program of home or other out-of-school instruction is provided, the district shall initiate instructional services to the student no later than five working days after the student has left the general education program.

N.J.A.C. 6A:16-9.2 requires the compliance with the following requirements when providing a program of home or other out-of-school instruction:

> (a) The school district shall assure a multidisciplinary approach to planning the delivery of the following services, and ensure that professionals with appropriate instructional and educational services certificates are consulted. The functions of the multidisciplinary team shall be to:
> 1. Assess and evaluate student needs and establish an appropriate program of home or other out-of-school instruction;
> 2. Develop an Individualized Program Plan that addresses:
> i. The student's individual educational and behavioral needs; and
> ii. placement in an appropriate educational program, including transition
> back to the general education setting; and
> 3. Conduct periodic assessment of the placement, instructional services and student progress and make appropriate revisions to the Individualized Program Plan every 60 days to determine progress and facilitate a transition to another appropriate educational program, if appropriate.
> (b) Each district board of education shall provide home or other out-of-school instruction according to the following minimum standards:
> 1. A record of the student's home or other out-of-school instruction shall be maintained;
> 2. The teacher providing the instruction shall be appropriately certified for the subject or level in which the instruction is given;
> 3. Instruction shall be provided for no fewer than 10 hours per week;

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assessments or evaluation of the student; and the recommendation of the principal or director of the alternative program in which the student has been placed.

> 4. Instruction may be provided by direct communication to a classroom program by distance learning devices;
> 5. Students shall receive a program that meets the Core Curriculum Content Standards in accordance with *N.J.A.C.* 6A:8 and that meets the requirements of the district board of education for promotion and graduation;
> 6. The instructional program shall be in accordance with the student's Individual Program Plan;
> 7. If instruction is delivered in the student's home, a parent or other adult 21 years of age or older who has been designated by the parent shall be present during all periods of home instruction; and
> 8. If instruction is provided in the home, refusal or failure by a parent to comply with the provisions of *N.J.A.C.* 6A:16-9 shall be deemed a violation of compulsory education laws, pursuant to *N.J.S.A.* 18A:38-1 and 25, and child neglect laws, pursuant to *N.J.S.A.* 9:6-1 *et seq.*
> (c) The district shall provide the student with the home or out-of-school placement until the student is placed in another appropriate educational program.

I **FIND** that there is no basis for distinguishing between the treatment of a student who has been removed for firearms possession or assaults with weapons offenses and a student removed for an assault on a district board of education member or employee. Surely a student who is involved in a possession of firearms offense or an assault with a weapons offense is no less a danger to a teacher at an alternate program or a home instructor than a student involved in a teacher assault. If a school district perceives there to be such a danger, it certainly has the ability to take steps to protect the teacher or apply for emergent relief for modifications to its placement obligations. Therefore, I **FIND** that respondent is obligated to comply in all respects with the provisions and requirements of *N.J.A.C.* 6A:16-8.3 and *N.J.A.C.* 6A:16-9.2 as specified above. I **FIND** the school district must assess and evaluate the student's needs and establish an appropriate program, develop an individualized program plan to address these needs, conduct periodic assessments, and provide instruction of no less than ten hours per week.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that emergency relief is hereby **GRANTED** to petitioner requiring that respondent comply in all respects with the provisions and requirements of *N.J.A.C.* 6A:16-8.3 and *N.J.A.C.* 6A:16-9.2 in providing a home instruction

program to O.N. It is further **ORDERED** that this home instruction program shall continue until such time as a final administrative decision is rendered in this matter and an appropriate order is entered with respect to the permanent placement and program to be provided by respondent to O.N.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER 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 (45) days following the entry of this order. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) 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.

February 3, 2004
DATE

JOSEPH F. MARTONE, ALJ

mph

OAL DKT. NO. EDU 67-04
AGENCY DKT. NO. 8-1/04

B.F., on behalf of minor child, O.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this remanded emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law on February 2, 2004, and the Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner adopts the recommended Order of the ALJ as he is persuaded, by the totality of the record and the particular circumstances of this case, that such Order affords O.N. an appropriate alternative education *during the pendency* of this matter.

Accordingly, the recommended decision on motion is adopted. This matter shall proceed to hearing on its merits on March 30, 2004 as contemplated by the ALJ.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/9/04

Date of Mailing: 2/10/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

49-04

VICTORIA CARRELLE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning nontenured teacher alleged the Board unilaterally changed the date of her resignation in violation of her contractual rights and school law.

The ALJ concluded that the Board, having adopted a resolution accepting petitioner's offer of resignation on the date chosen by her, failed to adopt a second resolution changing the dates of petitioner's employment as required by *N.J.S.A.* 18A:27-4.1. Although petitioner's contract specified that termination may be accomplished by either party giving the other 60 days' notice in writing, the ALJ noted that the Commissioner lacks jurisdiction over subject matter concerning alleged breach of contract. The ALJ ordered the Board to pay petitioner her full salary for the month of December 2002 minus two days' pay.

The Commissioner agreed with and adopted the ALJ's determination that the Board impermissibly accelerated petitioner's resignation date thereby depriving petitioner of her full salary for the month of December 2002. The Commissioner, however, modified the Initial Decision, clarifying that *N.J.S.A.* 18A:28-8 governing the notice required of any tenured teaching staff member desiring to relinquish his or her position was inapplicable herein; *N.J.S.A.* 18A:26-10 governing notice requirements for nontenured individuals is the applicable statute. The Commissioner found that this statute, in conjunction with the parties' employment contract, which required the party wishing to terminate employment to give the other party 60 days' notice of such intent, required that petitioner be compensated for the full notice period. Although the Commissioner lacks jurisdiction over disputes that are solely contractual in nature, he does have jurisdiction over contractural claims which are incidental to his obligation to resolve education claims that are the subject of litigation. (*B.P., on behalf of B.P.* State Board decision) The Commissioner directed the Board to pay petitioner her full salary for the month of December 2002, less the two days' compensation she previously received.

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
OAL DKT. NO. EDU 1852-03
AGENCY DKT. NO. 6-1/03

VICTORIA CARRELLE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Oxfeld Cohen, attorneys)

Joseph A. DeFuria, Esq., for respondent
(Gaccione, Pomaco & Malanga, attorneys)

Record Closed: December 23, 2003 Decided: December 24, 2003

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by a nontenured teacher who complains that respondent Bloomfield Board of Education ("Board") unilaterally changed the date of her resignation in violation of her contractual rights and school law. Pursuant to *N.J.S.A.* 18A:28-8, petitioner Victoria Carrelle ("Carrelle") tendered her resignation to the Board on sixty-

days notice. It is undisputed that the Board adopted a resolution accepting petitioner's offer to resign effective January 1, 2003, but later sought to move up the effective date of her resignation to December 10, 2002. Carrelle contends that, having accepted her resignation effective on a specific date, the Board is "barred" from changing that date unilaterally.

While admitting that it had approved the original resignation date, the Board denies it is under any legal obligation to honor its commitment. Instead, the Board claims to have acted in the interest of its students when it accelerated Carrelle's resignation. Further, the Board maintains that nothing in the language of its collective bargaining agreement with the teachers supports Carrelle's breach-of-contract claim.

For the reasons that follow, Carrelle has no statutory entitlement to receive sixty-days notice of the resignation date. Where, however, the Board failed to adopt a regulation rescinding its earlier acceptance of the original resignation date and establishing a new date, the purported action taken by the district personnel director is invalid and Carrelle is entitled to relief.

Procedural History

On January 10, 2003, Carrelle filed her verified petition of appeal with the Commissioner. Respondent Board filed its answer on February 5, 2003, raising lack of jurisdiction as an affirmative defense. Subsequently, on March 5, 2003, the Commissioner transmitted this matter to the Office of Administrative Law for hearing as a contested case.

In lieu of hearing, the parties submitted a joint stipulation of facts. Both parties filed legal briefs on December 12, 2003. Upon receipt additional information, the record closed on December 23, 2003.

Findings of Fact

All of the facts necessary for disposition of this matter have been stipulated. **I FIND** the following facts:

Bloomfield Board of Education employed Victoria Carrelle as a nontenured teacher during the 2002-2003 school year. Carrelle's employment contract contained a provision authorizing either party to terminate their agreement "by giving the other party 60 days notice in writing." By letter dated November 1, 2002, Carrelle provided sixty days notice to the Board that she intended to resign and that "her last day of work would be January 1, 2003." At its meeting on November 12, 2002, the Board adopted a resolution accepting Carrelle's resignation effective as of January 1, 2003. On the very next day, Personnel Director Heather Carr wrote to Carrelle advising her of the Board's action.

Nearly a month later, on December 9, 2002, Carr sent a second letter to Carrelle informing her that the Board had found a replacement for her position who was willing to start work on December 11, 2002. Consequently, Carr advised Carrelle that her last day of work had been changed to December 10, 2002. The Board concedes that it failed to adopt a second resolution authorizing the change in retirement date. Carrelle received payment for only two days in December (December 3 and 4, 2002) and received no salary for the remainder of that month.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Board failed to adopt a resolution changing the dates of Carrelle's employment as required by *N.J.S.A.* 18A:27-4.1.

Initially, Carrelle urges that the acceleration of her retirement date violates *N.J.S.A.* 18A:28-8, which mandates that any tenured teaching staff member 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.

Although this statute on its face is applicable to tenured teachers, state regulations provide for similar disciplinary action against any "teacher" who leaves school employment before the expiration of his term without the consent of the district board of education. *N.J.A.C.* 6:11-3.8.

Because the school laws obligate a teacher to give at least sixty days notice of an intended resignation, however, it does not automatically follow that a school board has a mutual obligation to give an equivalent notice to the staff member. To the contrary, if the Legislature had wanted to impose a corresponding duty on school boards, it could easily have done so. Furthermore, the one-sided nature of the statute indicates that the underlying legislative purpose is to prevent disruption of the children's education. *Allen v. Newark Bd. of Educ.*, 96 *N.J.A.R.*2d (EDU) 688 (Comm'r Nov. 30, 1994), 1994 *W.L* 912214 (N.J. Admin.).

Nevertheless, boards of education must comply with the procedural requirements enunciated in their enabling legislation. An administrative body is a creature of legislation, which must act within the bounds of authority delegated to it. *Matter of Closing of Jamesburg High Sch.*, 83 *N.J.* 540, 549 (1980). *N.J.S.A.* 18A:27-4.1 authorizes a board of education to determine personnel matters, including *removal* of an employee, "only upon recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board." Significantly, the

Board has not pointed to any other statute or contractual provision permitting unilateral change of a teacher's scheduled date of retirement.

Uncontradicted evidence establishes that the Board adopted a resolution accepting Carrelle's offer of resignation on the date chosen by her. It never adopted a second resolution rescinding its approval or changing the date of resignation. Therefore, Carrelle's resignation took effect on January 1, 2003, as approved by the Board. The personnel director exceeded her legitimate authority when she sought to shorten the resignation date specified in the Board resolution. Strict compliance with the statutory procedures is especially critical here, where another administrative law judge criticized the same district's unilateral change of a teacher's retirement date as "equitably wrong." *Bloomfield Educ. Ass'n v. Board of Educ.*, 2003 *WL* 22805063

Collective bargaining agreements often spell out procedures for ending the employment relationship of tenured teachers during the course of a school year. Relying on a recent arbitration order and award, the Board maintains that the collective bargaining agreement does not contain any language prohibiting it from changing a teacher's retirement date. *In re Arbitration Between Bloomfield Bd. of Educ. and Bloomfield Educ. Ass'n*, PERS, Dkt. No. AR-2002-298 (June 6, 2002). Rights and remedies of nontenured teachers, however, are governed not only by the collective bargaining agreement, but also by an annual contract of employment. *Allen*, *supra*. The arbitrator's decision never had occasion to interpret the language of Carrelle's individual contract for 2002-2003. Carrelle's employment contract supports her contention by specifying that termination may be accomplished "by either party giving the other 60 days notice in writing of intention to terminate same." Here the Board attempted to circumvent this provision and failed to give Carrelle the full sixty-days notice of its intent to terminate her employment.

Insofar as Carrelle's theory for recovery is based on contract rather than statute, however, the Commissioner lacks jurisdiction over the subject matter. *Fanego v. State-Operated Sch. Dist. of Jersey City*, 1999 *WL* 430777 (N.J. Adm.). Where the controversy does not arise under the school law, it lies outside the Commissioner's

jurisdiction even though it may pertain to school personnel. *Board of Educ. of East Brunswick v. Twp. Council of East Brunswick,* 48 *N.J.* 94, 102 (1966). It is well settled that the Commissioner's jurisdiction does not extend to claims for alleged breach of contract. *Paladino v. Lacey Bd. of Educ.*, OAL Dkt. No. EDU 5589-87 (St. Bd. Feb. 1, 1989); *Larsen v. Piscataway Bd. of Educ.*, OAL Dkt. No. EDU 1445-81 (St. Bd. Oct. 6, 1982).

Order

It is **ORDERED** that the Bloomfield Board of Education pay to Victoria Carrelle her full salary for the month of December 2002 minus two days pay.

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 (45) 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 (13) 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, 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.

Dec. 24, 2003
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

Dec. 24 2003
DATE

M. Kathleen Duncan (for)

Mailed to Parties:

JAN 02 2004
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NO. EDU. 1852-03
AGENCY DKT. NO. 8-1/03

VICTORIA CARRELLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and petitioner's reply thereto were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4.

The Board's exceptions first concur with the Administrative Law Judge (ALJ) that the Board's compelling interest of ensuring that no disruption in its students' education occurred was sufficient to allow him to conclude that the Board's actions here were not violative of *N.J.S.A.* 18A:28-8, "despite other decisions to the contrary." (Board's Exceptions at 1) However, it strenuously disagrees with the ALJ's conclusion that, because the Board's alteration of petitioner's resignation date was not ratified or adopted by the Board, such an action was violative of *N.J.S.A.* 18A:27-4.1, necessitating that petitioner be compensated for lost salary in December 2002. The Board charges that the ALJ's reliance on this statutory provision is misplaced as modification of petitioner's cessation of employment date is not an action contemplated by this statute which, by its very terms, deals only with the appointment, transfer or removal of a teacher. (*Id.* At 2) Moreover, even if the characterization of its actions as ones

falling under the ambit of this provision were valid, this statute contains no penalty provision for noncompliance and, therefore, provides no authority for the monetary damages to petitioner ordered by the ALJ. As such, the Board urges the Commissioner to reverse the Initial Decision.

In reply, petitioner supports the correctness of the decision and advocates its adoption. She does, however, urge that the ALJ's dictum dealing with discussion of jurisdiction of the Commissioner over a contractual violation be ignored as she proposes that such discussion here is "clearly incorrect." Rather, she argues, "[t]he requirement that a non-tenured teacher give a certain period of notification of that teacher's desire to terminate his/her employment is authorized in Title 18A:27-4. Accordingly, the contract in Carrelle's case was authorized by the Education Laws and is enforceable before the Commissioner of Education." (Petitioner's Reply Exceptions at 1) Here, she argues, because the Board entered the contract and petitioner complied by providing the requisite notification of her intention to resign, as a matter of law, the Board was precluded from altering her termination date without her consent. (*Ibid.*)

Upon his full and independent review of the record, Initial Decision and the parties' exception arguments, while the Commissioner agrees with and adopts the ALJ's determination that the Board impermissibly accelerated petitioner's resignation date thereby improperly depriving petitioner of her full salary for the month of December 2002, he provides the following modification.

The Commissioner, initially, clarifies that *N.J.S.A.* 18A:28-8, governing the notice required of any *tenured* teaching staff member desiring to relinquish his or her position is wholly inapplicable in this matter. Rather, such notice requirements for *nontenured* individuals is contained in *N.J.S.A.* 18A:26-10, **Suspension of certificate for wrongful cessation of performance of duties**, which specifies:

> Any teaching staff member employed by a board of eduction, 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.

It is well-grounded in education law that determination of the sufficiency of a term of notice pursuant to this statute is dictated by the terms of the parties' employment contract and any resignation or termination must be in accordance with the terms of such agreement. *See Ralph Boguszewski v. Board of Education of the Borough of Woodcliff Lake, Bergen County,* 1979 *S.L.D.* 727, *aff'd* State Board 1980 *S.L.D.* 1477. Here, petitioner's contract contained a provision which permitted either party to terminate their agreement by providing the other party with 60 days written notice of such intention. By letter dated November 1, 2002, petitioner provided written notice to the Board of her intent to resign effective January 1, 2003, in full satisfaction of her statutory responsibility under *N.J.S.A.* 18A:26-10. Such notice was accepted by a resolution of the Board on November 12, 2002. Under the circumstances existing in this case, unilateral acceleration of petitioner's resignation date without payment of salary for the full 60-day notice period, whether accomplished by a district administrator, as was the case here, or even by formal board action, pursuant to *N.J.S.A.* 18A:27-4.1, as suggested by the ALJ, is impermissible and tantamount to an improper termination. That the 60-day notice provision prescribed by *N.J.S.A.* 18A:26-10 in conjunction with the parties' employment contract is equally applicable to both petitioner and the Board is clearly evidenced in *Boguszewski, supra.* which found:

> Termination, which is equally available to both employee and employer in the instant matter, must follow the precise language of petitioner's contract. The sixty-day notice provision is intended to protect both parties. Certainly the Board would not countenance a teacher who is perhaps offered a better paying position elsewhere

> to give sixty days' notice on a prescribed date and then disappear for the next sixty days thereby rendering no service to the children of the district with resulting disruption and detriment to the educational process. The Board would certainly expect the teacher to be on duty for the sixty days to better enable the Board to find an adequate replacement for the teacher while protecting the educative process for the children. Similarly, the sixty-day notice provision is intended to protect the teacher, to enable him to seek gainful employment elsewhere. The option of a shorter period of time is one that can be exercised only by mutual agreement of a board of education and the employee involved. (at 729)

The Commissioner, however, emphasizes that the entitlement possessed by this nontenured petitioner was that of compensation for the contractual term of her notice. The Board could have chosen to pay her salary without requiring performance of services. *Canfield v. Pine Hill Board of Education,* 51 *N.J.* 400 (1968), *rev'g* 97 *N.J. Super.* 483 (App. Div. 1967). *Also see N.J.S.A.* 18A:27-9.

Finally, while concurring with the general proposition of the ALJ that the Commissioner lacks jurisdiction over matters which are purely contractual in nature, such is not the case in this matter. The issue before the Commissioner here is whether the Board acted improperly or illegally with respect to its alteration of petitioner's resignation date given pursuant to *N.J.S.A.* 18A:28-10. As noted by the State Board in *B.P., on behalf of minor child, B. P. v. Board of Education of the Lenape Regional High School District, Burlington County,* decided by the State Board December 3, 2003:

> [a]lthough the Commissioner does not have jurisdiction over disputes which are purely contractual in nature, he does have jurisdiction over contractual claims which are incidental to his obligation to resolve education claims that are the subject of litigation. (Slip opinion at 3-4, citations omitted)

Accordingly, the Initial Decision of the OAL is adopted as modified above. The Bloomfield Board of Education is hereby directed to pay petitioner her full salary for the month of December 2002, less the two days compensation she previously received.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/09/04

Date of Mailing: 2/10/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

52-04

#52-04SEC

IN THE MATTER OF :

DENISE IRVIN-JOHNSON, :

WILLINGBORO TOWNSHIP BOARD :

OF EDUCATION, BURLINGTON COUNTY. :

:

COMMISSIONER OF EDUCATION

DECISION

February 11, 2004

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D06-03**
DENISE IRVIN-JOHNSON WILLINGBORO TOWNSHIP BOARD OF EDUCATION BURLINGTON COUNTY	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, Ms. Denise Irvin-Johnson is principal in the Willingboro Township school district and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its October 28, 2003 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official did not provide any reason why she failed to comply with the requirement under N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is a reprimand, especially in light of the failure to respond to the Commission's reminder letter before the September 15, 2003 deadline.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Denise Irvin-Johnson violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of a reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

AGENCY DKT. NO. 13-1/04

IN THE MATTER OF	:	
		COMMISSIONER OF EDUCATION
DENISE IRVIN-JOHNSON,	:	
		DECISION
WILLINGBORO TOWNSHIP BOARD	:	
OF EDUCATION, BURLINGTON COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission, was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 24, 2003 directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official filed the completed disclosure statement thereafter; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 12-25 and 26; and

Whereas, the above-referenced school official did not provide any reason why she failed to comply with the requirement under *N.J.S.A.* 12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend reprimand of the above-named school official in light of her failure to respond to the Commission's reminder letter before the September 15, 2003 deadline, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated January 9, 2004 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending reprimand; and

Whereas, neither the above-named school official nor anyone on her behalf submitted a response for the Commissioner's consideration; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission, and further admonishes the school official for her failure to timely file the requisite statement, in that such delay has caused administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named school official be reprimanded as a school official found to have violated the School Ethics Act.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/11/04

Date of Mailing: 2/18/04

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1, *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

50-04L

50-04

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

February 11, 2004

Mr. Dominick Theresa, *Pro Se*
P.O. Box 10777
New Brunswick, NJ 08906

Mr. Peter Starrs, Board Secretary/Business Administrator
Bridgewater-Raritan Regional Board of Education
836 Newmans Lane
P.O. Box 6030
Bridgewater, NJ 08807

Dear Parties:

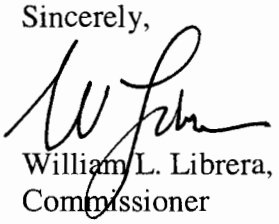
I have reviewed the papers filed by Petitioner D.T. in conjunction with his motions for stay and reconsideration of my January 20, 2004 decision in the matter entitled *D.T. and M.T., on behalf of minor child, N.T. v. Board of Education of the Bridgewater-Raritan Regional School District, Somerset County*, Agency Dkt. No. 51-2/03, Commissioner Decision #13-04, pending appeal to the State Board of Education. In support of his motion for stay, petitioner renews his arguments excepting to the decision of the Administrative Law Judge (ALJ), which was affirmed by me, and contends that several petitions newly filed by him will change the outcome of this matter. In support of his motion for reconsideration, petitioner raises similar claims and additionally alludes to newly discovered evidence of continuing violation on the part of the respondent Board of Education.

Upon such review, I have determined to deny both motions. In proceedings before the ALJ in the above-captioned matter, the Board agreed to nullify and remove all records of both the five-day bus suspension that was the subject of the appeal, as well as "any and all unresolved disciplinary matters involving N.T. which arose during the 2002-2003 school year***." (Initial Decision at 1) Therefore, notwithstanding petitioners' objections on exception, wherein they accused the ALJ and Board counsel of unethical conduct, treachery and malfeasance in allowing the Board to nullify disciplinary actions other than the one on appeal and sought a remand to the Office of Administrative Law for a hearing to give petitioners their day in court, I found that the relief sought by petitioners had been obtained and that there was no basis on which to order further proceedings. Nothing in the papers filed in conjunction with the

motions herein alters that conclusion, and petitioner has certainly not met (indeed, he does not even address) the criteria for grant of extraordinary relief set forth in *N.J.A.C.* 6A:3-1.6 and 6A:3-1.15.*

Accordingly, the motions for stay and reconsideration are DENIED, and my prior decision dismissing the above-captioned matter as moot remains in full force and effect, unless and until it may be stayed or reversed on appeal by the State Board of Education.

Sincerely,



William L. Librera, Ed.D.
Commissioner

WLL/GH/MKD/DAdtstay
c: Daniel Soriano, Esq.
Office of State Board Appeals
County Superintendent

* Pursuant to these rules and *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), an applicant for emergent relief must demonstrate irreparable harm, a settled legal right to relief, a likelihood of prevailing on the merits of the underlying matter, and a balancing of equities and interests in its favor.

53-04

#53-04SEC

IN THE MATTER OF HOWARD SEIGEL,	:	
GATEWAY CHARTER SCHOOL, HUDSON	:	COMMISSIONER OF EDUCATION
COUNTY.	:	DECISION

February 11, 2004

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D24-03**
HOWARD SEIGEL GATEWAY CHARTER SCHOOL HUDSON COUNTY	:	**RESOLUTION FOR FAILING TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission; and

WHEREAS, Mr. Howard Seigel is a member of the Gateway Charter School Board of Trustees and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official's reply to the Order to Show Cause indicated that he had submitted his disclosure statement to the Board secretary and was not aware that the form had not been filed; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at is October 28, 2003 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal for failure to file his disclosure statement; and

WHEREAS, the County Superintendent's Office advised that as of October 28, 2003 the disclosure form had not been filed; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the completed disclosure statement before the Commission's issuance of the Order to Show Cause; and

WHEREAS, the appropriate penalty for the violation is a reprimand.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Howard Seigel violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of a reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 28, 2003

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

AGENCY DKT. NO. 16-1/04

IN THE MATTER OF HOWARD SEIGEL,	:	
GATEWAY CHARTER SCHOOL, HUDSON	:	COMMISSIONER OF EDUCATION
COUNTY.	:	DECISION

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend sanction of the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2003 for school officials in office since January 30, 2003, or 30 days from swearing in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on September 5, 2003, indicating that if the completed statement was not filed by September 15, 2003, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 24, 2003 directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official replied to the Order to Show Cause by indicating that he had submitted his disclosure statement to the Board secretary and that he was unaware the form had not been filed; and

Whereas, the County Superintendent's Office advised the Commission that as of October 28, 2003, the form had still not been filed; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission found that the above-named school official was given ample opportunity to provide the completed disclosure statement before the Commission's issuance of the Order to Show Cause; and

Whereas, the Commission voted on October 28, 2003 to recommend reprimand of the above-named school official; and

Whereas, by letter dated January 9, 2004 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending reprimand; and

Whereas, no comments were received from the above-named school official; and

Whereas, the Commissioner recognizes that failure to abide by the requirements of the School Ethics Act in a timely fashion causes administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be reprimanded for his violation of the School Ethics Act.*



COMMISSIONER OF EDUCATION

Date of Decision: 2/11/04

Date of Mailing: 2/18/04

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

54-04

54-04

D.N. AND J.J., on behalf of minor child, J.J.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY AND KELLY A. WATERS, ESQ.,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning parents of student attending Category 1 schools in the 2002-03 school year sought an order citing the Board for violations of the public school choice option of the No Child Left Behind Act (NCLBA) and directing the Board to transfer their son from School #17 to School #19 under the provisions of that Act. The Board alleged petitioners had no right to challenge the law in a private lawsuit.

The Commissioner provided petitioners an extended opportunity to answer respondents' motions to dismiss. Petitioners, however, failed to respond. Accordingly, the Commissioner could have dismissed the appeal solely on petitioners' failure to prosecute their appeal, but the Commissioner determined that it was both in the public interest and a matter of judicial efficiency to address whether appeals of this nature with respect to enforcement of the provisions of NCLBA may be considered by the Commissioner.

Upon review, the Commissioner, citing the 2003 U.S. District Court decision in *Association of Community Organizations for Reform Now et al. v. New York City Department of Education et al.,* concluded that since the NCLBA does not provide for a private right of action, there is no basis on which the Commissioner may consider this matter. The Commissioner granted the Motions to Dismiss and dismissed the Petition of Appeal.

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.

February 11, 2004

AGENCY DKT. NO. 342-9/03

D.N. AND J.J., on behalf of minor child, J.J.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY AND KELLY A. WATERS, ESQ.,	:	DECISION
RESPONDENTS.	:	

This matter comes to the Commissioner by way of a Petition of Appeal, filed September 15, 2003, wherein petitioners seek an order citing the Board for violations of the public school choice option of the No Child Left Behind Act (NCLBA), specifically 34 CFR 200.44 and 34 CFR 200.32, and directing the Board to transfer their son from School #17 to School #19 under the provisions of that Act. Petitioners claim that the Elizabeth School District did not provide the required public school choice option to parents of students attending Category 1 schools in the 2002-03 school year and claim that the Board continues to deny parents their rights to choices of eligible schools. (Petition of Appeal at 1) Petitioners aver that such options must be made available to parents prior to the first day of the school year and that, if more than one choice is available within the district, then the district must provide more than one choice to transfer students. (*Ibid.*) Petitioners further aver that the Board did not provide options to parents prior to the first day of the school year and did not provide more than one choice of schools for parents wishing to transfer their children and, thus, the Board violated 34

CFR 200.44 of the 2001 NCLBA by not providing public school choice for the 2002-2003 school year as dictated by 34 CFR 200.32. (*Id.* at 6)

On October 6, 2003, the Board filed its Answer and both the Board and respondent Waters filed Motions to Dismiss. The Board claims that, by the letters sent on August 29, 2003 and on September 12, 2003, it complied with the requirement to offer petitioners an option to transfer their son to another school. (Board's Answer and Motion to Dismiss at 4) Moreover, citing *Association of Community Organizations for Reform Now et al. v. New York City Department of Education et al.,* 269 F. Supp. 2d 338 (SD NY 2003), the Board asserts that "the Court held that parental complaints about failures to provide appropriate notices and to follow other requirements of the law could not be challenged in a private lawsuit." (*Id.* at 2-3) Thus, the Board proffers, petitioners have no right to bring this action and no relief can be granted. (*Id.* at 4) Likewise, pointing to the same case, Respondent Waters claims in her Motion to Dismiss that this matter should be dismissed for failure to state a claim upon which relief can be granted as "the law under which Petitioners are attempting to proceed does not provide for a private right of action." (Respondent Waters' Motion to Dismiss at 1-2) Additionally, Respondent Waters asserts that she is not a proper party to this action in that: 1) "her involvement in this matter consisted of nothing more than counsel to the Board by advising the Board on the dimensions of the NCLBA;" 2) her "interaction with one of the Petitioners on behalf of the Board does not create a cause of action upon which liability can be assessed;" and 3) "[p]roviding advice to the Board, particularly when a new law is involved, does not create liability." (*Id.* at 2) Finally, Respondent Waters argues that, even assuming the viability of petitioners' claim, the case should be dismissed as moot because, notwithstanding petitioners' dissatisfaction with the timing of the notice and of the Board's action, petitioners have now been

provided with more than one option under the parental choice provision of the NCLBA.[1] (*Id.* at 4)

By letter of October 7, 2003, the Director of the Bureau of Controversies and Disputes acknowledged receipt of the Motions to Dismiss and requested that petitioners submit memorandums of law or letter briefs in response to the respective motions setting forth their legal arguments as to why each of the motions should not be granted and why the petition in this matter should not be dismissed. Additionally, petitioners were requested to respond to the Board's and respondent Waters' contentions in their respective motions that the substance of petitioners' complaint had been satisfied. Petitioners were, therefore, provided 20 days from receipt of the letter to respond to the motions or to submit a letter withdrawing their appeal, if their complaint had been satisfied. (Letter from the Director of the Bureau of Controversies and Disputes of October 7, 2003)

When no response was received from petitioners, by letter of November 21, 2003, sent via certified and regular mail, the Director of the Bureau of Controversies and Disputes provided petitioners a final opportunity to respond to the pending Motions to Dismiss and advised petitioners that failure to respond to this request within the 10 days provided "may result in your petition being dismissed for failure to prosecute your appeal." (Letter from the Director of the Bureau of Controversies and Disputes of November 21, 2003) By letter of December 15, 2003, petitioners claimed that they had not received the October 7, 2003 letter until November 29, the same day that they aver the November 21, 2003 letter was received.[2] Accordingly,

[1] By letter of October 20, 2003, the Board advised the Commissioner that the Elizabeth Board had offered petitioners another choice of school for transfer. (Board's Letter of October 20, 2003)

[2] The "green" certified mail receipt indicates that petitioners received the November 21, 2003 letter on November 28, 2003.

petitioners requested, and were granted, an extension until January 5, 2004 to file their Answers to the pending motions. Notwithstanding two opportunities to file Answers to the motions and an extension of time within which to do so, petitioners have not submitted any response to the motions nor have they notified the Bureau of Controversies and Disputes that they wish to withdraw their appeal. Accordingly, the Commissioner could dismiss the within appeal solely on petitioners' failure to prosecute their appeal. However, in that there is a possibility of future appeals to the Commissioner requesting enforcement of the provisions of the NCLBA, 20 U.S.C. §6301 *et seq.*, the Commissioner has determined that it is both in the public interest and a matter of judicial efficiency to address whether appeals of this nature with respect to enforcement of the provisions of the NCLBA may be considered by the Commissioner.

Upon a thorough review of this question, the Commissioner agrees with the Board and Respondent Waters that this question was answered in the 2003 U.S. District Court decision in *Association of Community Organizations for Reform Now et al, supra,* wherein plaintiffs, parents of school children residing in New York, claimed that respondent school districts had violated the NCLBA and sought to compel compliance with various provisions of that Act. Relying on the Supreme Court decision in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), the District Court found that:

> [T]he **NCLBA** does not reflect the clear and unambiguous intent of Congress to create individually enforceable rights. The statute lacks the necessary rights creating language, because it is focused on the regulation of states and local educational agencies, and focuses on improving the condition of children collectively, and therefore lacks the individual focus suggestive of Congressional intent to create personal rights. Finally, the enforcement scheme of the statute indicates a Congressional intent to centralize enforcement and thereby to avoid the possibility of individual lawsuits and multiple interpretations of the provisions of the Act. *Association of Community Organizations for Reform Now et al. v.*

New York City Department of Education et al., 269 F. Supp. 2d 338, 347.

In reaching the above conclusion, the District Court specifically pointed out that "[t]he 'Penalties' section of the NCLBA outlines the procedures available in the event of noncompliance by States with NCLBA provisions," but "contains no procedure for parents or students to seek judicial, administrative, or any other remedies for alleged noncompliance with the dictates of the Act." (*Id.* at 342) The District Court also pointed out that "[t]he NCLBA contains no provision for individuals to enforce the notice, transfer or SES provisions--there are no administrative or judicial procedures for any individual to use. Rather the statute contemplates that any enforcement actions for violations of the statute by states be taken by the Secretary of Education and vests such authority solely in the Secretary." (*Id.* at 345)

In that the NCLBA does not provide for a private right of action, therefore, the Commissioner concludes that there is no basis on which he may consider this matter. For the foregoing reasons, respondents' Motions to Dismiss are hereby granted, and the petition is hereby dismissed with prejudice. Given this result, it is unnecessary to address the other bases for respondents' motions.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 2/11/04

Date of Mailing: 2/18/04

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

56-04

56-04E

J.G., on behalf of minor child, Q.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD AND STEPHANIE REID, OCEAN COUNTY,	:	DECISION
	:	
RESPONDENT.	:	

February 17, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10073-03

AGENCY DKT. NO. 466-12/03

J.G., on behalf of minor child,

Q.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD AND STEPHANIE REID, OCEAN COUNTY,

Respondents.

J.G., grandmother of Q.B., petitioner

Michael I. Inzelbuch, Esq., for the respondent

Record Closed: December 29, 2003 Decided: December 31, 2003

BEFORE **JOHN SCHUSTER III**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, J.G. (petitioner), on behalf of her grandson, Q.B., filed a petition for emergency relief with the New Jersey Department of Education. The relief sought is a stay of the remaining period of the ten-day out-of-school suspension imposed by the Lakewood Township

Board of Education (respondent) upon Q.B. The matter was transmitted to the Office of Administrative Law (OAL) on December 22, 2003 without answer 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.* The issue to be decided in this case is whether or not the remaining portion of the ten-day suspension imposed upon the student should be stayed as being excessive.

FACTUAL DISCUSSION AND LEGAL ANALYSIS

On December 11, 2003, while in the class being taught by one Stephanie Reid, Q.B. stated "I'll cut you're a-- up and stuff you into a mattress like drug money." Q.B. says that this is a lyric to a rap song and while he does not deny making that statement he says it was in the context of discussing the lyrics with another student. The respondent's position is that Q.B. made that statement directly to Ms. Reid, his teacher. In addition, the respondent alleges he immediately stated thereafter "Oh wait you're too big to fit inside a mattress." Petitioner denies making that statement, but Ms. Reid claims it was made and clearly directed at her. She found this offensive because she is not of petite proportion. The following day she discussed the matter with her mentor and on December 15, the next school day, she reported the incident to the assistant principle of Lakewood High School. Ms. Francis, the assistant principle, investigated the matter and imposed a ten-day out-of-school suspension on Q.B. for making these statements which the respondent considers to be of a threatening and inappropriate nature. On that evening, J.G. attended a regularly scheduled board of education meeting objecting to the suspension and a superintendent's hearing on the matter was scheduled for Wednesday, December 17, 2003. The hearing was held before Superintendent of Schools, Dr. Ernest J. Cannava, who upheld the suspension.

The following are the terms of the discipline. Q.B. was to serve an out-of-school suspension for the dates December 16 through 19 and December 22 and 23, 2003 as well as January 5 through 8, 2004 for a total of ten days. He would be able to return to school on January 9, 2004 and he is being moved from Ms. Reid's English class to another class. The ten-day suspension would be considered excused absences and the reference of a threat would not be part of Q.B.'s permanent record. In addition, Q.B. was given work assignments to do during the period that he would not be in school.

N.J.A.C. 1:6A-12.1e provides that at the emergency relief hearing the judge may allow the affidavits to be supplemented by testimony and/or oral argument. The judge may order emergency relief if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying the petition'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.

Petitioner is alleging that Q.B.'s suspension was excessive for the conduct at issue and resulted from teacher bias. In addition, petitioner claims that the suspension was imposed without appropriate due process. As to the latter charge an investigation was conducted by Assistant Principle Francis, which included an interview with Q.B. and four students who witnessed the incident. Ms. Francis after that investigation made a finding that the threatening/inappropriate comments were made by Q.B. and they were directed at his teacher, Ms. Reid. Since Q.B. participated in that process and based on all the facts, Ms. Francis's conclusion was not arbitrary, capricious or without due process.

Petitioner has not submitted any evidence to support the allegation of teacher bias. She has, however, severely criticized Ms. Reid's teaching style and classroom activities.

Petitioner further alleges that Q.B.'s suspension is excessive because she does not believe Ms. Reid was truly threatened. To substantiate that position, J.G. stated that if Ms. Reid felt immediately threatened she would have removed Q.B. from her English class at the time of the incident and not waited a day or two to bring this matter to the attention of the assistant principle. However, a statement from Ms. Reid indicated that she felt under the circumstances that the best way to handle the situation was to let it go for the time being so that Q.B. would get away from

her and not have an immediate escalation of the situation. Under these circumstances, both actions would have been appropriate and it was just a matter of choice as to which option Ms. Reid chose to implement.

In spite of Q.B.'s allegation that he did not direct the offensive comments to Ms. Reid, I **FIND** that they were directed at her and if not threatening were totally inappropriate and by making those comments he rightfully subjected himself to disciplinary action.

J.G.'s position is that Q.B. will suffer irreparable harm if the suspension is continued for the four days in January 2004. Specifically, she says that the suspension will be shown as part of his permanent record. The District responds by indicating the suspension is not a cause for irreparable harm because the suspension is being shown on Q.B.'s permanent record as "excused absences" as opposed to a suspension and there is no reason shown on the permanent record for those absences. In other words, there will be no indication on Q.B.'s permanent record that he threatened any member of the staff or made inappropriate comments. I also **FIND** that Q.B.'s education process will not be irreparably harmed because he has been given assignments to do during his suspension so that he will not miss any school work during that time.

For the reasons set forth above, I **FIND** that Q.B. will not suffer any irreparable harm as a result of his suspension and therefore the petitioner has not met her burden for me to order a stay of the out-of-school suspension imposed on Q.B. Since the first burden of proof for granting emergent relief has not been met, there is no reason to determine whether petitioner has met the other three requirements set forth in *N.J.A.C.* 1:6A-12.1(e) necessary for the granting of an emergent relief application.

CONCLUSION

Based on the foregoing, I **CONCLUDE** that petitioner has failed to show that she is entitled to emergency relief staying the remaining days of the ten-day suspension imposed upon Q.B. I further **CONCLUDE** since the only relief sought is a stay of the balance of the out-of-school suspension and as a result of me denying that relief, I **FIND** this decision concludes this matter.

ORDER

For the reasons stated above, it is hereby **ORDERED** that petitioner's request for emergent relief 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 (45) 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 (13) 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, 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 31, 2003
DATE

JOHN SCHUSTER III, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

1-2-04
DATE

Mailed to Parties:

JAN 6 2004
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

OAL DKT. NO. EDU. 10073-03
AGENCY DKT. NO. 466-12/03

J.G., on behalf of minor child, Q.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD AND STEPHANIE REID, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge, for the reasons clearly stated in his Initial Decision, that petitioner's application for emergent relief is appropriately denied and that such denial effectively concludes this matter.

Accordingly, the recommended decision of the OAL is adopted and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/17/04

Date of Mailing: 2/18/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

58-04

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,

PETITIONER,

V.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board of Education sought reversal of the final decision of the NJSIAA, which declared student J.W. ineligible to play football because he transferred to the Board's district for athletic advantage, and further required the Board to forfeit its victory over Colonia High School as a result of J.W.'s participation in that game.

Mindful that the Commissioner's scope of review in NJSIAA matters is appellate in nature, the Commissioner was satisfied that the NJSIAA afforded both the Board and J.W. the full measure of due process to which they were entitled, and that the decision of the NJSIAA was supported by the record and was not not arbitrary, capricious or unreasonable. 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.

February 18, 2004

AGENCY DKT. NO. 397-11/03

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,

PETITIONER,

V.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, Anthony B. Vignuolo, Esq. (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C.)

For Respondent, Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter came before the Commissioner of Education on November 5, 2003, through the filing of a Petition of Appeal by the North Brunswick Board of Education ("North Brunswick" or "Board"). Therein, the Board sought reversal of the final decision of the New Jersey State Interscholastic Athletic Association ("NJSIAA") declaring J.W., a student newly registered in the District, ineligible to play football because he transferred from the Hillsborough School District ("Hillsborough') for athletic advantage and requiring North Brunswick to forfeit its victory over Colonia High School ("Colonia") in a September 26, 2003 game in which J.W. had participated. The petition was accompanied by an application for emergent relief seeking to stay the NJSIAA's decision pending determination on the merits, to which the NJSIAA responded with a submission including, for the sake of expediency, the entire record of the proceedings on appeal. (*cf.* *N.J.A.C.* 6A:3-7.2) Following denial of North Brunswick's emergent application by the Deputy Commissioner on November 13, 2003, the parties were directed to proceed with briefing on the merits in accordance with *N.J.A.C.* 6A:3-7.3, and, the parties' briefs being duly submitted, the record

before the Commissioner closed on December 11, 2003 with North Brunswick's submission of a letter of clarification regarding certain terminology used in its brief.[1]

OPERATIVE FACTS

The following facts were found by the NJSIAA, as stated in its October 17, 2003 decision of the Eligibility Appeals Committee (EAC) at 7-10:

> 1. J.W. was an outstanding member of the varsity football team at Hillsborough High School for his first three years at that school. In fact, according to the Hillsborough [c]oach, he was the best player on that school's football team. He received All County and All Conference honors in 2002 in football.
>
> 2. The Hillsborough High School Athletic Department has [an] "athletic contract," which is signed by each student-athlete and his or her parent or guardian before each season, recognizing that it is a "privilege to participate in all athletic activities" at the school and agreeing further to obey certain regulations established by the school Athletic Department and the NJSIAA, including satisfactory "citizenship" and an agreement to "at all times...conduct myself in an orderly manner, both on and off the school grounds, in such a way as to bring credit to my team, school and family."
>
> 3. J.W. had been involved in a few out of school incidents involving the police prior to the Spring of 2003.
>
> 4. In the Spring of 2003, J.W. was suspended from the baseball team in Hillsborough because of out of school conduct involving the police. At that time, he was specifically warned by the Hillsborough football coach that any further infractions would lead to his removal from the football team.
>
> 5. In the late Spring of 2003, J.W. was accused of criminal conduct by a female student in the Hillsborough High School. From late June 2003 until August 25, 2003, J.W. participated in weight training at Hillsborough, followed by actual practice.
>
> 6. The Hillsborough football coach excused J.W. from practice on August 25 because his case was to be tried that day in juvenile court in Somerset County. In a discussion at that time, the Hillsborough coach advised if he were found guilty of the charges, that this would be the "last straw" and he would be removed from the team.

[1] The Board indicated, in response to NJSIAA's observation (Brief at 2, note 1) that a "Motion to Vacate" was not appropriate in the present context, that it had, by use of that term, merely intended to appeal the underlying NJSIAA determination as set forth in *N.J.A.C.* 6A:3-7.1 *et seq.*

7. On August 25, J.W. was found guilty of four counts in juvenile court. As part of that disposition, he was instructed by the court not to have any contact with the accusing female student.

8. On August 26, the Hillsborough coach advised J.W. that he was removed from the team because of the disposition in the court. The coach stated that he would assist the young man and write a letter on his behalf to the judge prior to sentencing, which was then pending.

9. Within a few days of advising J.W. he was removed from the team, the Hillsborough coach spoke separately to both the mother and father of J.W. and explained that he had been removed from the team because of the problems in court and again, offered assistance in writing a letter on the young man's behalf. In one of those conversations, the coach suggested to J.W.'s mother that she should consider putting her son in a "military school."

10. On August 29, 2003, the parents of J.W. withdrew him from Hillsborough High School and registered him in North Brunswick High School. They established a residence in North Brunswick at the home of J.W.'s sister.

11. Shortly after registering at North Brunswick High School, J.W. approached the school's football coach, Mark Zielinski, and asked if he could be a member of the football team.

12. After that first contact with J.W., Coach Zielinski then called the Hillsborough football coach since it appeared unusual that such a skilled player would be wanting to transfer prior to his senior year.

13. In a conversation prior to the first game for any school on September 12, Coach Mantz advised Coach Zielinski that J.W. was not a part of his program any more and that he had been convicted on four counts in court.

14. Coach Zielinski then sought out J.W., who informed him that he had in fact been convicted on four counts.

15. Coach Zielinski then conferred with his Athletic Director, Aaron Speller, and Assistant Principal Sal Mistretta and they concluded that J.W. was in fact eligible to participate on the North Brunswick High School football team. Mr. Speller testified that the only issue they were concerned about was the actual residence of the student, which they were satisfied had been verified.

16. Although transcripts and other information had been submitted by Hillsborough to North Brunswick, there was no written information transmitted concerning the disciplinary action taken by the athletic program at the former school.

17. J.W. was a starter for the entire football game on defense on September 12, 19 and 26. The September 12 and 19 contests were lost but North Brunswick defeated Colonia on September 26.

18. The Colonia Coach and Athletic Director heard about "rumors" relating to the ineligibility of J.W., which [were] supplemented by anonymous e-mails directed to the Colonia football coach prior to the September 26 football game. They did not do anything prior to the game because they believed they could not verify "rumors."

19. After North Brunswick defeated Colonia on September 26, the Colonia coach and athletic director received further information that J.W. might have been ineligible to participate in the game. The school principal then contacted the NJSIAA leading to a hearing before [the NJSIAA Eligibility Appeals] Committee.

Subsequently, as recounted in the Board's petition:

On or about October 8, 2003, the NJSIAA [Eligibility Appeals Committee] held a full hearing on the matter to determine whether J.W. was eligible to participate in school athletics and, if ineligible, whether North Brunswick's September 26, 2003 victory over Colonia should be forfeited because of his participation in the game.

The NJSIAA ruled[2] that J.W. was ineligible to participate in school athletics because he transferred for competitive advantage, finding it was J.W.'s intent to nullify the punitive actions taken by Hillsborough High School against him. The NJSIAA further ruled that the victory over Colonia should be forfeited because of J.W.'s participation in the game. (Petition of Appeal at 3-4)

On November 5, 2003, North Brunswick filed the instant appeal, which then proceeded as set forth above.

NORTH BRUNSWICK'S POSITION

North Brunswick argues that the NJSIAA applied the wrong standard in determining whether the District had appropriately investigated J.W.'s eligibility prior to permitting him to participate in interscholastic football. The Board contends:

The [NJSIAA] incorrectly applied a standard requiring "no doubt" in investigating a student-athlete's eligibility, which was cited from the NJSIAA Interpretive Guidelines §4 on "Observance of Eligibility Standards and

[2] NJSIAA issued its written decision on October 17, 2003, but the parties were given an oral decision within a day of the hearing. (Hearing Transcript at 132, NJSIAA Brief on Emergent Relief at 14)

> Appeals." As this section does not pertain to the enforcement of eligibility standards, §6, which interprets enforcement as stated in Bylaw Article X, §1 should have been applied. The NJSIAA should have applied the "make certain" standard set forth in Bylaw Article X, §1 and interpreted in §6 of the guidelines, which does pertain to the enforcement of eligibility standards. Under this standard a member school is expected to "make certain" by performing due diligence. (Board's Brief on the Merits at 2, citations omitted)

The District proffers that it *did* "make certain" J.W. was eligible to participate by "performing due diligence." It argues that it initiated contact with Hillsborough, the staff of which "never completely and clearly advised" that J.W. was removed from the team for disciplinary reasons;[3] that it questioned J.W. and his family, who gave a plausible explanation for J.W.'s transfer; and that it reviewed J.W.'s records from Hillsborough, which, in violation of law did not indicate the disciplinary action taken against J.W. with respect to the football team.[4] Thus, North Brunswick avers, it made all the appropriate inquiries and received responses that "relieved its concerns and at no time suggested a disciplinary removal." (Board's Brief on Emergent Relief at 4-5, quotation at 5; Board's Brief on the Merits at 5-10) The Board having been duly diligent, it argues, NJSIAA should not have imputed the EAC's own doubts to the Board and used this as a basis to require forfeiture. If the Board carried out its duty to make certain a student is eligible, the Board proffers, "then the member school has fulfilled its obligation and should not be penalized for undetectable information that is unknown to the member school when it found the student-athlete eligible or for suspicious

---

[3] The Board particularly objects to NJSIAA's failure to accord sufficient weight to the Hillsborough coach's statement to the North Brunswick coach to the effect that if J.W. wanted to play for North Brunswick, that was North Brunswick's call; it further objects to the lack of specificity in the Hillsborough coach's statements in response to the North Brunswick coach's questioning. (Board's Brief on the Merits at 5, 7) The Board also notes that it, unlike Hillsborough, does not discipline student-athletes for conduct unrelated to school behavior, and that Hillsborough's policy was never communicated to North Brunswick's coach. (*Id.* at 6)

[4] The Board complains that prior to J.W.'s transfer, the principal took no official action to suspend him from the team and that Hillsborough does not, as a matter of policy, include actions related to athletics in discipline records. (Board's Brief on the Merits at 6, 9)

information that is satisfied through investigation." (Board's Brief on the Merits at 3) The Board explains:

> North Brunswick was diligent in its pre-season determination finding J.W. eligible to participate in interscholastic competition. This determination should not be discarded and penalized by a contrary NJSIAA finding, occurring over a month later and supplemented with additional information that was unavailable to North Brunswick at the original time of determination. At the time J.W. participated in athletics, North Brunswick made certain he was eligible as required by *NJSIAA Bylaw Article* X, §1, and yet, in its decision, the NJSIAA found that there was "overwhelming circumstantial evidence" indicating eligibility was questionable regardless of North Brunswick['s] due diligence. This is not the standard as set forth in *Bylaw Article* X, §1, but rather the suggestion in the *Interpretive Guidelines* §4, which is unrelated to the enforcement of eligibility standard found in §6.
>
> Application of the *Article* X, §1 "make certain standard" relieved petitioner of any responsibility once its due diligence failed to reveal any suspicious circumstances.***The burden of inquiry of "no doubt" as applied by NJSIAA improperly imposed a burden on the petitioner not required by law. The Commissioner must now act to correct this injustice. (Board's Brief on the Merits at 3-5, citations omitted)

The Board concludes by reiterating that it raised, acted on, and satisfied all appropriate concerns upon J.W.'s senior-year transfer into the District, and that NJSIAA's decision finding the Board culpable nonetheless places unreasonable demands on a district to "make certain by not only requiring it to investigate the suspicious circumstances but also to investigate their investigations." (Board's Brief on the Merits at 9-10)[5]

NJSIAA'S POSITION

The NJSIAA first stresses that member schools adopt NJSIAA regulations as their own, and that the NJSIAA has for over two decades had a policy, incorporated into its *Handbook* since the 1984-85 school year and into its Bylaws since 1987, that games won using an ineligible player must be forfeited. It further notes that since 1991-92, its

[5] Although the Board sought reversal of the entirety of the NJSIAA's decision, which addressed both J.W.'s eligibility and the question of penalty against the Board for using an ineligible player, the Board's arguments on appeal are directed exclusively to the latter.

Interpretive Guidelines have clearly indicated that "*if a school has any doubt whatsoever about the eligibility of a student, it should contact the NJSIAA Headquarters for an initial interpretation* and, if necessary, submit a formal request to the NJSIAA for an eligibility ruling by the Eligibility Committee prior to the beginning of each of the sports seasons.***A *school should never allow a student to participate in interscholastic sports if it has any doubt whatsoever as to that student's eligibility and until an interpretive ruling has been issued by [the NJSIAA]. Otherwise, the school risks imposition of appropriate penalties for the use of an ineligible student, including the forfeiture of games won by that school utilizing such a student....*" (emphasis in text) (NJSIAA Brief on the Merits at 3-4, quoting *NJSIAA Handbook* at 66-67; NJSIAA Brief on Emergent Relief at 2-4).

The NJSIAA next emphasizes, citing *D.J.K. and H.J.K. v. NJSIAA*, 1987 *S.L.D.* 259 and *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU)182, 188, that the Commissioner's scope of review over its decisions is appellate in nature, so that where due process has been granted and the record provides an adequate basis for the NJSIAA's decision, the Commissioner may not overturn that decision even if he might have reached a different result in a *de novo* review. (NJSIAA Brief on the Merits at 7-8; NJSIAA Brief on Emergent Relief at 18-19) The NJSIAA notes that the EAC promptly held a hearing on J.W.'s eligibility, which was attended by representatives from North Brunswick, Hillsborough and Colonia, as well as by J.W.'s parents and their counsel,[6] and that the hearing took well over three hours and resulted in a 12-page decision setting forth with specificity the basis for the EAC's findings. (NJSIAA Brief on the Merits at 5, 8-9; NJSIAA Brief on Emergent Relief at 19-20) The NJSIAA further maintains that its decision was based on substantial credible evidence in the record. Specifically, it points to the extensive background

[6] J.W. was invited to appear, but elected not to do so.

information in the record regarding J.W.'s history and the athletic contract signed by both J.W. and his parents indicating that further trouble with the law would lead to removal from the team; to the North Brunswick coach's statements to the effect that he was suspicious of J.W.'s status prior to the beginning of the football season based on the timing of J.W.'s arrival in the District and how good a player he was; to the fact that the Hillsborough coach undisputedly informed the North Brunswick coach that J.W. was no longer part of Hillsborough's football program and had been in trouble with the law; that J.W.'s parents clearly indicated, as a consequence of the conversation between the Hillsborough and North Brunswick coaches, that J.W. had been convicted on four counts in a criminal matter; that J.W.'s father had expressed his son's interest in playing football to North Brunswick officials prior to J.W.'s transfer there; and that J.W. transferred to North Brunswick within days of his removal from the Hillsborough football team. (NJSIAA Brief on the Merits at 5-6, 11-16) In response to the Board's emphasis on the Hillsborough coach's statement that to the effect that the decision to permit J.W. to play rested with the North Brunswick coach, the NJSIAA points to its clear rules and to the North Brunswick coach's statement that he does not rely on other coaches to ascertain those rules. (*Id* at 10-11, 14) Thus, the NJSIAA concludes, the Board cannot possibly meet its burden of demonstrating that the NJSIAA's decision was arbitrary, capricious, unreasonable or unsupported by substantial credible evidence in the record as a whole. (*Id* at 10, 16)

COMMISSIONER'S DETERMINATION

The NJSIAA is a voluntary association of public and nonpublic schools, organized pursuant to *N.J.S.A.* 18A:11-3, to oversee athletics for its member schools in accordance with its Constitution, Bylaws, rules and regulations, which are approved by the Commissioner of Education and adopted annually by the member schools. Upon adoption by

the member schools, these rules and regulations are deemed school policy and are enforced by the internal procedures of the NJSIAA.

It is well-established that the Commissioner's scope of review in matters involving NJSIAA determinations is appellate in nature. *N.J.S.A.* 18A:11-3; *N.J.A.C.* 6A:3-7.4; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a finding that the Association applied the rules in a patently arbitrary, capricious or unreasonable manner. *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Nor may the Commissioner substitute his judgment for that of the NJSIAA, *even if he were to decide differently in a de novo hearing,* where due process has been provided and where there is adequate basis for the decision reached by the NJSIAA Committees. *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259; *see, also, N.J.A.C.* 6A:3-7.4(a). The scope of the Commissioner's review in NJSIAA matters has also been codified to provide notice of this standard to the public and regulated parties:[7]

> 1. If the NJSIAA has granted a petitioner due process and its decision is supported by sufficient credible evidence in the record as a whole, the Commissioner shall not substitute his ***judgment for that of the NJSIAA, even if the Commissioner might judge otherwise in a *de novo* review.
>
> 2. The Commissioner shall not overturn NJSIAA's application of its own rules absent a demonstration by the petitioner that such rules were applied in an arbitrary, capricious, or unreasonable manner. *N.J.A.C.* 6A:3-7.4(a).

The burden of proof that an action was thus improper rests with the person or entity challenging the decision. *Kopera v. West Orange Board of Education*, 60 *N.J. Super.*

[7] *See* 31 *N.J.R.* 4173(a) and 32 *N.J.R.* 1177(a).

288, 297 (App. Div. 1960). It must be remembered that the arbitrary, capricious or unreasonable standard of review is extremely narrow in its scope and, consequently, imposes a heavy burden on those who challenge determinations of the NJSIAA. The standard, as defined by the New Jersey Courts provides:

> 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 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.*** (citations omitted) *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).

Upon careful consideration of the record of this matter, and mindful of the applicable standard of review, the Commissioner is satisfied that the decision of the NJSIAA finding J.W. ineligible to play football and requiring North Brunswick to forfeit its victory over Colonia High School as a result of permitting him to participate in the game was not arbitrary, capricious or unreasonable. The Commissioner is further satisfied that the EAC's findings of fact, credibility determinations and weighing of evidence, as well as the inferences and conclusions drawn from these, were substantially supported by the record and reached after affording both the Board and J.W. the full measure of due process to which they were entitled.

With regard to North Brunswick's arguments on appeal, the Commissioner finds entirely without merit the Board's claim that the requirement of the *Interpretive Guidelines* at § 6, to "make certain" of a player's eligibility, and the directive at § 4, to obtain an NJSIAA determination if there is "any doubt whatsoever" about such eligibility, refer to different situations and establish different standards, so that the NJSIAA erred in applying the § 4 standard rather than the § 6 standard in deciding the instant matter. To the contrary, the

Commissioner finds the two sections to be both clear and consistent in their instructions to member districts, and he finds it entirely reasonable and in accordance with the *Guidelines* for the NJSIAA to have concluded, under all of the circumstances herein, that, although North Brunswick did, in fact, undertake inquiries with regard to J.W.'s eligibility (the "due diligence" referenced by the Board on appeal), those inquiries revealed information sufficient to preclude certainty as to the young man's status, thereby requiring further action by the District before permitting him to play.

The Commissioner further finds reasonable the NJSIAA's determination to reject any reliance by North Brunswick on Hillsborough's purported failure to comply with pupil record law, since nothing in the controlling statute, *N.J.S.A.* 18A:36-19a, requires on its face that actions relating to athletic programs be included in the disciplinary records forwarded to a new district upon transfer of a student, and it is undisputed that Hillsborough's policy is not to include such information in its pupil records. Moreover, to any extent that Hillsborough may have had information in its possession pursuant to *N.J.S.A.* 2A:4A-60 at the time J.W.'s records were transferred (and the record on appeal does not clearly establish that it did), had notice of that information been provided to North Brunswick, such notice would have revealed substantially what the North Brunswick coach had already learned through conversations with J.W. and his parents. The Commissioner observes in this regard that J.W.'s involvement with the law is not, *in itself*, the cause of his inability to participate in the North Brunswick football program, since that District's policy is generally not to penalize student-athletes for infractions occurring outside school; rather, J.W.'s ineligibility is based

on his seeking to evade the consequences of his removal from Hillsborough's team by transferring to another district. [8]

Accordingly, the North Brunswick Board of Education having failed to sustain its burden of establishing that the NJSIAA's decision in this matter was arbitrary, capricious, unreasonable or contrary to law, the Commissioner upholds that decision and dismisses the Petition of Appeal.

IT IS SO ORDERED.[9]

COMMISSIONER OF EDUCATION

Date of Decision: 2/18/04

Date of Mailing: 2/20/04

[8] In addition to the arguments set forth above, the NJSIAA preliminarily urged that this matter be found moot upon the Deputy Commissioner's denial of emergent relief, since tournament rankings had already occurred at that point and, by the time briefing was concluded, the football season would effectively be over. (NJSIAA Brief on the Merits at 6-7) However, because the Board did not have an opportunity to argue this point, the Commissioner declines to reach it and instead addresses the merits of the appeal.

[9] This decision, as the final decision of the State administrative agency, may be appealed to the Superior Court. *N.J.S.A.* 18A:11-3, *N.J.A.C.* 6A:3-7.5

59-04

MERCER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

February 23, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT

OAL DKT. NO. EDU 939-03

AGENCY REF. NO. 20-1/03

MERCER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,

Respondent.

Dennis M. DeSantis, Esq., for petitioner (Destribats, Campbell, DeSantis, Magee & O'Donnell, attorneys)

Rocky Peterson, Esq., for respondent (Hill Wallack, attorneys)

Record Closed: October 23, 2003 Decided: January 5, 2004

BEFORE **ANA C. VISCOMI,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case on March 20, 2003, pursuant to *N.J.S.A.* 52:14B-1 to –13. The matter was scheduled for several telephone conferences that were adjourned for various reasons. The matter

was then scheduled for a telephone conference on June 24, 2003 and was heard at that time. The parties continued their negotiations and indicated they had reached a settlement. The parties prepared a written agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1)

I have reviewed the record and the terms of the 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 **CONCLUDE** that this agreement meets the requirement 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 (45) 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 5, 2004
DATE

ANA C. VISCOMI, ALJ

Receipt Acknowledged:

1-7-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 8 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

/jck

EXHIBITS

Jointly Submitted

J-1 Settlement Agreement

DESTRIBATS, CAMPBELL,
DeSANTIS & MAGEE, Esquires
247 White Horse Avenue
Trenton, NJ 08610
(609) 585-2443
Attorney For Petitioner

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW
2003 OCT 23 P 2:

BOARD OF EDUCATION, AREA VOCATIONAL-TECHNICAL SCHOOLS OF MERCER COUNTY, Petitioner, v. WILLINGBORO TOWNSHIP SCHOOL DISTRICT, BURLINGTON COUNTY Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY **Agency Docket No. 20-1/03** **STIPULATION OF SETTLEMENT**

The Petitioner, Area Vocational-Technical Schools of Mercer being represented by Dennis M. DeSantis, Esquire of the law firm of Destribats, Campbell, DeSantis & Magee, and the Respondent, Board of Education of the Willingboro School District, being represented by Rocky L. Peterson, Esquire of the law firm of Hill Wallack, by way of settlement in the within matter hereby stipulate and agree as follows:

1) The Respondent shall pay to the Petitioner the sum of Two Thousand Two Hundred ($2,200.00) Dollars for David Sanford, a resident of the Township of Willingboro, which payment shall be paid within thirty (30) days of the date of the within Stipulation of Settlement.

DESTRIBATS, CAMPBELL,
DESANTIS & MAGEE
COUNSELLORS AT LAW
247 WHITE HORSE AVENUE
TRENTON, NEW JERSEY 08610

2) The Petitioner shall no longer accept students from the Respondent's District unless the Respondent has first approved the student's attendance and authorized payment for that student's tuition.

DESTRIBATS, CAMPBELL,
DeSANTIS & MAGEE, ESQS.
Attorneys for Petitioner

BY: _____
DENNIS M. DeSANTIS, ESQ.

Dated : October 20 , 2003

HILL, WALLACK
Attorneys for Respondent

BY: _____
ROCKY L. PETERSON, ESQ.

Dated : October 15 , 2003

DESTRIBATS, CAMPBELL,
DESANTIS & MAGEE
COUNSELLORS AT LAW
247 HORSE AVENUE
TRENTON, NEW JERSEY 08610

OAL DKT. NO. EDU 939-03
AGENCY DKT. NO. 20-1/03

MERCER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/23/04

Date of Mailing: 2/23/04

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M.A.D., on behalf of minor child, R.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNT EPHRAIM, CAMDEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged respondent Board's residency determination that her child R.L. was not domiciled in the District. The matter had been opened in 1999 and remanded to OAL for further proceedings.

On remand, the ALJ found that respondent's evidence did not demonstrate that it acted reasonably in finding that R.L. was domiciled with his father. The ALJ found that R.L. stayed with his father about three nights per week, yet was domiciled with petitioner. The ALJ reversed the Board's action assessing tuition.

The Commissioner concurred with the ALJ that R.L. was domiciled in the District and entitled to a free public education.

February 23, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6054-00
AGENCY DKT. NO. 262-8/99

M.A.D. O/B/O MINOR CHILD, R.L.,
Petitioner,
v.
BOARD OF EDUCATION OF MOUNT EPHRIAM, CAMDEN COUNTY,
Respondent.

Carl Ahrens Price, Esq., for petitioner

Joseph F. Betley, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: December 15, 2003 Decided: January 9, 2004

BEFORE **DOUGLAS H. HURD,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Petitioner, M.A.D. on behalf of her minor child R.L., is challenging the residency determination of the Respondent, the Board of Education of the Borough of Mount Ephraim. The Petitioner's appeal was filed with the Department of Education on August 24, 1999. On September 8, 1999, the Respondent filed an Answer to the petition. The matter was then transmitted to the Office of Administrative Law, where it was filed on October 4, 1999. The case was assigned docket number EDU 8415-99. Following a hearing in February 2000, Administrative Law Judge Kathryn Clark filed an Initial Decision, dated May 23, 2000.

Although the parties did not file exceptions to the Initial Decision, by letter dated June 13, 2000, counsel for the Petitioner notified the ALJ and the Bureau of Controversies and Disputes that the hearing was concluded prematurely by the ALJ. Petitioner's counsel thereafter requested that the ALJ withdraw her Initial Decision and allow the hearing to continue. By Decision dated July 10, 2000, the Commissioner of Education granted the motion to reopen the hearing and remanded the matter to the OAL for continued proceedings.

The case was then retransmitted back to the OAL, where it was filed on July 21, 2000. The remanded case was assigned docket number EDU 6054-00. The proceedings were continued and a hearing was held on February 13, 2001. A post-hearing memorandum was submitted by counsel for the Petitioner on March 27, 2001. Judge Clark did not render an Initial Decision based on the subsequent hearings. Judge Clark went on a leave of absence in the Spring of 2003 and the case was transferred to the undersigned. A conference call was held on August 7, 2003, to discuss the status of the matter. It was agreed by the parties that additional hearings were not necessary. The undersigned ordered and was supplied transcripts of the hearings held in February 2000 and 2001. The transcripts were supplied on December 15, 2003.

FINDINGS OF FACT

Based on reading the transcripts, reviewing the evidence in the record and listening to the audiotapes, I find the following facts:

1. Since 1985, Petitioner has lived at 812 Bell Road, Mt. Ephraim. Petitioner is the mother of student, R.L.Jr. Petitioner has a younger son that is a student and a daughter that is a recent graduate of the Mt. Ephraim School District.
2. Mt. Ephraim students of high school age attend the Audubon High School.
3. R.L.Sr. is the father of R.L.Jr. R.L.Sr. resides at 125 West Cottage Avenue, Haddonfield. He has resided there for over ten years.
4. Petitioner and R.L.Sr. received a divorce in 1987.
5. Petitioner's residence and R.L.Sr.'s residence are in close proximity to each other. R.L.Jr. has remained close to both parents since the divorce.

6. R.L.Jr. resided with the Petitioner until the beginning of his 9th grade year. His 9th grade year was the 1997-1998 school year. For that year, R.L.Jr. resided with his father and attended the Haddonfield School District. Petitioner and R.L.Sr. in August 1997 executed a consent order stating that R.L.Sr. was to have custody of R.L.Jr. This Consent Order was executed in order to establish proof of R.L.Jr.'s residency so he could attend the Haddonfield School District.

7. For 7th and 8th grade, R.L.Jr. was placed at schools by the Mt. Ephraim School District.

8. After the 9th grade year, R.L.Jr. met with his parents and asked that he return to the Mt. Ephraim School District (Audubon) to be with his friends. R.L.Jr. moved back with the Petitioner in the summer of 1998, just prior to the 1998-1999 school year.

9. Respondent hired an investigator to investigate the residency of W.V. During the course of this investigation, the investigator, William Bittner, advised the District that R.L.Jr. also was not residing in Mt. Ephraim. Bittner's first report notes that a white van that departed from W.V.'s house picked-up R.L.Jr. at R.L.Sr.'s residence on four occasions in February 1999 and transported him to school. This report notes that R.L.Jr. was not seen leaving the school in that van to return to Haddonfield.

10. Bittner observed R.L.Sr.'s residence on March 25, March 26 and March 29. No activity was observed at this location. R.L.Jr. was suspended from school on March 25. Bittner did observe R.L.Jr. leave R.L.Sr.'s house and get into W.V.'s van on March 31 and April 1 and proceed to school.

11. On May 27, May 28, June 1, June 2, June 3 and June 4, Bittner observed a car leave from W.V.'s house and pick-up R.L.Jr. at R.L.Sr.'s house and proceed to school.

12. Bittner observed the Petitioner's home one time and did not see R.L.Jr.

13. Bittner did not see R.L.Jr. leave school and, therefore, was unable to track where he went after school.

14. Bittner never checked to see where R.L.Jr.'s mail was sent, nor did he ask neighbors questions about R.L.Jr.'s residency.

15. Bittner concluded that R.L.Jr. was domiciled with R.L.Sr.

16. In August 1999, Petitioner and R.L.Sr. entered into a consent order designating the Petitioner as the resident parent for R.L.Jr. This was done to demonstrate that R.L.Jr. lived with his mother. R.L.Jr. attended Audubon High School for the 1999-2000 school year.

17. Despite Bittner's conclusion, I find as a fact that R.L.Jr. was domiciled with his mother during the 1998-1999 school year. The evidence shows that R.L.Jr. would stay a few nights per week with his father, typically on weekends but also sometimes during the week. Petitioner's residence was close to R.L.Sr.'s residence and since R.L.Jr. was close to both parents he would try and see both of them often. Nonetheless, it is clear that he was domiciled at Petitioner's residence. The testimony of the Petitioner and R.L.Sr. was that he had a room there, had most of his clothing, etc., there and intended that the Petitioner's residence be his home. The paperwork with the district indicates that the Petitioner's residence was his home and his driver's license (obtained in December 1999) states that the Mt. Ephraim address is his home.

18. Bittner's testimony and reports are persuasive, but do not establish domicile. Although there were 12 times that R.L.Jr. was observed going to school from the Haddonfield residence, there were also a few times that R.L.Jr. was not seen leaving that residence. Further, there is no evidence showing R.L.Jr. leaving school and going back to Haddonfield. Bittner's evidence is merely consistent with the situation where R.L.Jr. spent some time living with R.L.Sr.

CONCLUSION AND ORDER

The Respondent seeks to assess tuition from February 8, 1999 until the end of the 1998-1999 school year. The Respondent's evidence does not demonstrate that it acted reasonably in finding that R.L.Jr. was domiciled with R.L.Sr. On the contrary, the evidence indicates that R.L.Jr. merely stayed with R.L.Sr. about three nights per week, yet was domiciled with the Petitioner since that is the residence he considered home.

Based on the foregoing, I hereby **ORDER** the action of the Mt. Ephraim Board of Education removing R.L.Jr. and assessing tuition be **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 (45) 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 (13) 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, 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.

January 9, 2004
DATE

DOUGLAS H. HURD, ALJ, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

1-9-04
DATE

Mailed to Parties:

JAN 14 2004
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

WITNESSES

For Petitioner:

Petitioner

R.L.Sr.

For Respondent:

William Bittner

Richard Serfling

Debra Rehn, Registrar

DOCUMENTS IN EVIDENCE

For Petitioner:[i]

P-1 July 14, 1999 letter from Serfling

P-2 July 26, 1999 letter from Joseph Wall, Vice Principal

P-5 Letter from R.L.Sr. to Mt. Ephraim

P-6 Affidavit of Petitioner

P-7 Authorization for tuition student registration

For Respondent:

R-1 August 1997 Consent Order

R-2 Investigative Report

R-3 Investigative Report

R-4 Investigative Report

R-5 August 1999 Consent Order

[i] P3a and b and P4a and b were for identification purposes and not introduced into evidence.

OAL DKT. NOS. EDU 6054-00 AND EDU 8415-99 (ON REMAND)
AGENCY DKT. NO. 262-8/99

M.A.D., on behalf of minor child, R.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNT EPHRAIM, CAMDEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties filed no exceptions to the Initial Decision.

Upon his full and independent review, the Commissioner concurs with the determination of the Administrative Law Judge that R.L. was domiciled in Mount Ephraim during the 1998-1999 school year, thereby entitling him to a free public education at the District's expense during this period.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 02/23/04
Date of Mailing: 02/25/04

[1] It is noted that the record contains transcripts of the hearing conducted by the Honorable Kathryn A. Clark, ALJ, on February 23, 2000, February 24, 2000 and February 13, 2001.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

MICHAEL GRANDE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, nontenured Spanish teacher, challenged the Board's decision not to renew his contract. Petitioner alleged that this decision was based upon his disabling medical condition, violating his rights under the New Jersey Law against Discrimination (NJLAD). The Board acknowledged that it did not renew him because of his poor attendance record both before and after his medical leave of absence.

The ALJ noted that petitioner's claim of disability had no impact on the superintendent's decision and that the superintendent had no medical documentation as to the nature of petitioner's illness or disability. The ALJ found petitioner's supervisor also recommended nonrenewal because of his absences, his failure to report absences and his inability to manage disruptive students. The ALJ found that petitioner's poor attendance record during his entire three years of employment was sufficient factual basis to justify the Board's decision to nonrenew. Moreover, the ALJ found that decision did not constitute a violation of constitutional or legislatively conferred rights. Also, as stated in *Dore*, local boards are afforded considerable discretion in employing teaching staff members. The ALJ granted the Board's motion to dismiss. Petition was dismissed.

The Commissioner modified the Initial Decision and granted the Board's motion to dismiss as to petitioner's claim that the Board's nonrenewal decision was arbitrary, capricious and unreasonable. The Commissioner, however, denied the Board's motion to dismiss as to petitioner's claim that the Board's nonrenewal constituted a violation of his rights under the NJLAD. The Commissioner remanded the matter to the OAL for proceedings solely on the latter claim.

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.

February 23, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENT'S
MOTION TO DISMISS
OAL DKT. NO. EDU 4991-03
AGENCY DKT. NO. 229-7/03

MICHAEL GRANDE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,
Respondent.

Dina R. Khajezadeh, Esq., for petitioner (Starkey, Kelly, Blaney, Bauer & White, attorneys)

Thomas E. Monahan, Esq., for respondent; **Stephen K. Foran,** Esq., on the brief (Gilmore & Monahan, attorneys)

Record Closed: December 1, 2003 Decided: January 9, 2004

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE

In this matter, petitioner, a non-tenured teaching staff member, challenges the decision of the respondent Board of Education not to renew his contract. In challenging this action, petitioner initially filed a petition on July 1, 2003. Respondent filed a motion to dismiss in lieu of an answer on July 11, 2003. On August 4, 2003, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case with respect to the

Motion to Dismiss in Lieu of Answer, to be reviewed under the limited standard applicable to non-tenured staff as set forth in *Dore v. Bedminster Twp. Bd. of Ed.,* 185 *N.J.* Super. 447 (App. Div. 1982), and other cited cases. Petitioner filed a brief in opposition to respondent's motion to dismiss and the Certification of the petitioner dated August 15, 2003. The matter was assigned to me on August 27, 2003.

N.J.A.C. 1:1-12.2(e) provides that all motions in writing shall be submitted for disposition on the papers unless oral argument is directed by the judge. Because of an extensive caseload with a heavy hearing schedule, and a number of other complex, completed cases requiring written decisions, I was unable to review the motion papers in this matter until December 1, 2003. After examining the motion papers, I determined that oral argument was not necessary in order to address the issues herein, and I closed the record on December 1, 2003.

FACTUAL DISCUSSION

I have made a careful review of the pleadings and certifications in this matter. In the first count of his petition, petitioner acknowledges that he is a non-tenured teaching staff member at the Manchester Township School District. He was employed as a Spanish teacher at the Manchester Township High School. He asserts that he commenced this employment in September 2000 at the Middle School for the first two years. He asserts that all evaluations received by him noted his superior performance.

Petitioner alleges that during his first two years of employment he was contacted by David Walling, the Principal of the High School, asking petitioner to transfer to the High School. He then submitted a request to transfer and by letter dated July 18, 2002, the Superintendent advised that the Board voted to approve his request for a transfer to the High School effective for September 1, 2002 through June 30, 2003.

Petitioner alleges that in September 2002, he became ill and he requested a medical leave of absence from September 30 through December 30, 2002. He was granted a medical leave of absence pursuant to the Family Medical Leave Act. Petitioner further alleges that he was

diagnosed with a disabling medical condition, although the nature of that condition is not revealed in the pleadings or other submissions in this matter. He contends that Principal Walling contacted him and pressured him to return to employment, and that he resumed his teaching duties in early December 2002, approximately one month before the end of his medical leave of absence. After his return from medical leave, he continued to receive outstanding evaluations, except for one prepared by Principal Walling in February 2003, in which he indicated that petitioner needed improvement in the area of professional growth.

By letter dated April 14, 2003, the Superintendent advised petitioner that the Board intended to take formal action with regard to the non-renewal of petitioner's contract at its public meeting of April 30, 2003. Petitioner appeared at the meeting and requested renewal of his contract. According to petitioner, respondent's attorney verbally advised petitioner's attorney that respondent decided not to offer petitioner a contract for the 2003-2004 school year because of petitioner's excessive absenteeism and for medical reasons. Petitioner alleges that respondent's decision was arbitrary, capricious and unreasonable.

In the second count of the Petition, petitioner alleges that he suffers from a disabling medical condition and he is a handicapped individual as defined in *N.J.S.A.* 10:5-5 of the New Jersey Law Against Discrimination. He alleges upon information and belief that respondent's decision not to renew petitioner's contract of employment was based upon the fact that petitioner suffers from a disabling medical condition and that this constitutes a violation of petitioner's rights under the Law Against Discrimination.

Respondent acknowledges that petitioner has been employed by the respondent, as a non-tenured teacher for three school years, namely, 2000-2001, 2001-2002 and 2002-2003. It also acknowledges that renewal of petitioner's employment contract for the 2003-2004 school year would have granted petitioner tenure. Pursuant to *N.J.S.A.* 18A:27-4.1(b), William E. DeFeo, Ed.D., Superintendent of Schools, determined not to recommend renewal of petitioner's employment contract for the 2003-2004 school year.

According to his Certification, Dr. DeFeo's recommendation was based on petitioner's

poor attendance record. (Certification of Dr. DeFeo). During his first two years of employment with the respondent, petitioner was allotted 10 sick days and two personal days for each school year, and he used every allotted sick and personal day. Petitioner even took an additional day without pay during his second year. (Petitioner's attendance records attached to Certification of Dr. DeFeo, Exhibits "A" and "B" respectively). Petitioner does not allege that his poor attendance record during his first two years of employment was caused by any disability.

Dr. DeFeo stated in paragraph 4 of his Certification:

> It has been my experience that a non-tenured teacher with excessive absenteeism is prone to future chronic absenteeism. A non-tenured teacher who during his first two years of employment uses every allotted day, and even takes additional time without pay, is very unusual and a great cause of concern.

Dr. DeFeo additionally asserts that in petitioner's third year of employment, he was allotted 11 sick days and 3 personal days, and he used all of his allotted days by September 27, 2002. After petitioner's return to work on December 4, 2002, he was absent without pay for nine additional days.

Dr. DeFeo states that petitioner alleged he suffered some undetermined illness and/or disability in September 2002. After he exhausted all of his allotted sick and personal time in September 2002, petitioner applied for and was granted a medical leave from September 30, 2002, until December 30, 2002. The nature of petitioner's illness or disability is unknown to the respondent.

During the second half of the 2002-2003 school year, petitioner took 9 additional days off without pay. Respondent points out that petitioner does not allege that these additional absences have any relationship to his prior illness and/or disability. In fact, petitioner sought additional sick time from the Board for the flu and other ordinary illnesses. (Certification of Dr. DeFeo, paragraph 10).

Dr. DeFeo states that petitioner's poor attendance record greatly concerned him as the

resultant lack of continuity negatively impacted student learning. Respondent asserts that petitioner's poor attendance record both before and after his leave provides sufficient evidence to justify the non-renewal of his contract as a teaching staff member. Dr. DeFeo stated in paragraph 7 of his Certification:

> In my opinion, Petitioner's attendance record is one of excessive absenteeism, which in and of itself justifies my recommendation for non-renewal. This poor attendance record is, however, compounded by a lack of professionalism and a negative recommendation by his supervisor. (See Certification of Principal, David Walling).

In paragraph 8 of his Certification, Dr. DeFeo emphasized that petitioner's claim of disability had no impact on his decision and, to date, he has no medical documentation as to the nature of petitioner's illness or disability. Petitioner's request for a medical leave afforded no details and the attached notice from a family physician, not a specialist, simply indicated that petitioner would not return to work until further notice. (See Petitioner's medical leave request dated September 30, 2002, Exhibit "E"). In paragraph 10 of his Certification, Dr. DeFeo states that he has no knowledge of the nature of petitioner's illness and/or disability and its impact, if any, on future attendance. In fact, petitioner's request for additional sick time after his return from leave was for ordinary illnesses.

Finally, Dr. DeFeo states in paragraph 11 of his Certification:

> Teacher attendance is extremely important for continuity of education and the furtherance of the educational goals of students. A non-tenured teacher who evidences excessive absenteeism, compounded by a lack of professionalism, cannot in good conscious be recommended for the privilege of tenure. Petitioner's attendance record before and after his medical leave, in and of itself, justifies the recommendation of non-renewal.

Petitioner's supervisor, Principal David Walling, also refused to recommend petitioner for renewal. Principal Walling noted petitioner's lack of professionalism in handling the circumstances of his leave and also his inability to properly manage disruptive students.

(Certification of Principal, David Walling).

In paragraphs 3 and 4 of his Certification, Principal Walling stated that petitioner worked a couple of days at the beginning of the school year and then just started to use sick and subsequently personal days. Petitioner never telephoned Principal Walling or any other school official to the best of his knowledge, to explain what was going on, and Principal Walling had no idea why petitioner was continually absent. Several teachers relayed to the Principal that students had seen him out in the area at stores and complained about his continual absences. Teachers within the World Language department were upset about constantly covering his classes. The teachers, including the Department Coordinator, Mrs. Abbe Clark, also had not received any phone calls from the Petitioner. Teachers are expected to contact their respective department coordinator when absent.

Principal Walling states that he called petitioner twice and left messages but received no response. He then contacted the central office administration and it could offer no explanation as to petitioner's continual absences. Finally, in September, petitioner applied for a medical leave. In the opinion of Principal Walling, petitioner handled this situation in a non-professional manner.

In his Certification, Principal Walling states that upon petitioner's return to work, he completed two evaluations of his teaching performance. The first dated February 6, 2003 notes a direct correlation between petitioner's attendance and student performance and also notes problems dealing with disruptive students. (See evaluation dated February 6, 2003, Walling Certification, Exhibit "A"). The petitioner did not submit an attachment to said evaluation as is his right to do, and Principal Walling assumes that he was not disputing the written evaluation. The second evaluation, dated June, 2003 notes poor attendance and disciplining problems.

In paragraph 6 of his Certification, Principal Walling states:

> It is important to note that Petitioner's attendance problems continued the second half of the school year. Petitioner's excessive absences resulted in a difficult classroom situation and a lack of

continuity which negatively affected student learning.

This information provided additional justification for the Superintendent's decision not to recommend renewal of the petitioner.

On April 14, 2003, the Superintendent notified petitioner of his decision not to recommend renewal of his employment contract. The petitioner, on April 24, 2003 notified the Superintendent of his intention to attend the April 30, 2003 closed session of the Board with his attorney. The petitioner appeared before the Board, but failed to convince the Board to renew his employment contract. Petitioner's attendance record and lack of professionalism were discussed. The Board voted not to renew petitioner's contract of employment. Petitioner was notified of the nonrenewal of his employment by correspondence dated May 2, 2003.

LEGAL DISCUSSION AND ANALYSIS

A board of education has broad discretionary authority in regard to the granting of tenure. *Donaldson v. Bd. of Ed. of No. Wildwood*, 65 *N.J.* 236, 240-241 (1974). A board's discretionary authority is not unlimited, and its action will be set aside if it was taken for arbitrary or capricious reasons. *Id.*, at 247; *N.J.S.A.* 18A:27-4.1(b). A determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance, as there are many unrelated but equally valid reasons. *Donaldson v. Bd. of Ed. of No. Wildwood*, 65 *N.J.* at 241. Thus, evaluations of classroom performance are not necessarily the controlling factor. *Dore v. Board of Educ.*, 185 *N.J. Super.* 447, 453-454 (App. Div. 1982).

A determination within a board's discretionary authority is arbitrary, capricious or unreasonable if it is without a rational basis or is induced by improper motives. *Kopera v. West Orange Bd. of Education,* 60 *N.J. Super.* 288, 294 (App. Div. 1960). A rational basis for a determination is lacking where the board's beliefs or assertions as to the underlying facts prove to be untrue or if the facts are true, they do not warrant the board's conclusion or action. *Id.*, at 296-297. The party challenging the board's action has the burden of proving unreasonableness. *Id.*, at 297.

The transmittal of this matter from the Commissioner of Education states that this matter is to be reviewed under the limited standard applicable to non-tenured staff as set forth in the cases cited hereinafter. The controlling case, and one of the cases referred to in the transmittal, is *Dore v. Bedminister Tp. Bd. of Ed., supra,* 185 *N.J. Super.* 447. In that matter, the local board voted not to renew the teaching contract of petitioner resulting in the denial of tenure. The petitioner requested a statement of the reasons for the non-renewal and the Board informed him of failings in his teaching effectiveness, poor teaching methods, poor grading procedures, lack of a structured classroom, and lack of assessment of student progress. Significantly, these criticisms were not contained in petitioner's formal evaluations, but were reasons articulated by Board members as their basis for dissatisfaction with the petitioner. They were based on personal observations of Board members and knowledge acquired through other parents. Petitioner received an informal appearance before the Board to rebut these assertions, but the Board did not change its decision.

The Commissioner reversed the non-renewal decision because the reasons were not supported by the evaluations and no other reasons were given to explain the Board's decision. However, the Comissioner rejected the argument that local boards are bound to predicate renewal decisions of non-tenured teaching staff members on evaluations conducted pursuant to the law and regulations.

The State Board reversed the Commissioner's decision and emphasized the considerable discretion afforded to local boards in employing teaching staff members. The State Board determined that the local board had sufficient information to support its decision not to reemploy petitioner and its statement of reasons for doing so. It concluded that the local board's action was not so arbitrary and capricious as to warrant the extraordinary remedy of overriding the managerial prerogative of a local board and requiring it to employ a teacher it does not want on its staff.

The Appellate Division concluded that the State Board's decision was correct. It stated:

> The decision of the Commissioner recognized a local board's right to base its decision not to re-employ on matters outside of a teacher's evaluations due to a board's virtually unlimited discretion in hiring or non-renewing non-tenured teachers.
>
> [185 *N.J. Super.* at 453.]

The Court then went on to say:

> The State Board's decision properly recognized the Board's right to reach its conclusion about its non-tenured teacher on a broad base of input received from a variety of people, including members of the public, parents of students and a board member's own knowledge of a teacher even if that knowledge is acquired through having a child in the teacher's class.
>
> [185 *N.J. Super.* at 453-454.]

Finally, the Court stated:

> We did not regard the lack of strict compliance with *N.J.S.A.* 18A:27-3.1 to be a sufficient reason to afford petitioner either reinstatement or financial reward.
>
> [186 *N.J. Super.* at 455.]

The Court then referred to the *Donaldson* case and indicated that in the language of that decision is a recognition by the Court that absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board. *Id.,* 186 *N.J. Super.* at 455.

The second case referred to in the transmittal to the OAL is *Guerriero v. Bd. of Ed. of the Borough of Glen Rock*, decided by the State Board of Education February 5, 1985, affirmed, Dkt. No. A-3316-85T6 (App. Div. 1986). In that matter, the reasons cited by the local board for not renewing petitioner's contract were that the parents of students expressed disillusionment with petitioner's methodology, frustration as to the manner in which the petitioner presented

materials, and regret at not being more persistent in seeking the transfer of their children. The Court stated that under *Dore*, the only substantive ground available to petitioner to contest the local board decision would have been a claim of deprivation of a constitutional or statutory right. Since petitioner made no such claim, the Court agreed with the State Board that even accepting petitioner's allegations as true, the local board was entitled to summary decision.

The third case referred to by the Commissioner in the transmittal to the OAL is *Cordell Wise v. Bd. of Ed. of the City of Trenton*, State Board decision January 3, 2001. In that case, the Commissioner of Education dismissed the petition as untimely. On appeal, the State Board stressed that a district board has virtually unlimited discretion in hiring or non-renewing non-tenured teachers, citing the *Dore* case and quoting language therein. The Board, citing *Guerriero,* stated:

> Thus, where a non-tenured teacher challenges a district board's decision to terminate his employment on 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.

Respondent takes the position that petitioner's attendance record is undisputed and that this record standing alone provides sufficient evidence to justify the Board's discretionary decision not to renew the employment contract of the petitioner. Respondent further argues that the Board also properly considered the opinions of Superintendent DeFeo and Principal Walling as to petitioner's poor attendance and lack of professionalism in further support of the exercise of its discretion. For these reasons respondent argues that the Petition of Appeal fails as a matter of law and should be dismissed.

Petitioner asserts that during his medical leave of absence he was diagnosed with a disabling medical condition, and he asserts that Principal Walling had been apprised of his condition by a fellow employee. He also asserts that the Board received factually incorrect information as to the exact number of days he had been absent, and that he had never been advised that his absences were a problem, thus denying him the opportunity to remediate. He further asserts that the Board attorney verbally advised petitioner's attorney that the Board

decided not to offer petitioner a contract for the 2003-2004 school year because of petitioner's excessive absenteeism "and for medical reasons". He also disputes the assertion that he acted unprofessionally during his September 2002 illness. Thus, petitioner contends that there are numerous significant factual issues present in this matter and that the motion to dismiss should be denied on the basis that he should be given the opportunity to engage in discovery in order to satisfy his burden of proving that the board's action was arbitrary, capricious and unreasonable and not supported by the facts.

Petitioner's contentions raise a number of factual issues. The first involves petitioner's assertion in the second count of the Petition, that he suffers from a disabling medical condition and is a handicapped individual as defined in *N.J.S.A.* 10:5-5 of the New Jersey Law Against Discrimination. He contends upon information and belief that respondent's decision not to renew his employment was based upon the fact that he suffers from a disabling medical condition and that this constitutes a violation of the Law Against Discrimination. He further asserts that the Board attorney verbally advised petitioner's attorney that the Board decided not to offer petitioner a contract for the 2003-2004 school year because of petitioner's excessive absenteeism "and for medical reasons". In his Certification, petitioner alleges that Principal Walling had been apprised of his condition by a fellow employee. He further disputes the assertion that he acted unprofessionally during his September 2002 illness.

In his certification, Principal Walling set forth the factual circumstances giving rise to the claim of unprofessional behavior during petitioner's September 2002 illness. However, Principal Walling did not dispute petitioner's allegation that he was apprised of petitioner's disabling condition by a third party, nor was there any denial of the assertion that the Board Attorney stated that the Board's nonrenewal was for petitioner's excessive absenteeism "and for medical reasons". However, in paragraph 8 of his Certification, Dr. DeFeo emphasized that petitioner's claim of disability had no impact on his decision to recommend against petitioner's renewal and that petitioner has provided no medical documentation as to the nature of his illness or disability. Dr. DeFeo states that petitioner's request for a medical leave afforded no details and the note from a family physician simply indicated that petitioner would not return to work until further notice. In paragraph 10 of his Certification, Dr. DeFeo states that he has no knowledge of the

nature of petitioner's illness and/or disability and its impact, if any, on future attendance. He points out that, in fact, petitioner's request for additional sick time after his return from leave was for ordinary illnesses. It is also noted that petitioner does not allege in any submission herein that he ever pursued his claim of a disability during his employment or sought any accommodation from respondent based on the disability.

In the present matter there can be no dispute that petitioner had a very poor attendance record during the entire three years of his employment by respondent, and I so **FIND**. During his first two years of employment with the respondent, petitioner was allotted 10 sick days and two personal days for each school year, and he used every allotted sick and personal day, and took an additional day without pay during his second year. Petitioner does not allege that his poor attendance record during his first two years of employment was caused by any disability. In petitioner's third year of employment, he was allotted 11 sick days and three personal days. Petitioner apparently suffered from an illness or disability in September 2002, and he used all of his allotted days by September 27, 2002. After petitioner's return to work from a leave of absence on December 4, 2002, he was absent without pay for nine additional days. He likewise does not allege that any of these absences were caused by any disability. I **FIND** that petitioner's poor attendance record during his probationary period of employment, standing alone, is a sufficient factual basis to justify the exercise of the board's discretion to refuse to renew petitioner's employment. In addition, I **FIND** that the Board's decision, based on excessive absences does not constitute a violation of constitutional or legislatively-conferred rights.

In his argument, petitioner misconstrues the nature of the motion to dismiss in this matter. This motion is not one for summary decision, which may be defeated by showing the existence of undisputed facts. The fact that there may be other factual issues present in this matter does not require a denial of the motion to dismiss. As stated in *Dore,* local boards are afforded considerable discretion in employing teaching staff members. If it is determined that the local board had sufficient information to support its decision not to reemploy petitioner and its statement of reasons for doing so, its action should be affirmed. It is clear in this matter that petitioner's poor attendance record during his employment by respondent is a sufficient factual basis to justify the board's refusal to renew petitioner's employment. Overriding the managerial

prerogative of a local board and requiring it to employ a teacher it does not want on its staff is an extraordinary remedy, and should not be granted herein if the local board's action was not so arbitrary and capricious as to warrant it. In addition, even if petitioner's additional factual allegations are found to be true, I **FIND** that they would have no impact on the finding that petitioner's poor attendance record during his employment by respondent is a sufficient factual basis to justify the board's refusal to renew petitioner's employment. Therefore, I **CONCLUDE** that respondent is entitled to have its motion to dismiss granted.

DECISION AND ORDER

For the reasons set forth above, it is hereby **ORDERED** that petitioner'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 (45) 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 (13) 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, 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.

January 9, 2004
DATE

JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

1/9/04 mph
DATE

Mailed to Parties:

JAN 14 2004
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mph

MICHAEL GRANDE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions initially contend that the Administrative Law Judge (ALJ) misapplied the standard of review in this matter. That is, although the ALJ cites to *Dore, Guerriero and Wise, supra,* and acknowledges that these cases allow a nontenured teaching staff member to challenge a board's decision to terminate him based upon a claim that he was deprived of his constitutional or legislatively conferred rights, petitioner contends that the ALJ erroneously ignores his viable claim. In this regard, petitioner argues,

> The Petition filed in this matter alleges that the Board's decision not to renew Petitioner's contract of employment was arbitrary, capricious and unreasonable and that it was in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. (hereinafter "NJLAD"), because the decision was based upon Petitioner's medical condition. As such, it is beyond dispute that, if Petitioner's allegations are proved to be true, the Board's termination of his employment would indeed constitute a violation of his rights under the NJLAD. Therefore, Judge Martone's

> decision to grant Respondent's Motion to Dismiss is in direct contravention of well-settled case law allowing a nontenured teacher to challenge a board of education's decision to terminate his employment based upon a violation of his legislatively-conferred rights. (Petitioner's Exceptions at 2)

Petitioner affirms that respondent's Motion to Dismiss is, in effect, comparable to a motion to dismiss for failure to state a claim upon which relief may be granted, pursuant to New Jersey Court Rule 4:6-2(e). "As stated by the Court in *Printing Mart v. Sharp Electronics*, 116 N.J. 739, 746 (1989), in ruling on such a motion, the complaint must be searched in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taken. Every reasonable inference is therefore accorded to the plaintiff and the motion is granted **only in rare instances** and ordinarily without prejudice.*** " (emphasis in text) (*Id.* at 3)

Further, petitioner asserts that the ALJ improperly rejected his argument that Respondent's Motion to Dismiss should be characterized as a Motion for Summary Judgment. In the absence of specific agency rules on point, petitioner contends that the ALJ *could* properly proceed in accordance with R. 4:6-2 which permits a motion to dismiss to be treated as a motion for summary judgment where "matters outside the pleading are presented to and not excluded by the court***." (*Id.* at 4, citing to R. 4:6-2) Here, as petitioner notes, respondent presented to the OAL two certifications with attachments, which were "clearly outside the pleading***," and, therefore, the motion should have been treated as one for summary judgment. (*Id.* at 4) Petitioner insists that he has demonstrated the existence of material facts that are in dispute and, therefore, as a matter of law, the motion should not have been granted.

In reply, the Board argues that the ALJ correctly distinguished its Motion to Dismiss from a summary judgment motion and properly applied the standard of review.

Petitioner's attempts, the Board contends, to "cloud the issue" by alleging that there is a dispute as to the number of days that he was absent must fail. The Board avers that the ALJ's determination was based on attendance figures that are not disputed and were not related to any alleged disability. (Board's Reply at 2) In this connection, the Board underscores that teacher absenteeism adversely impacts the education of its students and has been held to be sufficient grounds for nonrenewal of a teacher. (*Ibid.*) Finally, the Board notes that "Petitioner does not allege he ever pursued a claim of disability during his employment with the Respondent, nor does Petitioner allege he sought any accommodation based upon a disability." (*Id.* at 3) The Board urges, therefore, that petitioner failed, as a matter of law, to meet his burden under *Dore*, *supra*, since "the undisputed attendance record, absent Petitioner's medical leave, alleges no constitutional constraint and provides ample evidence of the Board's decision." (*Ibid.*)

Upon careful and independent review of the record, the Commissioner determines to modify the Initial Decision, for the reasons set forth herein. Initially, the Commissioner underscores that this matter is before him pursuant to the Board's Motion to Dismiss the Petition of Appeal, which was filed in lieu of the Board's Answer. As such, the Commissioner recognizes that it is within his 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 ex rel. Sloan v. Klagholtz*, 342 *N.J.Super.* 385, 394 (App. Div. 2001).

The issue before the Commissioner, then, is the adequacy of petitioner's pleadings.

Petitioner's substantive grounds to contest the Board's nonrenewal are limited. In this regard, the State Board of Education has affirmed that:

> [W]here, ***, a non-tenured teacher challenges a board's decision not to reemploy him 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.**** (emphasis added).*Guerriero v. Board of Education of the Borough of Glen Rock*, decided by the State Board of Education, February 5, 1986, Slip Opinion at 5 *aff'd*, Docket #A-3316-85T6 (App. Div. 1986)

Therefore, even accepting as true petitioner's factual allegations for the purpose of this motion, to the extent he contends, as set forth in Count I, that the Board's decision not to renew his contract of employment was arbitrary, capricious and unreasonable, the Commissioner finds that, pursuant to *Dore, Guerriero and Wise, supra,* he is *not* entitled to litigate such a claim. However, to the extent petitioner alleges facts which, if true, would constitute a violation of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, as set forth in Count II of the Petition of Appeal, pursuant to the aforementioned case law, petitioner may contest his nonrenewal.[1] The Commissioner so finds, notwithstanding that the factual allegations brought by petitioner to support his disability claim are scant, since he is mindful of the Court's liberal approach to determining the adequacy of a pleading. See, *Printing Mart, supra* at 746.[2]

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[1] In this connection, although the Superintendent certifies that he has "no medical documentation as to the nature of Petitioner's illness and/or disability," and that petitioner's current claim of disability had no impact on the Superintendent's nonrenewal decision, (Board's Brief in Support of Motion to Dismiss; Certification of William E. DeFeo, Ed.D., Superintendent of Schools at 3), petitioner *specifically* disputes the Superintendent's contentions. (Petitioner's Counterstatement of Facts and Procedural History at 6; Certification of Michael W. Grande at 2-3) Additionally, as the ALJ noted, "Principal Walling did not dispute petitioner's allegation that he was apprised of petitioner's disabling condition by a third party***." (Initial Decision at 11) Neither does the Board deny petitioner's assertion that, "[a]t the April 30, 2003 Board Meeting, the Board's attorney verbally advised [his] attorney *** that the Board decided not to offer [him] a contract for the 2003-2004 school year because of [petitioner's] 'excessive absenteeism and for medical reasons.'" (Certification of Michael W. Grande at 2; Initial Decision at 11)

[2] The Commissioner notes that even if the within motion were considered as one for summary decision, the result would be the same. That is, assuming all facts alleged by petitioner to be true for the purpose of such a motion, petitioner, in his certification, set forth facts sufficient to show that there is a genuine issue as to whether the Board's nonrenewal decision was unlawfully based on his alleged disability. See, *N.J.A.C.* 1:1-12.5.

Accordingly, the Initial Decision is modified, as set forth herein. The Board's Motion to Dismiss is granted as to petitioner's claim that the Board's nonrenewal decision was arbitrary, capricious and unreasonable; however, the Board's Motion to Dismiss is denied as to petitioner's claim that the Board's nonrenewal constituted a violation of his rights under the NJLAD. This matter is remanded to the OAL for proceedings *solely* on the latter claim.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 2/23/04

Date of Mailing: 2/25/04

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

64-04

#64-04

E.C. ON BEHALF OF MINOR, D.B.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, mother of D.B., challenged the Board's determination that during the entire period that D.B. attended school in the District (since September 1999) he was not a legal resident there.

In light of the testimony of the witnesses, including the school's residency investigators, the ALJ determined that D.B. did not reside in Union. The ALJ noted that not even on one occasion did the investigators observe D.B. going to school in Union without having been taken there from Newark. The ALJ concluded there was no reasonable question concerning D.B.'s residence -- he and petitioner were not living in Union. The ALJ ordered petitioner to reimburse the Board for tuition owed for the period of D.B.'s unauthorized attendance in the District.

The Commissioner adopted the Initial Decision as his own and ordered petitioner to pay the Board tuition in the amount of $31,847.16 for the ineligible attendance of D.B. in the District.

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.

February 23, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 7229-02
AGENCY DKT. NO. 150-5/02

E.C. o/b/o D.B.,
Petitioner,
v.
BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY,
Respondent.

Francis O. Obi, Esq., for petitioner

John P. Harrington, Esq., for respondent
(Appruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: December 31, 2003 Decided: January 9, 2004

BEFORE **STEPHEN G. WEISS,** ALJ:

PROCEDURAL HISTORY

This school residency case was transmitted by the Department of Education to the Office of Administrative Law on August 9, 2002 as the result of a challenge by E.C., the

mother of D.B., to a determination by the respondent Board of Education of Union Township (Board) that during the entire period D.B. has attended school in Union Township (since September 1999) he was not a legal resident there. The Board filed both an answer denying the allegations of the petition, as well as a counterclaim for tuition reimbursement amounting as of November 10, 2003, to nearly $32,000. A plenary hearing was held before the undersigned administrative law judge on November 10, 2003. Post hearing proposed findings of fact and conclusions of law have now been filed in accordance with an agreed schedule and my initial decision follows.

TESTIMONY

A. For the Board

Although E.C. on behalf of D.B., her nine-year-old son, is titled the petitioner, I determined that the respondent Board should present its case first, which it did.

The first witness, Maria Schmidtberg, has been a "residency investigator" in the employ of the Board for about ten years and conducts approximately 75 to 100 investigations per school year. In March 2002 she began an investigation as the result of information that D.B., then a seven-year-old second grader at Connecticut Farms School, was attending school in Union although he did not live in the school district (Ex. R-1). As a result, Schmidtberg first visited the school so she could personally identify him. Thereafter, she conducted surveillances both at a house at 375 Carnegie Place in Union which was claimed by E.C. to be where D.B. lived with her, and at a house on Smith Street in Newark where E.C.'s mother, D.B.'s grandmother, lived.

In her report, Schmidtberg related that between March 19, 2002 and March 27, 2002 she surveilled the 375 Carnegie Place home on four separate occasions and not once did she see the boy leave from there for school even though he did attend school in Union on those days. During the period, from March 28, 2002 to May 8, 2002, she surveilled his grandmother's residence in Newark twelve times. On each occasion she observed the boy driven each morning from Newark by his mother to a house at 149

Laurel Avenue in Union. From there, D.B. soon left to walk to a bus stop to be transported to school by bus. Thus, on no occasion did she ever see D.B. leave the residence on Carnegie Place in Union to go to school; whereas, when she surveilled the site in Newark she saw him leave each day when his mother drove him to Union in her car (Ex. R-7).

On cross-examination, Schmidtberg revealed that in addition to the 16 surveillances mentioned in her report, she also went "on her own" to the Newark site about once a week, and occasionally on weekends, where she observed E.C.'s car parked nearby. She explained she often does this as part of her job.

The second Board witness, Anthony R. Martino, is also a "residency investigator" who has been employed by the Board for about eight years. Like Schmidtberg, he conducts 75 to 100 residency investigations each school year.

In March 2003 Martino was asked to reinvestigate the residency issue involving E.C. and D.B. because a hearing was scheduled to take place before the Board in May. Thus, like Schmidtberg, Martino first visited the elementary school which D.B. attended in order to identify him so that he would know him if he saw him again. Thereafter, on several occasions during March 2003, Martino went either to the Smith Street location in Newark where D.B.'s grandmother lived, or to 149 Laurel Avenue. Like Schmidtberg, on each such occasion in Newark he saw the boy leave shortly after 7:00 a.m. each morning to be driven by his mother to the house at 149 Laurel Avenue in Union. Soon thereafter, D.B. would leave to go to a nearby school bus stop to be transported to school (Ex. R-3).

B. For the Petitioner:

Testimony of behalf of petitioner then was offered by Regine Rene, E.C.'s niece and by E.C. herself. According to Rene, her aunt E.C., and cousin D.B. live on Carnegie Place in Union and that her grandmother, E.C.'s mother, lives separately on Smith Street in Newark. Rene has visited the 375 Carnegie Place home many times where, she

insisted, E.C. lives with D.B., another aunt (P.C. who owns the house) and P.C.'s son who attends high school. She believes that property has three bedrooms and D.B. and his older cousin each have their own room. The house at 149 Laurel Avenue where both investigators saw D.B. dropped off in the morning is owned by another of E.C.'s sisters.

E.C. then testified on her own behalf. She too, insisted that since August 1999 she and her son have lived continuously at 375 Carnegie Place in Union. Before then they lived in Newark. Although the house on Carnegie Place is owned by her sister, P.C., E.C. said she shares in the payment of bills. The house has five bedrooms and she has a room in the basement.

E.C. next identified a variety of documents from local hospitals, the Internal Revenue Service, the Division of Motor Vehicles, local banks, etc., all of which were mailed to her in her name at the Carnegie Place address (Exs. P-1 to P-15). Also, it was stipulated that E.C.'s current and previous driver's licenses reflect her address as 375 Carnegie Place. So too, her paychecks have been and continue to be sent there. E.C. said she visited her mother in Newark often,[1] and sometimes took her son with her where he stayed overnight from time to time. However, she vehemently insisted that she and D.B. live with her sister in Union and have done so since 1999.

On cross-examination, E.C. continued to maintain that neither she nor her son has lived in Newark since 1999 and that they have resided at all times at 375 Carnegie Place in Union. She identified in answers to interrogatories the names of other adults living in the Carnegie Place house, but said none of them were able to come to testify on her behalf because they were otherwise occupied.[2] She agreed she owns a tan 1994 Honda which was described in the reports of both investigators on the vehicle which she used to drive D.B. from Newark to Union.

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[1] E.C.'s mother recently moved, as will be discussed *infra.*

[2] Nor did E.C.'s mother testify.

As the result of E.C.'s continued insistence on cross-examination that she lives at 375 Carnegie Place in Union, the Board then recalled Schmidtberg in rebuttal. She related that very recently she discovered that a telephone number listed in E.C.'s name at her mother's house on Smith Street in Newark had been changed to a new listing on Manor Drive in Union. The purpose of this testimony was to attempt to demonstrate that E.C. now has moved to Manor Drive and thus was lacking in credibility when she insisted she and D.B. still live on Carnegie Place.

As a result of Schmidtberg's "rebuttal" testimony, E.C. was recalled and explained that the person who now lives on Manor Drive in Union is her mother who just moved there from Newark and the phone number is still in E.C.'s name, as it was at the Newark apartment where her mother previously lived, since E.C. paid the bills for its use.. She reiterated that neither she nor her son had lived anywhere else in Union other than at 375 Carnegie Place since 1999, and the lease on the Manor Drive apartment is not in her name and she pays no rent there.

DISCUSSION

Although there were a substantial number of documents admitted into evidence reflecting that E.C. uses the 375 Carnegie Place address as the location for receiving her mail, etc. (Exs. P-1 to P-15), neither singly nor in combination do they prove she lived there or intended to do so. Indeed, even though several other persons apparently also reside there, not one of them, including her own sister and nephew, was called to testify on her behalf to corroborate the fact of her residence. Thus, her case rises or falls on her and Rene's credibility in the face of the Board's testimony.

In my view, it defies logic for there to have been over twenty random surveillances of the residences either on Carnegie Place in Union, or on Smith Street in Newark on regular school days, and on not even one of those occasions was D.B. ever observed leaving Carnegie Place to go to school without having been taken there from Newark. To the contrary, on every single occasion when the Newark premises was observed, D.B.

was seen leaving at about 7:00 a.m. and then driven by his mother to his aunt's house on Laurel Avenue in Union, from which he then went to a nearby bus stop to be transported to school. The numbers of such incidents simply cannot reasonably be ascribed to accident or coincidence. Plainly, D.B. and E.C. were living in Newark at the grandmother's house and D.B. daily was taken by E.C. to Union to board a school bus to go to school in Union. The contrary testimony from E.C., uncorroborated by either her mother or by persons who resided on Carnegie Place, was substantially lacking in credibility. It does not matter that bills, notices, etc. had 375 Carnegie Place as E.C.'s address. Mail can be sent wherever the addressee directs. Indeed, until recently, the only phone number listed under E.C.'s name was at her mother's residence in Newark. While E.C. attempted to explain that situation by indicating it was because she paid the phone bill for her mother, that fact also was evidential of her actual residency and thus that of her son as well. Not once in all the surveillances was D.B. observed leaving 375 Carnegie Place to go to school. Yet, every time the Smith Street address in Newark was surveilled, he was seen being driven to Union by E.C. in time to get on the bus to go to school there. In light of the overwhelming nature of those circumstances, where E.C.'s bills, paychecks, etc. are sent pales in comparison.

E.C.'s testimony was rife with contradictions. As pointed out by counsel for the Board, she obtained a driver's license reflecting her residence at 375 Carnegie Place months before she purportedly moved there and at a time that even she agreed she was residing in Newark. So too, although on direct examination she testified her mother lived at the 225 Smith Street address in Newark and she visits her there often, it turns out as a result of the Board's rebuttal testimony that her mother had in fact moved from Newark to Union in September 2003, two months before the hearing. In light of the contradictions and inconsistencies in her own testimony, not to mention the overwhelming evidence stemming from the observations made by two separate investigators, there is no reasonable question concerning D.B.'s residence during the period in question. Obviously, he resided with his grandmother at her house in Newark and was brought to Union by his mother in order to board a bus to be transported to school each day.

In a reply memorandum, counsel for E.C. maintains that the determination of D.B.'s domicile depends upon where E.C. intended her place of domicile was to be. While that may be so, it does not change the result. E.C. was not living at 375 Carnegie Place in Union, nor was her son, and all of the extrinsic evidence points to the fact that her intention, if it existed at all, to move to Union only came about after the Board questioned the propriety of D.B.'s continued attendance without payment of tuition in the Union public schools.

Accordingly, for the reasons set forth herein, the challenge by E.C. on behalf of D.B. to the Board's determination to collect tuition for D.B.'s unauthorized attendance at school in Union for the period in question must be rejected and a determination entered in favor of the Board on its tuition reimbursement counterclaim in the amount of approximately $32,000.[3]

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 (45) 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.

[3] The affidavit of Karen Dunn, the Board's School Business Administrator, dated December 13, 2003, was submitted at my request and is marked as Exhibit R-7.

Within thirteen (13) 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, 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.

January 9, 2004
DATE

STEPHEN G. WEISS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:

JAN 12 2004
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

For Petitioner:

Regine Rene

E.C.

For Respondent:

Maria Schmidtberg

Anthony Martino

List of Exhibits

For Petitioner:

P-1 Envelope addressed to E.C. from Children's Specialized Hospital

P-2 Patient itinerary for D.B.

P-3 INS notice to E.C.

P-4 IRS notice to E.C.

P-5 IRS notice to E.C.

P-6 DMV notice of scheduled suspension

P-7 Insurance policy amended declarations

P-8 Notice of eligibility determination, New Jersey Department of Labor

P-9 Checking account statement (9/9/03 through 10/7/03)

P-10 Checking account statement (10/6/01 through 11/7/01)

P-11 Bill from Union Hospital

P-12 Records check, Township of Union, Department of Public Safety, 12/30/99

P-13 Earning statement for P.C., August 2000

P-14 Medical records cover sheet, March 20, 2002

P-15 Letter from Boston Mutual Life Insurance Company

Respondent's Exhibits:

R-1 Residency investigation request form with attachments

R-2 Investigators report, March 2002

R-3 Investigator's report, March 2003

R-4 Union Township Board of Education registration form, September 1999 with attachments

R-5 Affidavit of Pierett A. Charles, August 30, 1999

R-6 Answers to interrogatories, October 2003, with attachments

R-7 Affidavit of Karen Dunn re tuition counterclaim, December 3, 2003

OAL DKT. NO. EDU 7229-02
AGENCY DKT. NO. 150-5/02

E.C. ON BEHALF OF MINOR, D.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4(a), in that the Initial Decision was mailed to the parties on January 12, 2004 and the exceptions were filed on February 2, 2004, well outside the 13-day period prescribed by regulation. Consequently, this submission was not considered in the Commissioner's determination of this matter.

Upon careful and independent review of the record in this matter, and based on the ALJ's credibility assessments, *N.J.S.A.* 52:14B-10(c), the Commissioner finds no cause to disturb the factual findings and legal conclusions of the ALJ.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein, and the within Petition of Appeal is dismissed. Consistent with the affidavit submitted by the Board's School Business Administrator, the tuition rate for D.B.'s attendance at the Connecticut Farms School is as follows:

- $6,773 for the 1999-2000 school year;
- $7,108 for the 2000-2001 school year;
- $7,814 for the 2001-2002 school year;
- $8,169 for the 2002-2003 school year; and
- $8,301 for the 2003-2004 school year, prorated at $46.12 per day for each of the 43 days D.B.'s attended school this year, as of November 10, 2003. (Affidavit of Karen Dunn Regarding Tuition Counterclaim, Exhibit R-7)

The Commissioner, therefore, directs that petitioner reimburse the Board for tuition in the amount of $31,847.16 for the ineligible attendance of D.B. in the district.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/23/04

Date of Mailing: 2/25/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

69-04

J.H., on behalf of minor child, ~~J.H.~~	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, parent of high school student J.H., challenged the Board's residency determination that J.H. was not a legal resident in the District. The Board filed a counterclaim for tuition for the period of ineligible attendance.

The ALJ dismissed the petition for failure of petitioner to appear at hearing or answer correspondence. The ALJ upheld the Board's counterclaim for $13,438.34 in tuition.

The Commissioner concurred with the ALJ's decision and granted the Board's counterclaim for $13,438.34 for the period of J.H.'s ineligible attendance at its school during the 2001-2002 and 2002-2003 school years.

February 26, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1843-03
AGENCY DKT. NO. 21-1/03

J.H. o/b/o J.H.

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE,

Respondent.

No Appearance for or on behalf of petitioner

Joseph A. DeFuria, Esq., for respondent
(Gaccione, Pomaco & Malanga, PA)

Record Closed: January 8, 2004 Decided: January 12, 2004

BEFORE **STEPHEN G. WEISS**, ALJ:

This is a school residence case which was transmitted to the Office of Administrative Law by the Department of Education on March 4, 2003 as a result of a challenge by the petitioner, J.H. on behalf of minor child J.H., to a determination by the Board the minor was not a legal resident in Belleville and therefore tuition for the period of time he attended school in that district was due and owing to the Board. *See, N.J.S.A.* 18A:38-1.

A plenary hearing was scheduled before the undersigned Administrative Law Judge on December 16, 2003. On that date no appearance was made by or on behalf of

the petitioner. Board counsel did appear and I directed that he submit proof of any tuition reimbursement sought so that a final determination on the counter-claim could be made.

Thereafter counsel submitted the affidavit of Dr. Joseph Ciccone, Superintendent of Schools (Exhibit R-1), in which Dr. Ciccone related that J.H., the minor, attended Belleville High School for the entire 2001-2002 school year and for 97 days during the 2002-2003 school year. The tuition expended by Belleville for that attendance amounted to $8,780.40 for the 2001-2002 school year (180 days x $48.78 per day) and $4,657.94 for the 2002-2003 school year (97 days x $48.02 per day). The total amount of tuition sought to be recouped by the Board's counterclaim therefore is $13,438.34.

Dr. Ciccone also related in his affidavit that the minor no longer is a student at Belleville High School and the tuition amount set forth in his affidavit is accurate up to the last day of attendance.

Since petitioner failed to appear for the hearing and did not respond to letters inquiring about his intent, his petition will therefore be dismissed.

With respect to the Board's counterclaim, in light of the affidavit of Dr. Ciccone, which was served on J.H. by mail and to which there has been no response, the Board is entitled to recover the total sum of $13,438.34.

Accordingly, for the reasons set forth above, the petition of appeal is dismissed and the Board's counterclaim in the amount of $13,438.34 is upheld.

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 (45) 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 (13) 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, 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.

January 12, 2004
DATE

STEPHEN G. WEISS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

January 12, 2004
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 13 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

\mvh

APPENDIX

Exhibit List:

R-1 Affidavit of Dr. Joseph Ciccone, December 22, 2003

OAL DKT. NO. EDU 1843-03
AGENCY DKT. NO. 21-1/03

J.H., on behalf of minor child, J.H.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner, who did not appear for the hearing in this matter, has failed to carry his burden of proof that his son was entitled to a free education in the District. The Commissioner further agrees with the grant of the Board's counterclaim for tuition in the amount of $13,438.34 for the period of J.H.'s ineligible attendance at its school during the 2001-2002 and 2002-2003 school years.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/26/04

Date of Mailing: 2/27/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

70-04

C.M.P., on behalf of minor child, A.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

February 23, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3682-03

AGENCY DKT. NO. 65-2/03

C.M.P., ON BEHALF OF MINOR CHILD, A.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

Respondent.

C.M.P., appearing *pro se*

Robert J. Merryman, Esq., appearing for respondent
(Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: January 5, 2004 Decided: January 20, 2004

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

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on April 23, 2003, 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.

A hearing was scheduled for August 22, 2003 at the OAL, 33 Washington Street, Newark, New Jersey; however, it adjourned to November 18, 2003 due to witness unavailability. Once again, the hearing was adjourned to allow petitioner to attend a custody hearing. The hearing was rescheduled for January 5, 2004. At the hearing, settlement discussions were held and a settlement was reached.

The parties have agreed to a settlement and have prepared a Agreement 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 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 (45) 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 20, 2004
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

January 23, 2004
DATE

M. Kathleen Duncan (tr)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 27 2004
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ...
JAN 20 9 54 PM '04

C.M.P. on behalf of A.B. v. Bayonne Board of Education

OAL DKT. No. EDU-3682-03
Agency DKT. No. 65-2/03

In settlement of this matter the parties agree as follows:

1. Petitioner agrees to withdraw the petition of appeal in this matter;

2. Cynthia Podurgiel and Carissa Balbuena agree jointly to pay to the Bayonne Board of Education the sum of ($6,500.00), six thousand five hundred dollars, in eighteen equal monthly payments of $361.10 beginning 30 days after the effective date of this Agreement representing a compromised amount of the tuition due as of the effective date of the Contract;

3. Payments are due by the 15th of the month. In the event any payment is more than 30 days late, the Board has the right to demand immediate payment of the remaining balance and to reduce this agreement to a judgment for the remaining balance;

4. The Board of education agrees to permit the student A.B. to remain in school for forty-five days after the effective date of this Agreement. During the forty-five days the issue of legal custody/guardianship must be resolved. In the event the grandmother, Cynthia Podurgiel, does not obtain legal custody or guardianship within the 45 days, the parents/grandmother agree to withdraw A.B. from the Bayonne School District and agree to pursue no further appeal of this matter;

5. The Bayonne Board of Education agrees to drop its demand for full tuition repayment; and

6. It is agreed that the parents/grandmother will have 10 days to review this Agreement with an attorney. If there is no written objection to this Agreement received by the

attorney for the Board of Education within 10 calendar days of the date this Agreement is signed, January 5, 2004, this Agreement shall take effect on January 15, 2004 and shall be legally binding on the parties.

Carissa Balbuena | S |
Carissa Balbuena

Dated: January 5, 2004

Robert J. Merryman | S |
Robert J. Merryman
Bayonne Board of Education
—Attorney—

Dated: January 5, 2004

Cynthia Podurgiel | S |
Cynthia Podurgiel

Dated: January 5, 2004

131218

J-1

EMP on behalf of A.B. v. Bayonne Board of Education

OAL Okt. No. EDU-3682-03
Agency Okt. No. 65-2/03

In settlement of this matter the parties agree as follows:

1. Petitioner agrees to withdraw the [redacted] of appeal in this matter;

2. Cynthia Rodriguiel and Carisso Balbuena agree jointly to pay to the Bayonne Board of Education the sum of ($6,500.00) six thousand five hundred dollars in eighteen equal monthly payments of $361.10 beginning 30 days from the effective date of this agreement representing the Compromised amount of the restitution due as of the effective date of this contract.

3. Payments are due by the 15th of the month. In the event any payment is more than 30 days late, the Board has the right to demand immediate payment of the remaining balance and to reduce this agreement to a judgment for the remaining balance.

4. The Board of Education agrees to permit the student A.B. to remain in school for forty-five days after the effective date of this agreement. During the forty-five days the issue of legal custody/guardianship must be

resolved. In the event the grandmother, Cynthia Rodriguez does not obtain legal custody or guardianship within the 45 days, the parents/ grandmother agree to withdraw A.B. from the Bayonne School District and agree to pursue no further appeal of this matter.

5. The Bayonne Board of Education agrees to drop its demand for full tuition repayment.

6. It is agreed that the parents/ grandmother will have 10 days to review this agreement with an attorney. If there is no written objection to this agreement received by the attorney for the Board of Education within 10 calendar days of the date this agreement is signed, January 5, 2004, this agreement shall take effect and shall be legally binding on the parties.

Clarissa Barbuena

Dated 1/5/04

Cynthia Rodriguez

Cynthia Rodriguez

Dated 1-5-2004

Robert J. Mayer

Bayonne Board of Education - Attorney

Dated: 1/5/04

OAL DKT. NO. EDU 3682-03
AGENCY DKT. NO. 65-2/03

C.M.P., on behalf of minor child, A.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/23/04

Date of Mailing: 2/27/04

71-04

ADAMU S. BRAIMAH, SR.,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, former principal, alleged the Board violated his tenure rights when it assigned him to a vice principal position.

The ALJ concluded that petitioner did not attain tenure as principal pursuant to *N.J.S.A.* 18A:28-6(a). The ALJ found that petitioner was appointed to the position on August 22, 2000 and served until August 12, 2002, a period that plainly falls short of the two calendar years required by statute. Moreover, the ALJ concluded that petitioner failed to serve the required length of time mandated by *N.J.S.A.* 18A:28-6(b) as defined in academic years and, thus, he was not entitled to tenure under this statutory provision. Petition was dismissed.

The Commissioner adopted the Initial Decision as his own.

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.

3/01/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 1361-03

AGENCY DKT. NO. 295-9/02

ADAMU S. BRAIMAH, SR.,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Anthony P. Sciarrillo, Esq., for petitioner (Lindabury, McCormick & Estabrook, attorneys)

Arsen Zartarian, Esq., for respondent (Perry Lattiboudere, General Counsel, attorney)

Record Closed: December 4, 2003 Decided: January 16, 2004

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

STATEMENT OF THE CASE

The petitioner, Adamu S. Braimah, Sr. (petitioner), challenges action by the respondent, the State-Operated School District of the City of Newark (the District), reassigning petitioner from the position of principal to vice principal effective August 12, 2002. Petitioner alleges that he achieved tenure in the position of principal pursuant to the provisions of *N.J.S.A.* 18A:28-6. The District controverts petitioner's tenure claim.

PROCEDURAL HISTORY

On September 19, 2002, petitioner filed a Verified Petition with the Commissioner of Education (Commissioner) alleging violation of his tenure rights and seeking reinstatement to the position of principal. The District filed an Answer to Verified Petition on November 26, 2002. Subsequently, the Commissioner transmitted the matter to the Office of Administrative Law where, on January 31, 2003, it was filed for determination as a contested case. The matter was scheduled to be heard on August 19 and 20, 2003. Prior to the hearing, counsel for the respective parties agreed that the dispute involved questions of law that should be decided on cross-motions for summary decision. Toward this end, the parties submitted briefs and an Amended Joint Stipulation of Facts. The undersigned heard oral argument on December 4, 2003, on which date the record was closed.

ISSUE PRESENTED

The critical issue presented is whether petitioner met the statutory qualifications embodied in *N.J.S.A.* 18A:28-6 necessary to acquire tenure as principal.

FINDINGS OF FACT

The parties stipulated to the material facts, which are not in dispute. Based upon the parties' Amended Joint Stipulation of Facts and attached exhibits, I **FIND** the following **FACTS**:

1. Petitioner was hired in 1987 as a security guard at the District.

2. In 1989, petitioner was appointed to the position of teacher with the District.

3. On or about February 27, 1997, petitioner was appointed to the position of vice principal.

4. Petitioner continued his employment as a vice principal until June 30, 2000, acquiring tenure in that position.

5. Effective August 22, 2000, petitioner was appointed to the position of interim principal at Dr. E. Alma Flagg School. The State District Assistant Superintendent informed petitioner of this appointment in a letter dated August 21, 2000. See Exhibit A attached to the Amended Joint Stipulation of Facts.

6. Petitioner worked the contracted work year for principals from August 22, 2000 through June 30, 2001.

7. Effective November 1, 2000, the District changed petitioner's status from interim principal to principal at Dr. E. Alma Flagg School. Petitioner was informed of this status change via letter dated November 20, 2000. See Exhibit B attached to the Amended Joint Stipulation of Facts.

8. The work year for principals changed to a twelve month work year on July 1, 2001.

9. Petitioner then worked as a principal from July 1, 2001 to June 30, 2002, the contracted work year for principals.

10. Continuing July 1, 2002, principals worked on a twelve month calendar.

11. On July 1, 2002, petitioner began his third contracted work year as principal.

12. Effective August 12, 2002, petitioner was reclassified from the position of principal and assigned to the position of vice principal.

13. By letter dated July 24, 2002, the District informed petitioner that he had been reclassified from the position of principal at Dr. E. Alma Flagg School to vice principal at Luis Munoz Marin School, effective August 12, 2002, along with the resulting decrease in his salary. See Exhibit C attached to the Amended Joint Stipulation of Facts.

14. Petitioner's relevant service may be summarized as follows:

* August 22, 2000 to October 31, 2000 – interim principal
* November 1, 2000 to August 12, 2002 – principal
* From August 22, 2000 to June 30, 2001, petitioner was employed on an academic year basis
* Beginning July 1, 2001 to August 12, 2002, petitioner was employed on a calendar year basis

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

The tenure provisions in the school laws, *N.J.S.A.* 18A:28-1 to –18, define the conditions under which teaching staff members are entitled to the security of tenure. Tenure has been described as a "statutory right imposed upon a teacher's contractual employment status." *Zimmerman v. Bd. of Educ. of the City of Newark*, 38 *N.J.* 65, 72 (1962), *cert. den.*, 371 *U.S.* 956, 83 *S. Ct.* 508, 9 *L. Ed.* 2d 502 (1963). The objective of the tenure statutes is to protect competent and qualified teaching staff members, after a probationary period, from removal for "unfounded, flimsy, or political reasons." *Id.* at 71. In other words, the provisions are "designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service." *Viemeister v. Bd. of Educ. of the Borough of Prospect Park,* 5 *N.J. Super.* 215, 218 (App. Div. 1949).

To acquire the security of tenure, the precise conditions articulated in the statute must be met. *Picogna v. Bd. of Educ. of the Twp. of Cherry Hill,* 143 *N.J.* 391, 400 (1996); *Kletzkin v. Bd. of Educ. of the Borough of Spotswood,* 136 *N.J.* 275, 278 (1993); *Spiewak v. Bd. of Educ. of Rutherford,* 90 *N.J.* 63, 72 (1982); *Zimmerman, supra,* 38 *N.J.* at 72; *Ahrensfield v. State Bd. of Educ.*, 126 *N.J.L.* 543, 544 (E & A 1941). The statute supercedes contractual terms. *Spiewak, supra,* 90 *N.J.* at 72. Tenure "arises only by passage of time fixed by the statute. . . ." *Canfield v. Bd. of Educ. of the Borough of Pine Hill,* 51 *N.J.* 400 (1968), *rev'g on dissent,* 97 *N.J. Super.* 483, 490 (App. Div. 1967). The burden of proving an entitlement to tenure is upon the teaching staff member and ordinarily must be clearly proven. *Id.* at 493.

This matter concerns *N.J.S.A.* 18A:28-6, the section of the tenure laws governing the acquisition of tenure following a transfer or promotion. Pursuant to its

terms, petitioner "shall not obtain tenure in the new position until after" one of the following proscribed periods:

> (a) the expiration of a period of employment of two consecutive calendar years in the new position . . .; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years....
>
> [*N.J.S.A.* 18A:28-6.]

The parties' paths diverge regarding whether petitioner achieved tenure within the intendment of *N.J.S.A.* 18A:28-6.

Certain cardinal principles of statutory interpretation lend guidance concerning the statutory language in issue. Our precedents counsel that "[t]he first step in any statutory analysis is to examine the statute's plain language as the clearest indication of its meaning." *Bergen Commercial Bank v. Sisler,* 157 *N.J.* 188, 202 (1999). It is fundamental that "'[i]f the [statutory] language is plain, unambiguous and uncontrolled by other parts of the act or other acts upon the same subject the court cannot give it a different meaning.'" *In the Matter of the Closing of Jamesburg High School,* 83 *N.J.* 540, 547 (1980) (citation omitted). Stated differently, when "statutory language is clear and unambiguous, and susceptible to only one interpretation, courts should apply the statute as written. . . ." *In the Matter of Passaic County Utilities Authority Petition,* 164 *N.J.* 270, 299 (2000). Similarly, "[a]bsent a legislative intent to the contrary, such language should be given its ordinary meaning." *Lammers v. Bd. of Educ. of the Borough of Point Pleasant*, 134 *N.J.* 264, 268 (1993). Our courts have further embraced the concept that "a construction that would render 'any word in the statute to be inoperative, superfluous or meaningless, or to mean something other than its

ordinary meaning'" should be avoided. *Bergen Commercial Bank, supra,* 157 *N.J.* at 204 (citation omitted).

Equally settled is the liberal construction to be afforded to the tenure laws toward achieving their beneficent purpose. *Kletzkin, supra,* 136 *N.J.* at 278; *Lammers, supra,* 134 *N.J.* at 272; *Spiewak, supra,* 90 *N.J.* at 74. However, this "liberal construction must be reasonable in light of the plain language of the controlling statutes." *Ibid.* In reviewing a different provision of the tenure laws, the New Jersey Supreme Court recognized that the "salutary objective cannot be secured by extending the law to situations in which it was not intended to apply." *Closing of Jamesburg High School, supra,* 83 *N.J.* at 548. Rather, the Court held:

> Our duty is to construe and apply the statute as enacted. We are not at liberty to presume the legislature intended something other than what it expressed by its plain language. This Court will not engage in conjecture or surmise which will circumvent the plain meaning of the act.
>
> [*Ibid.*]

It is against this backdrop that the parties' positions are considered.

Petitioner maintains that he attained tenure as principal, having worked for two academic years and the beginning of a third calendar year. More particularly, petitioner argues that, by beginning his third year as a principal, he satisfied the legislative intent of *N.J.S.A.* 18A:28-6(b) as articulated by the State Board of Education in *Donnelly v. Bd. of Educ. of the Borough of Hasbrouck Heights,* OAL Dkt. No. EDU 7770-99, State Board Dkt. No. 2-02 (November 6, 2002). Petitioner avers that the tenure statute, as written, did not contemplate a change in an employee's work year and should be liberally construed in favor of the employee due to the novel facts. In short, the District contends that, inasmuch as petitioner served in the capacity of principal for less than two calendar years and for no more than two academic years, he failed to satisfy any of the three criteria required by the statute.

It is beyond debate that the triggering date for tenure purposes is the date of performance of service, not the date of the employee's contract or hiring. *See, Kletzkin, supra,* 136 *N.J.* 279. *Zimmerman, supra,* 38 *N.J.* at 73-75; *Carroll v. State Bd. of Educ.,*

teaching staff member must be employed in the new position "for the equivalent of more than two academic years," "within a period of any three consecutive academic years." Since petitioner's employment as principal did not extend to a third academic year, *N.J.S.A.* 18A:28-6(c) provides no solace to petitioner. I **CONCLUDE** that, inasmuch as the precise terms of the statute were not met, petitioner did not attain tenure pursuant to *N.J.S.A.* 18A:28-6(c).

The undersigned is unpersuaded that the State Board's decision in *Donnelly* supports petitioner's tenure claim. As noted, in *Donnelly* the State Board held that *N.J.S.A.* 18A:28-6(c) is not limited to staff employed on an academic year basis. It further concluded that the petitioner had achieved tenure under its provisions. The evidence in *Donnelly* disclosed that the petitioner had served as acting principal for the full 1996-97 academic year, as acting and then principal for eight months during the 1997-98 academic year and as principal for the entire 1998-99 year. The State Board agreed with the Commissioner and the Administrative Law Judge that the petitioner's employment as acting principal was creditable toward the acquisition of tenure as principal. *Id.* at 6. Consequently, the length of petitioner's service met the requirements of *N.J.S.A.* 18A:28-6(c), *i.e.,* the petitioner served the equivalent of more than two academic years during portions of three academic years. In contrast, the undisputed facts in the instant case do not support a similar conclusion.

Finally, that petitioner's contracted work year changed during his service does not warrant an extension of the law to teaching staff members not contemplated by *N.J.S.A.* 18A:28-6. To grant petitioner tenure predicated on a change in his contracted work year is contrary to the plain and unambiguous language of the statute, as well as the teachings of *Spiewak* and *Donnelly.* It also would produce an anomalous result by granting petitioner a benefit he otherwise would not have obtained had no change in his work year occurred effective July 1, 2001. Specifically, had petitioner continued as an academic year employee, it is clear that petitioner's tenured status would not have arisen until the beginning of his third academic year in September 2002. Conversely, had petitioner been employed continuously on a calendar year basis, he would not be entitled to tenure until after two calendar years in the position, *i.e.,* after August 22, 2002.

In sum, based upon the foregoing facts and cited authorities, I **CONCLUDE** that petitioner did not achieve tenure as principal pursuant to *N.J.S.A.* 18A:28-6.

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 the Verified Petition filed on petitioner's behalf 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 (45) 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 (13) 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, 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.

January 16, 2004
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

January 16, 2004
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 2 0 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

OAL DKT. NO. EDU 1361-03
AGENCY DKT. NO. 295-9/02

ADAMU S. BRAIMAH, SR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law been reviewed. Petitioner's exceptions and the District's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.[1]

Upon careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge. Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/01/04

Date of Mailing: 3/01/04

[1] Both the exceptions and the reply thereto essentially reiterate arguments which were presented in papers previously considered by the Administrative Law Judge.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

72-04

K.S., on behalf of minor child, C.S.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

March 3, 2004

OAL DKT. NO. EDU 2380-02
AGENCY DKT. NO. 82-3/02

K.S., on behalf of minor child, C.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL dated on January 14, 2004 providing them the opportunity to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/3/04

Date of Mailing: 3/4/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

75-04

J.D. and P.A., on behalf of minor child, F.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

March 5, 2004

AGENCY DKT. NO. 379-10/03

J.D. and P.A., on behalf of minor child, F.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

This matter having been opened before the Commissioner of Education by way of a Petition of Appeal, filed on October 16, 2003, claiming that petitioners are domiciled in the Township of West Orange and are legal guardians of minor child, F.C., thereby entitling him to attend school in the West Orange School District free of charge pursuant to *N.J.S.A.* 18A:38-1, and seeking an order requiring the Board of Education of the Township of West Orange to admit F.C. to the District's schools; and

The Commissioner having directed the Board by notices dated October 16, 2003, via facsimile and regular mail, and November 13, 2003, via certified and regular mail, to file an Answer to the petition; and

Mary Anne Rourke having acknowledged receipt of service of the November 13, 2003 notice, on November 18, 2003, by signing the certified delivery receipt on behalf of the Board; and

As of this date, neither the Board nor any attorney on its behalf has filed an Answer to the petition; and

The Board's failure to Answer the petition is deemed to be a removal of its opposition to F.C.'s claim of entitlement to attend its schools; now therefore

IT IS ORDERED on this 5th day of March 2004 that summary decision shall be granted to petitioners. Minor child, F.C., is deemed to be domiciled in the Township of West Orange and, therefore, entitled to attend school free of charge in that District pursuant to *N.J.S.A.* 18A:38-1 as long as circumstances remain unchanged.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/5/04

Date of Mailing: 3/5/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

73-04

P.M., on behalf of minor child, P.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

March 3, 2004

OAL DKT. NO. EDU 5658-03
AGENCY DKT. NO. 126-4/03

P.M., on behalf of minor child, P.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of petitioner's failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on December 5, 2003, providing petitioner an opportunity to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/3/04

Date of Mailing: 3/4/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

79-04

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
ERIC D. KALET, SCHOOL DISTRICT	:	DECISION
OF THE CITY OF BURLINGTON,	:	
BURLINGTON COUNTY.	:	

March 5, 2004

AGENCY DKT NO. 425-11/03

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
ERIC D. KALET, SCHOOL DISTRICT	:	DECISION
OF THE CITY OF BURLINGTON,	:	
BURLINGTON COUNTY.	:	

For the Petitioning Board, Thomas J. Scattergood, Esq.

This matter was opened before the Commissioner of Education by way of a request for an Order to Show Cause filed by the Board of Education of the City of Burlington, seeking suspension of the instructional certificate of Eric D. Kalet ("respondent") for resigning from employment with the Burlington City School District on inadequate notice.

After reviewing the Board's papers, the Commissioner issued, on December 3, 2003, an Order directing respondent to show cause why a further order should not be entered suspending his teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10; that Order and the accompanying Affidavit of Edward F. Gola, Jr., Superintendent of the Burlington City School District, were served on the respondent via certified mail.

Respondent has failed to answer the allegations against him, notwithstanding two notices of his entitlement to do so, the second sent via regular and

certified mail[1] with the caution that failure to answer would be deemed an admission of each count of the Order and would result in the matter being decided by the Commissioner on a summary basis pursuant to *N.J.A.C.* 6A:3-1.5(e).

Consequently, respondent having failed to answer the Commissioner's Order, each allegation against him is deemed admitted, and the Commissioner finds that, by ceasing to perform his duties as a Teacher of Social Studies in the Burlington City School District without the Board's consent and before the expiration of his term of employment, respondent has engaged in unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10.

Accordingly, Respondent Eric D. Kalet's instructional certificate shall be suspended for a period of one year, to commence upon the filing date of this decision. A copy of this decision shall be forwarded to the State Board of Examiners for the purpose of effectuating the order herein.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/5/04

Date of Mailing: 3/9/04

[1] The certified mail was returned unclaimed, but the regular mail was not.

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

77-04

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
AMY FERRELL, SCHOOL DISTRICT OF :
PARSIPPANY-TROY HILLS, MORRIS :
COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

March 5, 2004

AGENCY DKT. NO. 24-1/04

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF AMY FERRELL, SCHOOL DISTRICT OF PARSIPPANY-TROY HILLS, MORRIS COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For the Petitioning Board, Marie-Laurence Fabian, Esq.

For the Respondent, Gregory T. Syrek, Esq.

This matter having been opened by way of Motion for an Order to Show Cause before the Commissioner of Education by the Board of Education of the Township of Parsippany-Troy Hills, seeking suspension of the instructional certificate of Amy Ferrell for resigning from employment on inadequate notice; and

The Commissioner having issued, on January 13, 2004, an Order directing Ms. Ferrell to show cause why further order should not be entered suspending her teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10; and

The Order and accompanying Affidavits of Eugene Vasile, Superintendent of Schools, and Matthew McGrath, Director of Personnel, having been sent by the Board, via certified mail, to Amy Ferrell; and

The Commissioner having directed respondent, by notice dated January 26, 2004, to submit an answer within 20 days of receipt of the Order; and

Respondent, through her counsel, having filed a Response to the Order to Show Cause on February 10, 2004 which stated, in pertinent part, "I do not wish to contest the application of the Board of Education in this matter" (Respondent's Response at 1); and

Respondent having ceased to perform her duties as a high school social studies teacher in the Parsippany-Troy Hills School District before the expiration of the term of her employment, without the Board's consent, and under the circumstances set forth in the Affidavits of Eugene Vasile, Superintendent of Schools, and Matthew McGrath, Director of Personnel and, thereby engaging in unprofessional conduct, pursuant to *N.J.S.A.* 18A:26-10; now therefore

IT IS ORDERED on this 5th day of March 2004, that Amy Ferrell's instructional certificate shall be suspended for a period of one year, to commence upon the date of this decision. A copy of this decision is hereby forwarded to the State Board of Examiners for the purpose of effectuating this order and taking such further action, if any, as it deems appropriate.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/05/04

Date of Mailing: 3/05/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

76-04

R.R., on behalf of minor child,
J.L-R. ,

PETITIONER,

V.

BOARD OF EDUCATION OF THE
CITY OF CLIFTON, PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

March 5, 2004

OAL DKT. NO. EDU 09442-01
AGENCY DKT. NO. 346-9/01

R.R., on behalf of minor child, J.L-R. ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL dated on November 13, 2003 providing them an opportunity to submit an explanation for such nonappearance, have been reviewed. By letter dated November 25, 2003, petitioner submitted correspondence to the Bureau of Controversies and Disputes explaining that he had neither transportation nor an available translator available for the scheduled proceeding on November 13, 2003. He further states,

> Please note that I am a 73-year-old man with mobile and language limitations, however, by no means do I wish to give the impression that I am apathetic about the situation on hand. With that in mind, I am asking for another opportunity to attend the proceeding at another scheduled time. (Rojas Letter, November 25, 2003)

Accordingly, the Commissioner finds, in the interest of fundamental fairness to a

pro se petitioner who may be facing the possibility of a tuition assessment, that this matter should be returned to the OAL for continued proceedings.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/05/04

Date of Mailing: 3/05/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

81-04

IN THE MATTER OF THE TENURE	:	
HEARING OF JEANNINE CARROLL,	:	COMMISSIONER OF EDUCATION
NORTH ARLINGTON SCHOOL DISTRICT,	:	DECISION
BERGEN COUNTY.	:	

March 8, 2004



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7494-03
AGENCY DKT. NO. 232-7/03

I/M/O THE TENURE HEARING OF JEANNINE CARROLL, NORTH ARLINGTON SCHOOL DISTRICT, BERGEN COUNTY,

---

Stephen R. Fogarty, Esq., for petitioners
(Fogarty and Hara, attorneys)

Sanford R. Oxfeld, Esq., for respondent
(Oxfeld, Cohen, LLC, attorneys)

Record Closed: January 8, 2003 Decided: January 20, 2004

BEFORE **LESLIE Z. CELENTANO,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on August 11, 2003, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13.

Hearing dates were scheduled for October 2, 2003, October 3, 2003, October 16, 2003 and October 17, 2003. However on August 27, 2003 respondent was served with amended tenure charges. Accordingly the hearing dates were adjourned to December 3, 2003, December 4, 2003, December 9, 2003 and December 10, 2003 to provide the parties with a reasonable time to complete discovery. Thereafter, on November 21, 2003 the parties agreed to settle this matter. The attached Settlement Agreement was submitted on January 8, 2004, indicating the terms of agreement which are incorporated herein by reference.

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

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

2. The settlement complies with the standards set forth in *Cardonick v. Brookline BOE, dec'd by the Comm'r,* April 7, 1992, *aff'd. St. Bd. of Ed.*, April 6, 1983, 1990 *SLD* 842, 846.

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 (45) 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 20, 2004
DATE

LESLIE Z. CELENTANO, ALJ

Receipt Acknowledged:

January 23 2004
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 2 7 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
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FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
Telecopier (201) 791-3432
Attorneys for Petitioner,
North Arlington Board of Education
Our File No. 125

IN THE MATTER OF THE TENURE HEARING OF JEANNINE CARROLL, BOROUGH OF NORTH ARLINGTON BOARD OF EDUCATION, BERGEN COUNTY	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY/OFFICE OF ADMINISTRATIVE LAW OAL Docket No.: EDU 07494-03 Agency Ref. No.: 232-7/03 SETTLEMENT AGREEMENT

WHEREAS, the respondent, Jeannine Carroll (hereinafter referred to as "Carroll") has been employed by the petitioner, the North Arlington Board of Education (hereinafter referred to as the "Board") as a school nurse since 1980, and has obtained tenure in that position; and

WHEREAS, on or about May 15, 2003, the Board Secretary/School Business Administrator served Carroll with charges of unbecoming conduct, failure to exercise appropriate authority and control over her students and insubordinate and irresponsible behavior (hereinafter referred to as the "Charges") together with a written statement of evidence in support thereof; and

WHEREAS, Carroll was informed in writing that she had fifteen (15) days in which to file a written response with the Board to the Charges with the Board; and

WHEREAS, Carroll did not file a written response to the Charges pursuant to N.J.S.A. 18A:6A-11 within the fifteen (15) day timeline; and

WHEREAS, on or about July 8, 2003, the Board certified the Charges against Carroll and suspended Carroll without pay for one hundred twenty (120) days, effective July 9, 2003; and

WHEREAS, on or about July 10, 2003, the Charges were filed by petition with the Commissioner of Education; and

WHEREAS, on or about August 4, 2003, Carroll filed an Answer to the Charges, denying the Charges filed against her, as well as an Affidavit establishing good cause to allow the untimely filing of same; and

WHEREAS, on or about August 7, 2003, the Commissioner of Education deemed the Charges sufficient, if true, to warrant Carroll's dismissal or the reduction in her salary, and forwarded the Charges to the Office of Administrative Law pursuant to N.J.S.A. 18A:6-16; and

WHEREAS, hearing dates for the adjudication of the Charges were scheduled before the Honorable Leslie Z. Celentano, A.L.J. for October 2, 2003, October 3, 2003, October 9, 2003, October 16, 2003 and October 17, 2003; and

WHEREAS, on or about August 27, 2003, due to newly discovered evidence, the Board Secretary formally served Carroll with amended tenure charges of unbecoming conduct, failure to exercise appropriate authority and control over her students, insubordinate and irresponsible behavior and exhibiting a pattern of insubordinate,

unprofessional and unbecoming conduct (hereinafter referred to as the "Amended Charges"); and

WHEREAS, Carroll was informed in writing that she had fifteen (15) days in which to file a written response with the Board to the Amended Charges; and

WHEREAS, on or about September 25, 2003, the Honorable Leslie Z. Celentano, A.L.J. adjourned the scheduled hearing dates to provide both parties with a reasonable amount of time to complete discovery due to the certification of the Amended Charges; and

WHEREAS, on or about September 5, 2003 Carroll filed an Answer to the Amended Charges; and

WHEREAS, hearing dates for the adjudication of the amended tenure charges were scheduled before the Honorable Leslie Z. Celentano, A.L.J. for December 1, 2003, December 3, 2003, December 4, 2003, December 9, 2003, and December 10, 2003; and

WHEREAS, on or about November 5, 2003, Carroll's one hundred twenty (120) day suspension without pay expired, whereafter Carroll's suspension continued with pay, beginning on or about November 6, 2003; and

WHEREAS, the parties agree that a settlement would benefit all witnesses and be in the best interests of the North Arlington School District and, therefore, the public; and

WHEREAS, further litigation of these charges would necessitate the disruption of the Board's educational program due to the necessary absence of administrators, teachers and office personnel who would be called to testify at the hearing, said hearing expected to require at least five (5) days to conclude; and

WHEREAS, the Board would incur substantial financial costs by continuing this litigation that would significantly exceed the cost of this settlement; and

WHEREAS, Carroll has been advised of the Commissioner of Education's duty to refer tenure determinations resulting in a loss of position to the State Board of Examiners for possible suspension or revocation of her certificate; and

WHEREAS, the parties wish to amicably resolve their differences without the need to resort to any further litigation;

NOW, THEREFORE, in consideration of the aforementioned mutual premises and the mutual promises and covenants of the parties set forth below, the parties hereby agree as follows:

1. Carroll shall resign from her position of employment with the Board, together with all tenure and seniority rights, effective June 30, 2006 subject only to approval of this Settlement Agreement by the Board, the Office of Administrative Law and the Commissioner of Education. Carroll submits her resignation, effective June 30, 2006, knowingly, voluntarily and irrevocably, free of coercion or duress, after consulting with counsel and receiving advice as to its ramifications. Carroll will sign an irrevocable letter to resignation from all employment with the Board in the form attached hereto as Exhibit A.

2. Carroll shall receive a thirty (30) day suspension from employment with the Board, from September 1, 2003 through October 1, 2003, resulting in a financial penalty of $7,520.00.

3. The Board shall issue Carroll a formal letter of reprimand to be placed in her personnel file, memorializing her involvement in the two (2) separate incidents which had precipitated the Board's decision to certify the Charges and the Amended Charges against her.

4. The Board agrees to withdraw, with prejudice, its Charges and Amended Charges in the above-captioned matter bearing O.A.L. Docket No. EDU 07494-03 and Agency Ref. No. 232-7/03, subject to the approval of this Settlement Agreement by the Office of Administrative Law and the Commissioner of Education.

5. In consideration for Carroll's resignation, effective June 30, 2006 and the financial penalty set forth in Paragraphs 1 and 2 of this Settlement Agreement, the Board has agreed to restore that portion of Carroll's 2003-2004 salary, inclusive of increment, which had been withheld due to her one hundred twenty (120) day suspension without pay beginning on or about July 9, 2003 and ending on or about October 6, 2003, for which she is entitled to receive payment in the following amount: $9,024.00, less usual and customary deductions for withholding taxes and charges, which represents the thirty seven (37) days for which she was entitled to her normal rate of pay from October 1, 2003 to November 6, 2003, following the period of her suspension as set forth in Paragraph 2 of this Settlement Agreement.

All monies due Carroll under this Settlement Agreement shall be paid, after normal payroll deductions, upon final approval of this Settlement Agreement by the Office of Administrative Law and the Commissioner of Education.

6. The Board agrees to retroactively restore Carroll to its payroll at her current annual salary rate of $75,200, inclusive of increment on October 1, 2003, upon the completion of her thirty (30) day suspension without pay, as set forth in Paragraph 2 of this Settlement Agreement.

7. The amounts specified in Paragraphs 5 and 6 of this Settlement Agreement are to be provided in consideration for Carroll waiving any and all claims she has, or could have, against the Board, its agents, employees and representatives, including but

not limited to, claims for discrimination, contract, tort or constitutional violations, or attorney's fees arising up until the date of this Settlement Agreement. Carroll shall execute a General Release in favor of the Board releasing the Board from all claims, liabilities and expenses to which it may be subject, arising from any claims or rights of Carroll arising up until the date of this Settlement Agreement. The form of this General Release is attached hereto as Exhibit B. Nothing in this Settlement Agreement or the documents referenced herein shall preclude either party from bringing an action to enforce performance of any term of this Settlement Agreement should there be a default in performance, or preclude Carroll from exercising any right or claim that she may have to indemnification from the Board under N.J.S.A. 18A:16-6 and N.J.S.A. 18A:16-6.1.

8. The parties acknowledge that this Settlement Agreement shall be submitted to the Office of Administrative Law and the Commissioner of Education for review and approval, and that the terms of this Settlement Agreement are expressly made subject to and contingent upon such review and approval. In the event that either agency disapproves and/or rejects any of the terms contained herein, this Settlement Agreement shall be null and void and the parties shall return to the same positions which they held prior to this Settlement Agreement.

9. The parties recognize that each has been represented by legal counsel or a representative of her or its own choosing and that they sign freely with the full understanding of the duties and obligations enumerated herein.

10. This Settlement Agreement shall be subject to the laws of the State of New Jersey.

11. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Settlement Agreement and bind the Board to its terms.

12. Carroll hereby declares that she is of sufficient physical, mental and emotional capacities to understand and agree to all of the terms and conditions of this Settlement Agreement and agrees that she is and will continue to be bound by these terms and conditions in the future.

13. All terms of this Settlement Agreement, are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS, WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

WITNESS:

Kathleen Marano
Business Administrator/Board Secretary

Dated: 12/15/03, 2003

BOROUGH OF NORTH ARLINGTON BOARD OF EDUCATION

By: _____
Brian Fitzhenry
Board President

Dated: 12/15/03, 2003

WITNESS:

Sanford R. Oxfeld, Esq.

Dated: 12-1, 2003

Jeannine Carroll

Dated: Dec. 1, 2003, 2003

RELEASE

This Release, dated Dec. 1, 2003, 2003 is given

BY the Releasor(s) JEANNINE CARROLL, residing at 58 Raymond Avenue, Nutley, New Jersey 07110-2235, referred to as "I".

TO BOROUGH OF NORTH ARLINGTON BOARD OF EDUCATION, and its officers, employers, administrators, agents, servants and all other persons firms or corporations who or which are or might be liable in the premises from any and all claims which I have or might have against them 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 specifically release the following claims:

> This Release includes any and all claims, of any and every nature, known or unknown, fixed or contingent, matured or unmatured, arising up until the date of this Release, which relate in any way to, arise from, or are in any way connected with the Tenure Hearing of Jeannine Carroll, Borough of North Arlington Board of Education, before the Commissioner of Education and the Office of Administrative Law and hearing Docket No. EDU 07494-03 and Agency Reference No. 232-7/03. Nothing in this Release or the documents referenced herein shall preclude me from exercising any right or claim I may have to indemnification from the Board under N.J.S.A. [redacted] and N.J.S.A. 18A:16-6.1.

2. **Payment.** I have been paid or will be a total of $[redacted], less all applicable deductions in accordance with the terms of the Settlement Agreement, in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. **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.

4. **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.

Witnessed or Attested by:

Jeannine Carroll

(Seal)

STATE OF NEW JERSEY)
SS:
COUNTY OF ESSEX)

BE IT REMEMBERED that on this 1st day of December, 2003, before me personally appeared Jeannine Carroll, who I am satisfied is the person mentioned in and who executed the within Agreement and who knows the contents thereof and thereupon I acknowledge that she signed, sealed and delivered the same as her voluntary act and deed for the uses and purposes therein expressed.

NOTARY PUBLIC
Barbara R. Oxtoby
An atty. at law of NJ

Prepared by:
Pogarty & Hara, Esqs.

Stephen R. Pogarty

31

NORTH ARLINGTON BOARD OF EDUCATION

222 Ridge Road
North Arlington, NJ 07031

Telephone 201-991-6800
Fax 201-991-8226

Kathleen McEwin-Marano
Secretary/Business Administrator

I, Kathleen McEwin-Marano, Secretary of the North Arlington Board of Education, hereby certify that the following resolution is a true excerpt of the official minutes of the December 15, 2003 Public Meeting of the North Arlington Board of Education.

BE IT RESOLVED by the Borough of North Arlington Board of Education (hereinafter referred to as "Board of Education") as follows:

1. The request of Jeannine Carroll to tender her resignation with the Board of Education, effectively June 30, 2006, is hereby approved and accepted.
2. The terms of the stipulations and conditions as established in the Settlement Agreement between the Board of Education and Jeannine Carroll, annexed hereto, are hereby adopted and approved by the Board of Education. The President and Secretary of the Board of Education are hereby authorized and directed to execute the attached Settlement Agreement, and any other documents necessary to effect said Settlement Agreement.

On Motion by Mr. Santos, second by Mr. Italiano. There was no discussion. On Roll Call all Board Members present voted in the affirmative and none in the negative, it was so ordered.

Respectfully submitted,

Kathleen McEwin-Marano

KMM:pz

LS

JEANNINE CARROLL
58 RAYMOND AVENUE
NUTLEY, NEW JERSEY 07110-2235

Mr. Brian Fitzhenry
Board President
North Arlington Board of Education
222 Ridge Road
North Arlington, New Jersey 07031

Re: Letter of Resignation

Dear Mr. Fitzhenry:

Pursuant to the terms of the Settlement Agreement between the Borough of North Arlington Board of Education and myself, I hereby submit my irrevocable resignation from the position of school nurse, effective June 30, 2006. This resignation is expressly conditioned upon the Board's compliance with the aforesaid Settlement Agreement and is of no force of effect, even if accepted, unless said Agreement is fully performed by the Board.

Sincerely,

Jeannine Carroll

Dated: Dec. 1, 2003

OAL DKT. NO. EDU 7494-03
AGENCY DKT. NO. 232-7/03

IN THE MATTER OF THE TENURE	:	
HEARING OF JEANNINE CARROLL,	:	COMMISSIONER OF EDUCATION
NORTH ARLINGTON SCHOOL DISTRICT,	:	DECISION
BERGEN COUNTY.	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

Date of Decision: 3/8/04

Date of Mailing: 3/9/04

80-04

V.S., on behalf of minor child, V.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

March 5, 2004

AGENCY DKT. NO. 316-9/03

V.S., on behalf of minor child, V.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

This matter having been opened before the Commissioner of Education by way of a Petition of Appeal, filed on September 4, 2003, claiming that petitioner and her child are domiciled in the Borough of Fair Lawn so as to entitle her child to attend school in the Fair Lawn School District free of charge pursuant to *N.J.S.A.* 18A:38-1, and seeking an Order requiring the Board of Education of the Borough of Fair Lawn to admit petitioner's child to the District's schools; and

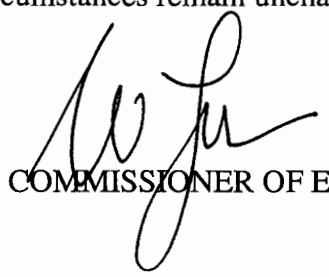
The Commissioner having directed the Board by notices dated September 4, 2003, via facsimile and regular mail, and September 29, 2003, via certified and regular mail, to file an Answer to the petition; and

M. Bombardier having acknowledged receipt of service of the September 29, 2003 notice, on October 3, 2003, by signing the certified delivery receipt on behalf of the Board; and

As of this date, neither the Board nor any attorney on its behalf has filed an Answer to the petition and, therefore, each count of the petition is deemed to be admitted; and

The petitioner, avers that she and her family were on a business trip when the District mailed forms and instructions with respect to the re-registration it was conducting for all District students and, thus, were not able to comply with the re-registration process. Petitioner further avers, that upon their return home, they immediately provided the Board with the documents it sought; now therefore

IT IS ORDERED on this 5th day of March 2004 that summary decision shall be granted to petitioner. Petitioner's child, V.S., is deemed to be domiciled in the Borough of Fair Lawn School District and, therefore, entitled to attend school free of charge in that District pursuant to *N.J.S.A.* 18A:38-1 as long as circumstances remain unchanged.*



COMMISSIONER OF EDUCATION

Date of Decision: 3/5/04

Date of Mailing: 3/9/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

82-04

GERALD W. KOHN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

March 8, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 0021-03

AGENCY DKT. NO. 339-10/00

(On Remand from OAL DKT. NO. EDU 8705-00)

GERALD W. KOHN,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,

Respondent.

Maria M. Lepore, Esq., for petitioner

Louis J. Greco, Esq., for respondent

Record Closed: December 19, 2003 Decided: December 24, 2003

BEFORE **LILLARD E. LAW**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 9, 2003, 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.

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 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 (45) 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.

12-24-03
DATE

Lillard E. Law by W.J. Kelly ALJ
LILLARD E. LAW, ALJ

Receipt Acknowledged:

January 21, 2004
DATE

M. Kathleen Duncan Esq.
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 22 2004

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

sd

SETTLEMENT AGREEMENT AND RELEASE

THIS AGREEMENT is made this _____ day of September, 2003 by and between **DR. GERALD W. KOHN** (hereinafter referred to as "Dr. Kohn") and the **BOARD OF EDUCATION OF VINELAND, CUMBERLAND COUNTY** (hereinafter referred to as the "Board").

WHEREAS, Dr. Kohn has filed suit against the Board with the Commissioner of Education of the State of New Jersey under Agency Docket Number 339-10/00 and OAL Docket Number EDU 8705-00 (hereinafter referred to as the "Litigation");

WHEREAS, the subject matter of the Litigation involves a dispute as to the salary and benefits to be paid to Dr. Kohn by the Board, pursuant to the Contract of Employment for a term beginning July 1, 1997 and ending June 30, 2002;

WHEREAS, the parties desire to amicably resolve the Litigation and to release each other from any claims which may be asserted therein; and

NOW, THEREFORE, in consideration of the promises and the mutual covenants and agreements contained herein, and intending to be legally bound, the parties hereto agree as follows:

1. Mutual Releases

The Board and its successors, assigns, and its individual members who are signatories hereto, do hereby release, remise and forever discharge Dr. Kohn and his respective successors, assigns, heirs, and administrators from any and all actions, causes of action, defenses, and claims whatsoever that it has both at law and in equity, by reason of any act, cause, matter or thing

whatsoever, including any such claims and defenses relating to the Litigation. Specifically excluded from this release is any and all action, causes of action, defenses and claims related to an action for enforcement or breech of this Settlement Agreement and Release.

Dr. Kohn does hereby release, remise and forever discharge the Board, its individual members, and its successors and assigns from any and all claims which could be asserted, and from any and all actions, causes of action, and claims whatsoever that he has both at law and in equity, by reason of any act, cause, matter or thing whatsoever including the claims asserted in the Litigation. Specifically excluded from this release is any and all actions, causes of action, defenses and claims related to an action for enforcement or breech of this Settlement Agreement and Release.

2. Dismissal/Withdrawal of Litigation

Dr. Kohn shall promptly cause his attorney to withdraw his Petition which began the Litigation upon: (1) the execution of this Agreement by an authorized representative of the Board; (2) payment to the Superintendent, or to others on the Superintendent's behalf as required by this Agreement in the gross sum of $87,500.00; and (3) filing the appropriate reports with the New Jersey Teachers' Pension and Annuity Fund in accordance with section 3 below.

3. Compromise of Disputed Compensation

It is expressly agreed by the parties that from September 6, 2000 through June 30, 2002, Dr. Kohn held the position of superintendent with the Board and was on leave with pay. On or before October 24, 2003, the Board shall pay to Dr. Kohn, or to others in Dr. Kohn's behalf, the following:

A. For the 2000-01 school year, the Board shall pay Dr. Kohn retroactive salary in the amount of $6,045.02. In accordance with *N.J.A.C.* 17:3-4.2, the Board, through its business office, shall immediately file all required forms and/or reports with the New Jersey Teachers' Pension and Annuity Fund (TPAF) to adjust Dr. Kohn's creditable salary for pension purposes for that school year to the amount of $138,589.72. The Board shall ensure that all necessary pension contributions in connection with this creditable salary are deducted from Dr. Kohn's salary and made to the TPAF.

B. For the 2001-02 school year, the Board Shall Pay Dr. Kohn retroactive salary in the amount of $25,529.00. In accordance with *N.J.A.C.* 17:3-4.2, the Board, through its business office, shall immediately file all required forms and/or reports with the New Jersey Teachers' Pension and Annuity Fund (TPAF) to adjust Dr. Kohn's creditable salary for pension purposes for that school year to the amount of $143,440.36. The Board shall ensure that all necessary pension contributions in connection with this creditable salary are deducted from Dr. Kohn's salary and made to the TPAF.

C. The Board shall pay any employer contributions required to be paid with salary adjustments required by paragraphs 3A and 3B, above. The Board represents that, based upon the above amounts, the Board shall deduct from the gross settlement amount the employer contributions in the amount of $2612.94.

D. The amounts paid by the Board pursuant to paragraphs 3A, 3B, and 3C above shall be deducted form the gross settlement amount of $87,500.00 and remaining balance thereof shall be paid to Dr. Kohn as reimbursement for professional expenses incurred by Dr. Kohn between September 6, 2000 and June 30, 2002.

It is agreed by and between the parties that Dr. Kohn shall be responsible for any additional employee taxes and deductions in connection with the payments as set forth above.

4. **CONFIDENTIALITY**

The parties agree that as a former employee of the Board, Dr. Kohn retains the same rights to confidentiality as all other employees. In this regard, the Board, including its individual members and officers agents and employees shall make no statement or disclosure relative to Dr. Kohn's employment except as required by New Jersey law.

The parties also agree that neither will make any statements or comments to any third party that disparage the other.

5. Miscellaneous Provisions

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, administrators, successors, and assigns.

This Agreement sets forth the entire understanding and agreement between the parties with respect to the subject matter hereof and may only be amended or modified by a writing signed by each party intending to be bound thereby. Except as otherwise provided herein, it is understood and agreed that any and all previous discussions and agreements, whether oral or written, are hereby merged into this Agreement, and that this Agreement is intended to be final and complete resolution of the Litigation.

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signatures of all the parties hereto are required for this Agreement to be binding on any party. An original signature transmitted by facsimile shall be deemed to be an original for purposes of this

Agreement.

The parties to this Agreement have read it and understand it, and acknowledge that this Agreement is entered into and executed voluntarily without any duress or undue influence. The parties also acknowledge that they had the opportunity to seek independent counsel and have such counsel review this Agreement prior to their execution of same.

This Agreement shall in all respects be interpreted, enforced, and governed under the laws of the State of New Jersey. In the event of any conflict between the terms, conditions and provisions of this Agreement and the provisions of any permissive federal or state law, the terms of this Agreement shall take precedence over the contrary provisions of or any such permissive law, unless otherwise prohibited by law.

If, during the term of this Agreement, it is determined that a specific clause of the contract is illegal or invalid under federal or state law, the remainder of this Agreement not affected by such a ruling shall remain in force.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective on the date and year first written above.

By: Frank M. Giordano
Board President

ATTEST:

Kerri J. Franchetta
Board Secretary

DR. GERALD W. KOHN

By: Gerald W. Kohn
Dr. Gerald W. Kohn

WITNESS:

BOARD OF EDUCATION OF VINELAND

OAL DKT. NOS. EDU 0021-03 AND EDU 8705-00 (ON REMAND)
AGENCY DKT. NO. 339-10/00

GERALD W. KOHN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, Settlement Agreement and Release,* 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 review, the Commissioner approves the settlement terms and adopts the settlement agreement as the final decision in this matter. In so holding, however, the Commissioner observes that the settlement included with the Initial Decision sets forth terms that were to be effectuated prior to approval of the settlement terms by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. The ALJ and the parties are cautioned against effectuating terms of a settlement agreement in controverted matters that have been duly transmitted to the OAL prior to its submission to, and approval by, the Commissioner.

The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/8/04

Date of Mailing: 3/9/04

* A copy of the October 8, 2003 Board's Resolution approving the within Settlement Agreement and Release is included in the record.

83-04

83-04 R

C.B., on behalf of minor children, C.B. AND J.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

March 8, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT NO. EDU 8543-03

ON REMAND FROM EDU 2711-03

AGENCY DKT. 108-4/03

C.B. O/B/O C.B. AND J.B.,

Petitioner,

v.

TOWNSHIP OF PENNSVILLE
BOARD OF EDUCATION,

Respondent.

C.B., parent, appearing *pro* se, for petitioners

Judith A. Karr, Esq., for respondent (Karr & Salber, attorneys)

Record Closed: December 5, 2003 Decided: January 15, 2004

BEFORE **W. TODD MILLER,** ALJ:

On May 12, 2003, the Bureau of Controversies and Disputes of the Department of Education referred the present matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14-b-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The Commissioner requested that an administrative law judge be assigned to conduct a hearing. The Director of the Office of Administrative Law assigned the matter to me to hear. *N.J.S.A.* 52:14F-5(o).

Prior to a hearing being scheduled, the parties arrived at a settlement agreement, and the terms were reduced to writing in the attached stipulation of settlement. The settlement was rejected by the Commissioner for technical reasons.

On November 17, 2003, this matter was remanded to the OAL so the Stipulation of Settlement incorporated a Resolution or Minutes authorizing the School Board President to execute the settlement. Respondent has complied with the remand conditions by submitting the Board Minutes authorizing the President to execute the settlement, as well as including the typed name under the President's signature.

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 signature or their representatives' signatures on the attached stipulation of settlement (signed by petitioner on July 20, 2003, and respondent on August 5, 2003, and thereafter filed with this ALJ on September 8, 2003). The original stipulation of stipulation has been amended to include the typed name of the Pennsville Board of Education President beneath the signature line, a separate signature page with the signature of Judith A. Karr, Esquire, Solicitor for respondent, Pennsville Township Board of Education and attaching a copy of the July 21, 2003 Pennsville Board of Education Meeting Minutes authorizing the settlement..

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

Therefore, I **ORDER** that the parties 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 (45) 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.

1-15-04
DATE

W. TODD MILLER, ALJ

Receipt Acknowledged:

January 21, 2004
DATE

M. Kathleen Duncan (GA)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 22 2004

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

sd

KARR & SALBER
681 South Broadway, Suite 1
Post Office Box 346
Pennsville, New Jersey 08070
Telephone: (609) 935-8500
Facsimile: (609) 935-4570
By: Judith A. Karr, Esquire
Attorneys for Pennsville Township Board of Education

C.B. O/B/O MINOR CHILDREN C.B. & J.B. Petitioner, vs. TOWNSHIP OF PENNSVILLE BOARD OF EDUCATION Respondents.	: : : : : : : : :	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO. EDUOS 02711-03S AGENCY REF. NO. 108-4/03 STIPULATION OF SETTLEMENT

THIS MATTER having come before the Honorable W. Todd Miller, A.L.J. by way of a telephonic pre-hearing conference with Carla Barnhart, petitioner, appearing and Gary M. Salber, Esquire, of Karr and Salber, appearing on behalf of the Pennsville Township Board of Education and the parties having reached an agreement for settlement with the terms of settlement set forth hereinafter.

1. If petitioner establishes a bona fide residence within the Township of Pennsville by August 18, 2003, her children, C.B. and J.B. shall be permitted to continue enrollment in the Pennsville Township School District and the Pennsville Township Board of Education will not seek reimbursement for any past tuition for said children.

2. In the event that the petitioner has not established a bona fide residence within the Township of Pennsville by August 18, 2003, Carla Barnhart shall have said children's records transferred to the Penns Grove/Carneys Point Township School District and that in said event the Pennsville Township Board of Education shall not seek reimbursement for past tuition in regard to said children.

3. Said children shall not be permitted to attend the Pennsville Township School District if said bona fide residency within the Township of Pennsville has not been established by August 18, 2003.

4. This Stipulation of Settlement resolves all issues concerning this matter.

CARLA BARNHART
Petitioner, On behalf of
C.B. & J.B.

Carla Barnhart
CARLA BARNHART

Dated: July 20, 2003

Pennsville Township Board
of Education

By: JOHN H. SMITH, President

Dated: August 5, 2003

Pennsville Township Board of
Education

By: 
JUDITH A. KARR, Esquire, Solicitor

July 21, 2003

The closed session meeting of the Pennsville Board of Education was called to order at 6:56 pm on Monday, July 21, 2003 by President Smith.

Board members present were Messrs. Carpenter, Dilks, Hooks, Mrs. Leuallen, Mrs. Phillips, Messrs. Roberts, Schmid, and Smith. Absent was Mr. Hankins. Also present were Dr. Peddle and Mr. Recchinti.

Middle School Bleacher Project
Mr. Recchinti explained to the board the bids received from the contractors for the bleacher project. He told the board why the project was bid with alternates and explained the pros and cons of awarding each alternate. The board discussed the project and which alternates they wanted.

Employment of Custodians
Mr. Recchinti explained the hiring process that is taking place to hire a custodian for the Penn Beach School and the Central Park School.

Barnhart Case
The board authorized Mr. Smith, President, to settle the Barnhart case as per the consultation with the Solicitor.

Mr. Recchinti left the meeting at 7:20 pm.

Business Administrator's Contract
The board discussed whether the Business Administrator should also fill the role of Director of Buildings and Grounds.

Mr. Recchinti returned to the meeting at 7:30 pm.

Mr. Dilks moved the meeting be adjourned. Mr. Schmid seconded the motion which was unanimously approved on voice vote.

Meeting adjourned at 7:31 pm.

Respectfully submitted,

John J. Recchinti
Board Secretary

7/31/03

OAL DKT. NOS. EDU 8543-03 AND EDU 2711-03 (ON REMAND)
AGENCY DKT. NO. 108-4/03

C.B., on behalf of minor children, C.B. AND J.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, Stipulation of Settlement and Release, and Initial Decision on Remand issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement agreement as the final decision in this matter.

Accordingly, the settlement is adopted as the final decision and the matter is dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/8/04

Date of Mailing: 3/9/04

84-04

B.D., on behalf of minor child, J.D.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

March 8, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09052-03
Agency Dkt. No. 273-8/03

B.D. o/b/o minor child, J.D.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,
Respondent.

B.D., *pro se*, no appearance

Anthony D'Elia, Esq., for respondent
(Chasan, Leyner, Bariso & Lamparello, attorneys)

Record Closed: January 21, 2004 Decided: January 21, 2004

BEFORE **BARRY N. FRANK**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this case, the petitioner challenges the Board of Education's residency determination pertaining to the minor child living with petitioner to the effect that the Board of Education ("Board") has determined that the child is not entitled to a free public education as the individual living with his sister who is not that child's

parent or guardian. The Board of Education further determined that since the application made by the sister of this minor child did not meet the statutory requirement of family or economic hardship, the said child's attendance at the school was denied by the district, effective August 5, 2003.

Petitioner, after receiving this determination, appealed the decision rendered by the school district by means of an appropriate application dated August 6, 2003.

After this letter was filed by the petitioner, the matter was then forwarded to the Office of Administrative Law ("OAL") as a contested matter on September 9, 2003. After being assigned this case, the undersigned forwarded a letter to petitioner on October 17, 2003 requesting petitioner to contact the undersigned's chambers so that a telephone conference could be scheduled to discuss this matter further prior to the trial.

No response was forthcoming from petitioner and no telephone communication was possible because petitioner's telephone had been disconnected. However, the letter was not returned and as a result, this matter was placed on the schedule for a full hearing on November 26, 2003.

Timely notice was forwarded by OAL to petitioner with regard to the date of the hearing.

Respondent advised that a representative from the Board of Education had visited petitioner the night before the hearing, and had advised her of the date, time and place of hearing, and had received assurances from petitioner that she would be present at the hearing. Nonetheless, petitioner failed to appear. As a result, respondent made a motion on the record to dismiss petitioner's appeal, and said motion was granted.

Respondent then requested and the court agreed to hold the record open until an Affidavit could be submitted to the court verifying that indeed petitioner had been personally contacted regarding the hearing date and also an Affidavit could be submitted in regard to the counterclaim itself, namely the cost and tuition reimbursement being sought by respondent.

These Affidavits were received by the court on January 21, 2004 on which date the record was closed.

FINDINGS OF FACT AND DISCUSSION

N.J.S.A. 18A:38-1(b) provides that:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person *gratis* as if he was such other person's own child, upon filing by such other person with the Secretary of the Board of Education of the district, if so required by the Board a sworn statement that he is domiciled within the district and is supporting the child *gratis* and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time then merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the Secretary of the Board of Education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident in the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about shall be supplied only through the Board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the Board of Education the evidence does not support the validity of the claim by the resident, the Board may deny admission to the child.

The statute further provides that:

> 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 1/180th of the total annual per pupil costs 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 burden of demonstrating the above in meeting the criteria for the minor child to receive a free public education in the school district itself rests upon the shoulders of the individual appealing the determination of residency made by the school district. Petitioner, filed an appeal of the unfavorable residency determination made by the school district and failed to appear at the hearing itself.

Appropriate notice was forwarded to and apparently received by petitioner as no return notice was received by the court. In addition, respondent has submitted an Affidavit of Vincent Constantino, School Board Domicile Investigator, dated January 14, 2004, to the effect that Mr. Constantino met with the petitioner on the evening of November 25, 2003 and identified her by means of her driver's license and through her daughter acting as a translator advised her of the hearing that was to take place the next day and the significance of said hearing. Mr. Constantino in his Affidavit at paragraph 4 states clearly that:

> She expressly stated to me that she knew she needed to be in court the next day, November 26, 2003, and provided further information regarding her living arrangements in Clifton.
>
> *An original of this Affidavit is annexed hereto*

Predicated upon this Affidavit, I **FIND** that petitioner was well aware of the time and place of the hearing itself, was fully informed that her presence required, was fully informed of the significance of the hearing and apparently consciously failed to appear at said hearing. Therefore, I have no choice but to **CONCLUDE** that petitioner has predicated upon her failure to appear at the hearing, abandoned any appeal to which she is entitled and further **FIND** that

respondent's motion to dismiss petitioner's appeal at the time of the hearing was appropriately made and appropriately granted.

Respondent, in addition, has a counterclaim for tuition dating back to the year 2001, setting forth specific dates on which the minor child living with petitioner attended the school in question and was not under the residency statute entitled to attend said school. Respondent set forth the appropriate numbers corresponding to tuition reimbursement for the days in question.

This Affidavit, dated January 14, 2004 and signed by Karen Perkins, Business Administrator for the Clifton Board of Education, states quite clearly that for 2001 through 2002, the minor child living with petitioner attended inappropriately the Clifton Board of Education School for 169 days and said school requested tuition reimbursement of $7,819.63 for that year; for 2002-2003, the minor child living with petitioner attended the Clifton Board of Education School for 164 days, said minor child not being entitled to attend said school and tuition reimbursement was sought in the amount of $6,842.08; and finally for school year 2003-2004, the minor child living with petitioner inappropriately attended the Clifton Board of Education School for a total of 66 days, tuition reimbursement being sought for that time frame totaling $2,785.86.

The Affidavit annexed hereto and submitted by respondent's representative requests total tuition reimbursement of $17,447.57 for all the days in which minor child lived with petitioner and inappropriately attended the Clifton Board of Education school and was not entitled to attend said school.

I **FIND** the Affidavit to be proper and appropriate in all respects, and I further **FIND** that the figures submitted in said Affidavit are uncontroverted. Therefore, I **CONCLUDE** that the respondent Board of Education is entitled to tuition reimbursement for the years 2001-2004 totaling $17,447.57 and **GRANT** respondent's counterclaim for tuition reimbursement for said amount.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioner's appeal be and hereby is **DISMISSED**, and it is further **ORDERED** that respondent's counterclaim seeking tuition reimbursement for the years 2001-2004 is **GRANTED** in the amounts totaling $17,447.57 as set forth in the Affidavit submitted by the business administrator for the respondent dated January 14, 2004.

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 the time allowed under the existing orders of the New Jersey Supreme Court 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.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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.

January 21, 2004
DATE

Barry N. Frank
BARRY N. FRANK, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

1/21/04
DATE

E-mailed Initial Decision to the parties on:

1/21/04
DATE

cb

APPENDIX

Exhibits:

Respondent

Affidavit of Vincent Constantino, dated January 14, 2004

Affidvavit of Karen Perkins, dated January 14, 2004

OAL DKT. NO. EDU 09052-03
AGENCY DKT. NO. 273-8/03

B.D., on behalf of minor child, J.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge that petitioner's appeal here is appropriately dismissed for failure to prosecute and the Board's counterclaim for tuition is appropriately granted.

Accordingly, the recommended decision of the OAL is adopted for the reasons clearly articulated therein. Petitioner is hereby directed to compensate the Board in the amount of $17,447.57 for the period of J.D.'s ineligible attendance in the Board's schools and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: March 8, 2004
Date of Mailing: March 10, 2004

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

85-04

T.F. ON BEHALF OF R.F. AND S.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

March 8, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2882-01

AGENCY DKT. NO. 94-4/01

T.F. o/b/o R.F. AND S.F.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,

Respondent.

Charlotte Hollander, Esq., for petitioner

Paul H. Green, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: January 8, 2004 Decided: January 22, 2004

BEFORE **JOHN SCHUSTER III**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 1, 2001, for determination as contested cases, 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 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 representatives' signatures.

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 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 (45) 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 22, 2004
DATE

JOHN SCHUSTER III, ALJ

Receipt Acknowledged:

January 23, 2004
DATE

M. Kathleen Duncan Esq
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 2 6 2004
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

DOCUMENTS IN EVIDENCE

Joint:

J-1 Consent Order

CHARLOTTE HOLLANDER, ESQ.
100 Essex Avenue, Suite 300
Bellmawr, NJ 08031
(856) 933-9500 Ext. 222
Attorney for Petitioner

2004 JAN -8 A 9:54

T.F. , o/b/o R.F. and S.F. Petitioner v. Board of Education of the Township of Cherry Hill, Camden County Respondent	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL Docket No.: EDU 02882-01 **CONSENT ORDER**

THIS MATTER having come before the Office of Administrative Law and the parties having consented to the dismissal of the matter by affixing their signatures to this Consent Order and for other good cause shown:

IT IS ON THIS _____ DAY OF _____ ORDERED that this matter is dismissed and Petitioner, T.F. shall not be required to pay tuition.

Jeff S. Masin, Chief A.L.J.

I consent to the entry and the form of the within Order.

Paul H. Green, Attorney for Respondent
Board of Education of Cherry Hill

Charlotte Hollander, Esq.
Attorney for Petitioner

85-04
OAL DKT. NO. EDU 2882-01
AGENCY DKT. NO. 94-4/01

T.F. ON BEHALF OF R.F. AND S.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Consent Order and Initial Decision issued by the Office of Administrative Law have been reviewed. Noting the absence of any document containing the terms of the parties' settlement so as to permit his review under *N.J.A.C.* 1:1-19.1, the Commissioner shall, instead, consider this matter a withdrawal pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: March 8, 2004

Date of Mailing: March 10, 2004

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*

86-04

86-04

IN THE MATTER OF THE TENURE	:	
HEARING OF JUNE NICHOLSON,	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF HUMAN	:	DECISION
SERVICES, OFFICE OF EDUCATION.	:	

SYNOPSIS

The New Jersey State Department of Human Services, Office of Education certified tenure charges of unbecoming conduct against respondent teacher for possession of controlled dangerous substances and drug paraphernalia.

The ALJ approved the Settlement Agreement submitted by the parties.

The Commissioner rejected the proposed settlement and remanded the matter to the OAL for further expansion of the record and revision of the documents, consistent with the *Cardonick* standards. There was no indication that respondent was advised of the Commissioner's duty to refer tenure determinations to the State Board of Examiners for possible revocation of her certificate, where the teacher has resigned subsequent to the filing of the tenure charges. Moreover, the Commissioner cannot sanction terms in a settlement that would require the agency to misrepresent the circumstances of respondent's resignation from employment with the Department of Human Services. The Commissioner noted that if the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a hearing 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.

March 8, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07078-03

AGENCY REF.NO.217-6/03

IN THE MATTER OF THE TENURE HEARING OF JUNE NICHOLSON, NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES, OFFICE OF EDUCATION,

---

Thomas Portelli, Esq., for petitioner

Steven L. Scher, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: December 17, 2003 Decided: January 21, 2004

BEFORE **CAROL I. COHEN**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on July 16, 2003 for determination as a contested case. A hearing was scheduled for December 9, 2003, which was adjourned for settlement purposes. A hearing was rescheduled for December 17, 2003.

On the date of hearing, the parties were able to resolve the matter. On January 20, 2004, the parties submitted the attached Settlement Agreement indicating the terms of the agreement. Having reviewed the record and the settlement terms, I **FIND**:

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

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

3. The settlement conforms with the standards set forth in *Cardonick v. Brookline BOE, dec'd by the Comm'r,* April 7, 1992, *aff'd. St. Bd. of Ed.*, April 6, 1983, 1990 *SLD* 842, 846.

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 (45) 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.

1/21/04
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

January 23, 2004
DATE

M. Kathleen Dunean (ta)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 27 2004
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

2004 JAN 15 A 9:29

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Attorney for State of New Jersey
Department of Human Services
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625

By: Steven L. Scher
Deputy Attorney General
(609)984-8464

OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO. EDUTH 07078-2003N
AGENCY REF. NO. 217-6/03

JUNE NICHOLSON,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES, OFFICE OF EDUCATION,

Respondent.

Civil Action

SETTLEMENT AGREEMENT

This matter was transmitted to the Office of Administrative Law pursuant to N.J.S.A. 52:14B-1-18 and N.J.S.A. 52:14B-14F -1 to -15 upon petitioner's request for a hearing on board certified charges against a tenured teacher for conduct unbecoming a teacher on July 16, 2003.

The parties agree to settle this matter in accordance with the following terms:

1. The petitioner will withdraw her request for a hearing on certified charges against a tenured teacher and the respondent-appointing authority agrees to withdraw the disciplinary action contained therein.

2. The petitioner will resign effective December 12, 2003 and agrees not to seek or accept employment with the Department of Human Services in any capacity in the future.

3. Respondent agrees it will respond to any inquiry by any outside person or entity, either prospective employer or other, by stating only that petitioner "resigned". Her record will reflect a resignation from the unclassified position of teacher. Also, the respondent will indicate the petitioner had no disciplinary action on her record nor was any pending at the time of her resignation.

4. The parties hereto stipulate that this agreement shall fully dispose of all issues in controversy between them with regard to this matter.

5. The petitioner shall not receive any back pay for the period of suspension without pay which ended on October 18, 2003, counsel fees, costs, or any other monetary relief as a result of this settlement.

5.A Petitioner is entitled to pay for that period between Oct. 19, 2003 and her date of resignation and any accumulated vacation; ~~and I, etc.~~

WM, 3b 85AN04

6. The personnel file for the petitioner shall be amended to reflect the provisions of this settlement.

7. This stipulation of settlement shall not constitute a precedent in any other matter involving another employee.

8. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.

9. This agreement will only become effective when it is approved by the Commissioner of Education. Any disapproval by the Commissioner shall operate to return the parties to the status quo pre-agreement.

10. The parties waive the right to file exceptions and cross-exceptions.

Authorization has been given by the Department of Human Services to agree to this settlement; the parties have read this settlement agreement and freely and voluntarily agree to its provisions.

Dated: 7JAN04

For the Appointing Authority

Dated: 12-16-03

Petitioner

Dated: 12-16-03

Petitioner's Representative

Dated: 9 Jan 2004

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY

By: Steven L. Scher
Deputy Attorney General

CERTIFICATION

I, June Nicholson, being the moving party in the above-captioned matter hereby certify that I have been represented in this matter by Thomas Portelli, Esq., that my representative has reviewed the foregoing Settlement Agreement with me and I fully understand the meaning and terms of this Agreement.

It is also my understanding that if the Settlement Agreement is approved by the Commissioner of Education my claims as set forth in the above-captioned matter will terminate against the State of New Jersey, Department of Human Services as long as the terms and conditions of this Settlement Agreement are met by the State of New Jersey.

Dated: 12-16-03

June Nicholson
Petitioner

OAL DKT. NO. EDU 07078-03
AGENCY DKT. NO. 217-6/03

IN THE MATTER OF THE TENURE	:	
HEARING OF JUNE NICHOLSON,	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF HUMAN	:	DECISION
SERVICES, OFFICE OF EDUCATION.	:	

The record of this matter, Initial Decision of the Office of Administrative Law (OAL) and the Settlement Agreement and Release have been reviewed.[1] Initially, the Commissioner notes that, pursuant to *N.J.A.C.* 6A:3-5.6(a), once tenure charges are certified to him, such charges may be settled only with his approval; any proposed settlement, whether submitted to the Commissioner or to the Administrative Law Judge, must address the standards established by the State Board of Education in the matter entitled, *In re Cardonick*, 1990 *S.L.D.* 842, 846. Specifically, the proposed settlement must: 1) Be accompanied by documentation as to the nature of the charges; 2) Include an explanation of the circumstances justifying the settlement or withdrawal; 3) Evidence the consent of both the charged and the charging parties; 4) Indicate that the charged party entered into the agreement with a full understanding of his or her rights; 5) Demonstrate that the agreement is in the public interest; and 6) Where the charged party is a teaching staff member, indicate that he or she 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 loss of certificate. *N.J.A.C.* 6A:3-5.6. Because the proposed agreement does not comport with these and other standards, the Commissioner is compelled to reject it and remand this manner, as specified below.

[1] Throughout the proposed Agreement, the parties misapply the terms "petitioner" and "respondent," in that the petitioner herein is the charging party, the Department of Human Services, and the respondent is Ms. Nicholson.

First, the parties fail to set forth the nature of the charges and the circumstances justifying the proposed settlement. It is well-established that, having once taken up the burden of tenure charges, the agency may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. (*In the Matter of the Tenure Hearing of Kenneth Smith, School District of the City of Orange, Essex County,* decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, 1983 *S.L.D.* 420; *affirmed with modification* by the State Board of Education November 2, 1983, 1983 *S.L.D.* 489; *affirmed* N.J. Superior Court, Appellate Division, January 30, 1986.) The Commissioner's determination in this regard is highly influenced by the serious nature of the charges, *i.e.*, allegations that respondent possessed controlled dangerous substances and drug paraphernalia, in violation of *N.J.S.* 2C:35-10(a)(4), *N.J.S.* 2C:36-2 and *N.J.S.* 2C:35-10.5, for which respondent was arrested on April 30, 2003.

Next, in accordance with *Cardonick, supra,* there is no indication in the proposed agreement that the within teaching staff member was advised of the Commissioner's duty to refer tenure determinations to the State Board of Examiners for possible revocation of her certificate, where the teaching staff member has resigned subsequent to the filing of tenure charges. *N.J.A.C.* 6A:9-17.6(a)1[2]

The Commissioner additionally notes that settlement term number 3 provides that:

> Respondent [sic] agrees it [sic] will respond to any inquiry by any outside person or entity, either prospective employer or other, by stating that petitioner [sic] "resigned". Her record will reflect a resignation from the unclassified position of a teacher. Also, the respondent [sic] will indicate the petitioner [sic] had no disciplinary action on her record nor was any pending at the time of resignation. (Proposed Settlement Agreement at 2)

Notably, the proposed agreement reflects a resignation date of December 12, 2003. On that date and continuing thereafter, until the present, the within tenure charges remain pending. In fact, as the parties appear to recognize in paragraph 9 of their proposed agreement, settlement agreements of controverted matters are of no force and effect and may not be implemented absent the Commissioner's approval pursuant to *N.J.A.C.* 1:1-19.1. Therefore, the disciplinary action will remain pending until this case is

[2] Formerly codified at *N.J.A.C.* 6:11-3.6.

concluded. The Commissioner cannot sanction terms in a settlement that would require the agency to misrepresent the circumstances of respondent's resignation from employment with the Department of Human Services.

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of this state, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for further expansion of the record and revision of the documents, consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a hearing on the merits.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: March 8, 2004

Date of Mailing: March 10, 2004

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

87-04

87-04

C.G., on behalf of minor child, T.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

March 10, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1158-04
Agency Dkt. No. 133-4/03

C.G. o/b/o minor child, T.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY//,

Respondent.

David R. Giles, Esq., for petitioner

Marvin L. Comick, Esq., for respondent
(Love and Randall, attorneys)

Record Closed: January 20, 2004 Decided: January 23, 2004

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE

This case was transmitted to the Office of Administrative Law ("OAL") on January 13, 2004 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into a settlement and have submitted an Agreement, which is attached and fully incorporated herein.

I have reviewed the record and the Agreement and **FIND**:

1. The parties have voluntarily agreed to a settlement of this matter.

2. The agreement 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(d) and should be approved. I approve the stipulation of settlement and therefore **ORDER** that the parties comply with the agreement.

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 (45) 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 27, 2004
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

January 27, 2004
DATE

M. Kathleen Duncan (Ca)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 29 2004
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

OAL Dkt:
EDU 1158-04

Margaret O'connor - Guidance will coordinate

1. The district will provide ~~petitioner~~ with copies of all ~~requested~~ records requested by January 23, 2004.

2. The respondent will amend, supplement or update its discovery response by February 1, 2004.

3. The parties will confer by February 6, 2004, regarding the sufficiency of respondent's response.

4. ~~If Respondent~~ The district will arrange meetings between Ms. Graham, ~~and~~ T.G. and her teachers to review her current academic status and to discuss what T.G. can do to ~~obtain~~ pass her classes and what support can be offered to assist her in doing so within a reasonable time.

(She will call after 1st month.)

1/27

1 day Notice

Watch

3a

5. Based on these meetings, the District will ~~do~~ produce a written plan indicating specifically what T.G. must do to pass each of her classes, by when she must accomplish these things, and what support will be offered to afford her a reasonable opportunity to accomplish these things

6. Included in the plan may be specific support offered by T.G.'s teachers and ~~any~~ other tutorial services offered by the district.

7. ~~T.G. will also agree~~ ~~in the~~ The plan will also describe what T.G. must do in order to avail herself of the support offered.

8. The district will also provide an opportunity for T.G.'s attendance +

performance in class and on this plan to be monitored on a weekly basis and for her parent to receive weekly monitoring reports.

8. An adult will be assigned to meet on a weekly basis with T.G. to review this progress + provide support as [T.G.] achieving the goals of her plan. ~~[illegible] in her grade~~

9. T.G. will be assigned an incomplete grade for the 2nd quarter of the school year. 3d

10. The time for making up work in the plan mentioned above will be reasonable in light of ongoing demands of the students ~~her~~ program as well as her current academic and study skills.

Dated 1/20/04

David Gibes
Education Law Center

Dated 1/20/04

Marvin Comick

C.G. O/B/O T.G. V. EAST ORANGE BOE
OAL DKT NO. EDU 1158-04 and EDU 5343-03

TERMS OF CONSENT ORDER
JANUARY 20, 2004

1. The District will provide petitioner with copies of all records requested by January 23, 2004.

2. The respondent will amend, supplement or update its discovery response by February 1, 2004.

3. The parties will confer by February 6, 2004, regarding the sufficiency of respondent's response.

4. The District will arrange meetings between C.G., T.G. and T.G.'s teachers by January 27, 2004, to review her current academic status and to discuss what T.G. can do to pass her classes and what support can be offered to assist her in doing so within a reasonable time.

5. Based on those meetings, the District will produce a written "Intervention Plan" indicating specifically what T.G. must do to pass each of her classes, by when she must accomplish these things, and what support will be offered to afford her a reasonable opportunity to accomplish these things.

6. Included in the Intervention Plan may be specific support offered by T.G.'s teachers and any other tutorial services offered by the District.

7. The Intervention Plan will also describe what T.G. must do in order to avail herself of the support offered.

8. The District will also provide an opportunity for T.G.'s attendance and performance in class and on this Intervention Plan to be monitored on a weekly basis and for her parent to receive weekly monitoring reports.

9. T.G. will be assigned an incomplete grade for the second quarter of this school year.

10. The time for making up work in the Intervention Plan mentioned above will be reasonable in light of ongoing demands of T.G.'s program as well as her current academic and study skills.

OAL DKT. NO. EDU 1158-04
AGENCY DKT. NO. 133-4/03(A)

C.G., on behalf of minor child, T.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

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

It is noted that the decision in this matter is categorized by the Administrative Law Judge (ALJ) as a settlement, pursuant to *N.J.A.C.* 1:1-19.1(d). Rather, it is determined that the parties' agreement herein is more appropriately categorized as a Consent Order on Motion. The Commissioner approves the terms of the Consent Order and adopts them as the agreed upon resolution in this interim matter.

Accordingly, the Initial Decision of the OAL on motion is adopted. The underlying Petition of Appeal in this matter, OAL Dkt. No. EDU 5343-03N, Agency Dkt. No. 133-4/03(B) shall proceed to hearing on its merits as scheduled by the ALJ for March 29, 2004.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: March 10, 2004
Date of Mailing: March 12, 2004

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

88-04

ROSEMARY SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 10, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6675-01

AGENCY DKT. NO. 325-8/01

ROSEMARY SMITH,

Petitioner,

v.

OLD BRIDGE TOWNSHIP BOARD OF EDUCATION, MIDDLESEX COUNTY,

Respondent.

Arnold M. Mellk, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Anthony Murphy, Esq., for respondent (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Record Closed: January 21, 2004 Decided: January 29, 2004

BEFORE **STEVEN C. REBACK**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 19, 2001, 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 Dismissal and Settlement Agreement and Mutual Release indicating the terms thereof, which are 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 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 (45) 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.

1/29/04
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

February 2, 2004
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 3 2004
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

2004 JAN 21 A 11: 18

RIKER, DANZIG, SCHERER, HYLAND & PERRETTI LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07962-1981
(973) 538-0800

Attorneys for Respondent,
Old Bridge Township Board of Education

Rosemary Smith, Petitioner, vs. OLD BRIDGE TOWNSHIP BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No.: EDU 06675-2001S AGENCY REF. NO. 325-8/01 CIVIL ACTION **STIPULATION OF DISMISSAL**

The matter in difference in the above-entitled action having been amicably adjusted between the parties; **IT IS HEREBY STIPULATED AND AGREED** by and between Petitioner, Rosemary Smith, and Respondent, Old Bridge Township Board of Education, that each and every claim asserted in this litigation is hereby **DISMISSED WITH PREJUDICE**.

RIKER, DANZIG, SCHERER, HYLAND & PERETTI LLP
Attorneys for Respondent,
Old Bridge Township Board of Education

By: _____
ANTHONY J. MURPHY, ESQ.

DATED: January 19, 2004

WILLS, O'NEILL & MELLK
Attorney for Petitioner,
Rosemary Smith

By: _____
ARNOLD MELLK, ESQ.

DATED: January 15, 2004

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT and MUTUAL RELEASE is given and entered into by and among the following parties: Rosemary Smith ("Smith") and Old Bridge Township Board of Education (the "Board"). The parties are sometimes hereinafter referred to collectively as the Signatories.

RECITALS

WHEREAS, the Old Bridge Township Board of Education an educational agency with its address at the Patrick A. Torre Administration Building, Route 516, Matawan, New Jersey 07747;

WHEREAS, Rosemary Smith, a former employee of the Old Bridge Township Board, residing at 968 Shepard Avenue, North Brunswick, New Jersey 08902;

WHEREAS, on or about August 15, 2001, Smith filed a Verified Petition with the Commissioner of Education (the "Petition") bearing docket number EDUOR-06675-2001S; and

WHEREAS, the Signatories hereto now desire to finally and completely resolve, compromise, and settle all disputes, claims, and controversies between and among them pursuant to the terms and conditions set forth below.

NOW, THEREFORE, in consideration of the foregoing recitals and for good and valuable consideration, the Signatories hereto, and each of them, hereby warrant, represent, acknowledge, covenant, and agree as follows:

AGREEMENT

1. **PAYMENTS**

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2009 JAN 21 A 11: 18

Within thirty (30) calendar days of the effective date of this Agreement, counsel for the Board will deliver to counsel for Smith a check in the amount of one hundred and five thousand one hundred and eight dollars ($105,108.00), made payable to **"Arnold L. Melk, Esq. Trust Account"**.

2. **DISMISSAL OF ACTION**

Execution, Delivery and Filing of Request for Dismissal. Upon execution of the Settlement Agreement, counsel for Smith will execute and return to counsel for the Board a Stipulation of Dismissal With Prejudice in the form attached as Exhibit A, which counsel for the Board will hold in escrow. Upon receipt of the payment set forth in paragraph one, counsel for Smith will notify counsel for the Board in writing that payment was received and counsel for the Board will promptly file the Stipulation with the Court.

Additional Steps Necessary to Dismiss Action. The Signatories hereto shall do all other things, including, but not limited to, the execution of additional documents, necessary to cause the claims alleged against each other to be dismissed with prejudice.

3. **RELEASES**

A. Smith will not seek any payment or reimbursement from The Board for any costs incurred or that will be incurred in the future in connection with the Petition.

B. Smith will not seek any payment or reimburse from the Board or the New Jersey State Employees Pension for contribution to her Pension for the years 1996, 1997,1998,1999, 2000, 2001 and 2002.

C. The Board will not seek payment or reimbursement from Smith for any costs incurred or that will be incurred in the future in connection with the Petition.

D. It is expressly understood by each of the Signatories that this constitutes a complete and final Release with respect to all costs, claims and damages asserted, in the past, present, or future, against or by Smith or against or by the Board in connection with the Petition.

E. In consideration of the above, Smith will forever release, discharge, and acquit the Board and each of it's respective present or former members, principals, officers, employees, agents, trustees, attorneys, insurers, reinsurers, parents, subsidiaries, affiliates, divisions, representatives, predecessors or successors and assigns, as may be applicable, from any and all liability, claims, demands, rights and causes of action (whether class, derivative or individual in nature) arising out of or in connection with the Petition, whether those claims are known or unknown, suspected or unsuspected, asserted or unasserted, fixed or contingent.

E. In consideration of the above, the Board will forever release, discharge, and acquit Smith and each of Smith's respective present or former attorneys, insurers, reinsurers, parents, subsidiaries, affiliates, divisions, representatives, predecessors or successors and assigns, as may be applicable, from any and all liability, claims, demands, rights and causes of action (whether class, derivative or individual in nature) arising out of or in connection with the Petition, whether those claims are known or unknown, suspected or unsuspected, asserted or unasserted, fixed or contingent.

4. **ADDITIONAL PROVISIONS**.

A. Each Signatory to this Settlement Agreement and Mutual Release acknowledges, represents and warrants that he, she or it has not assigned, sold, transferred or otherwise disposed of any of the rights, causes of action, claims or other

matters described herein. Each party in breach of said representation and warranty shall defend, indemnify and hold harmless all other parties from any and all claims prosecuted based upon any assignment or transfer and any attempted assignment or transfer contrary to the terms of this paragraph.

B. Each Signatory to this Settlement Agreement and Mutual Release acknowledges that he, she, or it may have sustained damages, losses, fees, costs or expenses that are presently unknown and unsuspected, and that such damages, losses, fees, costs or expenses as each party may have sustained might give rise to additional damages, losses, fees, costs or expenses in the future. Nevertheless, each Signatory to this Settlement Agreement and Mutual Release acknowledges that this Settlement Agreement and Mutual Release has been negotiated and agreed upon in light of such possible damages, losses, fees, costs or expenses which have been hereby released.

C. Each Signatory to this Settlement Agreement and Mutual Release understands, acknowledges and agrees that if any fact now believed to be true is found hereafter to be other than, or different from, that which is now believed, each expressly assumes the risk of such difference in fact and agrees that this Settlement Agreement and Mutual Release shall be, and will remain, effective notwithstanding any such difference in fact.

D. Each Signatory to this Settlement Agreement and Mutual Release understands, acknowledges and agrees that this Settlement Agreement and Mutual Release may be pleaded as a full and complete defense to, and used as a basis for any injunction against any action, suit or other proceeding that may be instituted, prosecuted or attempted in breach of this Settlement Agreement and Mutual Release.

E. Each Signatory to this Settlement Agreement and Mutual Release understands, acknowledges and agrees that this Settlement Agreement and Mutual Release shall be binding upon each of them and upon their respective present or former directors, partners, principals, officers, employees, agents, trustees, attorneys, and insurers, parents, subsidiaries, affiliates, divisions, managers, representatives, predecessors or successors, partnerships or corporations and their respective heirs, administrators, successors and assigns.

F. The Signatories to this Settlement Agreement and Mutual Release expressly acknowledge that this Settlement Agreement and Mutual Release is not to be relied upon by third parties and that it carries with it no precedential value and should not be relied upon by any person or entity as evidence of any obligation by any party other than the obligations contained in this Settlement Agreement and Mutual Release.

G. The Signatories agree that neither the execution of this Settlement Agreement and Mutual Release nor the provision of any consideration pursuant hereto is intended as, or shall be construed as, an admission of any liability or responsibility at any time or for any purpose whatsoever.

H. Each Signatory to this Settlement Agreement and Mutual Release understands, acknowledges and agrees that this Settlement Agreement and Mutual Release may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing.

I. In the event that any provision(s) of this Settlement Agreement and Mutual Release are determined to be invalid and/or unenforceable, any such provision(s) shall be severable from the remainder of said Settlement Agreement and Mutual Release

and shall not cause the invalidity and/or unenforceability of the remaining provisions of this Settlement Agreement and Mutual Release.

J. Each Signatory understands, represents and warrants that each fully understands and voluntarily accepts the terms of this Settlement Agreement and Mutual Release.

K. Each Signatory to this Settlement Agreement and Mutual Release understands, acknowledges and agrees that this Settlement Agreement and Mutual Release shall be construed under, and interpreted in accordance with, the law of the State of New Jersey as it exists on the date that this Settlement Agreement and Mutual Release is fully executed by the parties.

L. Each Signatory to this Settlement Agreement and Mutual Release who signs on behalf of another hereby warrants that he has the authority to sign on behalf of said person or entity. Each Signatory agrees to execute all documents and to do all things necessary to effectuate the terms of this Settlement Agreement and Mutual Release.

M. This Settlement Agreement and Mutual Release shall be deemed to be effective upon execution by all Signatories.

N. This Settlement Agreement and Mutual Release may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument.

O. This Settlement Agreement and Mutual Release or any uncertainty or ambiguity therein shall not be construed against any one party or several parties but shall

be construed as if all parties to this Settlement Agreement and Mutual Release jointly prepared this Settlement Agreement and Mutual Release.

P. This Settlement Agreement and Mutual Release and the implementation of any of its terms are and shall remain confidential. The Signatories hereto may disclose the terms hereof to related or affiliated corporate entities, if any, and to their respective attorneys, insurers, reinsurers, financial regulators and lending institutions. Other than as expressly provided for in this paragraph, this Settlement Agreement and Mutual Release and the terms hereof shall not be disclosed to any non-party unless so ordered by a court of law or pursuant to the consent of all signatories hereto.

WE, THE UNDERSIGNED, HEREBY CERTIFY THAT WE HAVE READ THIS ENTIRE SETTLEMENT AGREEMENT AND MUTUAL RELEASE AND HAVE HAD THE TERMS HEREIN AND THE CONSEQUENCES THEREOF EXPLAINED BY OUR RESPECTIVE ATTORNEYS. WE FULLY UNDERSTAND ALL THE TERMS AND CONSEQUENCES OF THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE AND, WHEREOF, WE HAVE EXECUTED THIS MUTUAL RELEASE OF ALL CLAIMS.

By Rosemary Smith DATED: Nov. 25, 2003
Rosemary Smith

By R. Gregory Quirk DATED: 12/4/03, 2003
Dr. R. Gregory Quirk
Old Bridge Township Board of Education
Assistant Superintendent for Business

3351839.01

OAL DKT. NO. EDU 6675-01
AGENCY DKT. NO. 325-8/01

ROSEMARY SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: March 10, 2004

Date of Mailing: March 12, 2004

* The parties are reminded that the Commissioner's decision in this matter is a public record and, therefore, although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, they cannot seek to bind the Commissioner to provision "4P", which requires that the agreement will be confidential.

124-04

#125-04

W.C.K., on behalf of minor child, M.P.-Y.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's residency determination that M.P.-Y.C. was not eligible for a free education in the Dumont Schools.

The ALJ found that petitioner is domiciled in the District and that she took M.P.-Y.C. into her home solely for the purpose of providing M.P.-Y.C. a free public education in the District. Moreover, the ALJ found that petitioner did not demonstrate that the parents, who reside in Hong Kong, were unable to support M.P.-Y.C. due to financial or family hardship. Thus, the ALJ concluded that petitioner did not satisfy the residency requirements pursuant to *N.J.A.C.* 18A:38-1(b)1. The ALJ concluded that petitioner was liable for tuition and directed the Board to submit to the Commissioner an updated accounting of the tuition due.

The Commissioner adopted the Initial Decision with modification. The Commissioner established that petitioner owed the Board tuition payments in the amount of $11,479.32 based on the updated calculation of tuition due provided by the Board. The Commissioner also found that the Board was not entitled to pre-judgment interest or post-judgment interest and concluded that in the absence of express statutory authority, the Commissioner may not direct compensation for legal fees in this matter. The Commissioner directed payment of the tuition owed.

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.

March 18, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9381-02
Agency Dkt. No. 301-9/02

W.C.K. o/b/o MINOR CHILD,
M.P.-Y.C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,
Respondent.

W-C.K., petitioner *pro se*

Joanne L. Butler, Esq., for respondent
(Schenk, Price, Smith & King, attorneys)

Record Closed: January 22, 2004 Decided: February 5, 2004

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners appeal the residency determination of respondent, Board of Education of the Borough of Dumont (District), which denied petitioner's request

to enroll to M.P.-Y.C. in the public school. The District denied the application because petitioner did not demonstrate a family or economic hardship.

On November 1, 2002, the matter was transmitted to the Office of Administrative Law (OAL) 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. A hearing was held on September 16, 2004. The parties submitted posthearing briefs and the record closed on January 22, 2004.

ISSUE

The issue is whether W.C.K. is eligible to attend the Dumont Public School District free of charge in accordance with *N.J.S.A.* 18A:38-1(b).

SUMMARY OF EVIDENCE

W.C.K. is a resident and domiciliary of Dumont, New Jersey. W.C.K. testified that the parents of M.P. reside in Hong Kong. They are not able to care for M.P. financially because they must support their parents and M.P.'s sibling, age 12. M.P.'s sworn statement provided additional information about M.P. The Affidavit of Application/Guardian states in relevant part:

> [M.P.] is already a permanent U.S. legal resident with valid social security number and legal U.S. alien card. His parents would prefer him to receive U.S. education as early as possible. Since his parents are occupied with their career responsibilities at the moment in Hong Kong, they would like uncle [H.K.] and aunt [C.K.] to be his guardians for at least the future 3 years.
>
> [R-1].

James Montesano, Assistant Superintendent of Dumont, reviewed the application to enroll M.P. in the district. The documents support his determination that M.P.'s parents sent him to New Jersey without a showing of

economic hardship. Rather, it is the desire of the parents that M.P. receive an education in the United States, for at least three years. Additionally, the attorney who represents the parents in Hong Kong submitted documents to enroll M.P. in the New Jersey public school district.

Montesano further testified that the annual tuition for school year 2002-2003 was $9,878.00. For school year 2003-2004, the tuition is $10,523.00, which includes the *per diem* rate of $58.46.

LEGAL DISCUSSION AND CONCLUSION

The State of New Jersey provides that "public schools shall be free to . . . any child who is domiciled within the school district." *N.J.S.A.* 18A:38-1(a). The domicile of a minor child follows that of his parents. *See V.R. on behalf of A.R. v. Bd. of Ed. of Hamburg*, 2 *N.J.A.R.* 283, 286.

Additionally, *N.J.S.A.* 18A-38-1(b)1 states in part:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person *gratis* as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the District, if so required by the board, a sworn statement that he is domiciled in the District and is supporting the child *gratis* and will assume all personal obligation for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parents or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economical hardship and that the child is not residing with the resident of the District solely for the purposes of receiving a free public education in the District. The statement shall be accompanied by documentation to support the validity of the sworn statement, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support

> or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Therefore, the evidence must show that: (1) petitioner is domiciled within the District; (2) petitioner is supporting M.P. *gratis;* (3) M.P.'s parents are not capable of supporting or caring for him due to family or economic hardship; and (4) M.P. is not residing with petitioner solely for the purpose of receiving a free public education in the District.

Petitioner has the burden of proof to demonstrate economic hardship. Petitioner did not dispute the statements made in the Affidavit of Application/Guardian. (R-1) Essentially, petitioner allowed M.P. to reside in her home and attend the Dumont School system because the families are "very close."

Respondent argue the parents' domicle in Hong Kong establishes M.P.'s domicle. *I.P. v. Board of Education of the Bororugh of* Leonia, 93 *N.J.A.R.* 2d (EDU) 128, 132 (1993). Further, petitioner failed to demonstrate that M.P.'s parents are financially incapable of supporting him due to economic or family hardship. I agree.

Based on the whole of the evidence, I **FIND** petitioner W.C.K. is domiciled in the Township of Dumont. I **FIND** that petitioner took M.P. into her home to live for an extended period of time because his parents reside in Hong Kong and desire that M.P. receive an education in the United States. I **FIND** that petitioner has not demonstrated M.P.'s parents are unable to support him due to financial or family hardship.

Based on the whole of the record, I **CONCLUDE** that petitioner has not satisfied the residency requirements pursuant to *N.J.A.C.* 18A:38-1(b)1. I **CONCLUDE** that M.P. is residing with petitioner solely for the purpose of

receiving a free public education in the District. Therefore, I **CONCLUDE** that petitioner is liable for tuition to the Dumont during the period that M.P. attends its schools. Therefore, I direct Dumont to submit to the Commissioner an updated balance of tuition due, consistent with the testimony provided in this matter.

ORDER

I **ORDER** petitioner's appeal be **DISMISSED**.

I **ORDER** that the Dumont's claim for payment of tuition is hereby **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 (45) 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 (13) 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, 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 5, 2004
DATE

MUMTAZ BARI-BROWN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

2/5/03
DATE

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

FEB 9 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

Presented on behalf of petitioner

W.C.K.
Y.C.

Presented on behalf of respondent

Joanne Butler
James Montesano

Exhibits:

Submitted on behalf of petitioner

None

Submitted on behalf of respondent

R-1 Affidavit of Applicant

R-2 Notice of Non-Residency

R-3 Interrogatories

R-4 Statement

R-5 Statement

OAL DKT. NO. EDU 9381-02
AGENCY DKT. NO. 301-9/02

W.C.K., on behalf of minor child, M.P.-Y.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The Board's exceptions, a letter confirming its counterclaim for tuition for the 2002-03 school year as $9,878.00 as set forth in the Initial Decision and calculating the tuition due for the 28 days of M.P.-Y.C.'s attendance in the district schools at $57.19 a day for a total of $1,601.32 for the 2003-04 school year, were timely filed pursuant to *N.J.A.C.* 1:1-18.4(a) and were considered in the Commissioner's determination of this matter.[1] Petitioner did not file exceptions nor did she reply to the tuition calculations set forth in the Board's exceptions.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that M.P.-Y.C. is not entitled to attend school free of charge as an affidavit student in the District pursuant to *N.J.A.C.* 18A:38-1(b)1 in that: 1) petitioner has failed in her burden of proving that

[1] The Initial Decision includes a directive to the Board to submit to the Commissioner an updated balance of tuition due. (Initial Decision at 5)

M.P.-Y.C. is not residing with her solely for the purpose of receiving an education in the United States; and 2) petitioner has failed to demonstrated that M.P.-Y.C.'s parents are unable to support him due to financial or family hardship.

With respect to the Board's counterclaim for tuition, the Commissioner agrees with the grant of the Board's counterclaim for tuition in the amount of $9,878.00 for the 2002-03 school year and for tuition in the amount of $1,601.32 for the 28 days of M.P.-Y.C.'s school attendance in the 2003-04 school year, for a total of tuition payments due of $11,479.32.[2]

With respect to the other remedies sought in the Board's counterclaim, the Commissioner finds that the record does not support a finding that petitioner's actions were taken in bad faith or in deliberate violation of the law so as to entitle the Board to an award of pre-judgment interest. *N.J.A.C.* 6A:3-1.17(c)1. The Commissioner further notes that the Board's claim for post-judgment interest is not properly before him at this time, since the requisite time period has not passed pursuant to *N.J.A.C.* 6A:3-1.17(c)2.

Finally, turning to the Board's claim for counsel fees, in the absence of express statutory authority to award counsel fees, the Commissioner may not direct that the Board be compensated for legal fees in this matter. *See Hinfey v. Matawan Regional Board of Education,* 77 *N.J.* 514, 525 (1978); *B.B., on behalf of her son, L.C. v. Board of Education of the Union County Regional High School District No.1. and Donald Merachnik, Superintendent of Schools, Union County,* 1987 *S.L.D.* 323; *Balsley v. North Hunterdon Bd. of Educ,.* 117 *N.J.* 434 (1990); *and State, Dept. of Environ. Protect. v. Ventron Corp.,* 94 *N.J.* 473 (1983).

[2] The Board notes in its exceptions that W.C.K. was granted legal guardianship of M.P.-Y.C. by the Bergen County Surrogate Court on October 15, 2003.

Accordingly, the Commissioner adopts the Initial Decision, as modified above, as the final decision in this matter for the reasons stated therein.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/04

Date of Mailing: 3/18/04

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

126-04

#126-04

CHARLES WEISBERG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RIVERSIDE, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, Director of Special Education, alleged the Board improperly reduced his salary by refusing to compensate him for a total of two sick days, even though he had a sufficient number of days to cover such absences. The Board reinstated petitioner's half-day salary for January 3 and 4, 2001 after he provided verification for those absences but the salary for January 2 was still withheld as petitioner did not provide the requested verification for that day's absence, namely, a physician's note indicating he had been ill.

The ALJ found that pursuant to *N.J.S.A.* 18A:30-4 the Board *may* require a physician's certificate before accepting a tenured employee's claim of sick time and excusing the employee's absence. The ALJ determined that even though petitioner was asked about the one-day absence, he chose not to respond and left the absence unexcused. The ALJ found that the Board acted appropriately in withholding one day's salary as it was authorized to do under *N.J.S.A.* 18A:30-1 *et seq.* and Article X, Section 10.3 of the negotiated Agreement between the Board and its Administrative Association. Moreover, the ALJ found that the issue of payment or non-payment of salary for occasional absences due to illness is not subject to the provisions of *N.J.S.A.* 18A:28-5 and 18A:6-10. Petition was dismissed.

The Commissioner concurred with the ALJ's conclusion that petitioner failed to demonstrate that the Board's action in docking him a day's pay pursuant to *N.J.S.A.* 18A:30-1 *et seq.* was prohibited by the tenure statutes. The Commissioner did not reach to the ALJ's discussion with respect to whether the Board's action was authorized pursuant to the negotiated Agreement. In addition, the Commissioner noted the sole issue was whether the Board 's action in docking petitioner for one day reduced his salary in violation of his tenure rights; timeliness of the petition was not an issue.

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.

March 18, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 4212-01S
AGENCY REF. NO. 158-6/01

CHARLES WEISBERG,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF RIVERSIDE, BURLINGTON COUNTY
Respondent.

Robert M. Schwartz, Esq., appearing for Petitioner

John T. Barbour, Esq., appearing for Respondent (Barbour & Barbour, P.A., attorneys)

Record Closed: July 31, 2003 Decided: February 3, 2004[1]

BEFORE **ISRAEL D. DUBIN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter concerns petitioner's claim that respondent violated his rights of tenure by unilaterally reducing his compensation for an "unaccounted absence" on January 2, 2001, based upon his failure to submit a doctor's note, as requested, after calling out sick on that day.

[1] By Orders of Extension, the time limit within which to file this Initial Decision with the Department of Education was extended until March 14, 2004.

By memorandum dated March 7, 2001, respondent's superintendent of schools advised petitioner that he was docking him a total of two days' pay for "unaccounted absences" on January 2, 2001, and one half-day each on January 3 and 4, 2001. Petitioner filed his appeal on June 6, 2001, and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on June 28, 2001. *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

Pursuant to *N.J.A.C.* 1:1-13.1 *et seq.*, a telephone prehearing conference was conducted by the Hon. Beatrice S. Tylutki, A.L.A.J., on September 24, 2001. At that time, the parties agreed that a hearing was unnecessary because the facts were uncontested and asked that the matter be summarily decided on the briefs. In her Prehearing Order dated September 25, 2001, Judge Tylutki granted their request and directed petitioner to submit a proposed stipulation of facts within thirty days and respondent to review and agree upon a final version within thirty days of his receipt of the proposed stipulation. The Order also directed the parties to submit concurrent briefs within thirty days of the filing of the stipulation, and reply briefs within fifteen days of the initial briefs.

For reasons undisclosed in the record, the Prehearing Order was not honored and the matter remained dormant for a full year until September 26, 2002, when the matter was reassigned to this Administrative Law Judge in anticipation of Judge Tylutki's impending retirement. Several telephone conferences followed and, on December 24, 2002, the matter was placed on the inactive list pending developments in the parties' civil case. The matter was reactivated on March 24, 2003, and by Letter Order dated May 6, 2003, the parties were directed to submit a Stipulation of Facts by no later than May 23, 2003, file contemporaneous Cross-Motions for Summary Decision by June 15, 2003, and file reply briefs by no later than July 7, 2003. The record finally closed on July 31, 2003, upon receipt of the final reply brief.

FINDINGS OF FACT

All of the material facts have been agreed upon and the following Stipulation of Facts, copied verbatim from Exhibit J-1, has been accepted as comprising the Findings of Fact in this matter:

1. Petitioner is a tenured employee of the Riverside School District currently serving as Director of Special Education.
2. Petitioner is tenured in his position as Director of Special Education.
3. Petitioner is a member of the Riverside Administrators Association.
4. Petitioner was absent from school on January 2, 2001, and was absent for half a day on both January 3 and 4, 2001.
5. In a memo dated March 7, 2001, Riverside's Superintendent, Jay Allen Ferner, stated to the Petitioner that he was "docking" him "two days['] pay" for what the Superintendent labeled as "unaccounted absences," for a full day on January 2, 2001, and for two half days on January 3 and 4, 2001.
6. In Petitioner's paycheck for the period ending March 17, 2001, having check number 10181, a sum of $788.07 was "docked" from his base salary of $3,637.23 for the preceding two week pay period leaving him with total earnings before any deductions [were] taken of $2,849.16.
7. Subsequently, per a memorandum dated March 20, 2001 to Jodi Lennon, School Business Administrator, Superintendent Ferner requested the reinstatement of Petitioner's half-day salary for January 4, 2001.
8. Also, per a memorandum dated March 22, 2001, to the Petitioner, Superintendent Ferner advised Petitioner that he would reinstate his half-day salary for January 3, 2001.
9. The reinstatement for Petitioner's half-day salary for January 3 and 4 was made after Petitioner provided verification of his absence for both days.
10. Petitioner's salary for January 2, 2001 was not reinstated as Petitioner did not provide [the requested verification] for that day's absence; notably, a physician's note indicating that he had been ill.
11. The Respondent's attendance policy is set forth in Policy 32.12.
12. Petitioner was a member of the Riverside Administrators Association. Attached [to the Stipulation of Facts] is the collective bargaining agreement, which applied through June 30, 2001.
13. The action to withhold one day[']s salary from the Petitioner was never done by formal resolution of the Respondent.

DISCUSSION OF THE LAW

Under the *Uniform Administrative Procedure Rules*, a party may move for summary decision 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. 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.
>
> [*N.J.A.C.* 1:1-12.5(b)]

Prior to the establishment of the OAL, the New Jersey Supreme Court stated that "court-fashioned doctrines for the handling of litigation do in fact have some genuine utility and relevance in administrative proceedings." *Hackensack v. Winner*, 82 *N.J.* 1, 29 (1980). The Court further opined that:

> many principles and rules that govern judicial proceedings and determinations can be applied to an agency's quasi-judicial or adjudicative function. Judicial rules of procedure and practice are transferable to administrative agencies 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) (citation omitted)]

N.J.A.C. 1:1-12.5(b) is similar to, and may therefore be interpreted and applied as is the summary judgment rule under the New Jersey Rules of Court, which permits a party to move for 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 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)]

In *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520 (1995), the New Jersey Supreme Court summarized the court rule and stated that the issue is "whether the evidence presents a sufficient disagreement to require a [hearing] or whether it is so one-sided that the party must prevail as a matter of law. *Id.* at 536, citing *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 251-252 (1986).

Using this analysis, a contested case clearly can be summarily disposed of before an Administrative Law Judge 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 the Matter of Robros Recycling Corp.*, 226 *N.J. Super.* 343, 350 (App. Div. 1988). Should the motion be granted, summary decision must be based on an examination of the totality of circumstances, mitigating and aggravating factors, adequate factual findings and conclusions of law. *Id.* Based upon the Stipulation of Facts and the documentation appended thereto, as well as the parties' respective briefs, I **FIND** that there are no genuine issues of material fact and that the matter is appropriate for disposition by Summary Decision.

Petitioner argues that the tenure statutes preclude respondent from summarily reducing a tenured employee's salary. In support of this argument, petitioner cites *N.J.S.A.* 18A:28-5 which, in pertinent part, provides that teaching staff members and administrators "under tenure during good behavior and efficiency . . . shall not be dismissed or reduced in compensation except for inefficiency, incapacity, conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by [*N.J.S.A.* 18A:6-9 *et seq.*]." He then makes reference to *N.J.S.A.* 18A:6-10 which, in addition to reiterating that no tenured employee shall be dismissed or reduced in compensation, except for inefficiency, incapacity, unbecoming conduct, or other just cause, expressly requires that written charges be preferred against the tenured

employee, and that a hearing to determine the validity of the charges be held, before the employee can be dismissed or reduced in compensation. "That [the 'docking' of petitioner's salary] was undertaken by the Riverside Board of Education outside of the permitted statutory parameters constituted a violation of petitioner's tenure rights as protected by N.J.S.A. 18A:28-5." *Petitioner's Brief*, June 18, 2003, pp. 3-4.

Respondent disagrees, arguing that the statutory authorization for its reduction of petitioner's salary may be found in the sick leave provisions of *N.J.S.A.* 18A:30-1 *et seq.* Sick leave is defined as "the absence from his or her post of duty, of any person because of personal disability due to illness or injury . . .." *N.J.S.A.* 18A:30-1. Such leave shall be available "with full pay for a minimum of 10 school days in any school year" to all tenured employees. *N.J.S.A.* 18A:30-2. However, certain conditions may attach, and "[i]n case of sick leave claimed, a board of education may require a physician's certificate to be filed with the secretary of the board of education in order to obtain sick leave." *N.J.S.A.* 18A:30-4.

Respondent also notes that a board of education may, in the exercise of its discretion, elect to continue paying a daily salary to an employee who has exhausted his or her annual and accumulated sick leave, less the pay or estimated pay of a substitute. *N.J.S.A.* 18A:30-6. Similarly, it may also "fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave, or . . . grant sick leave over and above the minimum sick leave as defined in this chapter or [allow] days to accumulate over and above those provided for in section 18A:30-2 . . . ." *N.J.S.A.* 18A:30-7.

Respondent concludes his argument as follows:

> It is clear from the combination of these statutory provisions that the issue of payment or non-payment of salary to even a tenured employee for absence form (*sic*) his or her position of employment is not subject to the provisions of the Tenured Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. Payment for services requires that the individual either be present and perform such services, or be on any excused, legitimate leave, in accordance with the applicable statutory provisions.
>
> [*Respondent's Brief*, July 10, 2003, page 2]

By way of reply, petitioner asserts that respondent's reliance on *N.J.S.A.* 18A:30-1 *et seq.* in general, and *N.J.S.A.* 18A:30-4 in particular, is misplaced. As he asserted in a January 25, 2001 letter from his attorney to counsel for the Board,

> In response to [petitioner's January 18, 2001 memo], Mr. Ferner stated that it was New Jersey law that allowed him to request a physician's note. The appropriate statute is N.J.S.A. 18A:30-4. However, this falls under the heading of sick leaves and leaves of absences. What we are dealing with here is a one-day absence, not a sick leave. Consequently, I don't believe that N.J.S.A. 18A:30-4 is pertinent.
>
> [*Respondent's Brief*, Exhibit 3]

It is axiomatic that a tenured teacher or administrator must be available on a consistent basis if that individual is to provide the quality of services that the school board and students have come to expect. Even the occasional absence, particularly when it occurs with some frequency, can have an adverse impact on the learning process; so much so that the benefits of regular instruction may not be completely regained, even upon that individual's return. This is particularly true in the case of special needs children, who must overcome extremely difficult obstacles to obtain a meaningful education. Therefore, the board of education, teachers, parents and students must be assured that an individual such as petitioner, who holds the position of Director of Special Education, will be present to perform the duties of that position.

In this matter, petitioner was ill and absent from school for a full day on January 2, 2001, and one half-day each on January 3 and 4, 2001. In accordance with *N.J.S.A.* 18A:30-4, the superintendent of schools directed petitioner to provide a doctor's note verifying that he had, in fact, been sick. Petitioner ultimately submitted notes covering his absences on January 3 and 4, and these absences were excused. However, despite several requests, he did not submit a doctor's note concerning his sick day on January 2. Consequently, the absence was considered unexcused and one day's salary was withheld from his check.

Petitioner argues that the board did not have the statutory right to take this action because "[w]hat we are dealing with here is a one-day absence, not a sick leave." He urges that this

purported distinction be made because it would render *N.J.S.A.* 18A:30-4 irrelevant and thereby eliminate whatever authority the board had to demand a physician's note and then withhold one day's salary when it was not produced.[2]

Careful review of the case law has revealed that the terms "sick time," "sick days" and "sick leave" have been used interchangeably in any number of tenure-related education cases including, but certainly not limited to *Gillespie v. State-Operated School District of the City of Newark*, OAL Docket No. EDU 9448-01; *Fedor v. Elmwood Park Board of Education*, OAL Docket No. EDU 7669-01; *Bruno-Schwartz v. Board of Education of South Hunterdon Regional High School District*, OAL Docket No. EDU 4198-01; *Nadasky, Waldvogel and Dougherty v. Board of Education of Township of Clark*, OAL Docket No. EDU 7375-99; *Schmidtke v. Board of Education of the Township of Woodbridge*, OAL Docket No. EDU 10756-98, *Wellins v. Board of Education of the City of Atlantic City, et als*, OAL Docket No. EDU 8903-98 and *Springer v. Board of Education of the Township of Mount Holly*, OAL Docket No. 8421-97. Consequently, if there is a distinction is to be made between a sick day and sick leave, it is a distinction without a difference.

Moreover, *N.J.S.A.* 18A:30-1 *et seq.*, is the only chapter in Title 18A that expressly entitles or authorizes tenured employees to take time off with full pay when sick. *N.J.S.A.* 18A:30-2 entitles such employees to take "sick leave with full pay for a minimum of 10 school days in any school year." If that section applied only to extended "sick leaves" or "leaves of absence" of ten days or more, it would have the unintended result of depriving countless tenured teachers, administrators, secretaries and custodians of a day's salary for each individual day they were out of work due to illness. Consequently, sick leave must have been intended to serve as an omnibus term for all absences due to illness, be they occasional or extended.

This still leaves the issue of whether the board must comply with the requirements of *N.J.S.A.* 18A:6-10 each time it docks an employee for the occasional unaccounted or unauthorized absence.[3] In construing statutes or regulations relating to the same subject matter,

[2] Petitioner's argument is somewhat disingenuous given the fact that he accepted the legitimacy of and complied with the demand by submitting physicians' notes for his half-day absences on January 3 and 4, 2001.

[3] Although he alleged in his Petition of Appeal that he "had a sufficient number of sick days to cover the January 2, 2001 absence," *Petition of Appeal*, page 2, numbered paragraph 9, petitioner did not raise this issue in either of his

"we must first strive to harmonize them." *In the Matter of J.W.D.*, 149 *N.J.* 108, 115 (1997). Hence, statutes should be construed in their entireties "to clear up any obscurities and ambiguities in the law and to make the whole of the law and every part of it harmonious and effective." *In re N.*, 96 *N.J. Super.* 415, 421-22 (App. Div. 1967) quoting McCaffrey, *Statutory Construction*, §44, at 86 (1953). A sensible application of the law "is to be gathered from its object and the nature of the subject matter, the contextual setting, and the statutes *in pari materia*." *Id.* at 422, *quoting State v. Brown*, 22 *N.J.* 405, 415 (1956).

Not only are *N.J.S.A.* 18A:28-5 and *N.J.S.A.* 18A:30-1 *et seq.* part of the same overall statutory scheme set forth in Title 18A, Education, they are also part of the same subtitle, Subtitle 6, Conduct of Schools. Therefore, in considering any perceived inconsistencies, such as whether a deduction of one day's salary for an unauthorized absence constitutes a reduction in compensation within the ambit of Chapter 28, Tenure, "we must first strive to harmonize them." *In the Matter of J.W.D., supra*, 149 *N.J.* 108, 115. And in doing so, it must be presumed, if not understood, that the Legislature knew what it was doing when it enacted these statutes, *Medical Society v. Dept. of Law & Public Safety*, 120 *N.J.* 18, 26 (1990), and sought to achieve a reasonable result. *Cf. Wene v. Meyner*, 13 *N.J.* 185, 192 (1953) ("Legislature may invoke measures reasonably appropriate to secure the integrity of the nominating process in the service of the community welfare.").

N.J.S.A. 18A:28-5 provides that tenured employees "shall not be dismissed or reduced in compensation except for inefficiency, incapacity, conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by [*N.J.S.A.* 18A:6-9 *et seq.*]." *N.J.S.A.* 18A:6-10 in turn provides the mechanism that must be employed in attempting to dismiss or reduce the compensation of these employees and expressly requires that written charges be preferred against the tenured employee and that a hearing to determine the validity of the charges be held.

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briefs. Nor did he include in the Stipulation of Facts any information supporting his contention. By the same token, although attendance records were attached to the first of its two briefs, respondent did not allege that petitioner had exhausted his paid sick leave in either brief, or include any facts supporting such a position in the Stipulation of Facts. Even so, for reasons to be discussed later in this decision, this issue need not be addressed.

A review of the relevant case law discloses that when *N.J.S.A.* 18A:28-5 has been invoked in cases involving compensation, it has generally been to protect tenured employees from board action affecting the employee's annual salary *ab initio*. *See e.g. Fedor v. Elmwood Park Board of Education*, OAL Docket No. 7669-01 (change in employment from a twelve-month position to a ten-month position with concomitant reduction in annual salary); *Iraggi v. Board of Education of the Borough of Bradley*, OAL Docket No. EDU 584-01 (assignment of Learning Disabled Teaching Consultant to regular teaching position at lower salary and employment of less senior non-tenured individual); *Tomassini v. Board of Education of the City of Trenton*, OAL Docket No. EDU 6585-00 (reassignment of teacher/facilitator to regular teaching position with attendant reduction in annual salary); and *Reinertsen v. East Brunswick Board of Education*, OAL Docket No. 4554-99 (reassignment of head custodian to regular custodial position with simultaneous reduction in annual salary). *Cf. Cerato v. Board of Education of the City of Newark*, 94 *N.J.A.R.* 2d (EDU) 248 (freeze in tenured employee's annual salary due to inadvertent ministerial overpayment not considered reduction in compensation).

On the other hand, there have been no reported cases where the occasional illness, without more, has been considered the type of "conduct unbecoming such a teaching staff member or other just cause" the Legislature contemplated as warranting a reduction in compensation. For the most part, it has only been when the employee's absenteeism was excessive or habitual that it called for the filing of tenure charges. *See e.g. In the Matter of the Tenure Hearing of Patricia Marsden, School District of Toms River*, OAL Docket No. EDU 1188-84 (Commissioner will not hesitate to dismiss a tenured employee for chronic, persistent absenteeism even when there is no charge of illegitimate use of sick leave).

Based upon the foregoing, it would not be unreasonable to assume that the Legislature intended that the issue of payment or non-payment of salary for occasional absences due to illness should be governed by *N.J.S.A.* 18A:30-1 *et seq.*, and not be subject to the provisions of *N.J.S.A.* 18A:28-5 and *N.J.S.A.* 18A:6-10. Written in a much more positive, compassionate vein, the sick leave provisions affirmatively entitle employees to a minimum of ten paid absences due to illness each school year. *N.J.S.A.* 18A:30-2. They also provide that a board of education may, in the exercise of its discretion, elect to continue paying a daily salary to an employee who has exhausted his or her annual and accumulated sick leave, less the pay or estimated pay of a

substitute. *N.J.S.A.* 18A:30-6. Similarly, a board may "fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave, or . . . grant sick leave over and above the minimum sick leave as defined in this chapter or [allow] days to accumulate over and above those provided for in section 18A:30-2 . . . ." *N.J.S.A.* 18A:30-7.

Conspicuous by their absences from *N.J.S.A.* 18A:30-1 *et seq.* are any references to "reductions in compensation" or the need to proceed "in the manner prescribed by [*N.J.S.A.* 18A:6-9 *et seq.*]" before docking employees a day's salary for an unexcused absence. This, coupled with the foregoing discussion of the case law concerning reductions in compensation, and the level of discretion the Legislature has given boards of education in granting sick leave over and above the minimum allotment of ten days, can only mean that matters involving sick leave are *sui generis* and are to be handled outside the scope of the tenure laws.

Moreover, Article X, Section 10.3 of the negotiated agreement between the Riverside Board of Education and the Riverside Administrative Association expressly provides that

> Any employee being absent for other than legitimate use of sick and personal leave as contained in this agreement, or without direct approval of the Superintendent and the Board of Education, **shall not be paid in proportion to the amount of time said absence occurred**. (Emphasis added)

Therefore, the inescapable conclusion is that boards of education may elect not to pay a day's salary to an employee who has taken an unaccounted for or unexcused absence and need not follow *N.J.S.A.* 18A:6-10 in withholding that salary. To hold otherwise would result in the waste of valuable time, money, and resources each time a tenured employee takes an unauthorized day off from work.

The only remaining issue would appear to be whether or not the board had the right to demand a doctor's note when it did. The board contends that it did pursuant to *N.J.S.A.* 18A:30-4, which authorizes a board of education to request a physician's certificate any time sick leave is claimed. Petitioner, however, argues that Article X, Section 10.2 of the negotiated agreement between the Riverside Board of Education and the Riverside Administrative Association

precludes the board from demanding a physician's note until an employee has called out sick for three consecutive days.

The New Jersey Supreme Court has held that "the mere existence of a statute or regulation relating to a given term or condition of employment does not automatically preclude negotiate[ed alternatives]", *Wright v. Board of Educ. of the City of East Orange, Essex County*, 99 *N.J.* 112, 119 (1985) (*citing In the Matter of Local 195, IFPTE, AFL-CIO v. State*, 88 *N.J.* 393, 403 (1982), but rather "'[n]egotiation is preempted only if the statutory or regulatory provisions . . . speak in the imperative and leave nothing to the discretion of the public employer.'" *Ibid, quoting State v. State Supervisory Employees Ass'n*, 78 *N.J.* 54, 80 (1978). Stated another way, it is only "[i]f the Legislature establishes a specific term or condition of employment that leaves no room for discretionary action, [that] negotiation on that term is fully preempted." *In the Matter of Local 195, IFPTE, AFL-CIO v. State, supra*, 88 *N.J.* at 403.

Mandatory or imperative statutes are those establishing a specific scheme that must be handled as directed. *State v. State Supervisory Employees Ass'n*, 77 *N.J.* 55, 82, n. 7 (1978). Obvious examples of mandatory statutes are *N.J.S.A.* 18A:28-5 and *N.J.S.A.* 18A:6-10, the very statutes upon which petitioner relies. They are very explicit and leave absolutely no room for discretionary action. Simply put, they expressly require that written charges be preferred against the tenured employee and that a hearing to determine the validity of the charges be held before that employee may be dismissed or have his compensation reduced.

N.J.S.A. 18A:30-4, however, is quite the opposite and provides that a board of education *may* require a physician's certificate before accepting a tenured employee's claim of sick time and excusing the employee's absence. It is under no obligation to do so in each and every case. Rather, it may examine each claim for sick time individually and decide from which employees it will demand doctors' notes. Since *N.J.S.A.* 18A:30-1 *et seq.* provides a board with virtually unlimited discretion in handling sick leave, *N.J.S.A.* 18A:30-4 cannot be considered a mandatory or imperative statute. Therefore, a board of education is free to waive its right to require a physician's certificate any time sick leave is claimed and agree instead to a negotiated alternative. Here, the alternative is Article X, Section 10.2 of the negotiated agreement, under which employees "taking three (3) consecutive sick days will present, upon request, a physician's

certificate attesting to capability to perform job duties and signifying freedom from any communicable disease."

Superintendent Ferner's memo of January 2, 2001 advised petitioner that upon returning from his absence on January 2, 2001, he was to attach a doctor's note to the staff absentee slip verifying his illness. Since the memo was dated the same day as his illness, it is obvious that unless he had been absent the last two school days before winter break,[4] petitioner had not been out sick for three consecutive days. Having negotiated away its right to insist upon a doctor's note whenever sick leave is claimed, neither the board nor its superintendent had the authority to demand a note the date the sick day was taken.

That being the case, we must now determine whether or not petitioner claimed three consecutive days of sick leave and, if so, whether the superintendent renewed his request for a doctor's note or sought advice as to how petitioner wished the day to be charged. Once again, petitioner claimed sick leave for a full day on January 2, 2001, and one-half day each on January 3 and 4, 2001. Although he actually worked for part of the day on both the 2nd and 3rd, the fact remains that he formally claimed sick leave, albeit for half a day, on those two days. Therefore, he claimed sick leave for all or part of three consecutive days. Any other finding would lead to an absurd result where an employee repeatedly calling out sick for half a day could not be asked for a doctor's note until he or she had been out for six consecutive half-days.

On February 14, 2001, approximately six weeks after these three consecutive sick days, Superintendent Ferner sent petitioner a memorandum acknowledging receipt of Mr. Schwartz's letter of January 25, 2001. Apparently taking Mr. Schawartz's comment that "[w]hat we are dealing with here is a one-day absence, not a sick leave" out of context, Mr. Ferner asked, "Since it is not sick time according to your attorney, how should this day be charged?" Knowing full well that he had claimed sick leave on January 2,[5] petitioner should have, at the very least, disabused the superintendent of this misconception and echoed his attorney's position that he did not believe he was required to provide a physician's note for a one-day absence. Although this

[4] There is nothing in the record before me, including the attendance records appended to respondent's brief, indicating that petitioner claimed sick leave the two days immediately preceding the break.

[5] Having pled that he "had a sufficient number of sick days to cover the January 2, 2001 absence," *Petition of Appeal*, Count One, ¶9, petitioner cannot now claim that the absence was for anything other than illness.

memorandum was tantamount to another request for a physician's certificate, petitioner chose not to respond and left the absence unaccounted for.

As of March 7, 2001, Mr. Ferner had still not received a physician's certificate. Therefore, by memorandum issued the same date, he recounted the procedural history of this matter and closed with the following passage: "You have not responded in writing, although you told me in conversation on Friday, March 2, 2001, that you had no intention of supplying me with the requested notes. I am, therefore, docking you two days' pay for these unaccounted absences."[6]

Given respondent's failure to provide a physician's certificate or otherwise indicate how he wished to be charged for his absence as requested, I **FIND** that petitioner's absence on January 2, 2001 was unexcused and further **FIND** that the board of education acted appropriately in withholding one day's salary as it was authorized to do under *N.J.S.A.* 18A:30-1 *et seq.* and Article X, Section 10.3 of the negotiated *Agreement* between the Riverside Board of Education and the Riverside Administrative Association.

DECISION AND ORDER

Based upon the foregoing, I **CONCLUDE** that respondent's withholding of one day's salary for an unexcused absence did not violate petitioner's rights of tenure under *N.J.S.A.* 18A:28-5 and should be **AFFIRMED**. Therefore, I further **CONCLUDE** that respondent's Motion for Summary Decision should be **GRANTED** and that petitioner's Motion for Summary Decision should be **DENIED** and his Petition of Appeal be **DISMISSED**. It is so **ORDERED**.

[6] In or about March 20-22, 2001, upon receipt of separate doctor's notes for the half-day absences claimed on January 3 and 4, Mr. Ferner caused the salary for the two half days to be restored.

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 (45) 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 (13) 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, 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 3, 2004 — DATE

ISRAEL D. DUBIN , ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

February 4, 2004

DATE

FEB 10 2004

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

EXHIBITS

Joint Exhibits:

J-1 Stipulation of Facts

For Petitioner:

None

For Respondent:

None

OAL DKT. NO. EDU 4212-01S
AGENCY DKT. 158-6/01

CHARLES WEISBERG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RIVERSIDE, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record in this matter, and assuming, *arguendo*, that this matter was timely filed,[1] the Commissioner concurs with the Administrative Law Judge's (ALJ) conclusion that petitioner has failed to demonstrate that the Board's action in docking him a day's pay on January 2, 2001 pursuant to *N.J.S.A.* 18A:30-1 *et seq.* was prohibited by the tenure statutes.

In so doing, the Commissioner does not reach to the ALJ's discussion with respect to whether the Board's action was authorized pursuant to the negotiated agreement between it and the Riverside Administrative Association. Notwithstanding petitioner's attempts in his exception arguments to expand the scope of the issues before him, the Commissioner notes that the *sole* issue raised in the Petition of Appeal was whether the Board's action in docking

[1] Although the Prehearing Order issued on September 25, 2001 by ALJ Tylutki identifies timeliness of the petition as one of the issues herein, (Prehearing Order at 1), it does not appear to have been addressed in subsequent proceedings.

petitioner for one day reduced his salary in violation of his tenure rights. (Petition of Appeal at 2) As a result, the Prehearing Order issued on September 25, 2001 identifies the issues in this matter as

1. Whether the docking of the one day salary is in violation of the tenure statute.
2. Whether the petition was filed timely. (Prehearing Order at 1).[2]

Indeed, subsequent to the issuance of the Prehearing Order, petitioner informed ALJ Tylutki by letter dated October 10, 2001 that he had filed "several grievances" against the Board, scheduled to be heard on October 17, 2001. One of the grievances alleged that the action taken by the Board in docking his single day's pay was a violation of his collective bargaining agreement. (Schwartz Letter, October 10, 2001 at 2) Petitioner therein recognized that "the contract issue being presented to the Arbitration is separate and distinct from those issues before the Commissioner, and because of the different jurisdictional consideration, no choice of remedy is necessary." (*Ibid.*)

Accordingly, the Initial Decision is adopted as set forth above. The Petition of Appeal is dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/04
Date of Mailing: 3/19/04

[2] There is nothing in the record to indicate that the Prehearing Order was later modified. Indeed, by letter order dated May 6, 2003, ALJ Dubin addresses the parties and states, in pertinent part, "This matter concerns petitioner's allegation that respondent unilaterally reduced his compensation by $788.07 on the grounds that he had not provided the superintendent with a physician's note for a day he had been absent from work. Petitioner contends that the reduction in compensation was violative of N.J.A.C. [sic] 18A:28-5 in that he had a sufficient number of sick days to cover the absence in question." (ALJ Dubin's Letter Order of May 6, 2003 at 1)

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

127-04

#127-04

THOMAS MATARAZZO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK, BERGEN COUNTY.	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's filling of supervisor positions. Petitioner sought appointment to the position of Supervisor of Instruction in the 2002-03 school year.

Upon review of the job descriptions for the old Supervisor of Instruction and new District-wide Supervisor of Instruction, the ALJ concluded that the new requirements did not create a position sufficiently different to give rise to a separately tenurable position. The ALJ concluded that petitioner, previously tenured in the position of Supervisor of Instruction, was entitled to the position of District-wide Supervisor of Instruction over the nontenured teaching staff member assigned by the Board to that position.

The Commissioner adopted the Initial Decision as his own.

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.

March 18, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 7230-02

AGENCY DKT. NO. 194-7/02

THOMAS MATARAZZO

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK, BERGEN COUNTY,

Respondent.

Louis P. Bucceri, Esq., for petitioner (Bucceri and Pincus, attorneys)

Jason P. Gratt, Esq. and **Stephen R. Fogarty**, Esq., for respondent (Fogarty & Hara, attorneys)

Record closed: February 6, 2004 Decided: February 9, 2004

BEFORE **ROBERT J. GIORDANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Thomas Matarazzo, was employed by the respondent Cliffside Park Board of Education as a teacher of social studies from 1974-75 through 1979-80. He was then assigned the duties of a Supervisor of Social Studies from 1980-81 through

1992-93. From 1993-94 through 1998-99, he was assigned as supervisor of both social studies and business.

As of June 30, 1999, the Board abolished the position of Supervisor of Instruction. During the 2001-2002 school year, respondent posted supervisory positions to commence as of the 2002-2003 school year. Respondent interviewed petitioner and five other candidates for the three, posted supervisory positions. Respondent hired three other candidates, Fabian, Merrill and Rudolph, as Supervisors of Instruction.

On July 2, 2002, petitioner filed a petition of appeal with the Commissioner of Education contending that these individuals are either not tenured as supervisor or they have less seniority as supervisor than petitioner. On July 23, 2002, respondent filed an answer to the petition of appeal. On August 9, 2002, the Department of Education transmitted the matter to the Office of Administrative Law 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 assigned to the undersigned and a prehearing conference was held on May 6, 2003. Thereafter, a conference was conducted on October 9, 2003, and the parties agreed that the matter could be resolved by way of cross-motions for summary decision on stipulated facts. Stipulations of fact along with documents J-1 through J-21, stipulated as to authenticity, were received on October 21, 2003. Thereafter, cross-motions and supporting briefs were filed by November 18, 2003. The parties submitted reply briefs by December 8, 2003. A telephone conference was conducted on February 6, 2004 to address issues regarding the stipulated facts submitted. No modifications or additions to the stipulated facts being made, the record closed on February 6, 2004.

STIPULATION OF FACTS

The parties to the within consolidated matters have entered into agreement as to the following stipulated **FACTS**:

1. Petitioner, Thomas Matarazzo, as been employed by respondent as follows:

1974-75 - Teacher of Social Studies
1975-76 - Teacher of Social Studies
1976-77 - Teacher of Social Studies
1977-78 - Teacher of Social Studies
1978-79 - Teacher of Social Studies
1979-80 - Teacher of Social Studies
1980-81 - Supervisor of Social Studies
1981-82 - Supervisor of Social Studies
1982-83 - Supervisor of Social Studies
1983-84 - Supervisor of Social Studies
1984-85 - Supervisor of Social Studies
1985-86 - Supervisor of Social Studies
1986-87 - Supervisor of Social Studies
1987-88 - Supervisor of Social Studies
1988-89 - Supervisor of Social Studies
1989-90 - Supervisor of Social Studies
1990-91 - Supervisor of Social Studies
1991-92 - Supervisor of Social Studies
1992-93 - Supervisor of Social Studies
1993-94 - Supervisor of Social Studies and Business
1994-95 - Supervisor of Social Studies and Business
1995-96 - Supervisor of Social Studies and Business
1996-97- Supervisor of Social Studies and Business
1997-98 - Supervisor of Social Studies and Business
1998-99 - Supervisor of Social Studies and Business
1999-2000 – Department Chairman, Social Studies
2000-2001 – Department Chairman, Social Studies
2001-2002 – Department Chairman, Social Studies
2002-2003 – Department Chairman, Social Studies
2003 – Present - Department Chairman, Social Studies

2. Petitioner holds the following educational certificates and endorsements issued by the New Jersey Department of Education:

Endorsement	Issue Date
Teacher of Social Studies (J-1)	8/72
Student Personnel Services (J-2)	9/76
Principal/Supervisor (J-3)	11/78
School Administrator (J-4)	7/89

3. The job description for the Supervisor of Instruction position held by petitioner from 1980 to 1999 is attached as Exhibit J-5. During this time period, the District

employed six Supervisors of Instruction in the following subject areas: Social Studies/Business, Mathematics, History, English, Physical Education/Industrial Arts and Science.

4. Effective June 30, 1999, respondent abolished the position of Supervisor of Instruction in its district. Petitioner was reassigned as Social Studies Department Chairperson. The job description for Department Chairperson is attached as Exhibit J-6.

5. Respondent created a new job description for the position of District Wide Supervisor of Instruction during the 2001-2002 school year (J-7).

6. Respondent issued a job posting for the position of District Wide Supervisor of Instruction with an application deadline of March 19, 2002 (J-8).

7. By memorandum of March 18, 2003, petitioner applied for the position of District Wide Supervisor of Instruction (J-9). Petitioner was interviewed for the position of District Wide Supervisor of Instruction by district principals and the superintendent (J-21).

8. The following district employees also applied and were interviewed by the district principals and superintendent for the newly-created District Wide Supervisor of Instruction position: George Fabiano (J-16), Janet Merrill (J-17), Martha Rudolph (J-18), Rhoda Shore (J-19) and Ann Marie Venezia (J-20). Rhoda Shore had previously been employed by the district as a Supervisor of Instruction assigned to the English Department effective January 4, 1994.

9. By memorandum of May 23, 2002, respondent's superintendent advised all staff that George Fabiano, Janet Merrill and Martha Rudolph were appointed as District Wide Supervisors of Instruction for the 2002-2003 school year (J-10). They have continued in that position through the 2003-2004 school year.

10. Petitioner was not appointed as District Wide Supervisor of Instruction for 2002-2003 or thereafter.

11. George Fabiano holds the following New Jersey educational certificates and endorsements:

Endorsement	Issue Date
Secondary Teacher of Mathematics	6/7/66
Principal/Supervisor	2/80
Teacher of Data Processing	3/87

12. George Fabiano's employment history with respondent is as follows:

1967 through June 1993 - High School Mathematics Teacher

September 1993 through June 1999 - Mathematics Supervisor (under job description J-5)

September 1999 through June 2002 - High School Math Teacher

September 2002- present – District Wide Supervisor of Instruction [under job description J-7], assigned to High School – Secondary pursuant to work schedule assignment J-14.

13. Martha Rudolph holds the following New Jersey educational certificates and endorsements:

Endorsement	Issue Date
Elementary School Teacher	3/17/66
Teacher of the Mentally Retarded	3/17/66
Teacher of the Physically Limited	3/17/66
Learning Disabilities Teacher Consultant (LDTC)	11/71
Teacher of the Socially and Emotionally Maladjusted	1/13/67
Principal/Supervisor	10/80

14. Martha Rudolph's employment history with respondent is as follows:

1963 through June 1969 - Special Education Teacher
1966 - 1969 - Part-time LDTC
1969 - 1980 - Full-time LDTC
1980-present - Child Study Team Chairperson (under job description J-15)
2002-present - District Wide Supervisor of Instruction (under job description J-7), assigned to Special Education pursuant to work schedule assignment J-14.

15. Janet Merrill holds the following New Jersey educational certificates and endorsements:

Endorsement	Issue Date
Elementary School Teacher	9/71 (J-11)
Nursery School Teacher	8/82 (J-12)
Supervisor	6/02 (J-13)

16. Janet Merrill's employment history with respondent is as follows:

1970-1991 - First Grade Teacher
1991-1994 - Basic Skills Teacher
1994-present - Early Childhood Coordinator
1998-present - Title 1 Coordinator
2002-present - District Wide Supervisor of Instruction (under job description J-7), assigned to pre-k through eighth grades-elementary pursuant to work schedule assignment J-14

17. The current work schedule assignments for Supervisors of Instruction is attached as J-14.

LEGAL DISCUSSION

The matter is now before this tribunal on cross-motions for summary decision. When considering a motion for summary decision, the administrative law judge (ALJ) must determine whether, based on the proceedings, discovery and affidavits submitted, a genuine issue of material fact exists which must be decided by a full evidentiary hearing. A contested matter can be summarily disposed of before an ALJ without plenary hearing in instances where undisputed material facts, as developed on motion or otherwise, indicate that a particular disposition is required as a matter of law. *In the Matter of Robros Recycling Corp.* 226 *N.J. Super.* 343 (App. Div. 1988). In this matter, the parties have stipulated to the material facts extant. The resolution of the issue raised by these cross-motions rests on analysis of legal principles. Thus, the matter is ripe for summary disposition.

The Tenure Act provides for the tenure of educational personnel in the State of New Jersey. *N.J.S.A.* 18A:28-1 *et seq.* No teaching staff member shall acquire tenure in any position in the public schools in any school district or under any board of education who is not the holder of an appropriate certificate for such position, issued by the State Board of Examiners. *N.J.S.A.* 18A:28-4. Under the authority of *N.J.S.A.* 18A:6-38, the State Board of Examiners is authorized to issue appropriate certificates to teaching staff members. "Certificate" means one of three types of credentials, instructional, educational services and administrative, that the Board of Examiners issues that permits an individual to serve as a teaching staff member. "Teaching staff member" means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications for such office, position or employment require him or her to hold a valid and effective standard, provisional or emergency certificate, appropriate to his or her office, position or employment issued by the State Board of Examiners. *N.J.S.A.* 18A:1-1; *N.J.A.C.* 6A:9-2.1.

The Board of Examiners will issue a separate endorsement for each subject area that falls under a specific type of certificate. The endorsement shall be considered part of that certificate. Under the administrative certification, the supervisor endorsement is required for supervisors of instruction who do not hold a standard principal's endorsement. The supervisor shall be defined as any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel. This endorsement also authorizes appointment as an assistant superintendent in charge of curriculum and/or instruction. *N.J.A.C.* 6A:9-12.3(c). In addition to possessing an appropriate certification, an educator must serve a probationary period in a given position under a designated certificate to achieve tenure. *Nelson v. Board of Educ. of Tp. Of Old Bridge*, 148 *N.J.* 358 (1997).

N.J.S.A. 18A:28-5 outlines the conditions under which teaching staff members are entitled to the security of tenure. The statute provides that the services of

> all teaching staff members employed in the positions of teachers ... and such other employees as are in positions which require them to hold

> appropriate certificates issued by the board of examiners ... shall be under tenure... after employment in the district or by such board...

upon satisfying the requisite statutory probationary terms set forth in the statute.

A teaching staff member achieves tenure by serving the probationary period either in a specifically designated "position," such as a teacher, or in a position that requires the teaching staff member to hold appropriate certificates. Our courts have held that tenure should be liberally construed to further its beneficial purpose of affording security to teaching staff who meet its standard of length of service. *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63 (1982). The Supreme Court has held that,

> tenure is achieved in a specific "position", and the scope of the tenured position is initially limited by the "certificate" the teaching staff member must hold to satisfy the prerequisite of qualifications for his or her employment. The statute does not require service of the probationary term under a specific "endorsement." Because the legislative will is expressed by the plain language of the statute, we will "not engage in conjecture or surmise which will circumvent the plain meaning of the act."
>
> [*In re Closing of Jamesburg High School,* 83 *N.J.* 540 (1980).]

However, the Supreme Court later held that the State Board of Education properly determined that the school district had a legitimate basis for restructuring the guidance department so as to eliminate the position of guidance counselor, which position required an education services certification, and for creating a new position of class supervisor, which required certification in both educational services and administration. *Dennery v. Board of Educ. of Passaic County Regional High School Dist. No. 1, Passaic County*, 131 *N.J.* 626 (1993). The *Dennery* Court held that:

> When the duties of the position in which a teaching-staff member has acquired tenure are substantially identical to those of the position that the person seeks, a local school board may not sidestep an educator's tenure rights by simply renaming the position or tacking on additional meaningless requirements. The local board must extend the teaching-staff member's tenure rights to the newly-created position. *See, e.g., Viemeister v. Board of Educ.*, 5 *N.J. Super.* 215, 218, 68 *A.2d* 768 (App. Div. 1949) (holding that tenured principal should be reinstated because his position had not in fact been abolished when local school board created the position of "teaching" principal); *Vogel v. Board of Educ.,*

> (State Bd. of Educ., June 5, 1985), *slip op.* at 5-6. (explaining that a "[b]oard's decision to abolish a position is not sacrosanct and will be disturbed if it is found that the duties of the abolished position essentially have been transferred to another position so as to defeat the rights of the tenured employee to the abolished position"); *Luppino v. Board of Educ.,* 1980 *S.L.D.* 1028, 1035-36 (ruling that duties of administrator of home instruction and principal of home instruction "were substantially the same" and change of title "did not involve the meaningful addition of extra duties").
>
> A mere overlap in duties, however, 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. *Santasiero v. Parsippany-Troy Hills Bd. of Educ.,* 1984 *S.L.D.* 854, 879; *see also Sandri v. Board of Educ.,* 1986 *S.L.D.* 1501 (ruling that duties of abolished position of supervisor of guidance/shop were similar but of greater nature and scope than newly-created position of director of special needs and student services); *Rufalo v. Board of Educ.,* 1986 *S.L.D.* 1699 (ruling that despite overlap of duties between post of vice-principal and newly-created supervisor position, positions were "substantially different"). Despite petitioner's belief that the new position of class supervisor is only a thinly-disguised effort to repackage the job of guidance counselor by creating a new job title and requiring minor additional supervisory duties, the record indicates that the Commissioner and State Board could reasonably conclude that the positions were in fact different.
>
> [*Id. at* 639-40.]

The Tenure Act authorizes the creation of seniority regulations to rank the job rights of tenured teaching staff in a reduction in force (RIF). One of the provisions of the Tenure Act is *N.J.S.A.* 18A:28-9, which states in essence that tenure does not limit the right of a school district to reduce staff. The next section, *N.J.S.A.* 18A:28-10, states that, in a RIF, dismissals shall be made on the basis of seniority according to standards adopted by the State. *N.J.S.A.* 18A:28-13 instructs the Commissioner how to create those standards. *N.J.S.A.* 18A:28-12 gives staff members, who are dismissed in a RIF, preference in reemployment. The statute does not create or authorize the Commissioner to create competing rights for non-tenured teachers. Under current regulations, seniority is measured by years of employment in specific job categories, which are normally narrower than the subject fields that are endorsed on teachers' certificates. *See N.J.S.A.* 18A:28-5; *N.J.A.C.* 6:3-1.10(b). *Bednar v. Westwood Bd. of*

Educ., 221 *NJ Super.* 239, 241-42 (App. Div. 1987). *N.J.A.C.* 6:3-5.1 provides in part that for seniority purposes, there shall be deemed to be specific categories including supervisor. Each supervisory title shall be a separate category, and district boards of education shall adopt a job description for each supervisory position which sets forth the qualifications and specific endorsements required for such position. *N.J.A.C.* 6:3-5.1(l)10(l) and (ii).

The State Board has noted that seniority provides a mechanism for ranking all tenured teaching staff members so that reductions among the tenured force can be effected in an equitable fashion and in accord with sound educational policies. A tenured teacher is entitled to retention as against a non-tenured teacher under the tenure law. To hold otherwise would be to defeat the purpose of tenure which was to give a measure of security to teachers after the prescribed number of years of service. *Capodilupo v. West Orange Tp. Bd. of Ed.* 218 *N.J. Super.* 510 (App. Div. 1987). Seniority is a statutory concept created by Chapter 28 of Title 18A, a chapter which deals only with the various aspects of tenure. *Old Bridge Tp. Bd. of Educ. v. Old Bridge Educ. Ass'n*, 98 *N.J.* 523 (1985). It does not purport to create employment rights for non-tenured employees. The Court has held that non-tenured teachers whose contracts are not renewed by reason of a RIF are not entitled to the reemployment rights conferred by Chapter 28. Union Cty. Bd. of Ed. v. Union Cty. Teach. Ass'n, 145 N.J. Super. 435 (App. Div. 1976), *certif. den.* 74 N.J. 248 (1977). "Chapter 28 surely does not contemplate use of the concept of seniority to justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher." *Capodilupo v. West Orange Tp. Ed. Bd., supra.*

> The law is well-settled that a supervisor endorsement is generic and authorizes the holder to supervise any subject matter and any grade level (citations omitted). Moreover, while there is nothing to prevent a local board from establishing additional instructional certification requirements, absent a showing that instructional certification is necessary to perform the duties of the position at issue, such requirements cannot sidestep the educator's tenure rights on a preferred eligibility list of supervisors.
>
> [*Galbraith v. Board of Educ. of Lenape Valley Regional High School District,* 96 *N.J.A.R.2d* (EDU) 396 (1996).]

CONCLUSIONS

While the foregoing cases may serve as instructive for the instant matter, there are several distinctions that bear comment. In the instant case, respondent maintains that the newly created supervisory positions are substantially different from the prior positions in that there is now district wide responsibility (J-5, J-7). Clearly, there are differences between the job descriptions for the old supervisor of instruction and new district wide supervisor of instruction. Such differences might arguably defeat a claim based on seniority. Such district wide responsibility, even if sufficiently different in scope, still does not give rise to the imposition of additional certification requirements. *See Galbraith, supra.* And while both the old requirements and the new requirements for supervisor of instruction require that the holder of the position may be assigned teaching assignments, unlike in *Galbraith*, there are no instructional certification requirements imposed by the Board under either the old or new supervisor of instruction requirements in this case. There has been no showing that any certification or endorsement is necessary or required for the performance of the district wide supervisor position other than certification as a supervisor in order to be authorized by statute and regulation to perform such functions. Upon review of the respective job descriptions, I **CONCLUDE** that the new requirements do not create a position sufficiently different to give rise to a separately tenurable position. I thus **CONCLUDE** that petitioner, previously tenured in the position of supervisor of instruction, is entitled to the position of district wide supervisor of instruction over the non-tenured supervisor assigned by respondent to that position.

ORDER

Based on the foregoing, I hereby **ORDER** that petitioner's motion for summary decision is and shall be granted. Respondent's motion for summary decision is **DENIED**.

It is further **ORDERED** that respondent assign petitioner to one of the three positions of district wide supervisor of instruction, replacing the untenured supervisor

currently assigned, along with back pay and other emoluments of employment, as appropriate.

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 (45) 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 (13) 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, 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.

2/9/04
DATE

ROBERT J. GIORDANO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

2/9/04
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 10 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NO. EDU 7230-02
AGENCY DKT. NO. 194-7/02

THOMAS MATARAZZO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK, BERGEN COUNTY.	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

In its exceptions, the Board continues to argue that there are "substantial differences between the two supervisory positions at issue" so as to require that they be considered as "separate for purposes of determining tenure rights***." (Board's Exceptions at 2) In so doing, the Board renews its contention that the additional responsibilities in the job description for the new positions (Exhibit J-7) render these new positions "district wide" and, therefore, the tenure rights earned by petitioner during his prior service as a supervisor do not transfer to them. (*Id.* at 6-8) Additionally, the Board now contends that implicit within its posting and job description for the new supervisor positions was the requirement for an instructional endorsement in the level or area to which the successful candidate was assigned; consequently, petitioner, who is not endorsed as a K-8 instructor, cannot properly be appointed to the position held by Ms. Merrill. (*Id.* at 3, 10-11, 20-21)

To this, petitioner counters that the job description for each of the three supervisory positions is identical and does not indicate that a teaching assignment will be, or must be, within the individual's area of certification. (Petitioner's Reply at 3) Neither does it require any additional certificate or endorsement. (*Id.* at 7) Petitioner further contends, as argued before the ALJ, that his "tenure as a Supervisor extends to any other position requiring Supervisor certification since the position of District-Wide Supervisor of Instruction (J-7) is not among those [separately tenurable positions] enumerated in *N.J.S.A.* 18A:28-5." (*Id.* at 6) Since Ms. Merrill has not achieved tenure as a supervisor, petitioner maintains that he is entitled to be appointed to the position she holds. Petitioner urges the Commissioner, therefore, to adopt the Initial Decision as it was correctly decided on both the facts and the law.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that petitioner has demonstrated he is entitled to the supervisor position now held by Ms. Merrill, a nontenured teaching staff member. In so doing, the Commissioner is not persuaded by the Board's characterization of the new supervisor positions as "substantially different" so as to thwart petitioner's tenure entitlement.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/04

Date of Mailing: 3/18/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

March 18, 2004

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THOMAS MATARAZZO V. BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK, BERGEN COUNTY,. AGENCY DKT. NO. 194-7/02, OAL DKT. NO. EDU 7230-02

Dear Parties:

We are enclosing a copy of the decision of the Commissioner of Education, dated March 18, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/ dec ltr/Matarazzo
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library

#132-04

132-04

IN THE MATTER OF THE TENURE HEARING :

OF DALE MANCUSO, SCHOOL DISTRICT : COMMISSIONER OF EDUCATION

OF THE TOWN OF PHILLIPSBURG, WARREN : DECISION

COUNTY. :

March 25, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11010-03

AGENCY DKT. NO. 347-9/03

SCHOOL DISTRICT OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,
Petitioner,

v.

DALE MANCUSO,
Respondent.

Richard H. Bauch, Esq., for petitioner
(Schenck, Price, Smith & King, LLP)

John M. Zaiter, Esq., for respondent
(Broscious & Fischer, PC)

Record Closed: January 30, 2004 Decided: February 5, 2004

BEFORE **ELINOR R. REINER,** ALJ:

On or about September 24, 2003, the School District of the Town of Phillipsburg certified charges of conduct unbecoming a teacher and corporal punishment against respondent, Dale Mancuso, a tenured kindergarten teacher. On October 16, 2003, respondent filed an answer denying the charges. On November 5, 2003, the Department of Education, Bureau of Controversies and Disputes transmitted this matter

to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52L14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned judge on November 7, 2003, and a telephone prehearing conference scheduled for December 3, 2003. During the prehearing conference held on that date, the issues were isolated, and a hearing scheduled for January 13, 14 and 29, 2004 at the OAL, 33 Washington Street, Newark, New Jersey. As a result of settlement conferences held between the parties on January 13, 2004, a settlement was reached, and the hearing was adjourned. The settlement was contingent on approval by the Board of Education of the Town of Phillipsburg. On January 26, 2004, the Board of Education approved the Settlement Agreement and General Release.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement and General Release and Resolution and Extract of the Board's January 26, 2004 meeting. These documents indicate the terms of settlement.

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

1. The settlement agreement complies with the requirements of *Cardonic v. Bd. of Ed. of the Borough of Brooklawn,* 1990 *S.L.D.* 842 (Commissioner of Ed. April 7, 1982), *aff'd* State Bd. of Ed., April 6, 1983.

2. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or their representatives' signatures.

3. The settlement agreement is in the public interest.

4. 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 (45) 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 5, 2004
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

2/10/04
DATE

Kathleen Shuncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 11 2004
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE (hereinafter "Agreement") is made and entered into this _____ day of January, 2004, by and between the BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY, with its administrative offices located at 445 Marshall Street, Phillipsburg, New Jersey 08865 (hereinafter referred to as the "Board" or "District") and DALE MANCUSO, whose address is 36 Stonehenge Drive, Phillipsburg, New Jersey 08865 (hereinafter referred to as the "Employee").

WITNESSETH:

WHEREAS, the Employee is an employee of the District and presently is employed as a teaching staff member by the Board; and

WHEREAS, the Phillipsburg Education Association (hereinafter, the "Association") is the exclusive majority representative of all non-supervisory teaching staff members employed in the District, including Employee: and

WHEREAS, the Employee's current terms and conditions of employment are set forth in a collective negotiations agreement between the Board and the Phillipsburg Education Association covering the period of July 1, 2003 through June 30, 2006 (hereinafter "PEA Agreement"); and

WHEREAS, during the 2002-2003 school year certain allegations of inappropriate conduct toward a student were made in connection with the Employee during the course of teaching her kindergarten class; and

WHEREAS, the Employee was suspended with pay pursuant to said allegations on or about March 21, 2003, pending further investigation; and

WHEREAS, the Board reported the allegations to the Division of Youth and Family Services ("DYFS"); and

WHEREAS, following such report, DYFS indicated to the Board that it would not intervene in this matter and that the Board could handle the matter internally; and

WHEREAS, the District conducted an internal investigation of said allegations; and

WHEREAS, as a result of the District's internal investigation, the Superintendent recommended to the Board that the filing of tenure charges against the Employee for conduct unbecoming a teacher was justifiable and warranted; and

WHEREAS, the Superintendent did, in fact, file with the Board Secretary a Statement of Charges Under the Tenure Employee Hearing Act charging the Employee with Conduct Unbecoming a Public Employee ("Charges"); and

WHEREAS, the Employee responded to the Charges, denying that she had committed any acts constituting conduct unbecoming a public employee; and

WHEREAS, on September 23, 2003, the Board certified the tenure charges to the Commissioner of Education and suspended Employee without pay; and

WHEREAS, case was transferred by the Commissioner of Education to the Office of Administrative Law ("OAL") and assigned for hearing before the Honorable Elinor R. Reiner, A.L.J.; and

WHEREAS, so that they might avoid the uncertainties of litigation and the time, expense and trauma that would be incurred by a protracted hearing, Judge Reiner urged the parties to consider potential settlement of this matter; and

WHEREAS, due to the age of the children who allegedly witnessed the series of events leading up the filing of tenure charges in this matter, their memories are insufficient to permit accurate testimony upon which the court could rely; and

WHEREAS, prior statements given by several adult witnesses to the District contained inconsistencies which would have subjected the witnesses to rigorous cross-examination, possibly undermining the Board's case against Employee; and

WHEREAS, in view of its sincere concerns that inconsistencies in witness statements and testimony could undermine the Board's case, its determination that any settlement must include a complete and permanent separation between the Employee and the District, a result that might not be achieved if the litigation proceeding to a plenary hearing, and its concern that litigation expenses

could cause the expenditure of monies that otherwise could be used to support education within the District, the Board determined that it would be in the public interest to enter into settlement negotiations with Employee; and

WHEREAS, after negotiating in good faith, with the assistance of Judge Reiner, the parties, through their respective counsel, have reached an agreement on January 13, 2004, providing for a complete a resolution of their dispute within the parameters of the law regarding the settlement of tenure charges, and for the Employee's complete separation from employment in the District; and

WHEREAS, the parties hereto wish to memorialize their promises and covenants more formally in this Agreement; and

NOW, THEREFORE, the Board and the Employee, for the consideration specified below, set forth the following mutual covenants and agreements:

1. RESIGNATION. The Employee hereby tenders with this Agreement her signed and irrevocable resignation from employment with the District, which shall be effective June 30, 2004 and enforceable immediately upon the approval by the Commissioner of Education of this Agreement.

2. COMPENSATION. Pursuant to the terms of the Tenure Employees Hearing Act, Employee's salary will be reinstated effective January 21, 2004 based upon her current regular salary of ~~$50,000.00~~ 50,595.00 RAB CM As partial consideration for the Employee's agreements in this Agreement, the Board agrees that within thirty (30) days following the approval of this Agreement by the Commissioner, it will (1) restore the salary increment the Board withheld from Employee on August 27, 2003; (2) pay to Employee, pursuant to the payment schedule set forth below in this paragraph, a prorated amount based upon the Employee's adjusted salary (including the increment restoration) during the 2003-2004 school year, for the period commencing December 1, 2003 until January 20, 2004, plus ~~$1,288.00~~ $1,783 RAB CM for a total base salary during that 2003-2004 school year of ~~$53,500.00~~ $54,095 RAB CM; and (3) the retroactive difference between Employee's original regular base salary and the adjusted base salary of ~~$53,500.00~~ $54,095 RAB CM. All amounts set forth in this paragraph are gross amounts and will be subject to required withholding including taxes and pension. The amounts to be paid

pursuant to items (1)-(3) of this paragraph will be paid in consecutive equal monthly payments on the 15th of each month commencing thirty (30) days following the approval of this Agreement by the Commissioner of Education, for a period not extending beyond June 30, 2004. In addition, Effective June 30, 2004, Employee's resignation will become effective and her salary will be terminated. Other than the aforesaid amounts set forth specifically in this paragraph, the Employee will not be entitled to any other payment from the District of any kind whatsoever for any period of time.

3. OTHER PROCEEDINGS. The Employee expressly understands that the Commissioner of Education may refer this matter to the State Board of Examiners for possible certificate revocation proceedings. By entering into this Agreement, the Employee is not waiving any rights she may have to defend against such a proceeding.

4. PENSION RIGHTS. The Board Agrees not to initiate any proceedings before the Division of Pensions that would prejudice the Employee's pension rights. The Employee understands that the Board of Trustees of the Teachers Pension and Annuity Fund may determine to take action regarding the Employee's pension which may adversely affect her right to receive a pension.

5. FUTURE EMPLOYMENT. The Employee agrees that, subsequent to the approval of this Agreement by the Commissioner of Education, she will not apply for employment with the Board or volunteer for any Board-sponsored programs/activities.

6. SERVICE LETTER. Upon request, the Board will provide a service letter stating the Employee's dates of employment, positions held in the District, reason for separation as resignation in good standing, and noting her long and meritorious service in the District as set forth in her evaluations. Nothing in this Agreement will preclude the Board from releasing information required by law, regulation and/or Executive Order.

7. CONFIDENTIALITY. As further consideration for this Agreement, the parties agree that, following the full execution of this Agreement, they will keep all terms of this Agreement completely confidential. It is expressly understood and agreed that, following the full

execution of this Agreement, neither the District, the Employee, or their attorneys or representatives 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) as may be required by any court or agency of competent jurisdiction; and (3) as may be required by law.

8. NO ADMISSION. By entering into this Agreement, the Employee is not admitting liability or guilt regarding any of the factual or legal allegations set forth in the Charges or in other related documents. The Employee reserves all her defenses for any future proceeding.

9. NO REIMBURSEMENT OF ATTORNEY'S FEES AND COSTS. The Employee and the Board each are responsible for the payment of their own attorney's fees and costs incurred in this matter.

10. GENERAL RELEASE. As further consideration for the Board's covenants as set forth in this Agreement, upon the full execution of this Agreement, the Employee, for herself and her past, present and future heirs, agents and representatives, forever and irrevocably releases and discharges the Board, its members, officials, employees, representatives, agents and attorneys (collectively referred to as the "Board") from any and all claims she may have against the Board resulting from anything that has happened up to the date of this Agreement, including claims of which she is unaware and claims which are not specifically released and given up in the following language. The Employee specifically releases and gives up any and all claims which she may have against the Board arising from or relating to Employee's employment with the Board and/or arising from or relating to the filing and prosecution of the Charges and/or Employee's separation from employment with the Board, including, but not limited to, claims arising under (1) the Constitution of the United States, (2) the Education Laws of the State of New Jersey, *N.J.S.A.* 18A:1-1 *et seq.*, including but not limited to the Tenured Employees Hearing Act, *N.J.S.A.* 18A:6-10 *et seq.*, (3) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.*, (4) the Civil Rights Act of 1866, 42 U.S.C. § 1981 *et seq.*, (5) the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, (6) the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, (6) the Family and Medical

Leave Act, 29 U.S.C. § 2601 *et seq.*, (7) the Family Leave Act, *N.J.S.A.* 34:11B-1 *et seq.*, (8) the Constitution of the State of New Jersey, (9) the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, (10) the Conscientious Employee Protection Act, *N.J.S.A.* 35:19-1 *et seq.*, (11) the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, (12) any expressed or implied contract between the Board and the Employee, whether oral or written, (13) any collective negotiations agreement, (14) all regulations promulgated pursuant to any of the aforementioned laws, (15) any other Federal, State, County, local or Board common law, statutes, ordinances, resolutions and regulations not mentioned above, and (16) any employment manual or handbook or personnel or Board policies. Specifically excepted from this release are any claims or rights arising under the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *et seq.*, the Teachers' Pension and Annuity Fund Law, and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA"), provided that the Employee is not entitled to have the Board pay any amounts for her or her dependents' health insurance continuation coverage under COBRA.

11. CONSULTATION. The Employee represents that she has been offered the opportunity to consult with an attorney during the negotiations and development of this Agreement. Employee further represents that during the negotiations and development of this Agreement she has been represented by her attorneys, John Zaiter, Esq. of the law firm of Broscious & Fischer, and that he fully explained all provisions of this Agreement and its consequences to the Employee before the Employee signed this Agreement. The Employee represents that she is fully satisfied with the advice she received from Mr. Zaiter.

12. NO COERCION. The Employee represents that the only consideration for signing this Agreement is the terms actually stated in this Agreement and that no other promises or agreements of any kind have been made to the Employee by any person or entity whatsoever to cause the Employee to sign this Agreement. The Employee represents that she fully understands the meaning and intent of this instrument and that she is voluntarily signing this Agreement of her own

will without coercion or duress. The Employee understands, accepts and agrees to all of the terms of this Agreement.

13. APPROVAL. This Agreement is subject first to the approval of the Phillipsburg Board of Education, then by the Office of Administrative Law, and finally by the Commissioner of Education, before it becomes a legally binding document. The parties agree to produce and execute any documents and to take any acts that may be required to effectuate the terms, conditions and spirit of this Agreement.

14. NO TAX ADVICE. The Employee acknowledges that the Board has made no representations to her regarding the tax implications of this Agreement.

15. GOVERNING LAW. This Agreement is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey.

16. PLAIN MEANING. The terms and conditions of this Agreement shall be construed according to their plain meaning, and shall not be construed in favor of or against either the Employee or the Board.

17. HEADINGS. The headings set forth in this Agreement are merely for the convenience of the reader and it is expressly understood and agreed that the headings shall not control or modify the meaning of this Agreement in any way.

18. WHO IS BOUND. 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, as well as the Employee's heirs and the executor of her estate, also are 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, employees, agents, attorneys, successors and assigns.

19. NOTICES. Any notices required to be sent pursuant to this Agreement shall be considered to be effective when sent by certified mail, return receipt requested, to:

To the Employee:

Mrs. Dale Mancuso
36 Stonehenge Drive
Phillipsburg, New Jersey 08865

To the Board:

Board Secretary
Phillipsburg Board of Education
445 Marshall Street
Phillipsburg, New Jersey 08865

Any changes in the above addresses must be provided by certified mail, return receipt requested to the other party.

20. NON-AGREEMENT OR NO APPROVAL. If this Agreement is not fully executed by all parties, then this Agreement shall become null and void and shall be of no effect and, whereupon, the District immediately shall proceed with the continued prosecution of the Charges against the Employee as provided by law and regulation. In the event that either the Office of Administrative Law or the Commissioner of Education fail to approve this Agreement, then, subject to the parties' appellate rights, the parties agree to follow the last legal ruling and either pursue continued efforts to settle this matter or proceed to litigation as directed by the Commissioner of Education or other tribunal of competent jurisdiction. In the event that this Agreement is not approved by the Office of Administrative Law or the Commissioner of Education neither party shall refer to it in the pending or any future litigation.

21. COMPLETE AGREEMENT. This Agreement embodies the entire agreement between the parties hereto and supersedes any prior or contemporaneous agreement, representation or understanding, whether written or oral. This Agreement may not be modified except by written instrument executed by all the parties hereto and approved by the Commissioner of Education.

REMAINDER OF PAGE LEFT INTENTIONALLY BLANK

PLEASE READ THIS SETTLEMENT AGREEMENT CAREFULLY. IT IS A LEGAL DOCUMENT. IT INCLUDES DALE MANCUSO'S AGREEMENT TO GIVE UP CERTAIN KNOWN AND UNKNOWN CLAIMS AGAINST THE BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY, ITS MEMBERS, OFFICIALS, OFFICERS, EMPLOYEES, AGENTS, REPRESENTATIVES AND ATTORNEYS.

IN WITNESS WHEREOF, the parties hereto set their hands and seals to this Separation Agreement effective on the day and year first above written.

Dale Mancuso
DALE MANCUSO

STATE OF NEW JERSEY, COUNTY OF WARREN SS.:

I CERTIFY that on the 13 day of January, 2004

Dale Mancuso personally came before me and acknowledge under oath, to my satisfaction, that this person:

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as her act and deed.

Sworn and subscribed to before me
this 13 day of January, 2004.

Attorney At Law of the State of New Jersey

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY

ATTEST:

By:_____
Roderick L. Pianelli
President

_____
William W. Poch
Board Secretary

January 13, 2004

To the Phillipsburg Board of Education

Please be advised that I hereby resign my employment with the Board of Education of Phillipsburg, effective June 30, 2004, pursuant to and in reliance upon the Board's performance of the material terms and conditions of the attached Separation Agreement and General Release ("Agreement").

Sincerely,

Dale Mancuso

Dale Mancuso

EXHIBIT "A"

OAL DKT. NO. EDU 11010-03
AGENCY DKT. NO. 347-9/03

IN THE MATTER OF THE TENURE HEARING	:	
OF DALE MANCUSO, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE TOWN OF PHILLIPSBURG, WARREN	:	DECISION
COUNTY.	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed subject to compliance with the terms of the settlement.

Notwithstanding this determination, a review of the tenure charges against Ms. Mancuso reveals, *inter alia, allegations* of grabbing a kindergarten student and dragging him from one table to another in front of a classroom full of students, squeezing a kindergarten student's wrists until they turned white, thus causing red marks to appear, and slapping a student on the back of the head. Ms. Mancuso has denied all charges. The serious nature of these charges, however, compels that this matter be referred to the State Board of Examiners for action

* The record contains a copy of the Board's Resolution approving the within Settlement Agreement on January 26, 2004.

as that body deems appropriate. Accordingly, a copy of this decision shall be transmitted to the State Board of Examiners for its consideration.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/25/04

Date of Mailing: 3/25/04

141-04

#141-04

LAURIE E. TUMIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

March 29, 2004



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3600-00
AGENCY DKT. NO. 76-2/00

LAURIE E. TUMIN,
Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,
Respondent.

Mary J. Hammer, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Jack Gillman, Esq., for respondent
(Hanley & Ryglicki, attorneys)

Record Closed: February 9, 2004 Decided: February 10, 2004

BEFORE **ELINOR R. REINER,** ALJ:

On or about February 28, 2000, petitioner, Laurie E. Tumin, filed a verified petition of appeal with the Commissioner of Education, alleging that respondent improperly charged her sick days for time lost due to a work-related injury in violation of *N.J.S.A.* 18A:30-2.1. On or about March 29, 2000, respondent filed its answer requesting dismissal of the petition and a stay of the matter pending the filing and

disposition of a claim before the Division of Workers Compensation. On April 14, 2000, the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52L14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned judge on May 26, 2000, and a telephone prehearing conference scheduled for September 11, 2000. After conference with counsel, it became clear that this matter should be placed on the inactive list pending the outcome of the workers' compensation proceeding brought by petitioner against respondent. As a result, the matter was placed on the inactive list by Order dated September 18, 2000 for a period of six months from that date until March 19, 2001. Further orders of inactivity dated March 21, 2001, October 2, 2001, April 12, 2002, October 10, 2002 and March 12, 2003 were entered and continued this matter on the inactive list until September 19, 2003.

By letter dated September 26, 2003, petitioner's attorney advised the undersigned that the workers' compensation case filed by petitioner had been settled and this matter should be returned to the active list. During the telephone prehearing conference with counsel on November 5, 2003, resolution of this matter was discussed, and counsel agreed to advise the undersigned whether a settlement had been reached. Further discussions were held with counsel, and a settlement was reached. The signed Settlement Agreement was received on February 9, 2004.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement, indicating the terms of settlement.

I have reviewed the record and the settlement terms and **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 (45) 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 10, 2004
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

2-13-04
DATE

M. Kathleen Duncan/eh
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 18 2004
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 FEB -9 A 9:05

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioner

LAURIE E. TUMIN, Petitioner,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
v.	:	AGENCY REF. NO. 76-2/00 OAL DKT. NO. EDU 3600-00N
STATE-OPERATED SCHOOL DISTRICT OF PATERSON, Respondent.	:	**SETTLEMENT AGREEMENT**

This matter having been brought before the Commissioner of Education upon the filing of a petition by Laurie E. Tumin and the parties having determined to amicably resolve this matter, herein agree as follows:

1. Respondent agrees that the four (4) sick days shall be restored to petitioner's account of accumulated sick leave days.

2. In consideration of the foregoing, petitioner hereby releases, waives and gives up any and all claims and rights which she may have against the respondent, its employees and agents, arising out of or otherwise related to the claims which were raised or could have been raised.

3. This action is hereby withdrawn with prejudice.

4. The parties acknowledge that they have been represented by counsel in this action and that the terms of the Settlement have been fully explained to them by counsel and that they understand the terms.

5. The parties acknowledge that this settlement agreement is subject to the approval of the Commissioner of Education.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

WITNESS:

FOR PETITIONER, LAURIE E. TUMIN

Laurie E. Tumin

Dated: 1/14/04

Mary J. Hammer, Esq.

Dated: 1-14-04

FOR THE STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON

Dated: 1/27/04

Jack G. Gillman, Esq.

Dated: 1/27/04

OAL DKT. NO. EDU 3600-00
AGENCY DKT. NO. 76-2/00

LAURIE E. TUMIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/29/04

Date of Mailing: 3/31/04

147-04

#147-04

DENISE IRVIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY *ET AL.*	:	DECISION ON MOTION
RESPONDENTS.	:	
	:	

April 2, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 2122-04S
AGENCY DKT. NO. 67-2/04

DENISE IRVIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, et als.
Respondents.

Denise Irvin, *pro se*[1]

Kathleen Smallwood-Johnson, Esq., appeared for Respondents

BEFORE **ISRAEL D. DUBIN**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On February 23, 2004, petitioner filed an application for emergent relief with the New Jersey Department of Education. The application, supplemented by letter brief filed on March 11, 2004, requested her immediate "Reinstatement to the position of Principal with the Willingboro School District, Reinstatement of Time-in-Position as Principal From December 11, 2003 to the

[1] Although the petition was filed by Michael D. Homans, Esq., Flaster/Greenberg P.C., Ms. Irvin stated on the record that he no longer represented her and that she had decided to represent herself. At my request, Mr. Homans confirmed this by letter faxed to me the afternoon of the oral argument.

present, Back pay from December 11, 2003, my last day of work, through the present, [and] The internet site on the Willingboro Server using my name removed."

This matter was transmitted to the Office of Administrative Law (OAL) on March 17, 2004 for a hearing on the requested emergent relief. The hearing, which consisted solely of oral argument, was conducted on March 29, 2004 at the OAL, Quakerbridge Plaza, Building 9, Quakerbridge Road, Mercerville, New Jersey.

SUMMARY OF THE RECORD

Petitioner was initially employed by the Willingboro Board of Education as an Assistant Principal at Willingboro High School, a position in which she obtained tenure, from July 1997 through November 2001. On or about November 28, 2001, she was promoted to the position of Vice Principal at the High School and held that position until in or about July 2002, when she was assigned to the Stuart School as Program Administrator, a position described as comparable to that of Principal. Describing the Stuart School as a "hostile work environment," petitioner requested a transfer and, on August 12, 2003, she was employed as a Principal at the district's Adult Education School.

Referring to the Adult Education School as "hostile" and "an even more uncomfortable work environment," on or about September 12, 2003 petitioner requested another transfer. It was not immediately forthcoming and, on October 3, 2003, petitioner took a thirty-day medical leave of absence for treatment of "Depression – Situational Stress." Throughout this period of medical leave she continued to complain that the Adult School was a hostile work environment and met with Harry Rocco, Assistant to the Superintendent of Operations, and Marvin Hopkins, Executive Director of Human Resources, to discuss these allegations on several occasions. On October 31, 2003, as her thirty-day leave was about to expire, Superintendent Alonzo Kittrels advised her by letter that the district's internal investigation had failed to uncover any evidence substantiating her complaint. He also advised her that given her continuing complaints, it was imperative she meet with Messrs. Rocco and Hopkins on November 3 at 9:30 a.m.

As directed, petitioner returned to work on November 3, 2003 and met with Messrs. Rocco and Hopkins, and the Superintendent, who was also in attendance. At that time she was advised that she was being reassigned to her tenured position as an Assistant Principal at the Memorial Middle School, at the salary set forth in the Collective Bargaining Agreement between the Board and the Willingboro Education Administrator's Association. She was also given a day or two to consult an attorney and decide whether to accept the new assignment.

According to petitioner, she met with Superintendent Kittrels on September 7, 2003 and expressed her reservations about what she termed "a double demotion." The superintendent is alleged to have responded by offering to arrange for her to obtain a position with the Department of Education in Trenton through his friendship with Commissioner William L. Librera. However, he would do so only if she agreed to resign. Then, without giving her sufficient time to think about the offer, she was ushered into a conference room and "coerced" into writing a letter of resignation effective April 2, 2004.[2] In the meantime, she would serve as Special Projects Director at the Country Club Elementary School.

Petitioner states that on or about December 7, 2003, she noticed that the New Jersey State Department of Education had published an advertisement for five budget examiner positions in *The Star Ledger*. Two days later she met with Superintendent Kittrels, showed him the advertisement, and took him up on his offer to call Commissioner Librera. She further states that he assured her that getting her one of those positions "would not be a problem at all." However, she would first have to submit a new letter of resignation moving her termination date up from April 4, 2004, to December 11, 2003. He then allowed her to take off December 10 to decide what she wanted to do.

On December 11, 2003, petitioner sent an interoffice memorandum to the Superintendent informing him the she "would like to change my last day of work from April 2 to Thursday, December 11, 2003," and thanking him "in advance for [his] kind consideration."

[2] The letter of resignation was accepted and ratified by the Board at its regularly scheduled business meeting on November 24, 2003.

DISCUSSION OF THE LAW

Pursuant to *Crowe v. DiGioia*, 90 *N.J.* 126 (1982), *N.J.A.C.* 6A:3-1.6(b) and *N.J.A.C.* 1:1-12.6, emergency relief may 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.

It is important to note that the rule, which sets forth a four-pronged test, is written in the conjunctive and not the disjunctive. Therefore, petitioner must satisfy and prevail on each of the four prongs in order to obtain the requested emergent relief.

Having carefully considered the parties' respective arguments, I am not convinced that petitioner will suffer irreparable harm if the emergent relief is not granted. First and foremost, petitioner's reassignment to her tenured position of Assistant Principal, with a $23,000 reduction in annual salary, became effective November 4, 2003. Yet, she did not file a petition of appeal from the Board's action, much less a request for emergent relief, until approximately five full months had passed. Nor did she take any action when she was allegedly coerced into moving up her effective date of resignation from April 2, 2004 to December 11, 2003. Instead, she waited approximately three-and-one-half months to file the petition.

Petitioner alleges that she is now suffering and will continue to suffer "egregious financial hardship" because of her forced resignation. She is currently without income and has diligently, albeit unsuccessfully, sought employment. She has attributed her difficulties in finding employment to "the sudden and unexpected nature" of respondent's actions, as well as the "emotional and psychological distress" these actions have caused her to suffer. While all of this may be true, it still begs the question of why she did not seek redress sooner. It only stands to

reason that her economic situation would worsen over time. However, her continuing financial hardship does not change the fact that the time to have sought emergent relief was on or about November 4 or December 11, 2003, and not at this late date.

Of course, petitioner will still have an opportunity to make her case during a plenary hearing on the merits. Should she prevail, she may be entitled to reinstatement, back pay, and credit for time she would have been accruing in her principal's position. However, at this point in time, the record simply does not compel the granting of such relief on an emergent basis. I therefore **CONCLUDE** that petitioner has failed to demonstrate that she will suffer irreparable harm if the relief is not granted.

Nor has petitioner persuaded me that the legal right underlying her claim is settled. If anything, my preliminary research has failed to disclose any case law supporting her position that she was unlawfully demoted and reduced in compensation. Simply stated, when promoted to a different position with its own tenure track, the employee does not enjoy the protections of the Tenure Act, *N.J.S.A.* 18A:28-1 *et seq.*, in the new position until he or she obtains tenure in that new position. That being the case, I **CONCLUDE** that the Board was well within its rights when it returned petitioner to her prior tenured position with a commensurate reduction in salary.

However, this does not mean that petitioner is not likely to prevail on her contention that she was forced to resign and therefore constructively discharged. She may be able to prove that Superintendent Kittrels made illusory promises of helping her secure a position with the Department of Education in order to get her to resign. However, the facts are so hotly disputed that I cannot make such a determination at this time. Therefore, based on the record before me, I simply **CANNOT CONCLUDE** that she will prevail on the merits.

Finally, when the equities and interests of the parties are balanced, it is not crystal clear that petitioner will suffer greater harm than the Board will suffer if the requested relief is not granted. As stated above, any harm that petitioner has suffered and may continue to suffer as a result of the Board's actions may be offset by reinstatement, an award of back pay and credit for time in position. On the other hand, the Board has stated that it does not currently have any open assistant principal positions and a "reshuffling" of positions to accommodate her rehiring so

This order on application for emergency relief may be adopted, modified or rejected by 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 does not adopt, modify or reject this order within forty-five (45) 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.

3-31-04

DATE

ISRAEL D. DUBIN, ALJ

IDD/mamf

OAL DKT. NO. EDU 2122-04S
AGENCY DKT. NO. 67-2/04

DENISE IRVIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY *ET AL.*	:	DECISION ON MOTION
RESPONDENTS.	:	

The audiocassette tape of the emergent hearing conducted at the Office of Administrative Law (OAL) on March 29, 2004, and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, concurs that petitioner has failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) for obtaining emergent relief. In accordance with *N.J.A.C.* 6A:3-1.6, a grant of emergent relief is considered an extraordinary remedy which may only be issued where petitioner has demonstrated that the relief is necessary to prevent irreparable harm, where the legal right underlying petitioner'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. *Crowe* at 132-34.

Accordingly, the recommended Order of the ALJ is adopted for the reasons expressed therein.[1] Petitioner's request for emergent relief is, therefore, denied and this matter shall continue at the OAL for further proceedings on the merits of petitioner's claim as may be deemed necessary.

IT IS SO ORDERED.[2]

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/02/04

Date of Mailing: 4/02/04

[1]The Assistant Commissioner notes that the ALJ incorrectly advised at hearing that the non-prevailing party in this motion could file an interlocutory appeal of his Order to the Commissioner. As correctly stated on page 7 of the ALJ's recommended Order, it is the Commissioner of Education, or his designee, who, by law, is authorized to make a final decision in this matter. (Order Denying Emergent Relief at 7) The Office of Administrative Law was created by the Legislature to conduct hearings and make recommended factual findings and determinations in contested cases to the agency heads, who are empowered by the Legislature to decide contested cases in accordance with the statutory duties that have been selectively delegated to them. *In re Uniform Adm'v Procedure Rules*, 90 *N.J.* 85, 91-94 (1982). Subsequent to the conduct of a hearing on emergent relief, therefore, the ALJ is required to forward a written order and any papers in support of or in opposition to the emergent relief application which were not previously filed with the agency and a sound recording of the oral argument of the application to the Commissioner for his review. *See N.J.A.C.* 1:1-12.6(i). In accordance with *N.J.S.A.* 52:14B-10, the recommended decision of the ALJ is considered the final decision *only if* the Commissioner does not adopt, modify or reject the recommended decision of the ALJ within forty-five (45) days, unless such time limit is otherwise extended.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

144-04

#144-04

RAYMOND C. HUHN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning custodian alleged the Board failed to pay his full salary without loss of sick time for work-related injury, pursuant to *N.J.S.A.* 18A:30-2.1.

The ALJ found that petitioner failed to file his petition within the 90-day period prescribed by *N.J.A.C.* 6A:3-1.3(d)(1). The ALJ found that petitioner filed his petition approximately four and a half months after the Board's letter advising him that he had exhausted all his allotted sick days as of March 15 and would be on "non-pay status" until he returned to work. Petition was dismissed.

The Commissioner adopted the Initial Decision as his own.

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.

March 31, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION -
DISMISSAL FOR FAILURE
TO FILE IN TIMELY MANNER
OAL DKT. NO. EDU 8028-02S
AGENCY REF. NO. 293-9/02

RAYMOND C. HUHN,

Petitioner,

v.

BOARD OF EDUCATION OF THE
BOROUGH OF MANVILLE,
SOMERSET COUNTY

Respondent.

Sanford R. Oxfeld, Esq., appearing for petitioner (Oxfeld Cohen, P.C., attorneys)

David B. Rubin, Esq., appearing for respondent

Record Closed: August 19, 2003 Decided: February 17, 2004[1]

BEFORE **ISRAEL D. DUBIN**, ALJ:

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[1] By Orders of Extension, the time limit within which to file this Initial Decision with the Department of Education was extended until February 15, 2004. Since February 15 fell on a Sunday, and State offices were closed February 16 in observance of Washington's Birthday, this Initial Decision is being issued on February 17, 2004.

CONSOLIDATED PROCEDURAL HISTORY AND DISCUSSION OF THE FACTS

On June 20, 2001, petitioner Raymond C. Huhn was employed as a custodian by respondent Board of Education of the Borough of Manville. A few months later, on November 7, 2001, he was injured in the course of his employment and remained out of work almost continuously through April 2002.

By letter dated April 8, 2002, respondent's School Business Administrator, Richard Reilly, advised petitioner that he had exhausted all of his allotted sick days as of March 15 and would be on "non-pay status" until he returned to work. Mr. Reilly went on to explain that according to respondent's workers' compensation carrier, petitioner had been cleared to return to work on a full time basis without further treatment on March 4, 2002. However, instead of returning to work, he had submitted another doctor's note[2] indicating that he would not be able to return until April 4, 2002. It was during this additional thirty-day leave of absence that petitioner exhausted his remaining sick leave.

Petitioner did not report for work as scheduled on April 5, 2002. Nor did he submit a new doctor's note indicating a need for additional sick leave or otherwise advise respondent that he would not be coming to work. Consequently, respondent invoked the fourteen-day termination clause in his contract, thereby ending his employment on April 22, 2002. By letter dated May 22, 2002, Superintendent of Schools Francis X. Heelan advised petitioner that the board of education had voted to confirm the termination of his employment effective April 22.

It was not until July 17, 2002, that petitioner filed his workers' compensation claim petition. Approximately one month later, petitioner's counsel filed with the Commissioner of Education a Petition of Appeal dated August 23, 2002 contending that respondent's action in withholding petitioner's salary effective March 15, 2002 violated *N.J.S.A.* 18A:30-2.1, which entitles an employee injured in the course of his employment to his full salary for up to one year.

[2] Mr. Reilly's letter states that petitioner "submitted another doctor's note (not related to workers' compensation)" indicating he was under the doctor's care and would be "unable to participate in work through Thursday, April 4, 2002." The record is devoid of any other information concerning the nature of petitioner's malady.

Respondent has now moved to dismiss the petition, arguing that petitioner failed to file the petition of appeal within the ninety-day-period prescribed by *N.J.A.C.* 6A:3-1.3(d)(1). Petitioner, who does not dispute the factual time line set forth in respondent's letter brief, has responded that it would have been frivolous to file the petition any sooner because the Commissioner did not have the jurisdiction to hear it until the Workers' Compensation claim had been filed.

DISCUSSION OF THE LAW

Pursuant to *N.J.S.A.* 18A:30-2.1, whenever one of its employees entitled to sick leave is out of work due to a work-related injury, a district board of education must pay the employee his full salary for the period of such absence for up to one calendar year without charging the absence to the employee's annual or accumulated sick leave. Should the board nevertheless charge these absences to the employee's annual or accumulated sick leave, the employee "must file a petition within 90 days of receipt of notice of the district board's action or of the action of the district board's agent, which has the effect of denying such benefits, notwithstanding that the Commissioner may hold the petition in abeyance pending determination by the Division of Workers' Compensation as to whether the underlying injury is work-related." *N.J.A.C.* 6A:3-1.3(d)(1).

It is well settled that the proper forum for the question of whether a work-related accident is the cause of an injury is the Division of Workers' Compensation. *Theodore v. Dover Bd. of Educ.*, 183 *N.J. Super.* 407, 416 (App. Div. 1982). Nevertheless, it is the Commissioner of Education who has "jurisdiction . . . [over] all controversies and disputes arising under the school laws." *N.J.S.A.* 18A:6-9. Therefore, "[w]hile the Commissioner will defer to a judge of compensation's temporary disability determination, it is the Commissioner of Education who usually decides whether and how the sick leave section, *N.J.S.A.* 18A:30-2.1, applies." *Magaw v. Middletown Bd. of Educ.*, 323 *N.J. Super.* 1, 17 (App. Div. 1999).

The primary case in this area of the law is *Verneret v. Board of Education of the City of Elizabeth*, 95 *N.J.A.R.*2d (EDU) 134, in which the State Board of Education held that in those instances where claims for relief filed under *N.J.S.A.* 18A:30-2.1 are dependent upon a determination of whether an injury arose out of and in the course of employment within the

meaning of N.J.S.A. 34:15-7, the Commissioner of Education should refrain from exercising his jurisdiction pending a determination of that issue by the Division of Workers' Compensation. Of course, a decision to refrain from considering a claim presupposes the existence of an underlying claim requiring a decision, and *N.J.A.C.* 6A:3-1.3(d)(1) sets forth certain filing requirements that must be met by petitioners seeking to bring a claim for benefits under *N.J.S.A.* 18A:30-2.1 before the Commissioner. Specifically, it requires the employee to file a petition within ninety days of an adverse determination by the local board, even though the Commissioner may well hold the petition in abeyance pending a final determination by a judge of compensation.

Since *N.J.A.C.* 6A:3-1.3(d)(1) expressly applies to claims filed pursuant to *N.J.S.A.* 18A:30-2.1, "[t]he fact that the Commissioner has the discretion to defer exercising his jurisdiction in order to permit the Division of Workers' Compensation to determine whether an injury was work-related **does not . . . excuse a petitioner's failure to comply with the filing requirements** . . . when seeking benefits under the education law." *Verneret v. Board of Education of the City of Elizabeth, supra,* 95 *N.J.A.R.*2d at 135 (emphasis added). Therefore, "any petitioner claiming benefits under N.J.S.A. 18A:30-2.1 must file a petition with the Commissioner of Education within 90 days of the district board's action which has the effect of denying such benefits to petitioner." *Ibid.*

Nevertheless, petitioner argues that "the Commissioner of Education does not even have jurisdiction to entertain an application for sick days/one year's salary unless and until a compensation claim petition is filed. In the present matter, Mr. Huhn filed his claim petition with the Workers' Compensation Court on July 17, 2002. Consequently, the Commissioner of Education would not even have had jurisdiction prior to that date to entertain Mr. Huhn's application for a full year's salary and restoration of sick days." *Petitioner's Brief*, page 3. In other words, petitioner asserts that he was under no obligation to file his petition for relief under *N.J.S.A.* 18A:30-2.1 until his workers' compensation claim had been filed with, if not decided by the Division of Workers' Compensation.

In support of his position, petitioner cites the Commissioner's Final Decision in *Schmidtke v. Board of Education of the Township of Woodbridge*, No. 361-00 (November 8, 2000). In *Schmidtke*, the petitioner alleged that she had been out of work from April 22, 1998 to

August 12, 1998, because of an illness suffered after a student placed a drug in her coffee mug. Respondent reported the petitioner's absences to its workers' compensation insurance carrier and would not let her return to work until the carrier's doctor had cleared her. For whatever reason, petitioner did not file a workers' compensation claim and respondent charged petitioner's absences to her annual and accumulated sick leave.

In affirming the Administrative Law Judge's dismissal of Schmidtke's petition based upon her failure to file a workers' compensation claim,[3] the Commissioner relied on *Russo v. Burlington Twp. Bd. of Ed.* (Commission decision September 29, 1997), in which a district board moved to dismiss a Petition of Appeal after petitioner's workers' compensation case had been dismissed for lack of prosecution. Noting that the factual circumstances in both cases were similar, in that Russo and Schmidtke had each voluntarily chosen not to pursue a claim with the Division of Workers' Compensation, the Commissioner adopted the holding in *Russo* that:

> Both the statutory provisions and the decision in *Verneret* envision that a petitioner seeking an award pursuant to *N.J.S.A.* 18A:30-2.1 will in fact present a Workers' Compensation claim and prosecute same. Petitioner cannot be awarded any damages under 18A:30-2.1 until the compensation claim has been determined because under the statute the Board is entitled to a reduction for the Workers' Compensation award made for temporary disability and because under *Vernet* [*sic*] the question of whether the injury arose out of and in the course of his employment is to be determined by a proceeding in the Division of Workers' Compensation. As petitioner has voluntarily chosen not to pursue his Workers' Compensation claim, his claim under the school law sick leave statute will be dismissed with prejudice. (*Russo* Initial Decision at 3).
>
> [*Schmidtke v. Board of Education of the Township of Woodbridge, supra*, Final Decision at 11.]

Given its repeated references to *Verneret*, which expressly holds that "any petitioner claiming benefits under N.J.S.A. 18A:30-2.1 must file a petition with the Commissioner of Education within 90 days of the district board's action which has the effect of denying such benefits to petitioner," *Verneret v. Board of Education of the City of Elizabeth, supra,* 95 *N.J.A.R.*2d at 135, petitioner's reliance on *Schmidtke* would appear to be misplaced. Rather, a

more convincing argument would have been that *N.J.S.A.* 18A:30-2.1 and *N.J.S.A.* 34:15-1 *et seq.* must be read *in pari materia*, thereby granting the Division of Workers' Compensation the predominant interest in considering the matter.

Statutes may be considered to pertain to the same subject matter if they:

> . . . relate to the same person or thing, or to the same class of persons or things or have the same purpose or object. As between characterization of the subject matter with which a statute deals and characterization of its object or purpose, the latter appears to be the most important factor in determining whether different statutes are closely enough related to justify interpreting one in light of the other.
>
> [2A Sutherland, *Statutory Construction*, §51.03, p. 298 (rth ed. 1973)].

This rule of statutory construction is most applicable to statutes that relate to the same subject matter and were passed during the same session of the Legislature, or where the later of the two statutes refers to the earlier.

N.J.S.A. 18A:30-2.1 states that "[s]alary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability." Although this statute makes specific reference to the Workers' Compensation Act, "it is identity or similarity of purpose or object that most convincingly justifies resort to the rule of *in pari materia* as an aid in statutory construction. *State v. DiCarlo*, 67 *N.J.* 321, 325 (1975).

N.J.S.A. 34:15-1 *et seq.* and *N.J.S.A.* 18A:30-2.1 are not part of the same overall statutory scheme, much less part of the same subtitle, and their purposes are different. The purpose of the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *et seq.*, has generally been held to provide for the

[3] *Sandra Schmidtke v. Board of Education of the Township of Woodbridge*, OAL Docket No. EDU 10756-98.

security of employees who are injured in the course of their employment. *DeMonaco v. Benton*, 18 *N.J.* 352 (1955). The purpose of *N.J.S.A.* 18A:30-2.1, on the other hand, has been seen as providing for and assisting with the administration of public elementary and secondary education. *Williams v. Deptford Bd. of Ed.*, 6 *N.J.A.R.* 40 (1982). Given the differences in their identities and purposes, a court should "interpret and enforce the legislative will as written and not according to some supposed unexpressed intention." *In re Bergwall*, 173 *N.J. Super.* 431 (App. Div. 1980) (Lora, J.A.D., dissenting), *rev'd* substantially for the reasons set forth in Judge Lora's dissenting opinion, 85 *N.J.* 382 (1981). Therefore, the statutes should not be construed *in pari materia*.

As part of his oversight authority over the administration of public elementary and secondary education, the Commissioner of Education has jurisdiction over all controversies and disputes that may arise under the school laws. *N.J.S.A.* 18A:6-9. Included within this jurisdiction is the authority to decide how, if at all, the sick leave section, *N.J.S.A.* 18A:30-2.1, is applied. *Magaw v. Middletown Bd. of Educ.*, *supra*, 323 *N.J. Super.* at 17. The fact that the Commissioner has the discretion to defer exercising his jurisdiction in a matter such as this in order to permit the Division of Workers' Compensation to determine whether an injury was work-related, does not mean that he lacks the jurisdiction to consider it *ab initio*. Therefore, any petitioner claiming benefits under *N.J.S.A.* 18A:30-2.1 must still file a petition with the Commissioner of Education within 90 days of the district board's action which has the effect of denying such benefits to petitioner. *Verneret v. Board of Education of the City of Elizabeth, supra,* 95 *N.J.A.R.*2d at 135.

It is undisputed that the Petition of Appeal was dated August 23, 2002, approximately four and a half months after Mr. Reilly's April 8, 2002 letter advising petitioner that he had exhausted all of his allotted sick days as of March 15 and would be on "non-pay status" until he returned to work. Mr. Reilly's letter clearly advised petitioner that his sick leave had been applied to his post-injury absences and constituted notice that his request for benefits under *N.J.S.A.* 18A:30-2.1 had been denied. Upon receipt of that letter, he had ninety days – or until on or about July 8, 2002 – to file his petition, but failed to do so within that allotted period of time. Petitioner has therefore lost his right to pursue this action against the board.

DECISION AND ORDER

Based upon the foregoing, I **FIND** that petitioner failed to file his Petition of Appeal for benefits under *N.J.S.A.* 18A:30-2.1 within the ninety-day period prescribed by *N.J.A.C.* 6A:3-1.3(d)(1) and therefore **CONCLUDE** that respondent's Motion to Dismiss the petition should be **GRANTED**. Accordingly, it is **ORDERED** that the Petition of Appeal 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 (45) 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 (13) 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, 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, 2004

DATE

ISRAEL D. DUBIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

February 19, 2004

DATE

Mailed to Parties:



FEB 25 2004

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

OAL DKT. NO. EDU 8028-02
AGENCY DKT. NO. 293-9/02

RAYMOND C. HUHN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his full and independent review, the Commissioner concurs with the determination of the Administrative Law Judge that, pursuant to *Verneret v. Board of Education of the City of Elizabeth*, 95 *N.J.A.R.* 2d (EDU) 134, the instant Petition of Appeal, seeking benefits pursuant to *N.J.S.A.* 18A:30-2.1, was untimely filed, necessitating its dismissal.

Accordingly, the Initial Decision of the OAL is hereby adopted for the reasons stated therein and the Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/31/04

Date of Mailing: 4/01/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

146-04

#146-04

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" Board of Education appealed the Department of Education's determination with respect to funding for the district's 2004-05 preschool program.

Initially, the ALJ determined that this proceeding should encompass issues arising from Board determinations on the budget requests of its contracted private preschool providers, since those determinations were made in conformance with Department directives and it is in the best interest of all involved to resolve the district's preschool budget in a single proceeding. Of the issues in dispute, only three remained following settlement negotiations between the parties. On the remaining issues, the ALJ rejected one private provider's request for a second custodian and two private providers' requests for additional compensation for office staff, but granted, based on the particular circumstances of this matter, that full rather than prorated salary amounts should be funded for teaching staff members assigned to smaller-than-permitted class sizes.

The Commissioner adopted the ALJ's decision as his own.

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

OAL DKT. NO. EDU 0367-04

AGENCY DKT. NO. 28-1/04

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION (EARLY CHILDHOOD EDUCATION),

Respondent.

Robert A. De Santo, Esq., for petitioner (Gruccio, Pepper, De Santo & Ruth, attorneys)

Allison C. Eck, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: February 27, 2004 Decided: March 8, 2004

BEFORE **JOHN SCHUSTER III**, ALJ:

STATEMENT OF THE CASE

This is an appeal by the City of Vineland Board of Education (District), an Abbott school district, from the adequacy of state aid granted by the State Department of Education (Department), to fund its early childhood plan for the 2004-2005 school year. The general issue

to be resolved in this matter is whether the Department has met its obligation to adequately fund the District's preschool program.

PROCEDURAL HISTORY

The District filed a Verified Petition of Appeal with the Department on January 23, 2004, alleging insufficient funding of its preschool program mandated by the *Abbott v. Burke* line of decisions. The matter was transmitted to the Office of Administrative Law (OAL) on January 30, 2004 as a contested case. The parties, through their counsel, submitted comprehensive prehearing submissions outlining their respective positions. The hearing was held on February 23, 25 and 27, 2004 and at the conclusion of the hearing, the record was closed.

At the commencement of the hearing, an application was made to the Court to incorporate in this hearing the requests by certain providers (private preschool facilities who contract with the District to satisfy its Early Childhood Program requirements), to amend their approved budgets to more accurately reflect the costs incurred in educating the preschool children in their program. The Department objected to this request because the requests were not set forth in the pleadings and since providers only deal with Districts and not the Department, it was alleged they have no standing to appear before this Court, at least not in this proceeding. The Department also argues the providers have a procedure which is set forth in the Administrative Code for appeals to the Commissioner of Education and that is the route that should have or should be followed.

I found the providers grievances should be resolved in this hearing. For these purposes, the providers are aggrieved parties since their budget requests were, in certain cases, lowered by the District during the initial review process and in other cases modified by the Department. I found they have standing because in that process, the District stood in the place of the Department and, in effect, implemented the position of the Department as published in its guidelines for the provider budgetary process. I also recognized the short deadline for the District to bring this action, which did not allow it to incorporate the claims or potential claims of the providers. In addition, I believe the providers could suffer an economic injustice if their financial issues were not resolved early on in the process, as they could not adequately plan their

programs in advance. This could have the dire result of them running out of money before the end of the contract school year. If a separate action were to be filed by each provider, it would take additional time, even with consolidation, to review and would not foster judicial economy. I **FIND** it a better course to resolve the entire controversy having to do with Vineland's Early Childhood Program in one hearing for those reasons and since I found no prejudice to the Department in doing so.

RESOLVED ISSUES

The District, in its specifications, sought relief in eight areas in addition to percentage increases for salaries and benefits. As a result of the diligent effort of the professionals and counsel for the District and the Department, all of the issues have been resolved. The parties asked that I memorialize those resolutions in this Decision. They are as follows:

1. The District's request for an additional $76,085 allocation for playground resurfacing has been reduced to $11,356 and the Department has agreed to increase its approved amount by that much.

2. The District sought an additional $100,000 over the $9,331 previously approved for office materials and supplies. The parties agreed that an additional $5,669 would be an appropriate increase for this anticipated expenditure.

3. The District requested an additional $33,312 for preschool intervention and referral team salaries. After reviewing the supporting documents associated with this request, the Department agreed it was reasonable and necessary. Therefore, the Department agreed to provide this additional amount of funding.

4. The District sought a total of $37,643 in salaries and benefits for an additional member of its clerical staff. The Department determined that pursuant to regulations, the District was of the size that the District's request for an additional clerical person was correct. Therefore, the Department approved this request, as it was permitted and reasonable.

5. The District sought an increase in its rent allocation for four additional classrooms in the amount of $27,600. Recognizing that growth is almost a certainty, but the full extent of the student population increase is unknown and the fact the District cannot by law secure space without having the funds to do so, the parties agreed to an increase in this line item allocation equivalent to two classrooms or $13,800 in funding. As part of the resolution of this issue, it is now acknowledged by the District that in future requests for additional funding for space, the Department will require an identification of a facility, best available information on student enrollment and details on associated costs and other reasonable and relevant information for the Department to make a meaningful decision.

6. The District in its specifications sought a special request for salary and benefits for a food service worker. The Department denied this request and same was withdrawn by the District.

7. The District sought $12,960 to fund summer curriculum work by way of a special request. The Department, by way of compromise and recognizing its current need, agreed to supplement its funding in that amount but on the caveat that it would no longer provide this funding beyond the 2004-2005 school year.

8. The District sought the substantial amount of $417,332 as direct education costs of its special needs children in the preschool program. This is not a usual expense of the Department under its Early Childhood Program. However, the District made the request because the usual source of this special education funding had not released its figures as of the filing of the petition and the District had to protect from being under funded in this crucial area. During the course of the hearing, funding was confirmed from its usual source and the District's request was withdrawn.

The Department and the providers also reached resolution on a number of contested issues. Those resolutions were reached in a large part because Department personnel took steps to

immediately review and analyze new information supplied by the providers during the course of the hearing. The Court wishes to extend its sincere appreciation for the extra effort shown by those employees. They are a credit to the Department of Education.

1. A settlement was reached with the All Kids First School, which culminates in a budget revision indicating food service workers will be funded at 100%. Therefore, the funding previously authorized in the amount of $19,356 will be increased to $36,394 because there is no other funding source available for this required program. The parties also agreed the Budget Worksheet would be amended so under the Support Costs section one clerical person, one assistant director and one facilities person will be added provided the addition of the costs associated with these positions will not result in allowed administrative costs to exceed 27.25% of the Abbott Educational Program costs.

2. Provider Little Lamb Preschool requested additional funding for office materials and supplies. The Department agreed to additional funding for this line item in the budget worksheet, so that the total non-adjusted amount would be $3,796. There was also a request to increase the maintenance cost line item for necessary cleaning supplies and the parties agreed the budget worksheet would be adjusted to reflect the total non-adjusted amount to be $10,750.

3. DiBiase Preschool sought additional funding for needed office materials and supplies. The parties agreed the total approved non-adjusted budgeted amount for this category would be amended to $5,968. In addition, the parties agreed to amend the budget worksheet to show an increase in the food service worker's salary and benefits from $5,815 to $13,192.

4. The Courtyard School, another Vineland provider, and the Department agreed to amend the budget worksheet to reflect an increase in office materials and supplies to $5,514 as the non-adjusted worksheet total.

FINDINGS OF FACT AND LEGAL ANALYSIS

The Department has the obligation to oversee and support the preschool program for all Abbott districts in the State. This includes providing adequate funding for developing and administering an effective pre-kindergarten educational program. Vineland is a municipality that has been given an Abbott classification and thus it is required to have a preschool program approved by the Department. Because of a shortage of space to educate its over 1,100 preschoolers, it must rely on private preschools to assist in this educational process. The providers of that service contract with the District and their individual budgets are developed with the Districts and ultimately approved by the Department. From the testimony presented at hearing, I **FIND** the District applied Department guidelines and, in essence, required the providers to submit budgets under protest as to certain line items and/or categories. As previously stated, many of those issues have been resolved and what follows are those that were not.

The DiBiase Preschool has requested additional funds for a full-time daytime custodian. Kathleen DiBiase, its Owner-Director, testified the school has 90 students in six classrooms, as well as lavatories and offices. There is a nighttime custodian that performs heavy-duty cleaning. She stated that someone is needed during the day for outside maintenance and dealing with everyday cleaning of accidents and spills that are common in preschools. Ms. DiBiase testified the students are in the school until 5:00 p.m., so the main building cleaning cannot be accomplished before that time. Eric Rodney, Ph.D., an Education Program Development Specialist for the Department, testified this request was not approved because it was initially denied by the District and a salary for a full-time custodian is already provided. He stated it is the Department's belief this requested position would be duplicative in task to the existing custodial position. I **FIND** that with proper organizational management, one full-time custodian should be sufficient to provide the necessary cleaning functions of a six classroom school. Options are available such as split shift employment or revisions in working hours, which I **FIND** would meet the needs of the school without the necessity of an additional hire.

A number of providers have sought an increase in budget funding for their office support staff for the 2004-2005 school year. This results from the Department, for the first time, capping

the salary at $24,350. Dr. Rodney testified this was not an arbitrary decision by the Department and is based on sound reasoning. First, the salary chosen ($24,350) was derived from State labor statistics (R-3) as the mean wage for general office clerks. Second, this amount exceeded the salary paid by the District to one holding a comparable position. He stated that as the Department sees it, the position is that of a general clerk and should require no additional skills or perform additional duties, as those are covered on other budgeted line items. The Courtyard School was represented by its Director, Mr. Lewis D'Ippolito. He stated he is seeking $8,126 additional funding on this issue, which includes withholding taxes. His reasons are that there is a substantial difference between a general office clerk and an administrative support person with substantial experience. He testified his office support person is not only a clerk/typist, but also is the parent liaison, oversees functional security, performs accounting functions, maintains all the files, works alone and is the first line of interaction in the facility of 24 employees. Mr. D'Ippolito stated she works from 9:00 to 5:00 everyday. He stated he needs these additional funds in order for her to earn the reasonable salary of $31,856, which is 2.8% higher than the current year. The Courtyard School educates 90 students. Ms. Ruth Piatt, the Owner/Director of Little Lamb Preschool, is also looking for additional funding on this issue. She is requesting $7,039 over cap, as her clerical staff person is now earning $30,534 with a 2.8% increase will earn $31,389. She testified she examined statistics on Office and Administrative Support Occupations, as published by the New Jersey Department of Labor (P-5), and she found that persons performing the closest functions to her office employee earn in the $29,400 to $30,600 range. These are for the Bookkeeping/Payroll Clerk job titles. Ms. Piatt stated her office support person has 12 years of experience with Little Lamb and she does many functions in order to prepare the records for the accountants and payroll service. She stated Little Lamb has 75 students. I **FIND** the Department was not arbitrary in capping its budget line item for office clerk at $24,350. I recognize the importance to any organization of good office support personnel and both Courtyard and Little Lamb have indicated they have exceptional and experienced people filling that position. I also understand their dedication in pursuing this matter because they each seem to have come to depend heavily upon them in making their daily operations run smoothly. I also **FIND** the Department's position to be reasonable in that it looked at the position from a strictly business viewpoint, absent of emotion or loyalty, and determined the cap of $24,350 was a reasonable amount of salary for the function which should be performed. I have examined the Department of Labor (DOL) definitions and I **FIND**

secretaries are to "perform routine clerical and administrative functions, such as drafting correspondence, scheduling appointments, organizing files, or providing information to callers. . ." (R-4). DOL lists the secretary mean salary at $32,275. The DOL states the duties of a general office clerk as one which is "too varied and diverse to be classified in any specific office clerical occupation, requiring limited knowledge of office management systems and procedures . . . and may include a combination of answering telephones, bookkeeping, typing or word processing, stenography, office machine operation and filing" (R-4). I **FIND** the Department's position to be reasonable under all the circumstances. That is not to say the persons employed are not worth their entire salary, but is not a question of what they do but what they should be doing. The Department sees the duties of the office support staff as strictly clerical in nature and not secretarial or as an administrative assistant. I **FIND** $24,350 to be a reasonable salary for the office clerk position, especially recognizing the number of students in each facility. I expect that I would have made a different finding if there were 150 students being educated because I believe the position in that instance would require more skills of an administrative nature.

The next issue for adjudication deals with the Department's decision to prorate salary and benefits of teachers and classroom assistants in provider classrooms where less than 15 students are taught. In those instances, the Department would only approve a fraction of the full salary and benefits with the formula being the number of students in the class as the numerator and 15 being the denominator. So if a class had 13 students, the Department would only approve thirteen fifteenths of the full salary. Dan Smith, the District's Abbott fiscal manager, testified the affected providers are Tiny Tots Preschool, which has one class of 14 students and is requesting $7,751 (P-9), the Vineland YMCA, which has one class of 14 students and is requesting $8,037 (P-10), the Vineland Nazarene Learning Center, which has one class of 13 students and is requesting $10,505 (P-11) and Granny's Child Care/Preschool, which has 2 classes with 15 students and 2 classes with 12 students. This request is for an additional $42,325 (P-12). Mr. Smith stated he was aware of the Department's concerns and policy of encouraging maximum class size, but he was not aware the Department decided not to fully fund staff costs in all approved classrooms in the 2004-2005 school year. Kimberly Friddell, the executive director of Vineland's Early Child Program (ECP) also testified. Prior to assuming her current position, she was employed by the Department as a manger in the ECP division. She stated the District and

the providers are currently at full capacity; in other words, there is no additional space to house any additional children or use larger classrooms. Ms. Friddell testified the smaller enrollment in some classes is because the regulations have changed over the years and now larger classrooms are required to house the same amount of students as what was previously permitted. Pursuant to the regulations, some of those smaller classrooms are permitted for use by a "grandfather" clause, but they can now only contain a smaller number of students. She testified the District is in the process of planning for a new school which will provide additional classrooms and the District is always looking to convert vacant rental space to classrooms in order to conform to current regulations, but as of yet it has been unsuccessful in formalizing an arrangement for new space. Ms. Friddell further testified that pursuant to Department policy, undersized classrooms that were grandfathered could be used in the 2004-2005 year upon securing a waiver, but after next year they would not be permitted. She also stated waivers were routinely given on a showing of no conforming space being available. She stated the ECP requires certified teachers and assistants who must work full-time. The program is designed so these teachers are paid comparable salaries with District teachers because if this was not the case, private school teachers would flee to the public education system leaving providers without teachers to run their program. She also stated whether a class has 15 students or a lesser amount, the instructors must be paid for the full day at full salary and unless these line items are fully funded by the Department, there is no other source of funds to pay the teachers.

Ms. Friddell testified she was aware of the Department's policy of removing undersized classrooms from the ECP. This became clear in its October 25, 2002 memo (Ra138), which called for a phase out of these classrooms over three years. She stated her understanding is the 2004-2005 school year falls within the phase out period. She also said there is no mandate or code requirement that undersigned classrooms could not be used in the 2004-2005 year nor is there authority to prorate salaries for the teachers in those classrooms. The first indication the Department intended to prorate salaries came in a review letter from the Department to the District, dated January 15, 2004 (Ra649). That letter states in applicable part: "Budgets with classrooms under the 15 student capacity have been prorated accordingly." The only logical reason Ms. Friddell could envision for this policy change (from phase-out to prorate funding) was set forth in Ms. Eck's prehearing submission statement to the Court, in which she writes on page 13: "The pro-ration of teacher's salaries should provide an incentive for the district and

provider to find classroom space that will accommodate 15 students per class and therefore serve a greater percentage of Vineland's eligible preschool population."

Dr. Eric Rodney testified on behalf of the Department on the salary proration issue. He stated this is a new policy of the Department starting in the 2004-2005 school year. He testified this is being done so the program would be more cost effective. Dr. Rodney stated he has requested a plan from the District indicating how they are going to accomplish the phasing out of undersized classrooms, but as yet he has not received same. He acknowledged he wrote to the District on December 15, 2003 (Ra186) and in that letter to Ms. Friddell he stated: "The 2004-2005 school year will be the last year where Abbott funding is approved for classrooms unable to accommodate 15 children." I **FIND** there is no indication in that letter that salaries were going to be prorated. Dr. Rodney also admitted he did not know how the affected teachers would be paid if proration is implemented. He also confirmed the Districts were never alerted to proration as a possibility. In addition, he testified, the provider, All Kids First Preschool did not have its teacher salaries prorated, even though they have less than 15 students in one or more classes; the District has until the end of the 2004-2005 school year to correct the undersized classroom issue; he expects Vineland will comply by the deadline; he knows Vineland currently has no other space to educate these children; he acknowledges Vineland lost a 3 classroom provider this year, which housed 15 students in each classroom. He also acknowledged that incentive to eliminate undersized classrooms is the reason of salary proration; he does not think it applies in the case of Vineland because they have no other space and therefore no other choices at this point; there is no regulation that authorizes this policy and the Department is not following its own regulations or guidance manual on this issue since they are silent on proration.

Preschool programs are described in *N.J.A.C.* 6A:10A-2.2 and subparagraph (a)3 states: "The district board of education shall provide one teacher and one aide for every 15 children. Class size shall not exceed 15 children." There is no legal authority which directs how funding should be handled in classrooms with less than 15 students. It is more likely than not this situation will arise either because of undersized approved space, as is in this case, or because when pupil enrollment occurs, it is most unlikely the total number of students will be an amount divisible by fifteen. Without legal authority as a guide, I **FIND** the issue to be whether the Department's policy on proration for the 2004-2005 year is a reasonable attempt at improving the

ECP. As applied to the Vineland District, I **FIND** it is not. The undersized classrooms have been approved by the Department for use in the 2004-2005 school year knowing they cannot legally accommodate 15 students. The Department has made it clear it will not permit future use of those facilities. The stated purpose of instituting this eleventh hour policy is to provide an incentive to discontinue the providers with undersized classrooms beyond this year, but I **FIND** this to be ineffective as applied to Vineland for two reasons: First, there are no options available to Vineland for next year except to use those undersized classrooms, and second, after next year those classrooms, according to previous Department edict, will no longer be available under any circumstances. Since there is no immediate action the District can take, an incentive to do something it cannot do is of no value. Therefore, I **FIND** applying the proration of salary policy to the Vineland District does not serve its intended purpose and should not be enforced.

CONCLUSION AND ORDER

I **CONCLUDE** the settlements reached between the Department and the District and the various providers as set forth in this decision satisfy the requirements of *N.J.A.C.* 1:1-19.1 and I **ORDER** the parties to comply with the settlement terms.

I further **CONCLUDE** the DiBiase Preschool's request for funding to secure a second custodian is not necessary to provide a thorough and efficient ECP and I **ORDER** this request be **DENIED**.

I further **CONCLUDE** the requests by the Countyard School and Little Lamb Preschool for additional funding to compensate their respective office support staff is not necessary to provide a thorough and efficient ECP and I **ORDER** these requests be **DENIED**.

I further **CONCLUDE** the requests by Tiny Tots Preschool, the Vineland YMCA, the Vineland Nazarene Learning Center and the Granny's Child Care/Preschool for full funding of its teaching staff in undersized classrooms in the respective amounts set forth in this decision is reasonable and a necessary expense in order for them to meet their contractual obligations with their teachers and the District. I therefore **ORDER** the Department to fund all teachers in those

provider schools at 100% full teachers and assistants salaries, benefits and taxes as requested in the exhibits enumerated in this decision.

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 the time allowed under the existing orders of the New Jersey Supreme Court 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.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in Abbott District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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, 2004

DATE

JOHN SCHUSTER III, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

3-9-04

DATE

E-mailed Initial Decision to the parties on:

3-9-04

DATE

Mailed to Parties:

MAR 23 2004

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

jh

WITNESSES

For petitioner:

Lewis D'Ippolito
James A. Deola
Ruth Piatt
Kathleen DiBiase
Kimberly Friddell
Daniel Smith
Kevin J. Franchetta

For respondent:

Eric Rodney

EXHIBITS

For petitioner:

P-1 2004-05 Preschool Program Worksheet revised through February 13, 2004
P-2 Undated statement of need prepared by Lewis D'Ippolito
P-3 Letter from All Kids First Preschool to Smith and Friddell, dated January 27, 2004
P-4 Special Request Appeal - Little Lamb Preschool, dated January 27, 2004
P-5 Occupational Employment and Wages statistics for Cumberland County, dated February 20, 2004
P-6 DiBiase letter of January 27, 2004
P-7 Courtyard School office supply needs list for 2004-2005 year
P-8 Courtyard audit statement year ended August 31, 2003
P-9 Tiny Tots instructional request
P-10 YMCA instructional request

P-11 Nazarene instructional request

P-12 Granny's Childcare Preschool instructional request

For respondent:

R-1 Department of Education letter to Dr. Hoover, dated January 6, 2003

R-2 Department of Education Abbott Preschool Operational Plan 2004-2005, regarding Vineland School District beginning pages Ra001 to Ra679

R-3 Occupational Employment Statistics Wage Survey for New Jersey

R-4 Job descriptions of Secretary/Clerk positions

OAL DKT. NO. 0367-04
AGENCY DKT. NO. 28-1/04

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Pursuant to *N.J.A.C.* 1:1-19.1(d), the Initial Decision is the final decision in this matter with respect to those issues resolved between the parties. With respect to the three issues remaining in dispute, the Commissioner is satisfied upon his full and independent review that the findings of the Administrative Law Judge (ALJ) are amply supported by the record, and he, moreover, concurs in full with the ALJ's analyses and conclusions based upon those findings.

Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 4/2/04
Date of Mailing: 4/5/04

* Pursuant to *P.L.* 2003, *c.*122, "Abbott" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court. In accordance with the June 24, 2003 Order of the Supreme Court, such appeals must be filed within six days of the Commissioner's decision.

149-04

#149-04

CAROL GOTTLIEB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

April 7, 2004

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1354-03

Agency Dkt. No. 385-11/02

CAROL GOTTLIEB,

Petitioner,

v.

BOARD OF EDUCATION OF

THE BOROUGH OF WOOD-RIDGE,

BERGEN COUNTY,

Respondent.

Gregory T. Syrek, Esq., for petitioner
(Bucceri and Pincus, attorneys)

Mark T. Janeczko, Esq., for respondent

Record Closed: January 30, 2004 Decided: February 9, 2004

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE

This case was transmitted to the Office of Administrative Law ("OAL") on January 31, 2003, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into an agreement and have prepared a Stipulation of Settlement, which is attached and fully incorporated herein.

I have reviewed the record and the correspondence and **FIND**:

1. The parties have voluntarily agreed to a settlement of this matter.

2. The correspondence 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(d) and should be approved. I approve the stipulation of settlement and therefore **ORDER** that the parties comply with the agreement.

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 (45) 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 9, 2004
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

2/24/04
DATE

M Kathleen Duncan, Dir. /ps
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 27 2004
DATE

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

BUCCERI & PINCUS, ESQS.
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Clifton, NJ 07013-2440
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Counsel for Petitioner

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
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CAROL GOTTLIEB,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
Petitioner,	:	ADMINISTRATIVE LAW
v.	:	AGENCY REF. NO. 385-11/02 OAL DKT. NO. EDU 1354-03N
WOOD-RIDGE BOARD OF EDUCATION,	:	
Respondent.	:	**STIPULATION OF SETTLEMENT**

This Stipulation of Settlement is made by and between the petitioner, Carol Gottlieb (hereinafter "Ms. Gottlieb") residing at 245 Rock Avenue, Park Ridge, New Jersey 07656, and the Wood-Ridge Board of Education (hereinafter "the Board"), with its offices located at 89 Hackensack Street, Wood-Ridge, New Jersey 07075. In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, Ms. Gottlieb has been employed by the Board since September 1, 1996; and,

WHEREAS, Ms. Gottlieb gained tenure as the result of her employment with the Board; and,

WHEREAS, Ms. Gottlieb filed a verified petition with the Commissioner of Education alleging that the Board's assignment of English as a Second Language ("E.S.L.") instructional classes to her for the 2002-2003 school year violated her tenure rights as a guidance counselor; and

WHEREAS, the Board filed an answer to the petition denying that it violated Ms. Gottlieb's tenure rights; and,

WHEREAS, for the 2003-2004 school year, the Board has appointed Ms. Gottlieb as a full-time guidance counselor and she is not being required to teach any E.S.L. classes; and,

WHEREAS, the parties have expressed a desire to teach an amicable resolution of this matter; and,

NOW THEREFORE, the parties herby agree to the following terms on this _____day of _____, 2004:

1. The Board intends to continue the appointment of Ms. Gottlieb as a full-time guidance counselor for the 2003-2004 school year.

2. Based upon the current status of Ms. Gottlieb's assignment for the 2003-2004 school year, the parties acknowledge that the underlying dispute is now moot because Ms. Gottlieb is presently in the position requested in the petition and there is no claim for additional salary or benefits.

3. The parties agree that this action will be dismissed without prejudice.

4. The parties agree that, except as provided in this Agreement, the dismissal of this action shall not limit or restrict in any way, the ability of the petitioner to file and pursue any future actions before the Commissioner of Education based upon an alleged future violation of her tenure and/or seniority rights.

5. The parties agree that, except as provided by this Agreement, the dismissal of this action shall not prevent, limit or restrict the Board in any way in the presentation of its defenses against any future actions brought by Ms. Gottlieb before the Commissioner of Education alleging a violation of her tenure and/or seniority rights.

6. Ms. Gottlieb acknowledges that she has been advised that she has the right to consult with an attorney or a representative of her own choosing prior to signing this Agreement, and has done so, and that she signs this Agreement as her own voluntary act and deed, and that she fully understands the duties and obligations enumerated herein.

7. The undersigned representatives of the Board hereby acknowledge that they agree to the terms and conditions of this Agreement subject to final ratification by the Board.

8. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked, except by an instrument executed in writing by the parties.

9. Both parties acknowledge that their agreement to dismiss the petition is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approval is not given, this Agreement and all of the stipulations, releases and acknowledgements shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

WITNESS:

Gregory T. Syrek, Esq.

Carol Gottlieb

Carol Gottlieb

WITNESS:

Mark T. Janeczko, Esq.

BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY

By: Robert Tacconi, Board President

Michael Leary, Board Secretary

OAL DKT. NO. EDU 1354-03
AGENCY DKT. NO. 385-11/02

CAROL GOTTLIEB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that Item No. 7 of the Stipulation of Settlement specifically states that:

> The undersigned representatives of the Board hereby acknowledge that they agree to the terms and conditions of this Agreement subject to final ratification by the Board. (Stipulation of Settlement, No. 7, at 3)

In that neither the file nor the Stipulation of Settlement contains a copy of the Board's Resolution approving the settlement, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for modification of the Stipulation of Settlement to include the Board's Resolution approving the

settlement. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/7/04

Date of Mailing: 4/7/04

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

150 04

#150-04

L.E.A., on behalf of minor child, N.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY, DR. GEORGE F. SHARP, SUPERINTENDENT, AND JAMES A. DUDA, PRINCIPAL,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Due to his son's unsuccessful tryout for the 2000-01 Delran Middle School basketball team, petitioning parent claimed ethics violations and alleged the Board violated its Pupil Records Policy through inadequate maintenance of his son's file and alleged altering of the file. The Board contended petitioner's claims were time-barred.

The ALJ concluded that the petition was not timely filed pursuant to *N.J.A.C.* 6A:3-1.3(d). In that there were no genuine issues of material fact regarding the 90-day limitation period, the ALJ determined that the matter was amenable to summary decision The ALJ found that even though pupil record violations were raised by petitioner in letters dated July 26 and September 3, 2002, he did not file with the Commissioner until April 4, 2003, well out of time. The ALJ determined that respondents were entitled to prevail as a matter of law, *N.J.A.C.* 1:1-12.5(b).

The Commissioner adopted the Initial Decision granting summary decision to respondents with modification. In his exceptions, petitioner conceded that violations raised in his letters of July 25 and September 3, 2002 were untimely, but asserted that violations of the Pupil Records Policy newly discovered in January 2003 were timely. Upon examination of the newly discovered documents, the Commissioner determined that these documents were not violations of the Pupil Records Policy. The Commissioner also noted that the record closed on January 12, 2004; thus, petitioner's submissions on February 20, 2004 were outside the record and the Commissioner declined to consider these submissions. Moreover, with respect to petitioner's claim that respondents did not provide his requests for discovery, the Commissioner found that there was nothing in the record to indicate that petitioner exercised his rights under *N.J.A.C.* 1:1-10.4(d) within the timeframe provided to compel discovery when this matter was at the OAL.

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 2793-03

AGENCY DKT. NO. 117-4/03

L. E. A., ON BEHALF OF MINOR CHILD, N. A.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY, DR. GEORGE F. SHARP, SUPERINTENDENT, AND JAMES A. DUDA, PRINCIPAL,

Respondents.

L. E. A., petitioner, *pro se*

John T. Barbour, Esq., for respondents

Record Closed: January 12, 2004 Decided: February 19, 2004

BEFORE **JOSEPH F. FIDLER**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner R.P.'s primary assertion in his verified Petition of Appeal is that respondents violated the Board's Pupil Records Policy. The genesis for this assertion is student N.A.'s unsuccessful tryout for the 2000-2001 Delran Middle School basketball team. R.P. filed his

Petition of Appeal with the New Jersey Commissioner of Education on April 4, 2003, and respondents filed an Answer on May 2, 2003. On May 15, 2003, the matter was transmitted to the Office of Administrative Law for determination as a contested case, and a prehearing conference was held on October 21, 2003.

Respondents have moved for summary decision on the ground that the Petition of Appeal was not timely filed, pursuant to *N.J.A.C.* 6A:3-1.3(d), and must be dismissed. Petitioner responded in opposition to the motion, and respondent Board thereafter filed a reply to petitioner's papers. The last papers on the motion were received on January 12, 2004, and the record closed on that date.

DISCUSSION

From my review of the parties' submissions, I **FIND** that there is no genuine dispute concerning the facts material to resolution of the motion for summary decision. Student N.A.'s unsuccessful tryout for the 2000-2001 Delran Middle School basketball team prompted a complaint by L.E.A. in April 2001 to the Office for Civil Rights, United States Department of Education. He alleged in part that the school district discriminated against N.A. on the basis of perceived disability. After investigation, the Office of Civil Rights closed its file effective March 20, 2002. The OCR determined that there was insufficient evidence to find a violation of Section 504 of the Rehabilitation Act of 1973 or the Americans With Disabilities Act of 1990.

By letter to Superintendent Sharp dated July 26, 2002, petitioner L.E.A. advised that he had reviewed the district's policies and regulations regarding pupil records. L.E.A. alleged that, based upon his review, it was apparent N.A.'s file had been inadequately maintained. He also asserted that, in the context of the earlier complaint to the Office of Civil Rights, N.A.'s file had been altered to suit the needs of the school district. By letter to Superintendent Sharp dated September 3, 2002, L.E.A. alleged that there had been conduct in obstruction of the OCR investigation, ethical transgressions, and violations regarding N.A.'s pupil records.

On October 11, 2002, L.E.A. filed a complaint with the New Jersey School Ethics Commission, alleging that respondents violated the School Ethics Act in connection with their

handling of the USDOE civil rights complaint. L.E.A. asserted in that complaint that respondents' ethics violations occurred during the investigation period from the end of October 2001 through July 8, 2002, and central among the claimed violations was the alleged improper use of N.A.'s pupil records. On November 14, 2002, respondents submitted their response to the complaint, denying the alleged ethics violations and noting that access to student files is not a School Ethics Act issue. At its meeting of January 28, 2003, the Ethics Commission found no probable cause to credit the allegations and voted to dismiss the complaint. The Commission adopted this decision by resolution at its meeting of May 1, 2003.

In the present Petition of Appeal, filed April 4, 2003, L.E.A. alleges that N.A. did not receive a complete and unbiased investigation of the 2000-2001 basketball tryouts and claimed ADA violations. He further alleges that the district's business agent and the Board's attorney committed numerous violations of the pupil record policy during the course of the Office of Civil Rights investigation. L.E.A. also alleges that Principal Duda, who was custodian of records, helped the business agent and the Board's attorney violate the pupil record policy during the federal investigation. L.E.A. included among the attachments to the Petition his letters to the Superintendent of July 26 and September 3, 2002, describing alleged violations of the district's pupil record policy in connection with the OCR investigation that was closed March 20, 2002.

Respondents contend that petitioner's claims are time-barred, and therefore must be dismissed. I agree. Pursuant to *N.J.A.C.* 6A:3-1.3(d), a petition of appeal must be filed "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." The actions by respondents which are the subject of the present contested case are those alleged pupil records violations that were raised by petitioner in his letters to Superintendent Sharp dated July 26 and September 3, 2002, and described in his complaint filed with the School Ethics Commission on October 11, 2002. Since L.E.A.'s Petition of Appeal was not filed with the Commissioner until April 4, 2003, it was well out of time and must be dismissed.

Petitioner's arguments in opposition to the motion are not persuasive. He cites no authority for the propositions that respondents or the School Ethics Commission had an

affirmative obligation to advise him as to the proper forum for his claims or as to the existence or running of the 90-day limitation on filing. Strict application of the 90-day rule is well settled and there are no exceptional circumstances present in this matter that might justify its relaxation. *See*, for example, *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 *N.J.* 572 (1993). It is clear that petitioner had notice adequate to trigger the 90-day limitation period by July 26, 2002, because in his letter to the Superintendent of that date, he described his awareness of the existence of facts that would enable him to claim pupil records violations. He further evidenced that he had adequate notice by his letter of September 3, 2002, and by his complaint to the School Ethics Commission filed October 11, 2002. Nor does that prior litigation serve as a basis for relaxation of the 90-day limitation. *See, Riely v. Hunterdon Central Bd. of Educ.*, 173 *N.J. Super.* 109 (App. Div. 1980).

There are no genuine issues of material fact regarding application of the 90-day limitation period. For the reasons set forth above, I **CONCLUDE** that respondents have demonstrated that the Petition of Appeal was not timely filed, pursuant to *N.J.A.C.* 6A:3-1.3(d). Accordingly, I further **CONCLUDE** that respondents are entitled to prevail as a matter of law, *N.J.A.C.* 1:1-12.5(b). Therefore, respondents' Motion for Summary Decision is **GRANTED** and the Petition of Appeal is **DISMISSED**. I so **ORDER**.

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 (45) 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 (13) 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, 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, 2004
DATE

Joseph F Fidler
JOSEPH F. FIDLER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

2/19/04
DATE

Mailed to Parties:

FEB 23 2004
DATE

Laura Reeves
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For petitioner:

Brief in Opposition to Motion for Summary Decision with attachments, and supplemental response

For respondent:

Brief in Support of Motion for Summary Decision with attachments, and Brief in Reply to Opposition papers

WITNESSES

For petitioner:

None

For respondent:

None

OAL DKT. NO. EDU 2793-03
AGENCY DKT. NO. 117-4/03

L.E.A., on behalf of minor child, N.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY, DR. GEORGE F. SHARP, SUPERINTENDENT, AND JAMES A. DUDA, PRINCIPAL,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions were submitted by petitioner in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.[1]

In his exceptions, petitioner acknowledges that the triggering of the 90-day limitation is valid, but asserts that "each violation of Pupil Records stands as a single [offense] and the 90-day limitation criterion must be applied to each incident***." (Petitioner's Exceptions at 1) In this regard, petitioner claims that, in response to his request to the Superintendent in a letter dated July 26, 2002 to review all files (with respect to his son), the Superintendent notified him by letter of February 3, 2003 that he had been permitted access to all

[1]Petitioner's exceptions were filed on March 4, 2004. On March 15, 2004, respondents filed a reply, claiming that petitioner's exceptions had not been received in the Board's offices until March 5, 2004. (Respondents' Reply at 1) Given respondents' claim that the petitioner's exceptions were not received until March 5, 2004, pursuant to *N.J.A.C.* 1:1-18.4(d), *N.J.A.C.* 1:1-1.4 and *N..J.A.C.* 6A:3 1.2, respondents' reply was due on March 12, 2004. In that respondents' reply was not filed until March 15, 2004, it was not timely filed; thus, it was not considered by the Commissioner.

the files on January 17, 2003.[2] (*Ibid.*) Petitioner points out that he does not control access to a student's file and the 90-day limitation applied to these circumstances allows respondents to withhold access to the student's file and then claim immunity under the 90-day rule. (*Ibid.*)

Noting that he filed his appeal on April 4, 2003, petitioner avers that pupil record violations he discovered within the files not previously viewed cannot be considered with the violations found in the central file in July 2002. (*Ibid.*) Petitioner claims that a letter he found in the Superintendent's file in January 2003, Exhibit J in the petition, is an example of a newly discovered violation. (*Id.* at 2) That letter, petitioner contends, shows the Board Secretary's receipt of a third-party disclosure which the Board Secretary then disclosed to respondents' attorney and other individuals in violation of the District's Pupil Records Policy. (*Ibid.*) Petitioner further points to a letter sent in conjunction with the transmission of his son's file on October 17, 2001 to the U.S. Department of Education, which he alleges constitutes another violation because "this letter was not submitted." (*Ibid.*)

Petitioner also contends that he is entitled to a copy of the student's file upon request, and *implies* that several discovery requests, including a request for a copy of the student's complete file, made to respondents' attorney from April 4, 2003 through February 19, 2004 were not provided. (*Ibid.*) Petitioner suggests this failure to provide the student's file during discovery could be considered "an obstruction." [3] (*Ibid.*) Additionally, petitioner avers that a letter from the U.S. Department of Education to respondent's attorney, dated June 25, 2001, was never placed in the student's file, and, thus is another violation of pupil

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[2] A review of the Superintendent's letter of February 3, 2003 to which petitioner refers (Petition, Exhibit O) indicates that it is a response to *petitioner's letter of January 17, 2003,* and that it confirms that petitioner had reviewed the files in question on January 24, 2003, not on January 17, 2003 as it appears from petitioner's exceptions.

[3] Petitioner claims he brought this to the attention of the Administrative Law Judge (ALJ) by letters of November 12, 2003 and December 14, 2003. (Petitioner's Exceptions at 2)

records, asserting that "a violation that occurs during discovery is admissible at the hearing." (*Ibid.*)

Finally, petitioner states that he submitted evidence to the ALJ on February 20, 2004, 30 days prior to the scheduled hearing, to prove that respondents violated the District's Pupil Records Policy, and that such evidence clearly delineates violations which were discovered within 90 days prior to filing his petition. (*Ibid.*) Petitioner notes that he is not asking for relaxation of the 90-day filing requirement, but only that it be applied equitably to the evidence submitted. In conclusion, petitioner concedes that respondents are entitled to a partial summary decision, but contends that respondents are not entitled to a complete summary decision. (*Ibid.*)

Initially, upon a careful and independent review of the record, the Initial Decision and petitioner's exceptions in this matter, the Commissioner concurs with the conclusion by the ALJ that: 1) the Petition of Appeal in this matter was not timely filed, pursuant to *N.J.A.C.* 6A:3-1.3(d); and 2) respondents are entitled to summary judgment in this matter in that a) there are no general issues of material fact regarding application of the 90-day limitation for the filing of an appeal, and b) respondents are entitled to prevail as a matter of law. *See N.J.A.C.* 1:1-12.5(b).

With respect to petitioner's exceptions, the Commissioner observes that petitioner does not dispute the ALJ's conclusion that alleged pupil records violations that appear in his petition, which were previously raised by him in his letters to the Superintendent, dated July 26, 2002 and September 3, 2002, and described in his complaint with the School Ethics Commission on October 11, 2002, are out-of time pursuant to *N.J.A.C.* 6A:3-1.3(d). Instead, petitioner raises an argument in his exceptions that does not appear in his petition or in his brief

in opposition to respondents' motion for summary decision, *i.e.,* that he discovered pupil record violations on January 2003 that were previously unknown to him and that these violations constitute violations such that each stands as a single offense subject to the 90-day limitation.

In support thereof, petitioner points to two letters discovered as the result of his review of District files in January 2003 as examples of documents that were not placed in his son's student file, which he alleges is a violation of the District's Pupil Records Policy. A review of the petition, however, reveals that only one of these letters is mentioned in the petition, a May 15, 2001 memo from the Board Secretary to the Board's counsel, identified as petitioner's Exhibit J. In point of fact, there is no record that petitioner ever asserted that the District violated the District's Pupil Records Policy with respect to its handling of the other document, an October 17, 2001 letter from the District to the Department of Education, accompanying a copy of the student's file being forwarded to that agency,[4] prior to filing his exceptions. Thus, even accepting, *arguendo*, petitioner's claim that he first discovered the October 17, 2001 letter in January 2003, petitioner was well aware of its existence when he filed his petition on April 4, 2003. The Commissioner, therefore, finds that petitioner is precluded from now asserting a claim with respect to the October 17 letter at issue as the 90-day limitation for asserting a claim concerning that document has passed.

The May 15, 2001 memo from the Board Secretary to the Board's counsel appears in the petition as Item No. 5, wherein petitioner claims that the memo violates school policy because the "business agent" (Board Secretary) "should not be handling matters concerning the welfare of children" and that "[n]o school official should disclose any file information to him, as per school policy." (Petition, Item No. 5) Petitioner further avers that "[t]his information should

[4] The record does not contain a copy of this letter.

not have been released to Mr. Barbour (the Board attorney) and Mr. Irons.[5] This is third party disclosure without parental permission." (*Ibid.*) A review of the May 15, 2001 memo from the Board Secretary to the Board's attorney reveals that this memo is an internal, confidential communication from the Board Secretary to the Board's attorney transmitting a copy of petitioner's complaint filed with U.S. Office of Education and providing background information to the Board's attorney for his requested response to the complaint on behalf of the Board and its employees named therein.[6] (Petition, Exhibit J) The other document, a June 25, 2001 letter, which petitioner claims to have noticed during the discovery process, is a letter to respondents' attorney from the U.S. Department of Education providing information on the District's responsibilities related to petitioner's complaint filed with that agency.

N.J.S.A. 18A:36-19, *N.J.S.A.* 6:3-6.1 *et seq.* and the District's Pupil Records Policy establish that a pupil's record may include only the specified mandated and permitted records set forth in code and policy as relevant to the *education* of the pupil. Since the May 15 memo[7] and the June 25 letter at issue do not fall within the mandated and permitted documents to be placed into a student's file as specified in State code and District policy, and in that these documents deal solely with litigation issues related to the complaint filed by petitioner at the U.S. Office of Education, the Commissioner finds that respondents' failure to place copies of these documents in petitioner's son's student file do not constitute violations of *N.J.S.A.* 18A:36-19, *N.J.S.A.* 6:3-6.1 *et seq.* or the District's Pupil Records Policy.

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[5] The copy notation at the bottom of the May 15, 2001 memo lists Mr. Irons as T. Irons, Utica Representative. This is the only mention of Mr. Irons in the record and petitioner does not clarify what his role is in the District.

[6] This letter was copied to the Superintendent and the Principal, who were named in the complaint, as well as T. Irons, identified as Utica Representative.

[7] Respondents assert that this memo is subject to attorney-client privilege, which has not been waived. (Answer, No. 5 at 2-3)

Turning to petitioner's assertion that respondents' counsel did not provide his requests for discovery, including the request for a copy of his son's complete file, when this matter was before the OAL, the Commissioner finds that petitioner's request for his son's pupil records within the context of discovery is a litigation issue, not a pupil records request under *N.J.S.A.* 18A:36-19, *N.J.S.A.* 6:3-6.1 *et seq.* or the District's Pupil Records Policy. Moreover, notwithstanding petitioner's assertion that he notified the ALJ of his inability to obtain the documents he requested from respondents, there is nothing in the record to indicate that petitioner exercised his rights under *N.J.A.C.* 1:1-10.4(d), within the timeframe provided, to compel discovery when this matter was at the OAL. In this instance, therefore, petitioner asserts a claim that is not within the Commissioner's jurisdiction and for which relief cannot be granted.

Finally, with respect to petitioner's assertion that on February 20, 2004 he submitted all the evidence required to prove that respondents violated the District's Pupil Records Policy and that such evidence clearly delineates violations which were discovered 90 days prior to filing his petition (Petitioner's Exceptions at 2), the Commissioner observes that the record in this matter closed on January 12, 2004, and the Initial Decision was issued on February 19, 2004. In that petitioner's submissions on February 20, 2004, are, therefore, outside the record, the Commissioner declines to consider these submissions in deciding the within matter.[8]

Accordingly, as set forth above, the Commissioner rejects petitioner's argument that the alleged newly discovered and additional violations of the District's Pupil Records Policy delineated in his exceptions undermine respondents' entitlement to summary decision in this

[8] The Commissioner notes that petitioner did not move to reopen the record.

matter. The Commissioner, therefore, adopts the Initial Decision granting summary decision to respondents for the reasons articulated therein, as modified above.

IT IS SO ORDERED.[9]



COMMISSIONER OF EDUCATION

Date of Decision: 4/05/04

Date of Mailing: 4/07/04

[9] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

155-04

#155-04E

G.W., on behalf of minor child, T.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY AND SUPERINTENDENT,	:	DECISION ON MOTION
RESPONDENTS.	:	

April 5, 2004

CONTROVERSIES
AND DISPUTES
04 MAR 31 AM 11:07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTERLOCUTORY ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 02228-04S
AGENCY DKT. 109-3/04

G.W., ON BEHALF OF MINOR CHILD, T.W,
Petitioner,
v.
SUPERINTENDENT, BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent.

BEFORE **JEFF S. MASIN**, ALJ:

This petition for emergent relief was transmitted to the Office of Administrative Law by the Commissioner of Education. A hearing on the application was held on Monday, March 29, 2004. At that time counsel for the parties argued their positions, and the written record was supplemented by unsworn representations by the petitioning parent and the athletic director for the district. Following oral argument and consideration of the record, I orally advised the parties that I would deny emergent relief.

The Board of Education of the Rumson-Fair Haven School District suspended T.W., a 12th grade student, for ten school days as the result of his involvement in an assault. In essence, the matter involved an exchange between this student and another that resulted in an orange peel or other parts of an orange being thrown by T.W. at E.K., a subsequent dumping of milk by E.K. upon T.W.'s head and finally, a dumping of a cup of regurgitated milk and a cookie onto E.K.'s

head. As of the day upon which this matter was argued before this judge, T.W. was just completing the full ten-day suspension.

The focus of the emergent relief application is not upon the propriety of the ten-day out-of-school suspension. [The Student Handbook issued by the District indicates that a first offense of assault may be punished by a suspension of from five to ten days]. The focus instead is upon the Board's intention to prevent T.W., a pitcher on the school's varsity baseball team, from participating in any games during his first ten days in school following service of the now completed suspension, during which suspension he was not permitted to practice with the team. [He claims to have participating in extensive private training during this period]. Apparently T.W. is a pitcher of some promise and, according to the representations made by his father in the Petition for Emergent and Interim Relief filed, the W.s have been advised that several colleges or universities are interested in considering T. for a full athletic scholarship. [Indeed, at the end of the oral argument, it was related that several scholarship offers have already been received.] They fear that the prohibition from competition may interfere with the ability of T. to perform in front of such college scouts as may attend games scheduled during this ten-day period.

Counsel for the parties agree that the prohibition upon participation in games, as opposed to practices in which T. may participate during the ten days, has not been reduced to writing, either as a part of any general statement in the student handbook provided to students and their parents, or, more specifically, in any written notice to T. and/or his parents. Instead, the family and their attorney have been informally told that T. will be prevented from playing in these games. Counsel for the Board advised that while he understood that the prohibition is a standard procedure, it is not part of any written Board policy or directive. The Handbook does specifically and prominently (in bold) notify that students that they must be in school for at least four hours in any given day or, if for example, they leave school due to illness prior to such minimum time, they may not participate that day in any extracurricular activities.

Emergency relief is an extraordinary remedy that is sparingly granted. The standards for determining whether to grant this relief are established in the seminal case of *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). In order to merit emergent relief, the petitioner must establish that (1) there is a likelihood that irreparable harm will result if the injunction requested is not granted; (2) the

legal right underlying the plaintiff's claim is settled, such that there is a reasonable probability of ultimate success on the merits; and (3) the relative hardship to the moving party if the relief is not granted outweighs the hardship to the other side if the relief is granted.

The allegation that irreparable harm will occur if the prohibition stands prior to a hearing on the merits is questionable. The speculative possibility that a scout might attend one of the few games scheduled during the suspension, which is unsupported by any actual evidence at this time, the uncertainty of when the student might pitch in any given game, the indefinable significance that his absence from a game or games may have upon his chances for a scholarship, where several have already been offered and the judgment as to such was made without reference to these early season games and where by counsel's own statement these judgments are made upon a broader view than one game or a few innings, and where the student's track record already shows promise, make the suggestion of irreparable harm arising during this ten day period nothing more than a speculative guess. While the usual measure of irreparable harm is whether the harm can be addressed by monetary compensation, here the proof of any harm is based upon supposition and speculation. As such, the petitioner does not meet the standards for injunctive relief.

This case involves a challenge to the determination of a local school board as to the imposition of disciplinary measures, or, perhaps more accurately, as to the consequences that flow from a Board's application of such measures. In general, the Commissioner is loathe to interfere in such matters, but will do so and will overturn a local school board's decision if it was arbitrary and capricious. Thus, in determining the likelihood of ultimate success on the merits of this challenge, it must be recognized that the arbitrary and capricious standard presents a significantly high burden for the petitioner to meet. While the lack of a written policy that spells out as a consequence of missing practices during a period of suspension a prohibition on participation in competition, although not practice, does raise some question about the propriety of the Board's action, it is not all that clear that such detail must be written into Board policy or Student Handbooks that already address the underlying punishment that may be meted out for a violation of school rules and other misconduct. Here, while one might quibble as to the number of days of suspension imposed, the student was, no doubt, properly disciplined for his misconduct. As such, it may not be unfair to expect that his misconduct, which kept him out of

school and away from the practices the other team members attended, might have consequences. Whether each of these needs be spelled out in writing is an issue to be determined, as is the question of whether notice of the policy was provided to athletes by other means [which I take it may well be an issue in dispute]. I cannot say at this time that the petitioner has demonstrated a reasonable likelihood of ultimate success on the merits.

Given the petitioner's failure to meet the *Crowe* standards, the application for emergent relief is **DENIED**. A plenary hearing shall be held on Friday, April 2, 2004, at 9 a.m. at the OAL in Mercerville.

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 (45) 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 (45) 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 29 2004

DATE

JEFF S. MASIN, ALJ

mjm

OAL DKT. NO. EDU 02228-04
AGENCY DKT. NO. 109-3/04

G.W., on behalf of minor child, T.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY AND SUPERINTENDENT,	:	DECISION ON MOTION
RESPONDENTS.	:	

The recommended Order of the Administrative Law Judge (ALJ), together with the audio tape of the emergent hearing conducted at the Office of Administrative Law (OAL) on March 29, 2004 have been reviewed.

Upon such review, the Commissioner concurs that petitioner has failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) necessary to warrant the extraordinary remedy of emergent relief. Accordingly, the recommended Order of the ALJ is adopted for the reasons expressed therein. This matter shall continue at the OAL with a plenary hearing scheduled for April 2, 2004.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/05/04

Date of Mailing: 4/08/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*

154-04

#154-04

ANTHONY CICENIA, BETTY CICENIA AND THE SOUTH ORANGE-MAPLEWOOD EDUCATION ASSOCIATION,

PETITIONERS,

V.

BOARD OF EDUCATION OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

April 7, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9379-02
AGENCY DKT. NO. 299-9/02

ANTHONY CICENIA, BETTY CICENIA AND THE SOUTH ORANGE/MAPLEWOOD EDUCATION ASSOCIATION,

Petitioner,
v.

SOUTH ORANGE/MAPLEWOOD BOARD OF EDUCATION,

Respondent.

Mary J. Hammer, Esq. for petitioner
(Bucceri & Pincus, attorneys)

Sidney A. Sayovitz, Esq. for respondent
(Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: February 23, 2004 Decided: February 24, 2004

BEFORE **SANDRA ANN ROBINSON,** ALJ:

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a fully executed Settlement Agreement. 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.

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 (45) 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 24, 2004
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Receipt Acknowledged:

2-27-04
DATE

M. Kathleen Dunson /eh
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 1 2004
DATE

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for Respondent,
Board of Education of South Orange/
Maplewood, Essex County

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ANTHONY CICENIA, BETTY CICENIA AND THE SOUTH ORANGE/MAPLEWOOD EDUCATION ASSOCIATION	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
	EDU NO. 299-9/02
Petitioners	OAL DOCKET NO. EDU OT 09379-2002N
v.	
SOUTH ORANGE/MAPLEWOOD BOARD OF EDUCATION	**SETTLEMENT AGREEMENT**
Respondent.	

This matter having been brought before the Court upon the filing of a petition by Anthony Cicenia, Betty Cicenia and the South Orange/Maplewood Education Association and the parties having determined to amicably resolve this matter, herein agree as follows:

1. On or before January 20, 2004, the Superintendent of Schools of Respondent shall recommend to Respondent's Policy Committee that Board Policy 5612 be amended to expand the definitions of "assault" to also include the definition under N.J.S.A. 2C:12-1(a)(3).

2. Respondent agrees that if a teaching staff member employed by Respondent is the victim of an assault, as defined under Board Policy 5612, as amended, the teaching staff member shall be notified of (i) the scheduling of a suspension/expulsion hearing before the Board and given the opportunity to submit a statement to the Board; and (ii) the Board determination, if any.

3. Respondent agrees that 68.5 sick days shall be restored to Betty Cicenia's account of accumulated, sick leave days.

4. In consideration of the foregoing, Petitioners hereby release, waive, and give up any and all claims and rights which they may have against the Board, its employees and agents, arising out of or otherwise related to the claims which were raised or could have been raised.

5. This action is hereby withdrawn with prejudice.

6. The parties acknowledge that they have been represented by counsel in this action, and that the terms of the Settlement have been fully explained to them by counsel, and that they understand the terms.

7. This Agreement is subject to the approval of the Respondent, Board of Education.

ANTHONY CICENIA

Dated: 11-24-03 Anthony Cicenia

BETTY CICENIA

Dated: 11-24-03 Betty Cicenia

SOUTH ORANGE/MAPLEWOOD EDUCATION ASSOCIATION

Dated: 12/10/03 By: Harvard Elder

Its President - SOMEA

SOUTH ORANGE/MAPLEWOOD BOARD OF EDUCATION

Dated: 1/21/04 By: Nilda M. Savey

Its President - BOE

{00657959;1 /SAS }

OAL DKT. NO. EDU 9379-02
AGENCY DKT. NO. 299-9/02

ANTHONY CICENIA, BETTY CICENIA AND THE SOUTH ORANGE-MAPLEWOOD EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, although the Deputy Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, has no objection to the terms of the settlement, he notes that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the proposed settlement pursuant to *N.J.A.C.* 6A:3-1.13(d).

Accordingly, the Deputy Commissioner is compelled to reject the proposed settlement and he hereby remands this matter to the OAL for expansion of the record, consistent with the concern set forth above.

Dwight Pfennig

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 4/07/04

Date of Mailing: 4/08/04

156-04

M.R., on behalf of minor child, M.L.M.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,

RESPONDENT.

: COMMISSIONER OF EDUCATION

DECISION

April 12, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09893-03

AGENCY REF.NO.320-9/03

M.R., ON BEHALF OF MINOR CHILD, M.L.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY,

Respondent.

Chris H. Colabella, Esq., for petitioner (Gruber, Colabella, Liuzza, Kutyla & Ullmann)

Joanne Butler, Esq., for respondent (Schenck, Price, Smith & King)

Record Closed: February 18, 2003 Decided: February 23, 2004

BEFORE **CAROL I. COHEN**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on October 24, 2003 for determination as a contested case. A hearing was scheduled for February 18, 2004.

On February 16, 2004, the parties were able to resolve the matter. On February 18, 2004, the parties submitted the attached Stipulation of Settlement and Mutual Dismissal indicating the terms of the agreement. Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signature of the parties and/or 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 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 (45) 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.

2/23/04
DATE

Carol I Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

2-27-04
DATE

M. Kathleen Duncan/CH
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 1 2004
DATE

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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SCHENCK, PRICE, SMITH & KING
10 Washington Street P. O. Box 905
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(201) 539-1000
Attorneys for Morris Hills Regional
District Board of Education

M.R. on behalf of M.L.,

Petitioner,

v.

MORRIS HILLS REGIONAL DISTRICT BOARD OF EDUCATION,

Respondent/Counterclaimant.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

Agency Ref. No. 320-9/03
OAL DKT NO. EDU 09893-03

STIPULATION OF SETTLEMENT AND MUTUAL DISMISSAL

Petitioner Maud Russ and Respondent/Counterclaimant Morris Hills Regional District Board of Education (hereinafter "Board"), herein stipulate and agree as follows:

1. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

2. The parties waive any and all claims which were or could be asserted in the within action or any other action arising out of the residency claims made in the Petition (Agency Ref. No. of 320-9/03) herein, including attorneys fees and damages pursuant to any federal or State educational, constitutional or civil rights claims, including 42 U.S.C. 1983, and specifically release the other party from any claims arising out of or related to these claims.

3. As a result of the foregoing, Petitioner Maud Russ withdraws her Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant Board hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

Maud Russ 12/18/03
MAUD RUSS Date

Manuel E Deus
Manuel E Deus 1/12/2004
MORRIS HILLS REGIONAL DISTRICT BOARD OF EDUCATION Date

00659452

EXTRACT FROM THE MINUTES OF A REGULAR
BOARD OF EDUCATION MEETING OF THE
MORRIS HILLS REGIONAL DISTRICT
OF ROCKAWAY, NJ, AS RECORDED IN THE OFFICIAL MINUTES BOOK

The Board of Education of the Morris Hills Regional District of Rockaway, in the County of Morris, New Jersey, convened in Special Session on Monday, January 12, 2004, at 8:00 p.m. in the Board Conference Room at Morris Knolls High School in Denville, New Jersey.

The following members were **present:** Thomas Greulich, Steven Kovacs, Samuel Parsons, Maryanne Pasquariello, E. James Soltys and Kalman N. Kolis, President.

The following members were absent: Debra J. Erwine; Vice-President, Florence Hauer and James J. Ross

The following resolution was offered by Mr. Greulich and seconded by Mr. Kovacs and adopted by the Board of Education on a roll call vote:

RESOLVED: Recommend authorization to accept the attached settlement agreement and authorize the Business Administrator/Board Secretary to sign said agreement. (Attachment)

All present voting yes – Motion Carried

STATE OF NEW JERSEY)
) ss
COUNTY OF MORRIS)

I, Manuel E. Deus, Board Secretary of the Morris Hills Regional District Board of Education in the County of Morris, State of New Jersey, hereby certify that the attached extract of the minutes of the meeting of the Board of Education, of said district, duly called and held on January 12, 2004, have been compared by me with the original minutes as officially recorded in my office in the official minutes book of said Morris Hills Regional District Board of Education and is a true and 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 minutes. In witness I have hereunto set my hand and affixed the corporate seal of said Board of Education on this thirteenth day of January 2004.

Manuel E. Deus
Board Secretary

(seal)

OAL DKT. NO. EDU 9893-03
AGENCY DKT. NO. 320-9/03

M.R., on behalf of minor child, M.L.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter, including the Initial Decision and Stipulation of Settlement and Mutual Dismissal. Noting the absence of any document containing the terms of the parties' agreement so as to permit his review under *N.J.A.C.* 1:1-19.1, however, the Commissioner shall consider this matter a withdrawal pursuant to *N.J.A.C.* 1:1-19.2. The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/12/04

Date of Mailing: 4/13/04

157-04SEC

IN THE MATTER OF :

CHARLES FISCHER, : COMMISSIONER OF EDUCATION

EATONTOWN BOARD OF EDUCATION,: DECISION

MONMOUTH COUNTY. :

SYNOPSIS

The School Ethics Commission determined that respondent Board member violated *N.J.S.A.* 18A:12-24.1(e) and (i) of the School Ethics Act for calling an employee at home and becoming angry when she said she did not send him the reports that he requested.

After considering the nature of the charge and respondent's submission, the Commission recommended a penalty of reprimand.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent reprimanded 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.

April 12, 2004

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
CHARLES FISCHER,	:	**Docket No.: C30-03**
EATONTOWN BOARD OF EDUCATION MONMOUTH COUNTY	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint alleging that Mr. Fischer called an employee at home and when she returned the call, threatened her, told her that she was breaking the law and demanded that she return to work at 8:45 p.m. on a Friday night in order to obtain reports that Mr. Fischer had requested earlier in the day. She alleged that his conduct violated Code of Ethics sections N.J.S.A. 18A:12-24.1(a), (b), (c), (d), (e) and (i) of the School Ethics Act.

In his answer, Mr. Fischer stated that he asked for financial information from complainant early on Friday morning because she was the most senior full time member of the financial staff at the Board Office. He said that she agreed to provide the information. He did not receive a call from the complainant all day so he obtained her home number from the board secretary and left a message. When she called back and said that she did not send him the requested information, they got into an argument. He said that she started yelling at him first and he admits that he was "most likely yelling himself" in response. He denied ever demanding anything of her or threatening her and denied having violated the School Ethics Act.

The parties were invited to attend the Commission's October 28, 2003 meeting to testify and present witnesses. Both parties appeared on their own behalf. At its special public meeting on October 31, 2003, that was called to complete the Commission's October 28, 2003 agenda, the Commission found probable cause to credit the allegations that Mr. Fischer violated N.J.S.A. 18A:12-24.1(d), (e) and (i) of the Code of Ethics, but found no probable cause to credit the allegation that he violated sections N.J.S.A. 18A:12-24.1(a), (b) and (c).

In his response to the Commission's probable cause decision, Mr. Fischer argued that he did not administer the schools in violation of N.J.S.A. 18A:12-24.1(d) since he called Mrs. Miller as a result of her invitation and she returned his call when he was unsuccessful in contacting her. Although Mr. Fischer admits that he did raise his voice during his conversation with Mrs. Miller, he argues that he was responding to Mrs. Miller yelling at him and that he was not acting out of anger or in a manner that would compromise the board in violation of N.J.S.A. 18A:12-24.1(e). Mr. Fischer further argues

that by requesting the information he did not fail to support or protect Mrs. Miller in the performance of her duties in violation of N.J.S.A. 18A:12-24.1(i). After consideration of Mr. Fischer's response to its probable cause decision, the Commission found, at its meeting of February 3, 2004, that Mr. Fischer violated N.J.S.A. 18A:12-24.1(e) and (i), but that he did not violate N.J.S.A. 18A:12-24.1(d) and dismissed this charge against him. The Commission recommended a penalty of reprimand.

FACTS

The Commission was able to discern the following facts based on the pleadings, documents submitted, testimony and its investigation.

At all time relevant to this complaint, Mr. Fischer was a member of the Eatontown Board of Education. Complainant was at all times relevant to this complaint, an employee of the Eatontown Board of Education who worked in the business office.

On Thursday, June 26, 2003, Mr. Fischer had a conversation with the incoming superintendent who was scheduled to begin working on July 1, 2003. During that conversation, the incoming superintendent mentioned that she had met with the complainant regarding the 2003-04 budget. Mr. Fischer had some concerns as a result of his meeting with the incoming superintendent. Considering complainant to be the most senior full-time member of the financial staff, next to the business administrator, and the one whom board members frequently contacted for information, Mr. Fischer spoke to complainant on the morning of Friday, June 27, 2003 about the budget and the proposed cut of 11 unidentified teachers. Based on the conversation, Mr. Fischer asked her for 1) the payroll by person for the 2002-03 year; 2) the payroll by person for the 2003-04 budget; 3) a report of the preliminary close of the year showing the 2002-03 expense details compared to the revised 2003-04 budget and if the comparison could not be done in one report, then two separate reports. Complainant said she would send the information to his house and offered to include her phone number and cell phone number with the package so he could call her with questions.

Mr. Fischer did not receive a call from the complainant or any employees of the Board that day, although they all have his various phone numbers. He tried to call complainant at the board office from his cell phone as he drove home in his car. There was no answer; so he called the board secretary who gave him complainant's home phone number. He called the number and left a message.

Complainant returned his call at approximately 8:30 p.m. and told him that she did not send him the schedules that he requested. She told him that she did not want to get in the middle of this. When he asked what she meant, she did not give an exact answer, but said that she had spoken to the superintendent who told her to talk to the incoming superintendent who told her to speak to the board president. Mr. Fischer told her that a board member should not be refused information to which she replied that the information

AGENCY DKT. NO. 82-2/04

IN THE MATTER OF	:	
CHARLES FISCHER,	:	COMMISSIONER OF EDUCATION
EATONTOWN BOARD OF EDUCATION,	:	DECISION
MONMOUTH COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission ("Commission") finding Eatontown Board of Education member Charles Fischer violated Code of Ethics section *N.J.S.A.* 18A:12-24.1(e) and (i) of the School Ethics Act, and recommending a penalty of reprimand have been reviewed. Upon issuance of the decision of the Commission, Mr. Fischer was provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration.

No comments were filed by Mr. Fischer.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the

reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied that in recommending a penalty for the violations it found, the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS hereby ORDERED that Charles Fischer be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/12/04

Date of Mailing: 4/13/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

158-04

SYLVIA LUSTBERG,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner alleged that the Board's failure to reemploy her for the 2003-04 school year as a full-time teacher was a violation of her tenure and seniority rights pursuant to *N.J.S.A.* 18A:28-5. Petitioner contended that her time spent as a long-term substitute teacher from March through June 2000 in place of third grade teacher, Ms. Lituchy, should have been counted toward the acquisition of tenure.

The ALJ found that Ms. Lituchy's position did not become vacant until the end of the 1999-2000 academic year and petitioner remained a long-term substitute during the period from March 6, 2000 through June 30, 2000, the date when Ms. Lituchy's resignation became effective. Thus, the ALJ concluded that petitioner's service as a long-term substitute could not be counted toward her tenure since the position she filled did not become vacant until June 30, 2000. The ALJ, therefore concluded that the Board could release petitioner following three years of service because she had not acquired tenure pursuant to *N.J.S.A.* 18A:28-5(c). (*Spiewak; Lammers*; *Sayerville;* and *Driscoll*)

The Commissioner concurred with the ALJ, noting that petitioner was not entitled to accrue time toward tenure acquisition while serving in an "acting" position in that Ms. Lituchy's resignation did not become effective until June 30, 2000. Since petitioner's service during the 1999-2000 school year could not be counted toward tenure, the Commissioner found that petitioner did not achieve tenure by the end of the 2002-03 school year. The Commissioner also found that the Board did not act in bad faith toward petitioner in that it did appoint petitioner to teaching positions for the next three consecutive school years. Therefore, it was within the Board's discretion to inform petitioner, a nontenured teacher, that her contract would not be renewed for the 2003-04 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.

April 12, 2004



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 7080-03

AGENCY DKT. NO. 164-5/03

SYLVIA LUSTBERG,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

Respondent.

Louis P. Bucceri, Esq., for petitioner (Bucceri & Pincus, attorneys)

Linda Ganz Ott, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: February 10, 2004 Decided: February 27, 2004

BEFORE **EDITH KLINGER**, ALJ:

On May 22, 2003, petitioner, Sylvia Lustberg, filed a Petition with the Commissioner of Education seeking to compel the Board of Education of the Township of Tenafly (Board) to grant her tenure as a teacher in the school district (District) with

tenure and seniority rights, salary, benefits and emoluments retroactive to March 7, 2003.

On June 19, 2003, the Board filed its answer and on July 16, 2003, the Commissioner of Education transmitted the matter to the Office of Administrative Law for hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

During a pre-hearing telephone conference with the parties, it was determined that the facts in this matter could be stipulated and the appeal proceed to hearing on cross-motions for summary decision. The record closed on February 10, 2003, when the final submission was received from the parties.

THE STIPULATED FACTS

The facts in this matter are not in dispute. They are as follows:

1. On or about June 14, 1999, the Board approved an extension of child-rearing leave for third grade teacher, Anne Lituchy, for the 1999-2000 school year.

2. Lituchy performed no duties for the Board and received no salary during the 1999-2000 school year. This is confirmed by the Board's payroll records for the designated year.

3. On or about June 28, 1999, the Board approved the hiring of Lustberg as a third grade long-term substitute teacher for the 1999-2000 school year to replace Lituchy during her child-rearing leave.

4. Lustberg holds an instructional certificate with an endorsement for elementary school teacher issued in July 1999.

5. At the Board's instruction, upon hiring, Lustberg was enrolled in the Public Employees Retirement System (PERS) from September 1, 1999 through August 2000. She was not enrolled in the Teachers'

Pension and Annuity Fund (TPAF) because she was hired as a temporary employee, replacing an individual on a leave of absence.

6. Throughout the course of the 1999-2000 school year, Lustberg performed all of the duties of a classroom teacher in respondent's Mackay Elementary School. Lustberg was observed by the Board's administrative staff on at least three occasions during the 1999-2000 school year.

7. Lustberg was employed for the 1999-2000 school year pursuant to a written employment contract. Her salary was set at M.A. Step 2 of the teachers' salary guide.

8. In order to assess staffing needs for the 2000-2001 school year, the Board sent a letter to Lituchy on or about February 4, 2000, inquiring whether she would be returning to her position for the next school year,

9. On or about February 23, 2000, the Board received a response from Lituchy stating that she would not return in September 2000 and enclosing her resignation.

10. On or about March 6, 2000, the Board accepted the resignation of Lituchy, effective June 30, 2000.

11. On or about April 4, 2000, Lustberg was notified that the Board had resolved to terminate her employment as a long-term substitute teacher as of June 30, 2000.

12. A letter dated, May 1, 2000 from Superintendent A. Glen Everhart to Lustberg offered her an elementary teaching position at a salary of $41, 833 at M.A. Step 3 for the 2000-2001 school year which was approved by the Board on or about May 8, 2000.

13. On or about June 6, 2000, Lustberg submitted an application to transfer her PERS account to the TPAF.

14. Lustberg was employed as a third grade teacher at the Mackay Elementary School for the 2000-2001 school year at an adjusted salary of $42,133 (M.A. +8 Step 3).

15. Lustberg was employed as a third grade teacher at the Mackay Elementary School for the 2001-2002 school year at an adjusted salary of $44,735 (M.A. +8 Step 4).

16. Lustberg was employed as a third grade teacher at the Mackay Elementary School for the 2002-2003 school year at an adjusted salary of $46,849 (M.A. +8 Step 5). This was adjusted to $47,149 for M.A. +16 Step 5.

17. By letter dated March 17, 2003 from Superintendent Darrell R. Lund, Lustberg was informed that her employment contract would not be renewed for the 2003-2003 school year.

18. If Lustberg had been employed by the Board for the 2003-2004 school year, her salary would have been $49,422 for M.A. +16 Step 6.

19. For the 2003-2004 school year, the Board employs thirty-two non-tenured teachers in positions requiring instructional certification with an elementary school teacher endorsement.

20. For the 2003-2004 school year, Lustberg is employed as a teacher in a private school, The Solomon Schechter Day School of Bergen County, at an annual salary of $45,868.

21. If Lustberg had been employed by the Board for the 2003-2004 school year, the Board would have provided her with family coverage health and dental insurance at no cost to her.

22. For the 2003-2004 school year, Lustberg is enrolled in her husband's health and dental insurance plan with family coverage at her cost. The parties agree to defer calculation of that cost pending the outcome of the liability phase of this appeal.

DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS

The acquisition and effect of tenure are statutorily defined by *N.J.S.A.* 18A:28-5, which states that teaching staff members acquire tenure by completing:

> (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) The equivalent of more then three academic years within a period of any four consecutive academic years.

"Academic year" is defined in *N.J.S.A.* 18A:1-1 as "the period between the time school opens in any school district or under any board of education after the general summer vacation until the next summer vacation."

The facts show that Lustberg was employed as a teaching staff member for three consecutive academic years: 2000-2001, 2001-2002, and 2002-2003. If she had been rehired for the 2003-2004 academic year, she would clearly have acquired tenure pursuant to *N.J.S.A.* 18A:28-5(b). Consequently, the only way that Lustberg can now be deemed to have acquired tenure is pursuant to *N.J.S.A.* 18A:28-5(c), but only if her teaching time during the 1999-2000 school year can be counted toward tenure.

The New Jersey Supreme Court has held that "all teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years, are eligible for tenure unless they come within the explicit exceptions in *N.J.S.A.* 18A:28-5 or related statutes such as N.J.S.A. 18A:16-1.1." *Spiewak v. Bd. of Educ. of Rutherford*, 90 *N.J.* 63, 81-82 (1982).

In the present matter, it is undisputed that Lustberg worked in a position requiring a certificate, and that she possessed the necessary certificate when she was holding that position. Additionally, it is undisputed that she was employed as a full-time teacher for the requisite number of academic years. The only remaining issue is whether Lustberg falls within one of the explicit statutory exceptions.

N.J.S.A. 18A:16-1.1, provides the following exception to the tenure statute:

> In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee subject to the provisions of section 18A:17-13.
>
> The act of any person so designated shall in all cases be legal and binding as if done and performed by the officer or employee for whom such designated person is acting but no person acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.

This exception applies "when the services of a substitute teacher are required because of the temporary absence, even if protracted, of a regular teacher whose return to duty is contemplated." *Sayreville Educ. Ass'n v. Bd. of Educ. of the Borough of Sayreville*, 193 *N.J. Super.* 424, 428 (App. Div. 1984). It helps to prevent a school board from incurring the expense of providing duplicative benefits if both the substitute and the absent teacher were to be regarded as simultaneously entitled to all of the statutory and contractually mandated benefits of regular staff membership. *Id.*, at 430.

This holding applies only where the position to be filled is not a vacant one. If it is, then a long-term substitute teacher filling the vacant position is entitled to have this period credited toward tenure. *Id.,* at 428-9.

In *Lammers v. Bd. of Educ. of the Borough of Point Pleasant*, 134 *N.J.* 264, 267 (1993), the Court stated, "an entitlement to a position arises only when a vacancy exists." In that case, a tenured teacher, who had lost her position as a result of a

reduction in force, petitioned to require the board of education to rehire her to fill in for a tenured teacher on a one year maternity leave. *Id.* at 266. The court held that "a one-year leave of absence does not create a vacancy or temporary vacancy under *N.J.S.A.* 18A:28-12." *Id.* at 267.

However, if the employee on leave terminates his or her employment at the time the substitute is appointed, then the position which the substitute is filling is vacant and *N.J.S.A.* 18A:16-1.1 does not apply. *Sayreville Educ. Ass'n, supra,* at 430.

Therefore, according to the case law as stated above, the first issue to be resolved In the present matter is whether a vacancy occurred at the time the Board approved the resignation of Lituchy or at the time her resignation became effective.

The undisputed facts, based upon the documentary evidence as well as the stipulations, are these. On June 17, 1999, the Board granted Lituchy a leave of absence for "the 1999-2000 school year." That is, this leave, pursuant to *N.J.S.A.* 18A:1-1, extended from the time school opened in September 1999 until June 30, 2000, the beginning of the next summer vacation.

Lituchy was told in the letter of notification, dated February 4, 2000, that she would have to notify the District by March 1, 2000 of her intent to return for the following academic year so that the District could plan for its staffing needs. Lituchy's resignation was tendered directly in response to the Board's specific inquiry about the next year and she stated that she would "not return in September 2000." Her response does not offer her immediate resignation.

The Board accepted her resignation on March 6, 2000 for purposes of planning but it did not rescind the one year child-rearing leave previously granted since she did not ask that it be done. In accord with its prior commitment to Lituchy, it made her resignation effective at the end of her approved leave, June 30, 2000. I **FIND** that, pursuant to *N.J.S.A.* 18A:28-5, the Board could not terminate Lituchy, a tenured teacher, at an earlier time since it had no just cause to do so. I **FIND** nothing in the

record to suggest that the Board's approval of Lituchy's resignation at the end of the academic year was intended to circumvent Lustberg's tenure rights.

Lustberg was hired as a long-term substitute to fill Lituchy's position until her return. Petitioner's contract specifically designates her status and her term of employment as September 1, 1999 to June 30, 2000. She neither attempted to change her status when Lituchy's resignation was accepted by the Board on March 3, 2000 nor when it became effective on June 30, 2000. Petitioner continued to serve as a long-term substitute until the end of the academic year and accepted the Board's termination of that status. On May 9, 2000, the Board approved her hiring as a regular third grade teacher for the following academic year. She applied to TPAF on June 7, 2000 stating that she resigned from her long-term substitute position as of June 30, 2000.

Lustberg was given a good evaluation for her service as a substitute. This is reflected in the Board's offer of a contract for the following year. I **FIND** that the Board acted in good faith toward Lustberg. It hired her for the following year and the two subsequent years as a regular teacher and refused to rehire her only after determining that her performance was not up to the District's standards. The issue of her performance was not contested and is not before this forum.

Where a Board does not act in bad faith and has no real control over the actions of an absent teacher, it

> can not be compelled to convert the status of a substitute to that of a regular teacher for the purpose of adding the time served as a substitute to the time served as a regular teacher in order to provide her with the time necessary to effect tenure. This is so notwithstanding the fact that she did the work of a regular teacher.
>
> [*Driscoll v. Bd. of Ed. of the City of Clifton,* 165 *N.J. Super.* 241,246 (App. Div. 1977, *aff'd* 79 *N.J.* 126 (1979).]

Based upon the above, I **FIND** that Lituchy's position did not become vacant until the end of the 1999-2000 academic year and Lustberg remained a long-term substitute during the period from March 6, 2000 through June 30, 2000.

I, therefore, **CONCLUDE** that Lustberg's service as a long-term substitute during the 1999-2000 academic year cannot be counted toward her tenure since the position she filled did not become vacant until June 30, 2000. For this reason, I **CONCLUDE** that the Board could release Lustberg following her three years of service because she had not acquired tenure pursuant to *N.J.S.A.* 18A:28-5(c).

ORDER

Accordingly, it is **ORDERED** that respondent is entitled to summary decision in this matter and the petition of Sylvia Lustberg is hereby **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 (45) 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 (13) 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, 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 27, 2004
DATE

EDITH KLINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

2-27-04
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 1 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

OAL DKT. NO. EDU 7080-03
AGENCY DKT. NO. 164-5/03

SYLVIA LUSTBERG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and respondent's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were considered by the Commissioner in reaching his decision.

Initially, petitioner takes exception to the statement in the Initial Decision that "[t]he issue of her performance was not contested," asserting that no finding can be made on that topic because there was no evidence submitted, and moreover, whether or not petitioner contested her nonrenewal is irrelevant to the determination of her tenure rights.[1] (Petitioner's Exceptions at 2, quoting Initial Decision at 8) Petitioner also takes issue, *inter alia*, with the conclusion in the Initial Decision that *Driscoll, supra,* is analogous to this matter, arguing that, in the instant matter the Board had complete control over Ms. Lituchy's employment, wherein the Board in *Driscoll* did not have control over the actions of Voss, the teacher being replaced in that matter. (*Id.* at 3) In support thereof, petitioner avers that Voes "engaged in a series of

[1] Petitioner claims that she "did dispute the reasons for her nonrenewal but did not litigate them because in the absence of tenure, she could not successfully dispute reasons which do not qualify as arbitrary or capricious." (Petitioner's Exceptions at 2)

contradictory decisions about returning to work and not doing so" and did not submit a resignation until "*after* the service time Driscoll sought to include for tenure." (emphasis in text) (*Ibid.*) Thus, petitioner submits, the Board in *Driscoll* could not deem Voss as having abandoned her position because it had no knowledge as to whether or not she would return. (*Ibid.*) Petitioner concludes, therefore, that whether the Board had control over the employment of the teacher being replaced is a critical difference that was ignored in the Initial Decision. (*Ibid.*)

Moreover, petitioner points out that Ms. Lituchy's resignation letter does not specify the effective date of her resignation, but simply states that she is resigning. (*Id.* at 4) Petitioner submits that it is clear that the Board's vote to accept Ms. Lituchy's resignation on March 6, 2000 made such resignation binding and non-rescindable. (*Ibid.*) Petitioner, therefore, contends that, on March 6, 2000, the Board thus had the certainty that did not exist in *Driscoll, supra,* and that payroll records listing Ms. Lituchy as terminated as early as May 15, 2000 prove this contention. (*Ibid.*) In pointing out that she only needs one day of service in 1999-2000 to achieve tenure, petitioner claims that the wording of the Board's March 6, 2000 resolution accepting Ms. Lituchy's resignation effective June 30, 2000 was simply the Board's choice and is the only basis for denying her tenure in that the wording of that resolution was not necessitated by Ms. Lituchy's resignation letter or required by any payroll obligation to her. (*Id.* at 4-5)

Additionally, petitioner argues that on May 8, 2000 she was appointed to teach the next year, which shows that even before June 30, 2000 the Board had hired her to continue in her position because it knew that Ms. Lituchy was not returning. (*Id.* at 5) Pointing to *Spiewak, supra*, and *citing Lammers, supra*, at 272, petitioner contends that "the demarcation between true substitute service (excluded from tenure accrual by *N.J.S.A.* 18A:16-1.1) and tenure-eligible replacement service must be the *knowledge* on the part of the board as to the status of the absent person." (emphasis in text) (*Id.* at 5-6) The time served by a replacement person must

therefore, petitioner concludes, count towards tenure once a board knows with certainty that the individual being replaced is not returning. (*Id.* at 6) Accordingly, petitioner contends that her service from February 23, 2000 onward was in a vacant position and should be counted as time toward tenure because the Board in the instant matter knew precisely at that point that the incumbent did not intend to return.[2] (*Ibid.*) In further support thereof, petitioner points to *Jannarone v. Bd. of Ed. of Asbury Park et al.,* 1976 *S.L.D.* 526 and *Puryear v. Bd. of Ed. of East Orange*, 1987 *S.L.D.* 2412, averring that "these cases stand for the proposition that a board cannot unilaterally turn a vacant job into one which is temporarily unoccupied by labeling the job as an 'acting' position." (*Id.* at 7)

Moreover, petitioner submits that *Ward v. Westfield Bd. of Ed.*, 1988 *S.L.D.* 386, *aff'd* with modification 1988 *S.L.D.* 395 (Comm. of Ed.), *aff'd* 1988 *S.L.D.* 400 (St. Bd. of Ed.) lends further support for her position. (*Ibid.*) In *Ward,* a teacher who had suffered a heart attack did not resign, but, instead, by letter of May 15, 1985 advised the board that he was permanently disabled and requested a one-year leave so he could qualify for a veteran's retirement rather than a disability pension. (*Id.* at 8) Notwithstanding that the teacher did not submit a binding resignation, nor did the board act to approve a resignation, retirement or vacancy, petitioner contends, the State Board found that the May 15 letter created a vacant position so that Ms. Ward's service after that point was tenure eligible. (*Id.* at 9) Thus, petitioner concludes, in that the Board knew with certainty on February 23, 2000 that Ms. Lituchy was not returning, petitioner's service from that date must count toward tenure. (*Ibid.*)

In reply, the Board takes issue with petitioner's assertion that Ms. Lituchy's position became vacant when the Board knew that she would not be returning for the next school

[2] According to the Joint Stipulation of Facts, the Board received Ms. Lituchy's resignation letter on or about February 23, 2000, stating that she would not return in September 2000. (Stipulation of Facts, No. 9 at 3)

year, averring that, from the Joint Stipulation of Facts "it is clear that Ms. Lituchy was on a leave of absence until June 30, 2000 and that her resignation effective June 30, 2000 was directed towards her desire not to return for the 2000-2001 school year." (Board's Reply Exceptions at 1) With respect to petitioner's contention that the Administrative Law Judge's (ALJ) decision might have turned on her statement that the issue of petitioner's performance was not contested, the Board states that it is difficult to understand how petitioner could have reached this conclusion in that the finding merely reflected the Board's action and evaluative comment and that the matter was not at issue in this litigation. (*Id.* at 2)

Turning to whether *Driscoll, supra,* applies, the Board argues that it does apply, because on the one important issue raised, the cases are analogous; that is, the Board in *Driscoll* did not have control over a teacher who did not return to work and the Board herein did not have control over Ms. Lituchy's resignation. (*Ibid.*) In support thereof, the Board submits that: 1) Ms. Lituchy was granted a leave of absence for the entire 1999-2000 school year and was expected to return; 2) the Board requested Ms. Lituchy to indicate whether she would be returning to teach in 2000-2001 in order to prepare for the next school year; and 3) Ms. Lituchy advised the Board she would not be returning the next year and submitted her letter of resignation. (*Ibid.*) The Board claims that Ms. Lituchy's letter, clearly stating that her resignation was to be effective the next school year, was in direct response to its specific inquiry regarding the next school year, and in that her letter does not offer her immediate resignation, the Board had no choice but to accept her resignation effective at the conclusion of her leave. (*Id.* at 2-3) The Board concludes, therefore, that it had no more control over petitioner's resignation than the board in *Driscoll* did. (*Id.* at 3)

Moreover, the Board claims that petitioner is correct that Ms. Lituchy could not rescind her resignation once it was approved by the Board, but asserts that what she could not

rescind was that she would not have an employment relationship after June 30, 2000. (*Ibid.*) The Board reiterates its position that Ms. Lituchy's resignation was not an immediate severance of her employment relationship and that the position was, therefore, not vacant on March 7, 2000 after the Board accepted her resignation, but, instead, was vacant after the effective date of the resignation on June 30, 2000. (*Id.* at 3-4) Petitioner further claims that "[t]he payroll record (J-23-24), relied on by Petitioner, does not reflect the Board action and can only be considered a payroll clerk's mistake." (*Id.* at 4)

The Board acknowledges that *Jannarone, supra*, stands for the proposition that if you do all the duties of a position, you are entitled to accrue tenure in that position even if it is an "acting" position, but reasons that the *Jannarone* decision defies logic when examining the clear language in the statute, *N.J.S.A.* 18A:16-1.1, which states:

> In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee...*The act of any person shall in all cases be legal and binding as if done and performed by the officer or employee for whom such designated person is acting, but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.* (emphasis in text) (*Ibid.*)

It is thus clear from the statute, the Board argues, that the substitute will act exactly as a teacher, but that such time served does not accrue towards tenure acquisition. (*Ibid.*)

With respect to *Ward, supra*, the Board contends that *Ward* is distinguishable form the instant matter because, in *Ward*, the teacher's letter stating that she was permanently disabled and not able to return to work was the only notice received from the teacher and provided the only certainty on which the board could rely; whereas, in this matter, Ms. Lituchy's letter provided a certainty that she was resigning effective June 30, 2000. (*Id.* at 5) The Board avers that *Williams v. Board of Educ. of the City of Orange*, 1987 *S.L.D.* 997, 1000, *aff'd* State Board of Educ. 1988 *S.L.D.* 2534 is the only case that it has identified that deals with the issue of

a letter of resignation with a future effective resignation date. (*Ibid.*) In *Williams*, the Board received a letter on or about March 28, 1983 from an ill teacher, resigning/retiring effective May 15, 1983. (*Ibid.*) The Commissioner in *Williams* found that "the teacher on leave maintained an employment relationship with the District *until the effective date of his resignation* and retirement, not when the letter of resignation was provided to the District." (emphasis in text) (*Ibid.*) The Board avers that the same principle applies herein and that petitioner accrued time towards tenure by working three school years for the Board, but did not work the one day in the fourth school year that would entitle her to tenure pursuant to *N.J.S.A.* 18A:28-5(b), nor did she attain tenure under *N.J.S.A.* 18A:28-5(a) or (c). The Board concludes, therefore, that it was within its rights not to renew petitioner's contract for the 2003-04 school year since petitioner had not achieved tenure. (*Id.* at 6)

Upon careful and independent review of the record, the Initial Decision, petitioner's exceptions and the Board's reply thereto, the Commissioner determines to adopt the findings and conclusions expressed in the Initial Decision, finding that petitioner's service as a long-term substitute for the 1999-00 school year cannot be counted toward tenure. Accordingly, the Board could release petitioner following her three years of service because she had not achieved tenure pursuant to *N.J.S.A.* 18A:28-5(c). In so determining, the Commissioner emphasizes in response to the concern expressed in petitioner's exceptions that this ultimate conclusion does not rest on whether or not petitioner contested her nonrenewal as that issue is not before him and is irrelevant to the determination of petitioner's tenure rights.

The Commissioner reiterates that it is undisputed that Ms. Lituchy was granted a one-year leave of absence for the 1999-00 school year. (Exhibit J-1, in evidence) In *Lammers, supra* at 267, the Court found that "an entitlement to a position arises only when a vacancy exists" and that "a one-year leave of absence does not create a vacancy or temporary vacancy

under *N.J.S.A.* 18A:28-12." Ms. Lituchy's position was, therefore, not vacant during her one-year leave of absence that ended June 30, 2000. In response to a February 4, 2000 letter from the Board inquiring as to whether she would return to her position the next school year, 2000-2001, Ms. Lituchy responded:

> It is with mixed feelings that I write this letter to inform you of my resignation from my teaching position in the Tenafly School District. While I have greatly enjoyed my teaching position at Mackay School, I wish to spend the next several years as a full-time, stay-at-home mother to my two sons.
>
> Taking care of young children is a full-time, demanding job, and I do not feel I could be a fine teacher while fulfilling the responsibilities I have at home. *I am enclosing the letter I recently received from Terry Collins stating that I will not return in September 2000.*
>
> Thank you.
> (emphasis supplied) (Exhibit J-8, in evidence)

Thus, Ms. Lituchy's response, provided in answer to the Board's specific inquiry as to whether she planned to return for the 2000-01 school year, does not offer her immediate resignation or specify an effective date of her resignation that revokes her leave of absence, but instead, informs the Board that she will not be returning in September 2000. The Commissioner notes that, in accepting Ms. Lituchy's resignation on March 6, 2000, the Board did not rescind the one-year leave of absence granted her in accord with its prior commitment, but made Ms. Lituchy's resignation effective June 30, 2000, the end of her approved leave. As observed by the ALJ, "pursuant to *N.J.S.A.* 18A:28-5, the Board could not terminate Lituchy, a tenured teacher, at an earlier time since it had no just cause to do so." (Initial Decision at 7) Notwithstanding petitioner's arguments that the ALJ misapplied *Driscoll, supra, Spiewak, supra and Lammers, supra,* in this matter and that petitioner's service from February 23, 2000 onward should be counted towards her tenure service because the Board knew with certainty on that date that Ms. Lituchy was not returning, the Commissioner concurs with the ALJ that Ms. Lituchy's

resignation was not effective until June 30, 2000 and, thus, her position was not vacant until that date. For the reasons fully explicated in the Initial Decision, the Commissioner finds this conclusion entirely consistent with *Spiewak, supra; Lammers, supra; Sayreville, supra; and Driscoll, supra.*

Additionally, the Commissioner rejects petitioner's reliance on *Ward, supra.* Unlike *Ward,* wherein the retiring teacher notified the board that his health status prohibited his return to teaching and requested that "the Board consider granting him retirement 'one year hence as a veteran at half-pay rather than as a disabled teacher this year at a significantly lower rate,'" *Ward, supra* at 397,[3] Ms. Lituchy was on an *approved* one-year leave of absence that expired June 30, 2000, and she submitted a letter that specifically stated that she was not returning in September. Absent Ms. Lituchy's request to terminate her leave of absence prior to June 30 or the provision of an effective date for her resignation that differed from June 30, 2000, there was no basis for the Board in this matter to adjust her resignation date.

With respect to *Jannarone, supra*, the Commissioner notes that this decision was not reviewed by the State Board or the Courts. Since the 1976 *Jannarone* decision, however, by decisions in *Spiewak, supra, Sayreville, supra, and Lammers, supra,* the courts have interpreted and clarified the exception to the Tenure Act relating to the tenure accrual exception set forth in *N.J.S.A.* 18A:16-1.1 as a statute that denies tenure accrual during the time served to temporary employees who act in place of another employee who is absent, disabled or disqualified and who is ultimately expected to return to the position. Thus, the Commissioner concludes that petitioner, while acting as a teacher for Ms. Lituchy during her leave of absence, is not entitled to accrue time toward tenure acquisition while serving in such "acting" position.

[3] It is unclear whether the Board in this matter granted this request.

Moreover, the Commissioner cannot find that the Board acted in bad faith toward petitioner in that it appointed petitioner to teaching positions for the next three consecutive school years. However, since petitioner's service as a long-term substitute for Ms. Lituchy for the 1999-00 school year cannot be counted toward tenure, the Commissioner finds petitioner had not achieved tenure at the end of the 2002-03 school year. It was, therefore, within the Board's discretion to inform petitioner, a nontenured teacher, that her contract would not be renewed for the 2003-04 school year.

Accordingly, the Commissioner adopts the Initial Decision in this matter for the reasons expressed therein.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 4/12/04

Date of Mailing: 4/14/04

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

159-04

#159-04

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" Board of Education appealed the Department of Education's determination with respect to funding for the district's 2004-05 preschool program.

Of the issues in dispute, only two remained following settlement negotiations between the parties. On the remaining issues, the ALJ, in light of testimony provided and the record, determined in favor of the respondent Department. The ALJ found no legal requirement to provide computers exclusively for teachers nor does the State's Technology Plan require a five to one ratio for computers for students. As to the appropriate method for funding preschool disabled children, the ALJ found they are already included in enrollment figures which drive the amount of CEIFA aid and the State is not mandated to exclusively fund preschool in the *Abbott* districts.

The Commissioner adopted the ALJ's decision as his own.

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.

April 15, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1705-04

AGENCY DKT. NO. 54-2/04

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION (EARLY CHILDHOOD EDUCATION),

Respondent.

Richard E. Shapiro, Esq., appearing for petitioner
(Richard E. Shapiro, L.L.C., attorney)

Kathleen Asher, Deputy Attorney General, appearing for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: March 12, 2004 Decided: March 23, 2004

BEFORE **STEPHEN G. WEISS**, ALJ:

NATURE OF THE CASE AND PROCEDURAL HISTORY

In mid-August 2003, the New Jersey Department of Education, Office of Early Childhood Education, provided the "*Abbott*" school districts with an "Instruction and

Guidance" document respecting the development by each such district, including the Board of Education of Elizabeth (hereafter "Board"), of a programmatic budget reflecting the actual cost of delivering a preschool program in 2004-2005 (J-3). In mid-November 2003, the Board, in accordance with those instructions, submitted a budget which described its needs in a variety of preschool areas (J-1). The Board pointed out that its plan was designed to provide its three and four year old preschool children with the tools necessary to prepare them to move on to kindergarten and thereby to facilitate their ability to achieve those objectives described in the *"Abbott V"* (*Abbott v. Burke*, 153 *N.J.* 480 (1998)), and *Abbott VI*, (163 *N.J.* 95 (2000)) decisions. See also, *N.J.A.C.* 6A:10A-1.1, *et seq.* These are accomplished, in part, by providing one teacher and one aide for every 15 preschool pupils, and prohibiting any class to exceed that number. *N.J.A.C.* 6A:10A-2.2(a)(3). The districts must also provide programs that meet the Department's Preschool Teaching and Learning Expectations: Standards of Quality, 2002 ("Expectations"), participate in self assessment and validations systems and provide master teachers at a ratio of no more than 20 preschool classrooms for each master teacher. *N.J.A.C.* 6A:10A-2.2(a)(4)(6)(7).

To assist *Abbott* districts in providing high quality preschool programs, as well as meeting applicable regulatory requirements, the Department had provided certain guidelines. Thus, pursuant to *N.J.A.C.* 6A:10A-2.3, *Abbott* districts were required to provide three-year operational plans to the Department, with annual revisions for the appropriate school years by November 15 of each year. After approval of the 2003-2006 Plan, the districts then were required to submit annual one-year programmatic budgets for each of the school years contained in the three-year plan and also to report on their progress toward achieving the objectives outlined in their approved plans. *N.J.A.C.* 6A:10A-2.3(i)(j).

As noted, in November 2003, Elizabeth submitted its one-year operational budget for the 2004-2005 school year, one-year operational budget for its early childhood providers for the 2004-2005 school year, and revisions to its three-year plan (J-1). On January 15, 2004, the Department responded to (and largely approved) the

Board's proposal (J-2). However, some "Special Requests," which were part of the proposal were disapproved including, *inter alia,* funding for five computers (four for the students and one per teacher) in each of 40 classrooms under construction (designated as Schools No. 44 and 45). According to the Department, the Board already had received adequate funding for "start up" classroom materials, supplies and technology sufficient to meet its needs and these funds provided for enough computers (J-2, p. 6). That determination is one of two items which are the subject of the instant appeal.

Although nine (9) separate areas initially were identified in the Board's Verified Petition of Appeal with respect to the denial of its funding requests, seven were settled prior to the start of the hearing on March 1, 2004, leaving only the computer issue mentioned above and another issue to be described below.

In its Instruction and Guidance document the Department specifically noted that preschool disabled students are already supported by funding through regular State School Aid, *N.J.S.A.* 18A:7F-1, *et seq.*; thus, no such child, either in a self-contained classroom or included in a regular education preschool classroom, would be separately funded through preschool program aid. To make its point, the Department instructed the Board that classified preschool students must not be included in any line item within the preschool program support areas because funding for those students was covered pursuant to the Comprehensive Educational Improvement and Financing Act (CEIFA). Those students are required to be included in the district's pupil enrollment data and each is supported by a minimum of $11,569 per pupil with no related services (Tier I), up to a maximum of $22,586 for students classified as "Tier 4" who also may receive up to four related services, based on the 2002 level of aid. "Tier 4" are the more severely disabled category of classified preschool disabled pupils. See, *N.J.A.C.* 18:7F-19.

The Board's Verified Petition was transmitted to the Office of Administrative Law as a contested case on February 19, 2004 and plenary hearings were scheduled for Monday, March 1, 2004 and Tuesday, March 2, 2004. However, the first hearing date, March 1, was used by the parties to discuss resolution of some of the issues. As a

result, all but two of the issues were resolved and those two were the subject of the testimony at the hearing conducted on March 2, 2004.

At the conclusion of the hearing, I directed counsel to submit Proposed Findings of Fact and Conclusions of Law no later than March 12, 2004. However, in a March 15, 2004, letter I also asked counsel to comment upon the impact, if any, of the March 12, 2004, Appellate Division decisions in the consolidated *Millville, Pemberton, Phillipsburg and Neptune* cases. See, *Millville Bd. of Educ. v. New Jersey Dept. of Educ.*, ___ *N.J. Super.* ____, decided March 12, 2004. The following constitutes my Initial Decision rejecting the Board's arguments and approving the position taken by the Department with respect both to the "technology" issue (funding for computers for Schools No. 44 and 45), and with respect to the appropriate method for funding preschool disabled children.

TESTIMONY

A. Board of Education of Elizabeth

Testimony on behalf of the Board was offered by four witnesses: Valerie Anne Dunn, Supervisor of Early Childhood Education; Richard Esperon, Supervisor of Technology; Alice Chiarello, Director of Special Services and Harold Kennedy, Controller.

Dunn, the person primarily responsible for development of the Board's 2004-2005 Early Childhood Education programmatic budget, pointed out that in accordance with the Instructions and Guidance received from the Department it reluctantly was determined that funding for special education could not be included in that budget. Although preschool disabled students who are "included" in regular classrooms (as opposed to attendance in self-contained classrooms) initially are included, they had to be removed (J-2, p. 2 of 2). In the case of Elizabeth, current enrollment figures as of Fall 2003 indicated 14 such students at a cost of $12,410 each and Dunn stressed the

substantial need in a district like Elizabeth with regard to providing adequately for its entire preschool disabled population. The Board's submission to the Department in mid-November 2003 (J-1), also noted that to the greatest extent possible consistent with their IEPs, children with special needs would receive services in the regular classroom setting. Thus, as of February 26, 2004, Elizabeth anticipated a total of 42 preschool "inclusion" children, or 1.6 percent of the total projected 2004-05 pupil population (P-5).

With respect to the request for technology funding (five computers) for Schools No. 44 and 45, Dunn identified the Special Request forms pertinent thereto. For School No. 44 (Special Request 45) the total amount requested was $518,067; for School No. 45 (Special Request 44) the total amount requested was $520,147. Each Special Request anticipated five computers per preschool classroom – four to service the students and one for each teacher. Dunn observed those needs were determined by comparing them to existing preschool programs, such as in School No. 50, where there are five computers per classroom. Thus, the Board's proposal to provide the same number of computers for the two centers under construction sought nothing more than "parity" with existing classrooms.

Although the Department turned down the two Special Requests for additional computers (it approved funding for only two per classroom) on the basis that the Board received adequate funding for such technology items, she disagreed. The other monies provided for those schools simply was not adequate to fund, as well, the purchase of the total numbers of computers actually needed. For example, each teacher needs his or her own computer for access to the internet, e-mail, District curriculum guides, confidential evaluative data and the like. Also, providing less than four computers for 15 students creates delays resulting in situations where, at times, some pupils do not have computer time at all.

The Board's second witness, Richard Esperon, is its Supervisor of Technology who helped develop and integrate technology into the preschool curriculum. Like Dunn,

he also commented that the request to fund five computers per classroom was designed, in part, to stay consistent with what already existed in preschool programs in other schools.

Esperon also identified an extract from the State Board of Education's Three-Year Technology Plan (P-2) which, he noted, specifically encouraged a student to multimedia computer ratio of 5:1 or less in order to provide necessary access for students and staff and to enhance achievement of one of the State's own technology goals. Thus, the Board's Technology Plan (P-3), consistent with the State's Plan, calls for a computer for about every four students and one for each teacher, and has been approved both by the Department's regional office – the Union County ETTC – and by the Division of Technology.

The third Board witness, Alice Chiarello, has been Director of Special Services for the last seven years. Her responsibilities include oversight of services for preschool disabled, both "included" and "self-contained." She identified the numbers of preschool instructional staff (P-4) and the number of included and self-contained preschool disabled children which, as of February 26, 2004, numbered 55 "included" and 40 in "self-contained" settings (P-5). She also identified a class profile of preschool disabled children (P-6) which described in further detail the objectives sought to be obtained in accordance with State requirements. The thrust of Chiarello's testimony was to attempt to further demonstrate that the Department's determination no longer to separately fund preschool disabled programmatic needs through the early childhood budget was inimical to the carrying out of the State and local missions to provide a structured and supportive learning environment for preschool special needs pupils.

The last witness for the Board was Harold Kennedy, the Controller, whose responsibilities include oversight of the accounting and budget operations of the district. According to Kennedy, the determination to eliminate funding in the early childhood budget for preschool disabled children, and to now require districts to provide services for them out of the general school aid budget (CEIFA), deprives the District of the ability

to carry out its mission in a meaningful way. According to Kennedy (and Chiarello), for the past few years the Board has not even had adequate funds to provide for all of the special education services called for in its budget, and to add to that regrettable situation by shifting nearly the entire cost of preschool disabled services to the general budget for 2004-2005 would be devastating. To that end, for example, he observed that the total tuition cost in 2003-04 for 21 out-of-district placements for preschool disabled was in excess of $874,000, and the tuition often exceeded $40,000 per pupil (P-7). Indeed, with respect to three students at the Crossroads School, their tuition was $44,775 each, and with respect to another placement at the Jardine School, the tuition was in excess of $50,000.

B. Department of Education

Two persons testified on behalf of the DOE, Allen Dupree, Manager, Office of School Funding and Tonia Davis, an Educational Program Specialist who is the Department's liaison to the Board.

The first witness, Dupree, described the Office of School funding as primarily devoted to research and fiscal policy analysis. Prior to becoming its Manager he was a research analyst and, before then, worked for a public policy research concern in Washington, D.C. Dupree holds a Bachelor's Degree in Political Science from Swarthmore College and a Master's Degree in Public Affairs from Princeton University. He is quite familiar with the concept of Early Childhood Education aid in New Jersey and in preparation for the proceeding prepared a data sheet describing how it is calculated (R-1). Primarily, pursuant to statute (*N.J.S.A.* 18A:7F-3), preschool disabled students specifically are included in the determination of a school district's enrollment with respect to CEIFA (the Comprehensive Education Improvement and Financing Act of 1997) under which state education aid for districts is calculated. According to Dupree, pursuant to *N.J.S.A.* 18A:7F-3; 7F-12, and 7F-19, disabled preschool students already are included in the enrollment figures which drives the amount of CEIFA aid

and to continue separately to fund them, as well, in the Early Childhood funding would "double count" these students.

Specifically referring to the analysis he prepared for the hearing (R-1), Dupree noted that per pupil funding under CEIFA for fiscal year 2002 included, on average, over $16,000 for each disabled student. This consisted of approximately $8,300 for T&E, $3,260 for Tier II classification (the "default" classification) and approximately $5,400 for other categories. He also noted that a student classified in Tier III would receive nearly $6,000 in special education aid, as opposed to $3,260 for the Tier II student, and a Tier IV student would receive an additional $13,037, thereby increasing total aid for such a student to over $26,000. Dupree also observed that his enrollment trend analysis reveals that over the past few school years the number of Tier II elementary students actually has declined, which suggests that assuming no formula change the funding provided for preschool disabled pupils through CEIFA was and should continue to be sufficient to provide necessary services. He further noted that since in his calculation he used Tier II, the "default" classification, the funding figures were "conservative" and students classified in higher tiers and/or receiving related services would generate even more funding.

Accordingly, using the budget figures provided by the Board in November 2003, and the number of inclusion students (14), he calculated that the available funding actually provided a surplus of $60,000 over and above the total cost (R-1). In short, the *Abbott* mandated needs of preschool disabled students in this school district are being met through CEIFA funding and there is no need to provide separate, additional funds for them. Indeed, if a need could be demonstrated by the Board for such additional funding there are mechanisms available for it to apply to the State for "Preschool Expansion Aid" or "Extraordinary Special Education Aid." See, *N.J.S.A.* 18A:7F-19(b). He agreed, of course, this would require an additional appropriation and the Department could only request the funds, it could not guarantee they would be offered.

During his cross-examination by Board counsel, Dupree described the approach the Department was taking *vis a vis* the preschool disabled population as follows:

"THE WITNESS: I believe if I'm understanding it correctly that's not the case. You have [hypothetically] a million dollars in needs we'll call it for the preschool population, and say another 10 million for the K through 12 population, for a total of 11 million dollars. The district received, for example, and we'll just assume everything is fully funded for this example. The district received 11 million dollars per the CEIFA formula for special education purposes, and then in the early childhood program in previous years, I'm not quite sure of the exact timing, they received an additional one million dollars.

"What the Department is saying is in this 11 million dollars we gave you, a million of that should have been spent on the preschool population, because they generated that revenue, so therefore we're not going to give you a total of 12 million dollars anymore to support 11 million dollars worth of needs. We're going to give you 11 million dollars to support.

"Q [Mr. Shapiro] Do you know that as a fact? Did you look into Elizabeth's budget to find out whether in fact the district was given sufficient money to fund the preschool special education program in the past in the district wide budget?

"A I'm not positive, but I actually do not believe that's the case, but I'm not positive.

"Q Okay.

"A However, I want to clarify the Department is not saying take money out of the district budget and spend it on preschool. The Department is

saying take the revenue that the preschool disabled children generated, and spend it on the preschool disabled population." Transcript, pp. 124-20 to 126-8.

And further:

"Q Is it your claim that the shift in preschool education cost for special education to the district wide budget was designed to avoid double funding, or was it as Mr. Kennedy testified to require the district to absorb additional costs for supplemental funding out of – special education out of the district wide budget without getting – with the same flat funding that its received in prior years?

"A Well –

"Q Do you follow my question?

"A I followed your question. First I would not characterize the Department's position as a shift of these preschool disabled costs to the district wide budget. I characterize it as the Department's position being that the preschool disabled population should first be funded with the revenue they generate, and to the extent that that has not happened in the past the Department wants to correct that, so to the extent that a preschool disabled student generates X number of dollars, you use that X number of dollars to support the students needs.

"If additional needs are there and that funding is not sufficient to support that students full needs, then there would be some need for some additional allocation revenue to the district, but you would not count that – you would not start off with fully funding the preschool disabled population

in a preschool budget while they're simultaneously generating other State revenues.

"Q What you theoretically believe has happened, but you don't have any evidence of it actually has happened?

"A What we definitely know is not theoretical, it's actual that they generated X amount of revenue in the preschool budget, and that was simultaneously the revenue generated from CEIFA. Now, whether or not the money that was generated by CEIFA was spent in early childhood or elsewhere I don't know. But we definitely know that they generated revenue in two different places." Transcript, pp. 146-11 to 148-1.

And, finally, in colloquy with the undersigned:

"Q [Judge Weiss] In a nutshell is the Department saying, you know, you're getting more than you need, you're getting it in two places and you shouldn't get it in two places. The one place under CEIFA, that should do it, because you're including the disabled?

"A Well, the Department is saying you're getting it in CEIFA. If that's not sufficient then we can talk further about what additional revenue you would need, however, you would not for example – take for example of their budget that where the Department deducts the $173,000 for the inclusion students. That represents – that includes the full cost of that inclusion student, so if we fully funded the preschool budget with those students in there, and they also generated this additional revenue through CEIFA, you would give them more revenue than they need. Now, it's possible that may be some of the self-contained students, or students were educated out of district, some additional revenue would be needed, but that should be revenue on top of the CEIFA revenue, as opposed to

that full cost paid for it here, and then the CEIFA revenue is still out there unused.

"Q Okay. But it's true also that – may be you're not the right person to ask, but you don't know the actual on the ground experience with regard to how the money was used for example last year, the year before, whether or not there was a short fall and they had to take funds out of CEIFA to supplement?

"A That's correct. I do not know – I do not know that for certain, and if that was in fact the situation, then I presume what would happen under what the Department says we should do now is that the District would just say the preschool money generated by these students is not sufficient to cover the full cost, we need some additional funding.

"Q So the Department is saying if you do it the way we say you're supposed to do it that should be enough, and if you need more come and tell us and we'll talk about it.

"A Correct." Transcript, pp. 150-8 to 151-22

The last witness, Tonia Davis, is liaison to the Board in the area of early childhood education and in that capacity helped in the development of its preschool budget. She is certified in special education and holds both Bachelor's and Master's Degrees in Social Work. Davis confirmed that for 2004-05, special education preschool funding was taken out of the early childhood budget and left to be funded through CEIFA.

With regard to the technology issue (funds for only two computers per class as opposed to the five requested) she felt the total amount of funding per each of 40 new classrooms (over $19,000) gave the Board the discretion to work within that amount to

purchase more than two computers if it felt such additional items were necessary. She did not believe a teacher needs his or her own personal computer since the first use should be for the student and teachers could use another available computer in the school.

On cross-examination, Davis conceded she was not that familiar with the State Technology Plan's recommendation of a five students to one computer ratio as a benchmark (P-1), nor had she seen the Board's own technology plan (P-3). She agreed that a limit of two computers per classroom was not to be found in any guideline or regulation with which she was familiar, although neither did she see any requirement that each teacher must have a computer either.

Finally, in rebuttal, the Board recalled both Dunn and Kennedy to repeat their views that the denials with regard to the proposed early childhood education budget left the school district with inadequate funds to deliver the necessary services demanded by the *Abbott* cases.

DISCUSSION

The first issue is the Board's claim that it is entitled to funding adequate to purchase five (5) computers for each of 40 new classrooms, 20 in School No. 44 and 20 in School No. 45. As noted, the respondent's position with regard to the two Special Requests is multiple. First, that the budget for early childhood programming already takes into account new classroom "start-up" costs and to that end over $12,000 was added to each classroom amount, totaling $19,250. According to the Department, this funding is sufficient to provide discretion to the Board to allocate its purchases so that it could acquire more than two computers per classroom if it so desired. If the Board chooses to permit one computer to be devoted exclusively to teacher use, that is its choice. The funding provides for enough to purchase two computers for students and the teacher can use a student's computer as necessary.

With regard to the Board's contention that the extra computers are needed in order to meet curriculum needs, the Department noted there was no competent educationally based proof in that regard since Esperon is technology, not curriculum oriented – particular in early childhood education matters.

With respect to the Board's claim that the State's Technology Plan (P-2) justifies, if not requires, a student ratio of five to one, at least, the Department responds that since there is a maximum of 15 students per classroom, even if this was a requirement it would mean only three computers (15 ÷ 5), not five. Moreover, there is no requirement in any rule, regulation or statute that every teacher also must have a computer, and in any case the five to one ratio is simply a suggested "benchmark" for goal achievement and is not specified nor intended to be a mandate. Thus, the District has adequate funding for two computers per new classroom and can, if it wishes, purchase one or more within its discretion out of the additional funds it will receive.

For its part, the Board maintains that it simply seeks "parity" with other early childhood programs at School No. 50 and neighborhood schools and there is no reason to "shortchange" the new classrooms by providing only a meager amount of computers and none for the teacher. It points, in this regard, to the State Plan guideline which, while admittedly not a mandate, recommends that in order to help achieve the early childhood education goals set out by the New Jersey Supreme Court, proper technologic support is needed. The Board also points to the fact that its own plan calling for five computers per classroom was reviewed and approved by the regional authorities, as well as the Department's own Office of Technology, and limiting access by 15 students and a teacher to only two computers could cause students either to be delayed or to lose time on the computer.

In respect to this issue, I believe that the Department's position must be sustained essentially for the reasons it has articulated. First, while it might be preferable to provide a computer exclusively for a teacher's use, there is no legal requirement this be done and, as respondent has observed, there likely is at least one

computer that teachers can use in the building. While I agree with the Board that ensuring equity and equality in educational programs is certainly a goal which hopefully will be obtained, that cannot mean that every classroom in every school must have exactly the same materials and supplies. Even if I adopt the suggested guideline of five students to each computer, this would only mean one, not two or three more, per preschool classroom. The fact that both regional and state technology offices approved the Board's plan does not convert that approval into a requirement that funding be provided separate and apart from that already made available. Their approval can be read equally to support the proposition that if the Board wants to provide that number of computers per classroom, they are free to do so.

The second and larger issue has to do with the methodology by which the Department determined to provide early childhood education funding for disabled students in 2004-05. The obligation to pay special attention to these special needs three and four year old children cannot be argued – it is a requirement of huge dimension. Whether it is also of State constitutional dimension has not been resolved and was specifically left open in *Abbott V.* Such an extension, of course, to preschool students, could have monumental financial implications.

Nevertheless, according to the Board, there are three reasons why the Department's position excluding preschool disabled from the early childhood budget is improper: (a) it violates the spirit, at least, of the *Abbott* cases; (b) it conflicts with the Department's own regulations; and (c) it is arbitrary and capricious.

As to the first point, the very recent Appellate Division decision in *Millville, et al., supra,* provides guidance:

> "We conclude, as did the Commissioner, that the adoption of whole-school reform, with its inclusion of preschool education in the *Abbott* districts, was designed by the Court as a remedy for the past constitutional deprivation of a thorough and efficient education for children between the ages of five and eighteen in the *Abbott* districts. In so recognizing the nature of *Abbott V's* mandate, and in

comparing that mandate with others rendered by the Court in this context, we also conclude that the Court did not intend to require exclusive state funding of preschool in the *Abbott* districts."

"Here, in requiring preschool programs in the *Abbott* districts to remediate the prior deprivation of the constitutional right to a thorough and efficient education for children between the ages of five and eighteen, the Court's directives take on a less mandatory tone. Instead of compelling State funding of the implementation of all preschool programs included within whole-school reform, the Court simply imposed an obligation on the Commissioner to "ensure" that such funding is provided:

> 'In directing the implementation of preschool programs in the *Abbott* schools, the Commissioner must ensure that such programs are adequately funded and assist the schools in meeting the need for transportation and other services, support, and resources related to such programs. The Commissioner may authorize cooperation with or the use of existing early childhood and day-care programs in the community.'
>
> [*Abbot V., supra,* 153 *N.J.* at 508 (emphasis added)].

"It is the Court's direction in *Abbott V* that the Commissioner "ensure" and "assist" which has informed the Commissioner's decision, and our affirmance of that decision, that other resources, including funds existing at the district level, may be allocated for these purposes." *Millville, supra*, Slip Opinion at pp. 10, 11, 12.

Thus, as the Appellate Division then concluded:

> "Since the Supreme Court has not mandated exclusive State funding for all aspects of preschool education in the *Abbott* districts and since the Legislature has not provided for the funding of preschool beyond the funding components of PSEA and ECPA, we agree with the Commissioner's determination that the State is not mandated to exclusively fund preschool in the *Abbott* districts and that local resources, if available, may be allocated for such purposes." *Millville, etc., supra* at p. 15.

Accordingly, there is no mandate in the *Abbott* cases, or in any statute, rule or regulation requiring the Department to fund preschool disabled education other than how it proposes to do so in this case. As described by Dupree, if there is a deficit the local district must share in shoring up any shortfall.

The Board's second reason for challenging the Department's methodology is equally unavailing - a self-imposed requirement that a high quality preschool education for all eligible three and four year olds presupposes that all the funds necessary to implement the same will be provided. *N.J.A.C.* 6A:10A-2.4(a)(18). The methodology used by the Department, as described by Dupree, does not contradict that salutary objective for a "high quality preschool program" is capable of achievement with the funds provided through CIEFA and other categorical special education program funds. These would include Consolidated Aid, Education Opportunity Aid and Early Childhood Program Aid ("ECPA"), not to mention federal IDEA aid. Indeed, this being the case, the Board's "arbitrary and capricious" argument also must fail.

CONCLUSION AND ORDER

Accordingly, for the reasons set forth above, I **CONCLUDE** that the two issues heard in this case should be determined in favor of the respondent and I **ORDER** that the Board's Verified 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 the time allowed under the existing orders of the New Jersey Supreme Court 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.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decision of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 other parties.

March 23, 2004
DATE

STEPHEN G. WEISS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

March 23, 2004
DATE

E-mailed Initial Decision to Parties on:

March 23, 2004
DATE

jb

APPENDIX

Witness List

For Elizabeth Board of Education:

Valerie Anne Dunn

Richard Esperon

Alice Chiarello

Harold Kennedy

State Department of Education:

Allen Dupree

Tonia Davis

Exhibit List

J-1 Letter of November 14, 2003 from Superintendent of Schools Thomas G. Dunn, Jr., to Ellen Frede, Assistant to the Commissioner, Division of Early Childhood with attached Abbott Preschool Program Three-year Operational Plan (2003-2006) and one-year Programmatic Budget (2004-2005)

J-2 Letter of January 15, 2004 from Ellen Frede and Gordon MacInnes, Assistant Commissioners, with attachments

J-3 Instruction and Guidance, August 15, 2003

P-1 Special Education Costs List

P-2 Excerpt from State Board of Education Technology Plan

P-3 Excerpt from Elizabeth Board's Technology Plan

P-4 List of Special Education Facilitators and Teachers

P-5 Current Preschool Pupils Statistics (February 26, 2004)

P-6 Class Profile: Preschool Disabilities

P-7 List of Out-of-District Placements, February 27, 2004

R-1 Dupree Analysis of Special Education Funding for Elizabeth

OAL DKT. NO. EDU 1705-04
AGENCY DKT. NO. 54-2/04

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Pursuant to *N.J.A.C.* 1:1-19.1(d), the Initial Decision is the final decision in this matter with respect to those issues resolved between the parties. (Initial Decision at 3) With respect to the two issues remaining in dispute, the funding of preschool disabled students and the District's special request for additional funding for five computers in each of 40 new classrooms, the Commissioner is satisfied upon his full and independent review of this record, which included a transcript of the hearing conducted on March 2, 2004 at the OAL, that the findings and conclusions of the Administrative Law Judge are amply supported by the record and should not be disturbed.

Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/15/04

Date of Mailing: 4/15/04

* Pursuant to *P.L.* 2003, *c.*122, "Abbott" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court. In accordance with the June 24, 2003 Order of the Supreme Court, such appeals must be filed within six days of the Commissioner's decision.

161-04

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF EARLY CHILDHOOD,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" Board of Education appealed the Department of Education's determination with respect to funding for the district's 2004-05 preschool program.

As to the appropriate method for funding preschool disabled children, the ALJ concluded that the State is not mandated to exclusively fund preschool in the *Abbott* districts and that it had not been shown that the Department's calculations would not presumptively generate sufficient funding within the district-wide budget in order to assist the Board relative to its preschool disabled programs. The ALJ found that the Department's decision to include the special education preschool disabled population within the scope of the district-wide budget and not within the preschool budget was consistent with the Administrative Code and Statutes. The Board's appeal was denied.

The Commissioner adopted the ALJ's decision as his own with modification making note of revisions made to the Department's exhibit R-1.

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.

April 19, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 630-04

AGENCY DKT. NO. 52-2/04

BOARD OF EDUCATION OF
THE CITY OF GLOUCESTER,
CAMDEN COUNTY

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Carolyn Grace Labin, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: March 17, 2004 Decided: March 23, 2004

BEFORE **JOHN R. FUTEY**, ALJ:

STATEMENT OF THE CASE

In this matter the Board of Education of the City of Gloucester, Camden, County (hereinafter "Gloucester"), which is a petitioning "**Abbott**" district, appeals the determination by respondent, the New Jersey Department of Education (hereinafter "DOE") regarding funding of

it's Early Childhood Plan (hereinafter "ECP") for the 2004-2005 school year pursuant to *N.J.A.C.* 6A:24-1.1 *et. seq.*

PROCEDURAL HISTORY

Petitioner Gloucester filed a Verified Petition of Appeal with the DOE on February 17, 2004, in which it alleged insufficient funding of it's pre-school program mandated by the *Abbott v. Burke* line of decisions. The matter was thereafter transmitted by the DOE to the Office of Administrative Law (hereinafter "OAL") and received by the OAL on February 18, 2004 at 4:08 pm. Thereafter, on February 19, 2004, the case file was received by this administrative law judge at 7:30 am, immediately after which counsel for the parties were contacted and a telephone prehearing conference was conducted early on the morning of the same date. At that time, the hearing dates of March 10, and 17, 2004, were peremptorily set. Thereafter, on February 24, 2004, a Letter Order was issued which recited and reconfirmed that the matter would be held on those dates at the OAL in Mercerville, New Jersey. In addition, the Letter Order stated: "I herewith direct that I receive a written opening statement from each of you on or before March 3, 2004. That statement should identify all the issues to be resolved at hearing and each party's position, vis-`a-vis facts as they understand them to be, regarding those issues, including relevant case/statutory law." In addition, specialized instructions regarding the pre-submission of all pre-marked exhibits were set forth. Thereafter, on February 27, 2004, a telephone conference was conducted with both counsel at 2:15 pm at which time the DOE's Ms. Labin advised that her only witness, who was scheduled to testify on the first hearing date, was scheduled to be in Salt Lake City, Utah, with another DOE representative at a conference at that time. The parties were ordered to reverse their presentations accordingly. In addition, at the parties' joint request the date to submit their exhibits and statements/positions was extended to Friday, March 5, 2004. Additional documents were submitted by the parties, by agreement and with this ALJ's consent on Monday March 8, as well as immediately prior to the commencement of the first day of hearing on March 10, 2004.

As the hearing commenced on that date, this administrative law judge advised the parties regarding his understanding of the issues, as framed by the parties in their written submissions. Each side has submitted one issue for consideration. At that time, counsel for the petitioner

objected there were two other issues which should also be considered by me, notwithstanding his failure to have articulated them in his response to the letter order. After careful reconsideration, and, notwithstanding the parameters of the letter order as aforesaid, it was ordered that the parties would be permitted to submit and supplement all of their issues no later than Friday, March 12, 2004, with the opportunity to reply to same by both sides on March 15, 2004. The testimony of several of the witnesses proceeded on that basis on March 10, 2004. The hearing continued to completion on March 17, 2004, at which time the hearing record closed. Pursuant to my pre-announced order, written summations were submitted by both counsel by the end of the court day.

FACTS

Based upon the totality of the evidence presented, both testimonial as well as documentary, the following constitute the relevant facts adduced from the five witnesses who testified in this matter.

Nina Longer

Nina Longer is the Director of Special Services for Gloucester, in which capacity she has been employed for 11 years. As part of her responsibilities, she insures compliance regarding Special Education in the Gloucester District, including all eligible pre-school disabled children between the ages of three and five years of age. Those special education program participants are based upon referrals generated for children in those age categories. In the process, each child gets psychological, educational, social and speech/language assessments, as well as in appropriate cases, neurological assessments among others. Once eligibility is determined, an Individualized Education Program (hereinafter "IEP") is created in accordance with the Individuals with Disabilities Education Act, 20 *U.S.C.A.*, 1400, *et. seq.* as well as *N.J.A.C.* 6A:14-1 *et. seq.* She noted that Gloucester is required to provide a continuum of services in the least restrictive environment for each child, which continuum ranges from in-class placement to self-contained classrooms, and may even include out-of-district –placement.

She reviewed the pre-school population in Gloucester which was contained in Exhibit P-3, which and represents pre-school children with disabilities who were counted in Gloucester's Application for State School Aide (hereinafter "ASSA") for the school years encompassing the years 2000 to 2004. Three "tiers" of disabilities were denoted in that chart prepared by her staff. Tier 2 represents preschoolers with disabilities who are without intensive needs. This population may include "inclusive" students, who are to be included in the mainstream population of the school for educational purposes. Tier 4 students require more intensive services such as an extended school year (hereinafter "ESY"). Tier 1 students represent a duplicated count for those students who received up to four related services. The ASSA chart (P-3) revealed that the projected enrollment at Gloucester for 2004 includes 10 Tier 2 students, 6 in-district Tier 4 students and 28 Tier 1 students. She did not project any out-of-district students for next year since one child has moved on to a higher class level. She noted that for the one child who attended the Lark School in Westville, Gloucester County, New Jersey, the tuition for that one child is $33,000.00 per year and $17,000.00 for transportation.

She also reviewed the staff allocation for all pre-school children in Gloucester (P-1). She indicated that there are three pre-school disabled teachers on that list. She also noted that in the self-contained classroom there are six pre-school disabled children. In the two inclusive classes, there are 14 pre-schoolers out of which six in each class receive special education services along with 9 regular education pre-school participants. Each of the two inclusive classes have a full time special education teacher, who directs the needs of them regarding individual IEPs in order to have their needs addressed. The effort is meant to have the six be part of the regular population in the inclusive setting.

Regarding the funding of pre-school disabled students, she helped develop the budget with James Devereaux, the district's business administrator. She also "developed the numbers" and hired the teachers. She noted that they are funded by State aid but that the local budget picks up the balance since the bulk of State funding does not provide for all the services. She also noted that it has not been increased since 2000. In fact she noted that the funding goes back to the year 2000 when there was only one Tier 4 student, whereas in the year 2003 there are 8 Tier 4 students. They received no additional funding for the excess students since the year 2000.

On cross-examination she was asked regarding the projected Tier 2 level of 10 students for the year 2004. She indicated that out of that batch 6 are being currently assessed regarding eligibility. She acknowledged that there had been a decrease in the Tier 2 population prior to the projected year of 2004, which reflects the fact that in the year 2000 there were 9 Tier 2 students as opposed to 6 in the year 2003.

When asked about the single Tier 4 child who has received out-of-district placement at the Lark School, she had no idea how much of either the tuition or the transportation costs were actually provided for by State aid.

She was also asked regarding the use of dually certified teachers in the inclusive setting, which pre-supposed that a single dually certified general education and special education teacher could assume the role of the two teachers who presently exist in each inclusive class, thereby reducing those costs significantly. She noted that there is only one such teacher in the district and she has served as only a regular education teacher in the three year old class. She maintained that a dually certified teacher concept would not work out in Gloucester. Everything is IEP driven. She also noted on redirect examination that they only place six inclusive children in each regular education class of 15 in order to provide for an appropriate mix, as opposed to putting all 12 in one class out of a class of possible 15. She indicated that inclusiveness would not be accomplished in such a setting. She also indicated that any dually certified teacher could not give the services on a close order basis and provide appropriate multi-tasking for all the students in that setting. She acknowledged that the New Jersey Administrative Code requires a teacher of the handicapped in the classroom along with a regular education teacher or a dually certified teacher (which subject had been broached by counsel for DOE on cross-examination.) Yet, Ms. Longer indicated that she did not believe that such a teacher could be charged with all such responsibility. It was just not feasible since Gloucester had tried it, as she understood it, for one year. But that "experiment", as she described it, was done approximately three years ago and has not been revisited since that time. At the same time, she offered no specific proofs to support her contention that the "experiment" had failed. And, even though she maintained that Gloucester had exhausted all of the avenues in that regard, she failed to provide any substantiated proofs to corroborate that assertion. She closed her testimonial presentation at that juncture by indicating that dually certified teachers are extremely hard to get in the marketplace. Once again, however,

she failed to provide any documentary evidence in support of that assertion. It is noted that she was later recalled a couple of times in order to either augment other district witnesses' testimonies and/or to testify as a rebuttal witness. Her relevant additional testimonies are summarized hereinafter, as appropriate.

James J. Lavender

James J. Lavender is in his second year as the director of the Early Childhood Program at Gloucester. He participated in the preparation of the Gloucester budget for only the 2004-2005 school year. In the process of his work in that regard, he recalled that the district received the budget guidelines from DOE. It was at that time that they were advised that they were not to budget the preschool disabled children in the Early Childhood budget even though it was his understanding that it had been done so in previous years. He noted that they did provide for the disabled population and budget them for inclusion in the budget prepared by the district (J-2) for the 2004/2005 school year. However, they were removed by DOE in its January 2004, letter regarding that budget at which time the DOE deducted the 12 pre-school inclusive students. He prepared a spreadsheet of all preschool children in the district for the 2004-05 projected Early Childhood costs (P-2). The unit cost of educating each inclusion education student will be $10,144.00 for a total of $121,728.00 for all 12 inclusion students. In addition, the per-pupil cost of teacher's salaries ($85,850.00) and teacher benefits ($26,880.00) adds up to $112,730.00 for those students. The total cost for all 12 inclusion students over and above regular education adds up to $234,458.00.

He further indicated that the total district budget would have been $3,109,161.00, but he then acknowledged that $50,000.00 should have been deducted for one of the two out-of-district children, who had moved out of the district after he had made his calculation. At the same time, however, the DOE has only funded $2,617,152.00 for the district. Based upon the disparity between those two budget figures, he computer that the per-pupil cost for each inclusion student is actually $19,538.17 and $19,694.00 for the self contained students. He also noted that they did not even include the extended school year (ESY) costs and acknowledged that he was not even aware of the actual figure for it and, further, did not even know how many extended school year students there were in any event.

total number of students from the year 2000 to 2004. Now there are 8 self contained and 12 inclusion students in the district. Yet, the funding amounts for all of the four first categories in Table One have not increased since 2000. State aid has remained "flat" during that time, and yet the cost for special education students has increased. At the same time, the revenues have not increased.

Further, regarding entry number 5 on Table 1, to wit, the Consolidated Aid (FY-04), he indicated that it was based upon the school year for 03-04 as well as the fiscal year 02 school year of ASSA figures. He noted that from October 2002 through October 2004 the total number of pre-school students increased but that the total amount of Consolidated Aid has not increased. In that case there is less funding for each student.

Regarding the entry regarding Education Opportunity Aid (Line entry number 6 on Table 1), he acknowledged that that funding source is new for this year and is based upon the ASSA for fiscal year 03. Yet, the number of Tier 2 students in that timeframe has increased, even though he conceded there was a drop in Tier 2 enrollment in at least two of the prior years.

He further indicated that, assuming that the funds set for in Table 1 are correct, they will nonetheless remain flat despite there being more students in Gloucester. And, he also "assumed" that if DOE does give all of the aid as promised therein, there would still be a shortfall over and about the $16,447.72 projected by DOE in that funding table.

At the same time, he stated that based upon the ECP approved plan by the DOE, there is not enough to cover the costs of the district, although he volunteered that he even is not yet still sure regarding the recent calculations derived in Table 1. At the same time, however, he noted that even assuming that, the figure of $16,447.00 is correct, the actual costs generated for the self-contained classroom of 8 students was actually $19,696.00. This represented a shortfall of approximately $3,400.00 for each of those students. In the process, he noted that the district also provides extra costs such as one to one aides, equipment for the children including such things as hearing devices, and ESYS, among others, which are above the costs allowed for by the DOE at this time.

He conceded on cross-examination that those extra costs were not specifically delineated by him. Instead, the district has "accepted" the guidance from the State despite the fact that it subsequently got cuts in the approved budget from their requested expenditures. He acknowledged that there is an understanding that Education Opportunity Aid will be adjusted to reflect the real or actual number of students in the district, although he is still skeptical that the true funding amounts will change has a result in any event. In addition, he is not convinced that the Supplemental Aid will be guaranteed to address any addition shortfalls either.

He also admitted that the ASSA figures which the DOE employed were generated from the district and were properly included in the State figure, which reflected the October 2000 elementary enrollment of 91 students as a base. At the same time, he acknowledged that there had been a drop in enrollment in the two subsequent years of 75 students FY 2003 and 62 students for FY 2004. Further, in projecting for FY 2005, there are 80 students projected in the elementary enrollment trend spreadsheet. Although he was asked what happened to the monies in those years when there was lesser actual enrollment than the 91 students who formed the baseline in October 2000, he generally noted only that the district spread around those monies in order to fill in gaps in other programs. He failed to produce any proofs to demonstrate what happened to those excess funds.

In addition, regarding the Supplemental Aid, he conceded that Gloucester could potentially apply for any gaps from that program although he is not aware of any such mechanism in place in order to facilitate that at this time. Finally, he indicated, that, in past years, Gloucester has received additional *Abbott v. Burke* aid "in cash." Part of it came in the form of a receivable which they never even thought they would get.

Nina Longer was recalled as a witness to supplement James Devereaux's testimony regarding the status of those "excess monies or funds." She indicated that those monies were used during those enrollment declining years in order to reflect shifts in the Tier needs of the children. That is to say, as children generated more severe disabling conditions which warranted additional services, they were up-graded to Tier 4, which compelled additional funding to be plugged in to assist those specialized needs. Generally, she noted that Gloucester "never" has had enough money for funding special education in anyway. She further noted, upon questioning

receiving an enhanced entitlement based upon that level of funding. Ms. Longer noted, however, that even though there are Tier 4 children in the district, they do not get funding for all of them. In fact, only one of them was utilized in the count for purposes of the level funds for the year 2000. Yet, the remaining 7 children, who are now projected into the current enrollment for Tier 4, are only receiving Tier 2 funding which is what they received from the 2000 funding level. In fact, of that group of 7, some are not even getting Tier 2 funding in any event. And that results in an additional shortfall overall in the program. In fact, since October 2000, they have generated an increase of 23 children in the program, despite the flatline budgeting assessed by DOE.

LEGAL ANALYSIS

In this matter petitioner's counsel has, by way of supplementing its sole identified issue (#2) after the hearing commenced, raised three issues for purposes of appeal: (1) Whether the DOE's failure to provide adequate funding for disabled children violates the *Abbott* mandates: (2) Whether the DOE's exclusion of the preschool disabled population from the Early Childhood Program budget conflicts with the DOE's own regulations; and (3) Whether the DOE's exclusion of preschool disabled children from the Early Childhood budget is arbitrary and capricious. In response, the DOE has identified the sole issue as being whether or not DOE's decision to exclude special education preschool children from the pre-school budget is reasonable and should be upheld.

In order to address all four of the issues, cited hereinabove, the parties relied upon the testimony of five witnesses who testified at length and whose presentations are summarized hereinabove. After having considered the testimonies and after having given due deference to the respective positions of the parties in this matter, I **FIND** that Gloucester has failed to demonstrate any sufficient proofs or any appropriate law in order to grant relief under any of the three issues identified by it therein. The key component relative to all three issues framed by petitioner involves whether or not DOE has complied with the mandates set forth under the *Abbott* line of decisions. Although, under *Abbott v. Burke* 153 N.J. 480,518 for (1998) ("Abbott II") the Supreme Court held that the DOE Commissioner "Must insure that such programs are accurately funded and assist the schools in meeting the needs of transportations and other services, support and other resources related to such program," Id. at 508, the Appellate Division

held *In the matter of Millville Board of Education v. New Jersey Department of Education* (A-0886-03T3), *et als*. decided on March 12, 2004, that":...we follow the Court's prior holdings and conclude that the Court has only directed the Commissioner to "ensure" and "assist" in the "adequate funding" of pre-school programs in the Abbott districts. We are satisfied that the Court's wording of this obligation -- particularly when viewed against the Court's determination not to declare that a preschool education is constitutionally mandated -- fall significantly short of requiring exclusive State funding for preschool programs in the Abbott districts." (*Id* at page 13)

Further, at page 15, in the same decision, the Appellate Division held: "Since the Supreme Court has not mandated exclusive State funding of all aspects of pre-school education in the Abbott districts and since the Legislature has not provided for the funding of pre-school beyond the funding components of PSEA (*i.e.,* mine, *Abbott* Preschool Expansion Aid) and ECPA (*i.e.,* mine, Early Childhood Program Aid), we agree with the Commissioner's determination that the State is not mandated to exclusively fund the pre-school in the Abbott districts and that local resources, if available, may be allocated for such purposes."

Taken in total context with that decision, I **FIND** that, after having considered the testimony of all the witnesses hereinabove, the DOE has in fact provided a satisfactory mechanism in order to address the needs of Gloucester in preparing its pre-school disabled budget at this time. At the same time, it is noted that there is no provision in *N.J.A.C.* 6A:10A(10A-2.4) which even requires the DOE to account for special education children specifically within the pre-school budget. Similarly, nothing within *N.J.S.A.* 18A:7F *et.seq.* requires that the DOE allocates specific funding for special education pre-school students. In fact, there is no provision which even mandates the way in which DOE should distribute special education funds to the school districts. As a result, I **FIND** that the DOE is in compliance with the *Abbott* regulations. Further, the fact that Gloucester wants all of its monies delineated up front does not compel DOE to accede to it's demand at this time. Rather, the mechanism which DOE has devised allows for presumptive adequate funding and, should there be any shortfall therein, it allows for Gloucester to seek additional funding as the actual figures become clarified. Further, the new addition of the Education Opportunity Aid for FY 2005 reflects another part of the formula by which DOE is attempting to address, assure, and assist Gloucester's needs under the circumstances. In addition, I am concerned about the lack of clarity regarding the other

sources of funding, to wit, the *Individuals with disabilities Education Act* funding, which can further add to the funding sources on behalf of the district. None of that was presented either graphically or specifically before me to give any indication that there actually is a bonafide shortfall being generated by Gloucester at this time. Rather, I **FIND** that Gloucester's appeal centers upon its preference to have its funding level locked in at the inception of the approved budget process rather than requiring it to go through various budget reviews with DOE thereafter. I **FIND** that its preference in that regard to be less plausible than the approach taken by DOE, which agrees that it remains available to assist in the various reassessments which are necessary thereafter. Thus, presumptively the DOE's delineation of the per pupil costs appears reasonable under the circumstances and reflects its ongoing obligation to assist the district in that regard. And I so **FIND**.

Additionally, the district is required to garner other resources, including funds which exist at the district level, in order to meet those commitments. DOE has also established a mechanism for the district to seek supplemental aid to further assist in that process. Gloucester has provided no actual evidence to support its claim that there have been shortfalls generated as a result of having made such applications in the past, other than to rely upon some vague and unsupported conclusions presented at hearing. Thus, I am not convinced with Gloucester's preferences and nor do I **FIND** that DOE is mandated to meet Gloucester's ECP pre-school disabled needs in the approved budget in the manner which it prefers.

At the same time, I do not **FIND** that DOE's issuance of the pre-school disabled Guidelines in August 2003 alters or diminishes its commitment or requirement to ensure and assist the district. Since there is no constitutional mandate upon the DOE to fund pre-school education, any reasonable efforts by it to meet its court-ordered obligations are to be viewed as being sustainable. In the process, I **FIND** that DOE's apparent failure to affirmatively pursue regulatory rule-making relative to those guidelines does not fatally or materially detract from its acknowledged requirement to assist Gloucester, and those efforts are not contrary to its obligations under the *Abbott* line of decisions. Thus, to the extent that DOE continues to explore ways to help the district meet its funding goals, I **FIND** those efforts to be commendable. At the same time, although I am extraordinarily sympathetic with the frustrations and plight of the district as it attempts to meet its business-related obligations regarding the education of its

constituency, I am nonetheless constrained to afford significant deference to DOE in the efforts which it has made to presumptively project and reasonably anticipate the costs of educating the children in Gloucester at this time.

At the same time, it is noted that some considerable time was spent at hearing in order to demonstrate how, despite the flatline funding which has been in place since 2000, Gloucester has nonetheless witnessed a decline in its pre-school disabled population and yet, it apparently did not receive a reduction in funding from that baseline level despite those reductions. This is not to suggest that Gloucester has acted inappropriately regarding its apparent excess funds. Rather, it merely points up the fact that there is a certain amount of fluidity in the process which must be periodically scrutinized and reviewed by both Gloucester and the DOE in order to assure that all available funds are reasonably applied and, as appropriate, mandatorally assigned to only those programs for which those funds may be otherwise designated. This is particularly acute in the area of special education where the funding formulas, as identified by Allen Dupree herein, must "holistically" consider all available sources of funding. This is totally consistent with the requirements set forth in the Appellate Division ruling in *Millville, et als.*, cited hereinabove.

CONCLUSION AND ORDER

Based upon all the foregoing, I **CONCLUDE** that the DOE has demonstrated that it has created and has at its command a plethora of options to assist the district in meeting its required pre-school funding goals. I also **CONCLUDE** that DOE's policy decision does not violate the Administrative Code under the circumstances. It's decision to include the special education pre-school disabled population within the scope of the district-wide budget and not within the pre-school (ECP) budget is consistent with the statutory provisions of *N.J.S.A.* 18A:7F. I also **CONCLUDE** that Gloucester has not presented any proofs to demonstrate that the presumptive funding provided to it by DOE, as well as its supplemental funding mechanisms, will not allow Gloucester to implement a "high quality pre-school program," as required by the DOE under *N.J.A.C* 6A:10-2.4(a)(8)a. Therefore, I **CONCLUDE** that it has not been shown that DOE's calculations will not presumptively generate sufficient funding within the district-wide budget in order to assist Gloucester relative to its pre-school disabled programs. I make all of the above findings and form all of these conclusions by a preponderance of the credible evidence.

It is therefore **ORDERED** that the appeal by Gloucester, which challenged the DOE's determination on the funding of its Early Childhood Plan, is herewith **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 the time allowed under the existing orders of the New Jersey Supreme Court 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.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 23, 2004
DATE

JOHN R. FUTEY, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

E-mailed Initial Decision to the parties on:

3/25/2004
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 31 2004

DATE

OFFICE OF ADMINISTRATIVE LAW

JRF/mamf

DOCUMENTS IN EVIDENCE

For petitioner

P-1 List of pre-school disabled staff

P-2 2004-2005 Early Childhood costs

P-3 Gloucester City Public Schools Preschoolers with of disabilities counted on ASSA by Tier Category

For respondent

R-1 (Revised) Overview of funding generated by pre-school special education students of Gloucester City

R-2 State School Aid Projected Enrollment report – 2004-2005

R-3 State School Aid Projected Enrollment report – 2001-2002

R-4 Application for State School Aid Instructions; Special Education Part

R-5 State School Aid Pre-Budget Year Aid and Total – 2003 –2004

Joint exhibits

J-1 Gloucester City's Annual Operational Plan and Budget

J-2 District One-Year Budget Instructions and Guidance School Year-2004-2005, dated August 15, 2003

J-3 Decision of Department of Education regarding Gloucester City's approved budget, dated January 15, 2003

J-4 Revised final budget determination

WITNESSES

For petitioner

Nina Longer

James J. Lavender

Dr. Mary Stansky

James Devereaux

For respondent

Allen Dupree

OAL DKT. NO. EDU 630-04
AGENCY DKT. NO. 52-2/04

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY, PETITIONER, V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF EARLY CHILDHOOD, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were filed in accordance with the accelerated timelines for *Abbott* budget appeal matters.

Respondent's exceptions make the following clarifications to the Initial Decision:

> In the list of exhibits attached to the initial decision, one exhibit is misidentified. On the list, J-3 is identified as the Department of Education's decision regarding Gloucester City's approved preschool budget, dated January 15, 2003. The document is dated January 15, 2004, not January 15, 2003.
>
> Further, in Judge Futey's findings of fact he refers to the Department's exhibit, R-1. As noted by the opinion, a revision of the exhibit was submitted to the court on March 8, 2004. Judge Futey, on page 13 of his initial decision refers to the unrevised version of R-1 in discussing its Table 3. On line 3 of the initial decision, Judge Futey states that Gloucester City's total approved budget without the inclusion students is $2,629,313; however, on the revised R-1, the total approved budget without the inclusion students equals $2,617,414. (*See* J-4 and revised R-1, Table 3). Further, on line 4 of Judge Futey's initial decision, he states that the total cost of the inclusion students is set at $109,554. Given the aforementioned change regarding the approved budget

total, the total cost of the inclusion students equals $121,454, not $109,554. (*See* revised R-1). Additionally, the surplus listed on the revised R-1 equals $75,922, rather than the $87,821 listed on line 8 of page 13 of Judge Futey's decision. (*See* revised R-1). (Respondent's Exceptions at 1-2)

Upon his full and independent review, the Commissioner determines to adopt the Initial Decision of the OAL, as modified by respondent's exceptions, for the reasons stated therein.

Accordingly, the recommended Initial Decision is adopted as the final decision in this matter, with the modifications described in respondent's exceptions quoted hereinabove, and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/19/04

Date of Mailing: 4/19/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

165-04

#165-04

IN THE MATTER OF THE TENURE HEARING	:	
OF CONSTANCE GERESY, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
PISCATAWAY, MIDDLESEX COUNTY.	:	

April 20, 2004

OAL DKT. NO. EDU 12636-95
AGENCY DKT. NO. 453-11/95

IN THE MATTER OF THE TENURE HEARING	:	
OF CONSTANCE GERESY, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
PISCATAWAY, MIDDLESEX COUNTY.	:	

On February 26, 2004, the Office of Administrative Law returned the case file in this matter for review by the Commissioner as a "withdrawal" of the tenure charges against respondent, a tenured bookkeeper, accused of incapacity and/or unbecoming conduct in connection with a late payment of Federal Income Tax Withholding and Social Security payments to the Internal Revenue Service.

In reviewing the file, the Commissioner observes that the Acting Director and Chief Administrative Law Judge (ALJ) advised the parties by letter of February 5, 2004 that, in reviewing the files of an ALJ who had recently retired, "it appears that there has been no activity on this case for a significant period of time." (Letter from Acting Director and Chief ALJ, dated February 5, 2004) The Acting Director and Chief ALJ thus instructed the parties to contact him within 30 days if there was an interest in pursuing the matter, and further advised the parties that failure to respond within that time frame would result in the matter being dismissed for failure to prosecute. (*Ibid.*)

By letter of February 11, 2004, respondent's attorney replied, stating, in pertinent part:

> It is my understanding that the above captioned matter was withdrawn, Ms. Geresy is now retired and the matter is moot. (Letter from respondent's attorney, dated February 11, 2004)

The Board did not respond to either the letter by the Acting Director and Chief ALJ or the February 11 letter of respondent's attorney.

Accordingly, the Commissioner determines that, in light of respondent's retirement from the District, there is no basis upon which this matter can be ordered to proceed and it is, therefore, dismissed as moot.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/20/04

Date of Mailing: 4/21/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 543-98

AGENCY DKT. NO. 490-12/97

HAMILTON TOWNSHIP
BOARD OF EDUCATION,

Petitioner,

v.

LEWIS SHINKLE,

Respondent.

Michael Paglione, Esq., and **Richard Haws**, Esq., for the petitioner (Paglione & Massi, attorneys)

Arnold Melk, Esq., for the respondent (Wills, O'Neill & Melk, attorneys)

Record Closed: July 7, 2004 Decided: July 14, 2004

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of tenure charges filed by petitioner with the Department of Education pursuant to *N.J.S.A.* 18A:6-9. The matter was transmitted to the Office of Administrative Law as a contested case in 1998[1], pursuant to *N.J.S.A.* 52:14B-1 to –15. A

[1] The proceeding was considerably delayed by criminal indictments in Mercer County and by a State Grand Jury. Both indictments were eventually dismissed. Scheduling was further complicated when the Attorney General refused to release evidence gathered during his investigation, requiring separate litigation. Finally, progress was encumbered to a degree by a pending civil suit initiated by L.K. against both parties here.

hearing was conducted over the course of twelve days and the record closed on July 7, 2004, with the receipt of briefs.

Certain facts are undisputed. Respondent was born in May 1955 and was employed as a social studies teacher at Nottingham High School. During the 1996/97 school year he also served as the yearbook advisor and stage crew manager for production of the annual play. At the time L.K. was a sixteen-year-old eleventh grader, who volunteered as a stage crew assistant. She was a student in respondent's advanced placement European History class. The tenure charges assert that respondent engaged in a sexual relationship with L.K. from approximately February 28, 1997 to May 1, 1997. Respondent was escorted from the school on May 5, 1997, and suspended indefinitely pending a resolution of these allegations.

L.K. testified that she and respondent developed a sexual relationship while she served as a stage crew assistant for the annual school play. The affair began on the evening of February 28, 1997, while L.K. and other students were in the school auditorium helping respondent set up lights and microphones. Sometime between 6:00 and 7:00 p.m. respondent asked her to accompany him to the audio-visual room to search for extension cords. L.K. complied and testified that after locating the extension cords respondent turned out the lights in the room and moved toward her. He began touching her over and under her clothing and she started to squirm. Respondent released her and as they prepared to leave the room he grabbed her wrist and asked her to tell no one of the incident. L.K. testified that later that evening, between 7:00 and 8:00 p.m., respondent asked her to go with him to the music room to find a lamp and she went along willingly. He sat on a chair and pulled her down so that she was sitting on his lap with her back towards him. He rubbed her back and after a few minutes they left.

L.K. testified that after a few more meetings she and respondent began to engage in sexual intercourse. These liaisons occurred in a number of locations throughout the school, including the girls locker room, respondent's classroom, the yearbook room, the audio-visual room and in the loft above the janitor's closet. Additionally, on or about April 8, 1998, they went to respondent's home during the school day and had intercourse in a guest bedroom. L.K. testified that during one of a few encounters in the loft above the janitor's closet, she and

respondent leaned against a wooden ladder while engaged in sexual activity. L.K. began a diary in which she reflected on these events (P-55).

L.K. testified that she told a few friends about the relationship and the information leaked out more widely during a school trip to Europe when she left her journal out and then saw classmates reading it. The trip to Europe began on March 27, 1997 and the group returned on April 6, 1997. Respondent and his wife were chaperones for the trip and L.K. had no sexual contact with him during this time frame. The relationship resumed upon their return from Europe.

On April 10, 1997, L.K. was called to the office of the Principal, Michael Zapicchi, who confronted her about the relationship, in the presence of the school nurse; she denied the allegation. L.K. sought out respondent to inform him and he inquired whether she had disclosed the relationship to anyone. She denied any disclosures and he suggested they "lay low" for a while.

L.K. testified that she and respondent next had sexual relations on or about April 17, 1997. Respondent called her fourth-period teacher, Ms. Sokol, and said that L.K. was wanted in the guidance office. Ms. Sokol released her, but at the guidance office L.K. was told that no one there had summoned her. On leaving the area L.K. saw respondent standing near the auditorium door. He told her that he had placed the call to Ms. Sokol and they went into the booth at the rear of the auditorium and had intercourse there. L.K. testified that she and respondent next had sexual relations in the same location on April 22, 1997. Their next and last encounter took place on or about May 1, 1997, the day before a class trip to New York City. L.K. testified that at this point her mother had gotten wind of the relationship and when confronted by her mother she confessed.

L.K. acknowledged initially telling the police that her relationship with respondent was non-consensual primarily because she had not intended for any of this to happen. Subsequently she learned that consent merely meant that her involvement was voluntary and she then conceded that the relationship had been consensual. L.K. also told the police that she was fearful to end the relationship, but actually she was just uncomfortable with her role and thought this slant would

cast her in a better light. L.K. conceded that some of the notes she wrote to friends during this period about the relationship were fanciful and exaggerated. She was attempting to persuade her peers that this was not a tawdry affair with an older married man, but a romance more akin to the relationships they were reporting on. She also said that respondent wore a condom, but actually that was not true.

Leonard Santa Maria is currently an assistant principal in the South Brunswick School District. During the period in question he was a teacher at Nottingham High School, was chairperson of the social studies department and producer of the school play. He and respondent were friends and colleagues. Mr. Santa Maria knew L.K. through the school play as respondent's assistant.

Mr. Santa Maria testified that he visited respondent at his home on the evening of May 6, 1997, the day after he was summarily suspended and escorted from school. As the social studies chairperson he had to arrange for substitutes to assume respondent's teaching duties for the remainder of the year and needed certain information from him. Respondent and his wife, also a teacher at the school, generally discussed the allegations and they were both visibly upset. At one point during the conversation respondent asked Mr. Santa Maria to step out onto the patio, outside of his wife's presence. Respondent was distraught and said that he needed a favor. Mr. Santa Maria testified that respondent asked him to collect some cleaning supplies and go to the loft area above the janitor's closet at the high school where he was to wipe away any telltale ejaculate that might be present. Respondent said that he had sexual relations there the year before with A.K., another student who had since graduated, and did not want the authorities to come upon this and mistake it for evidence in relation to the current allegations.

Mr. Santa Maria testified that he just nodded as respondent made this request. They reentered the house and respondent's wife asked what they had been talking about. Respondent made some noncommittal response and Mr. Santa Maria left as soon as he could. As he was leaving respondent said "I would do this for you and we never had this conversation." Mr. Santa Maria testified that he then telephoned another teacher and they met to discuss the incident. They decided not to get involved and Mr. Santa Maria did not volunteer this information when he was interviewed by the police and the District's investigator, Mary Jane Cooper, Esq. He was

told by lawyers for the New Jersey Education Association to answer only those questions put to him and that is what he did.

Some month's later Mr. Santa Maria was speaking with Mr. Zapicchi, the Principal, about a laptop computer that was missing. Mr. Santa Maria indicated that he thought respondent may have lent this computer to A.K., the female student respondent said he had sex with during the prior school year, and this led him to disclose the conversation he had with respondent on May 6, 1997. Mr. Santa Maria testified that he cried during this conversation and during subsequent conversations he had with various investigators, as this disclosure was quite uncomfortable for him.

Detective James Molinaro and investigator Nancy Beiger, of the New Jersey State Police and Division of Criminal Justice, respectively, testified that they went to Nottingham High School on August 26, 1998 to collect samples in locations to which they were directed. This included the girl's locker room, library, audio-visual room, and janitor's closet. The area is darkened and substances of interest are revealed using a specialized light source that creates a luminescence. Among these were stains in a drip pattern on the two bottom steps of the wooden ladder in the loft above the janitor's closet. These steps were removed, packaged and sent to the laboratory with the other samples.

Dr. Charlotte Word is the director of Cellmark Diagnostics Inc., a Maryland laboratory that performs DNA testing. Dr. Word was admitted as an expert in molecular biology and DNA testing. She explained some of the science supporting DNA testing and the procedures and protocols used at Cellmark for this purpose. These methods are now widely accepted in the field. Dr. Word related that although 99.9% of human DNA is exactly the same, there are loci on the DNA molecule that reflect variability and thirteen of these are now examined for forensic purposes. The sample taken from the wood pieces delivered to the lab contained sperm cells and this DNA was compared with a blood sample from respondent. Dr. Word concluded that the DNA from the wood samples matched the DNA from the blood sample. The chances that the sperm sample came from anyone other than respondent were 1 in 3.1 quadrillion (P-99).

Cross-examination inquired into two earlier DNA tests performed in 1997 and 1998 that were inconclusive (R-5, R-6). Dr. Word explained, however, that advances in the field using the thirteen loci approach were developed since those tests were performed. The prior reports were inconclusive because fewer loci were being used, but nothing in those earlier reports is inconsistent with her current findings. In fact, when those loci are added to the most recent evaluation, they simply increase the likelihood that the sperm molecules on the wood pieces tested come from respondent. Dr. Word conceded that other samples of hair and fiber received by Cellmark proved inconclusive.

Donna Ireland is a custodian at Nottingham High School who works the 3:00-p.m.-to-11:00-p.m. shift. Ms. Ireland testified that one evening in 1997 she saw respondent walking with a blonde-haired girl who was wearing a baseball cap. She was cleaning inside the nurse's office and heard the yearbook room door, a few offices away, open and close. When she finished cleaning in the nurse's office Ms. Ireland went to the yearbook room to clean, but the lights were out and the door was locked. She moved on to clean elsewhere and saw Carl McRae, the supervisor of custodians. Ms. Ireland testified that she recounted her observations to him and as they stood and talked respondent and the girl came out of the yearbook room and walked toward them before turning in the direction of the cafeteria (P-5). Ms. Ireland noticed that some part of respondent's undershirt was hanging out from under his shirt.

Carl McRae has been on the janitorial staff at Nottingham High School for some twenty-three years and is currently the supervisor of the custodial staff. He knew respondent and that he was the yearbook advisor and play manager. It is part of his job to know which teachers and students are authorized to be in the building after hours. Ms. Ireland stopped him one evening and told him that respondent had gone into the yearbook room with a girl, and as they were talking respondent and a girl departed that room. Respondent would typically say hello, but on this occasion his head was down and he made no eye contact. Respondent's undershirt was half out and the belt he was wearing was hanging down loosely. The girl was blonde and had on jeans, a shirt and a cap. Mr. McRae recognized her as a student in the school, but didn't know her name. He reported the incident to Harvey Highland, an administrator, who said he would inform Mr. Zapicchi.

Michael Zapicchi was the principal at Nottingham High School during the period in question. On or about April 10, 1997, he learned through a parent that respondent and L.K. may have been involved and he began to look into the matter. Respondent and L.K. both denied any wrongdoing. He spoke with L.K.'s mother about these rumors and also came into possession of a spiral notebook, which L.K. and a few other girls used to communicate back and forth during classes. Among other things, these notes discussed the relationship between respondent and L.K. (P-72).

Respondent also presented a series of witnesses. Respondent's father, Mr. Lewis Shinkle, Sr., his father-in-law Mr. Bob Callahan, and his sister-in-law Ms. Deborah Gottlick, all testified briefly that they were in and out of respondent's house at different times of the day on most days of the year, to see to the dog, or otherwise care for the property. Raymond Gibbs, the chief custodian for the Board of Education during the period in question, testified that he went up into the janitor's loft a few times a week and that a swim team, the Hamilton Aquatics, used the pool every night from 6:00 p.m. to about 11:00 p.m. He was not there at this time, but his night custodian would report this.[2] Ralph Petty, a retired Hamilton Township detective currently employed by the Mercer County Prosecutor's Office, testified that he was in the loft area above the janitor's closet and it is fairly cramped, dirty and dangerous, and is an unlikely meeting place for sex. Alicia Orlowski was a senior student at Nottingham High School during the period in question. She was an editor of the yearbook and the publication deadline was approaching as the school play was in rehearsal. She and other staff were in the yearbook office constantly in the evening. Additionally, she and other students regularly used the sound booth area to eat lunch, or do homework.

Robert Hamilton was a Hamilton Township police officer for twenty-five years and has been involved in many crime scene investigations. He was sent to Nottingham High School to investigate L.K.'s allegations. He took photographs and, using appropriate light sources, checked for body fluids in the areas where these alleged liaisons occurred. He used his light source in the loft area, but did not focus on the ladder, as no specific report of sex there had been

[2] The parties stipulated that the leader of the Hamilton aquatics would have testified that the group was authorized to use the facility every night from about 6:00 p.m. to about 11:00 p.m., but that they may or may not have fully used all of that time on any given night.

made at the time. No sperm samples were found elsewhere in the loft. In the audio-visual room he viewed a suspect area on a desk where a sexual encounter had been reported and he took a swab, which proved negative. Pursuant to protocol officer Hamilton also took a control swab in an adjacent area of the desk some six inches away, which as it happens, proved positive for sperm. This wasn't too surprising as material can smear from one spot to another. These fluids were inconclusive regarding respondent or L.K.

Darwin Keefer was a Hamilton Township detective in 1998 who was assigned to investigate the possible theft of a computer at Nottingham High School. He interviewed Mr. Santa Maria on this subject and after the formal interview was done he confronted Santa Maria concerning his initial failure to mention any conversation with respondent about tidying up after him in the loft area above the janitor's closet. Mr. Santa Maria became upset and Detective Keefer attributed this to a guilty mind.

Respondent testified briefly and flatly denied that he and L.K. had a sexual relationship of any kind. He thought she was a troubled young girl. He further denied ever asking Mr. Santa Maria to clean up his ejaculate. He did not know how his sperm found passage onto the ladder in the loft area above the janitor's closet, but he speculated that it may have been on his shoes and somehow transferred that way. This is the substance of the record.

Petitioner must show by a preponderance of the credible evidence that respondent engaged in a sexual relationship with L.K. while she was a student at Nottingham High School. This has been done. L.K. credibly related that she and respondent commenced a sexual relationship on February 28, 1997, that ended on or about May 1, 1997. She provided descriptions of these encounters in some detail, though with the passage of time a few dates and particulars were blurred in her mind. L.K. acknowledged that she was not fully truthful with the police initially, or with her friends as she sought to explain this affair to herself and to others. She also has pending a civil suit in which she stands to recover substantial sums if her version of events is endorsed.

The effort to undermine L.K. also included a body of testimony meant to show that the locations she described were unlikely venues for an assignation. All of the individuals who

testified in this regard – Lewis Shinkle Sr., Mr. Callahan, Ms. Gottlick, Mr. Gibbs, Officer Petty, Ms. Orlowski - were fine witnesses, but none of this makes sex in these locations unachievable.[3] Risky behavior in pursuit of coital pleasure is exposed too often to give much credence to the idea that the conduct was improbable because it would have been incautious.

Importantly, this is not a case of "he said she said," where subtle facts must be carefully sifted to reach an answer that narrowly preponderates in one or another direction. The evidence is fairly one-sided. Dr. Word, a highly qualified expert, testified that the sperm specimen found on the wood pieces she tested came from respondent. The level of statistical likelihood, 1 in 3.1 quadrillion, creates a fact bordering on certainty. Respondent called no DNA expert to disagree with Dr. Word's methods or conclusions. The wood pieces tested are actually two rungs from the ladder in the loft above the janitor's closet, a location identified by L.K. as a place where she and respondent engaged in sexual relations. She recalled that during one encounter in the loft they leaned against the ladder. No better explanation suggests itself for the presence of respondent's issue in this location. His apparent befuddlement concerning the presence of his sperm on the ladder was feigned and his surmise concerning his shoes reached for a benign account. The testimony of Officer Hamilton concerning the possibility that samples can smear from one spot on a desk to another was supposed to underpin this suggestion.

Mr. Santa Maria also supplied relevant corroboration. As a friend and colleague he was reluctant to come forward and did not do so for some months after the matter came to light. In an excited and desperate moment respondent effectively admitted to the illicit relationship by asking Mr. Santa Maria to dispose of any telltale ejaculate in the loft above the janitor's closet. We are not here to discern whether respondent had sex with A.K., a student who graduated a year before the incident at bar, and a matter about which there are no charges. Rather, it is likely that the story was an effort to enlist Mr. Santa Maria's aid without appearing to suggest that he destroy evidence in a pending case.

[3] The parties suggested a site visit to the loft after Officer Petty testified. Three attorneys, an assistant principal and I climbed into the area and stood there together with adequate elbowroom. The only inhibition to intimate relations in this location is ambiance.

Respondent sought to weaken Mr. Santa Maria by attacking his initial failure to come forward and his explanation for that omission. At hearing Mr. Santa Maria clung to the notion that he truthfully answered the questions put to him by various investigators and that he followed the advice of NJEA lawyers not to volunteer information. Mr. Santa Maria exhibited a narrow understanding of his obligation to be forthcoming with investigators, and he could not concede even now, some years after the fact that he behaved improperly. While this made him vulnerable to attack, on balance I accept his recitation. No evidence was developed that points to any animus, or other motive that might have stirred Mr. Santa Maria to fabricate so strange and ruinous a story. From every indication respondent and Mr. Santa Maria had a cordial relationship. Moreover, Mr. Santa Maria made his disclosure to Mr. Zappicchi in the latter part of 1997, long before respondent's semen was identified in the loft area. The subsequently developed DNA evidence is significant confirmation that Mr. Santa Maria accurately relayed the essence of his May 6, 1997 conversation with respondent.

Given the nature of the offense little need be said regarding the merits of the proposed penalty. Respondent grievously exploited his position of trust and disgraced himself, the district, and his profession. Dismissal is the only appropriate penalty. See generally, *Frugis v. Bracigliano*, 177 N.J. 250, 268 (2003), regarding the high obligation of school officials toward the students in their care.

Based on the foregoing, I conclude that petitioner has established good cause for the removal of a tenured professional under *N.J.S.A.* 18A:6-10, and it is **ORDERED** that respondent 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 (45) 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 (13) 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, 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.

7/14/04
DATE

SOLOMON A. METZGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/14/04
DATE

Mailed to Parties:

JUL 19 2004
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

EXHIBITS

For Petitioner:

P-1 Résumé of Mary Jane R. Cooper
P-2 List of School Personnel
P-3 Yearbook photograph
P-4 Class schedules for 1996-1997
P-5 School layout, demonstrative exhibit
P-6 Photograph, outside of school
P-7 Photograph Audio Visual Storage Room
R-8 Photograph – Audio Visual Storage Room
P-9 Photograph – Audio Visual Storage Room
P-10 Photograph – Audio Visual Storage Room
P-11 Photograph – Choral Music Room
P-12 Photograph – Coral Music Room
P-13 Photograph – Choral Music Room
P-14 Photograph – School Library
P-15 Photograph – School Library
P-16 Photograph – School Library
P-17 Photograph – School Library
P-18 Photograph – School Library
P-19 Photograph – School Library
P-20 Photograph – School Library
P-21 Photograph – Girls Library
P-22 Photograph – Girls' Locker Room
P-23 Photograph – Girls' Locker Room
P-24 Photograph – Girls' Locker Room
P-25 Photograph – Girls' Locker Room
P-26 Photograph – Girls' Pool Locker Room
P-27 Photograph – Girls' Pool Locker Room
P-28 Photograph – Girls' Pool Locker Room

P-29 Photograph – Girls' Pool Locker Room

P-30 Photograph – Room 208

P-31 Photograph – Room 208

P-32 Photograph – Room 208

P-33 Photograph – Yearbook Room

P-34 Photograph – Yearbook Room

P-35 Photograph – Yearbook Room

P-36 Photograph – Yearbook Room

P-37 Photograph – Yearbook Room

P-38 Photograph – Yearbook Room

P-39 Photograph – Yearbook Room

P-40 Photograph – Janitor's Closet & Loft

P-41 Photograph – Janitor's Closet & Loft

P-42 Photograph – Janitor's Closet & Loft

P-43 Photograph – Janitor's Closet & Loft

P-44 Photograph – Janitor's Closet & Loft

P-45 Photograph – Janitor's Closet & Loft

P-46 Photograph – Janitor's Closet & Loft

P-47 Photograph – Janitor's Closet & Loft

P-48 Videotape, November 2002

P-49 Statement of Charges

P-50 Program excerpts

P-51 July 25, 1996 Board approval for respondent to act as stage manager

P-52 L.K., Sworn Affidavit

P-53 M. Cooper memo of interview with L.K. Interview

P-54 L.K., May 6, 1997 statement

P-55 L.K. Journal

P-56 March 15, 1997, Journal Entry

P-57 October 16, 1997, Statement of D. Ireland

P-58 November 12, 1997, Statement of D. Ireland

P-59 October 16, 1997, Statement of Virginia Powell

P-60 October 1, 1997, Statement of Karl McRae

P-61 November 12, 1997, Statement of Karl McRae

P-62 K. McRae letter received December 11, 1997

P-63 K. McRae Certification re: Police Report

P-64 Statement of Harvey Highland, dated October 7, 1997

P-65 Correspondence re: Yearbook

P-66 Excerpt page

P-67

P-68 Personnel Absence Record

P-69 Hamilton Township Schools Annual Performance Report

P-70 Chronology of Events LS/LK

P-71 Certification of Michael Zapicchi

P-72 Notebook containing recordings of students, including LK

P-73 Note to Desiree from LK

P-74

P-75

P-76 Statement of Lewis Charles Shinkle, dated May 9, 1997

P-77 Page listing students names and grades

P-78

P-79 Receipt from Hamilton Police Department

P-80 Supplemental Investigation Report

P-82 Crime Scene Evidence Log

P-83 Crime Scene Investigation Report, James Molinaro

P-84 Photograph

P-85 Memo of Nancy Beiger

P-86 Evidence voucher

P-87 Evidence voucher

P-88 Evidence voucher

P-89 Letter of N. Beiger to L. Osborn, dated 9/10/98

P-90 Cellmark Diagnostics, evidence release form

P-91 Cellmark Diagnostic, forensic case form

P-92 Letter of N. Beiger to L. Osborn, dated 3/24/99

P-93 Division of Criminal Justice, evidence voucher

P-93 Photograph, blow up

P-94 Resume of Charlotte Word, Ph.D.

P-95 Demonstrative exhibit

P-96 Demonstrative exhibit

P-97 Demonstrative exhibit

P-98 Cellmark Diagnostics, forensic case form

P-99 Cellmark Diagnostics, Report of Laboratory Examination

P-100 Demonstrative exhibit

P-101 Cellmark Diagnostics, photo documentation

P-102 Cellmark Diagnostics, specimen results

P-103 Demonstrative exhibit

P-104 Certification of Carol Sokol

P-105 Drawing

P-106 State Police, seminal stain analysis

For Respondent:

R-1 Letter of 11/14/00 from J. Madden to M.J. Cooper, with attachments

R-2 Handwritten notes, M. Cooper

R-3 Police Interview

R-4 Police interview

R-5 Cellmark Diagnostics Lab report, 1997

R-6 Cellmark Diagnostics Lab report, 1998

R-7 15 page document

R-8 Desk photo

R-9 LK testimony before the Mercer County Grand Jury (R-9)

R-10 LK deposition, 10/24/03

R-11 LK deposition, 4/13/04

R-12 6/3/97 report

R-13 6/10/97 report

R-14 12/3/93 report

R-15 6/3/97 report

R-16 6/10/97 report

R-17 report

R-18 Deposition

R-19 1997 Yearbook

R-20 Supplemental report of Detective Hamilton

R-21 to R-40 photographs

R-41 State Police Lab Report

WITNESSES

For Petitioner:

Mary Jane Cooper, Esq.

Donna Ireland

Carl McRae

Harvey Highland

Michael Zapicchi

Stephen Simek

Catherine J. Cimino

Patricia L. Coplin

Leonard Santa Maria

L.K.

Ralph R. Petty

James P. Molinaro

Nancy Beiger

Dr. Charlotte Word

For Respondent:

Lewis Shinkle

Ralph R. Petty

Leonard Gadsby

Darwin Keefer

Alicia Orlowski

Robert Callahan

Lewis Shinkle, Sr.

Deborah Gottlich

Raymond Gibbs

Robert Hamilton

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2565-03

AGENCY DKT. NO. 92-3/03

DEBORAH M. TRIONFO,

Petitioner,

v.

BOARD OF EDUCATION OF
THE BOROUGH OF GLASSBORO,
GLOUCESTER COUNTY,

Respondent.

Michael Damm, Esq., for petitioner (Selikoff and Cohen, attorneys)

Catherine Merino Reisman, Esq., for respondent (Montgomery, McCracken, Walker & Rhoads, LLP, attorneys)

Record Closed: April 13, 2004 Decided: April 28, 2004

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, Deborah M. Trionfo, was employed by the Glassboro Board of Education until February 14, 2003, at which time she was terminated in a reduction in force for financial reasons. Petitioner claimed continued employment in view of seniority rights over non-tenured personnel. At the time, there were three music teachers employed in the school district who were non-tenured. Petitioner was certified as a music teacher,

kindergarten - 12th grade. The Board of Education denied petitioner's claim of tenure. The petitioner requested a fair hearing and the matter was transmitted to the OAL on May 5, 2003, to be heard as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and 14F-1 to 13. The parties filed a joint stipulation of facts and exhibits and cross motions for summary judgment. Petitioner's exhibits also contained an Affidavit of the petitioner which was not a part of the stipulation and which I did not read. The record closed on April 13, 2004.

A SUMMARY OF THE RELEVANT FACTS

Petitioner was employed by the Glassboro Board of Education in 1989. She was employed as a substitute teacher until February 1, 1992, when she became a Special Population Coordinator, part time. In that position she was employed until June 30, 1992, and again in the next school year, from September 17, 1992, until June 30, 1993.

Meanwhile, on March 9, 1993, the New Jersey State Department of Education invited proposals for a Program for Displaced Homemakers in order to teach survival skills. This proposal included staffing requirements. The educational attainment of the coordinator of the program proposed was, in pertinent part, as follows: "A designated person responsible for coordination for each project paid in full or part time who shall be a qualified counselor or teacher..."

The petitioner was named to the position. She is a certified teacher of music, kindergarten to 12th grade. Her teaching certificate was issued February 1982.

The program began in the 1993-1994 school year and continued through 1994-1995 and 1995-1996. The program was again approved for the school year 1996-1997 by the Glassboro Board of Education. For a fourth continuous year the petitioner was employed as the coordinator according to the Board minutes of the meeting of August 21, 1996. Petitioner remained in this and similar positions involved in adult education until her termination in February 2003.

These facts alone establish that petitioner obtained tenure on the first day following the third anniversary of the program in the 1996-1997 school year. *N.J.S.A.* 18A-28-5. The statute is quite clear. There are three ways to obtain tenure if you are a certified teacher or other employee in a position which requires certification, with certain exceptions which are inapplicable to the petitioner. The three methods are:

> (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; 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.

Petitioner also meets the three requirements of *Spiewak v. Rutherford Board of Education*, 90 *N.J.* 63, 73, 74 (1982), which interpreted the statute. She was required to possess a teaching certificate, she held a teaching certificate, and she served the requisite period of time.

In addition, the petitioner was endowed by the Board of Education with all of the emoluments of tenure. She was referred to in all subsequent contracts as a tenured teacher and treated accordingly in salary, benefits and responsibilities. These facts are not necessary to show tenure, but indicate that the Board of Education recognized that petitioner achieved tenure long ago.

The Board of Education, in denying petitioner's tenure claim relies on *Brown v. Board of Education of Warren Township, Somerset County, EDU* 7432-01 (2001), *aff'd* October 24, 2002, from which the instant case may be distinguished. In *Brown*, the employees were certified, although not required to be so. In this matter, the petitioner was certified and the Commissioner's proposal required certification.

In their briefs, the parties underline the words of the tenure statute most favorable to their case. The Board of Education underlines the words ...all teaching staff members...; the petitioner underlines the words and such other employees as are in positions which require them to hold appropriate certificates... These phrases appear in the same sentence, which is the opening paragraph of the tenure statute defining who is eligible. *N.J.S.A.* 18A:28-5. The latter phrase describes the petitioner.

CONCLUSION

I therefore **CONCLUDE** that the Glassboro Board of Education violated the petitioner's tenure rights when it failed to honor her tenure claim in 2003.

REDUCTION IN FORCE

Reductions in force are approved by the legislature. *N.J.S.A.* 18A:28-9. The legislature also has derived a method by which tenured teachers and others may sort out their status and respective rights, duties, and obligations. *N.J.S.A.* 18A:28-11, 12.

Petitioner is entitled to reinstatement.

ORDER

I **ORDER** the Board to reinstate petitioner in the position of music teacher, together with all back pay and emoluments, subject to mitigation. In the absence of such a position, I **ORDER** that she be placed on a preferred eligibility list.

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 (45) 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 (13) 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, 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.

4/28/04
DATE

EDGAR R. HOLMES, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

4/28/04
DATE

Mailed to Parties:

MAY 3 2004

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

sd

WITNESSES

For Petitioner:

None.

For Respondent:

None.

DOCUMENTS IN EVIDENCE

Exhibit A - Joint Stipulation of Facts

Exhibit B - Petitioner's Brief

Exhibit C - Respondent's Brief

Exhibit D - Notebook (1 of 2) GBOE 0013 - GBOE 1969

Exhibit E - Notebook (2 of 2) PET 006012 - PET 006953

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 11336-03
AGENCY DKT. NO. 393-10/03

M.N. and E.Y., o/b/o minor child K.N.,
Petitioners,
v.
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY, DR. CHARLES EPPS, FRANKLIN WALKER, ANNE BUTLER AND LAURA BUCCINNA,
Respondents.

Benjamin D. Light, Esq., for petitioners (Aromando & Light, attorneys)

Mark S. Tabenkin, Esq., for respondents (Scarinci & Hollenbeck, attorneys)

Record Closed: May 12, 2004 Decided: June 17, 2004

BEFORE **ELINOR R. REINER**, ALJ:

Procedural History

On or about October 30, 2003, petitioners M.N. and E.Y. on behalf of K.N. appealed to the Commissioner of Education, alleging that respondents' determination to retain K.N. in the fifth grade for school year 2003-2004 was arbitrary, capricious and unreasonable. Petitioners also asserted that respondents' actions constituted intentional infliction of emotional distress on K.N. and his parents; constituted racial and/or religious discrimination based on national origin; and violated K.N.'s civil and constitutional rights. Respondents filed an answer on November 14, 2003, denying certain of the allegations and asserting that petitioners' claim was barred for failure to file within applicable time limitations and mootness. On November 24, 2003, the matter was transmitted to the Office of Administrative Law (OAL) 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 case was assigned to the undersigned on December 1, 2003, and a telephone prehearing conference was held on December 12, 2003. During the prehearing conference, the issues were isolated, a settlement conference was scheduled for March 12, 2004, and a hearing was scheduled for April 26, 27 and 30, 2004, at the OAL.

On or about February 20, 2004, prior to the scheduled settlement conference, counsel for petitioners moved to be relieved. On or about March 1, 2004, respondents moved for summary decision, alleging that the petition was barred by the 90-day limitation of *N.J.A.C.* 6A:3-1.3(d).

An in-person settlement conference was held on March 12, 2004, at the OAL. At that time, since petitioners agreed that their attorney would no longer be representing them, I signed an order relieving petitioners' then attorney as counsel of record. Although another attorney appeared at the conference, he indicated that he would not be representing petitioners. Thus, at petitioners' request, I gave them an extension until April 5, 2004, to retain another attorney to represent them and to respond to the pending motion for summary decision. Respondents were to reply by April 15, 2004.

As a result, the hearing dates of April 26 and 27, 2004, were adjourned. On or about April 12, 2004, the undersigned was advised by Benjamin D. Light, Esq., that he now was representing petitioners and requested a three-week extension to respond to respondents' motion for summary decision. During a telephone conference held on that date, counsel agreed that the time for petitioners' response to the motion would be extended to April 29, 2004, and the reply filed by May 10, 2004. As a result, the hearing scheduled for April 30, 2004, was adjourned to June 18, 2004.

Issues

At issue is whether respondents' decision to retain K.N. in the fifth grade for school year 2003-2004 was arbitrary, capricious or unreasonable and, if so, what would constitute the appropriate remedy. Respondents asserted that also at issue was whether petitioners are barred from pursuing this appeal pursuant to *N.J.A.C.* 6A:3-1.3(d), and whether the 90-day limitation period should be relaxed pursuant to *N.J.A.C.* 6A:3-1.16.

Facts

It is clear from a review of the certification of counsel for respondents, and the attachments thereto, as well as the petition, that the facts necessary for determination are essentially undisputed. They may be summarized as follows:

1. K.N. was in the fifth grade during the 2002-2003 school year.

2. Petitioners received K.N.'s final report card in June 2003.

3. The report card stated that K.N. would be retained in the fifth grade, Room 305, for the school year beginning September 4, 2003.

4. When petitioners received the report card they were aware that K.N. was being retained.

5. Petitioners consulted with a medical professional to determine whether there might be a medical basis for K.N.'s poor performance. Paragraph 11 of the petition of appeal states:

> Upon learning that K.N. was to repeat the fifth grade, K.N.'s parents, the petitioners herein, were astonished and devastated. On June 30, 2003, they took K.N. to a neurologist for examination. The neurologist's report, prepared on or about July 18, 2003 is attached as Exhibit F.

6. During the summer of 2003, petitioners, through a lay representative, sought to persuade the respondents not to retain K.N. in the fifth grade.

7. Petitioners have provided no certification or any specifics in support of their assertion that K.N.'s retention in fifth grade remained under review and could be reversed.

8. On September 3, 2003, petitioners were again informed that K.N. would be retained.

Arguments of Counsel

Petitioners contend that respondents' motion for summary decision should be denied since material facts are in dispute in regard to the date that a "final decision" was communicated to them. Petitioners also allege that even if the petition was filed untimely, the limitations period should be relaxed because K.N. was the victim of discrimination based on his race, religion and/or ethnic background. Thus, since a matter of significant public interest is involved, strict adherence to the 90-day limitation is inappropriate.

Respondents contend that the petition is barred by the 90-day limitations period of *N.J.A.C.* 6A:3-1.3(d), since the period began to run in June 2003, when petitioners

received notice that K.N. would be retained in the fifth grade for the 2003-2004 school year, and the petition was not filed until October 30, 2003. Respondents assert that petitioners' self-serving efforts during the summer of 2003 to persuade the district to reverse its decision to retain K.N. in the fifth grade did not toll the running of the 90-day limitations period. Further, respondents contend that there is no basis in the record for relaxing the strict 90-day limitations period since there is no compelling or exceptional circumstance to warrant relaxation or waiver of the 90-day rule. To the contrary, this case presents the narrow issue of K.N.'s alleged right to be promoted to the sixth grade, which is not a fundamental public interest. In fact, respondents contend that failure to dismiss the petition of appeal at this late date will only result in a hearing on an issue which is essentially moot, since K.N. will already have repeated the fifth grade at the time of the hearing.

Discussion

Summary Decision

N.J.A.C. 1:1-12.5(b) 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 the guidelines for summary judgment under New Jersey Court Rule 4:46-2(c).[1] The OAL's standard for summary decision is as set forth by the New Jersey Supreme Court.

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

[1] *R.* 4:46-2(c) provides, in part:

> 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.

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 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 250, 106 *S. Ct.* 2505, 2511, 91 *L. Ed.* 2d 202, 213 (1986)). The Court recognized that this necessarily involves the judge in the process of weighing the evidence presented. 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. *Ibid.* This weighing differs from the weighing the judge would perform after a hearing in that "[o]n a motion for summary [decision] the court must grant all the favorable inferences to the non-movant." *Id.* at 536.

It is clear that the standard for summary decision has been met in the instant matter. As stated in *N.J.A.C.* 1:1-12.5(b), the requirement imposed on a party opposing the motion is to submit an affidavit setting forth specific facts showing that there is a genuine issue that can only be determined in an evidentiary proceeding. Thus, one must not only show that there is a genuine factual issue, but also that such issue can only be determined in an evidentiary proceeding.

In the instant matter, petitioners did not submit such an affidavit and provided no specifics as to representations made, either express or implied, that the retention of K.N. remained under review. They failed to set forth specific facts that indicated that they were in some sense lulled into a false sense of security that the determination to retain K.N. in the fifth grade would be reconsidered. In sum, the motion for summary decision has not been adequately opposed. Even granting petitioners all favorable inferences, there is no support for their allegation that the 90-day limitations period did not begin to run in June 2003, when petitioners received notice that K.N. was being retained in the fifth grade, instead of promoted to the sixth grade. The facts, undisputed in any meaningful manner, support respondents' assertion that petitioners' right to challenge the retention decision commenced at that time.

The 90-Day Rule

The threshold issue in this matter deals with whether petitioners' claim was timely filed pursuant to *N.J.A.C.* 6A:3-1.3(d), which provides in pertinent part 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, which is the subject of the requested contested case hearing.[2]

In *Kaprow v. Board of Education of Berkeley Township*, 131 *N.J.* 572, 582 (1993), the New Jersey Supreme Court held that the Commissioner and the State Board of Education have the authority to establish a time limitation for the resolution of disputes arising under the school laws and addressed the public policy reasons behind the 90-day rule:

> The limitations 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 limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. . . . *N.J.A.C.* 6:24-1.2(c) represents a fair and reasonably-necessary requirement for the proper and efficient resolution of disputes under the school laws.

The public policy, which favors providing school districts with "a measure of repose," must be weighed against the right of the petitioners to be notified that the school district has taken a position adverse to them. Thus:

> Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know

[2] Formerly *N.J.A.C.* 6:24-1.2(c), recodified as *N.J.A.C.* 6A:3-1.3(d) effective April 3, 2000. The language of *N.J.A.C.* 6A:3-1.3(d), except for an addition not relevant here, is identical to that of *N.J.A.C.* 6:24-1.2(c). Therefore, cases interpreting *N.J.A.C.* 6:24-1.2(c) will apply to *N.J.A.C.* 6A:3-1.3(d) and the regulations will be used interchangeably here.

> 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. . . .
>
> . . . [T]he notice requirement should effectuate concerns for individual justice by not triggering the limitations period until [the petitioner has been alerted to the existence of facts that would be adverse to it]. At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government."
>
> [*Kaprow, supra*, 131 *N.J.* at 587 (citations omitted).]

Adequate notice under *N.J.A.C.* 6A:3-1.3(d) should accommodate the dual purposes of the limitations period:

> 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.
>
> [*Ibid.* (citations omitted).]

In *Kaprow,* the petitioner was notified by a secretary of the respondent board that someone else was given her job. The Court held that such informal notice satisfied the notice of a "final order, ruling or other action" required by *N.J.A.C.* 6:24-1.2(c). *Id.* at 588.

In *North Plainfield Education Association v. Board of Education of North Plainfield Borough*, 96 *N.J.* 587 (1984), the New Jersey Supreme Court found that the petitioners were on notice that they had not advanced on the salary scale when they received their first paycheck for the subsequent school year. The Court held that the petitioners were required to file their petition for salary scale credit within the 90 days following the receipt of their first paychecks.

The 90-day requirement has been strictly followed and applied almost without exception. Specifically, in *Dreher v. Jersey City Board of Education*, EDU 2777-87, (December 18, 1987*), adopted*, Comm'r (February 2, 1988), *aff'd*, State Bd. (July 8, 1988), a petition filed just two days after the 90-day period expired was dismissed. Other cases have also strictly applied the 90-day rule.

In this case, K.N.'s final report card was issued in June 2003 and it notified his parents that he was being retained in the fifth grade for the 2003-2004 school year. Unlike the situation in *Kaprow*, in which the Court determined that informal notice satisfied the notice requirement, this notice was neither unofficial nor informal. Thus, the 90-day limitations period began in June 2003 when petitioners received notice that K.N. was being retained in the fifth grade instead of being promoted to the sixth grade. Since petitioners did not file their petition of appeal until October 30, 2003, more than four months later, it is untimely pursuant to *N.J.A.C.* 6A:3-1.3(d).

Although petitioners would have the undersigned determine that attempts through their representative to persuade the district to reverse its decision to retain K.N. in the fifth grade tolled the running of the 90-day limitations period, the applicable case law clearly establishes that such attempts to resolve a dispute by means other than filing a petition of appeal do not toll the limitations period. As pointed out by respondents, even attempts to secure redress by filing for arbitration do not toll the 90-day limitations period. *See, e.g., Riely v. Hunterdon Central High School Bd. of Educ.*, 173 *N.J. Super.* 109 (App. Div. 1980); *Bd. of Educ. of the Township of Bernards v. Bernards Township Education Ass'n*, 79 *N.J.* 311 (1979).

In *Pacio v. Board of Education of Lakeland Regional High School District*, 1989 *S.L.D.* 2060, 2069, the Commissioner stated:

> Further, the Commissioner would clarify for the record that requests to a board (of education) for reconsideration of its final decision do not toll the running of the 90-day rule.

Similarly, in *J.M. v. Board of Education of City of Summit, Union County*, EDU 3937-98 (April 14, 1999), *aff'd*, Comm'r (June 1, 1999), *rev'd*, State Board (November 3, 1999)[3] <http://lawlibrary.rutgers.edu/oal/search.html>, the Commissioner stated:

> As stated by the New Jersey Supreme Court in *Kaprow, supra*, attempts to resolve a claim through negotiation with the local board of education are irrelevant. Such efforts do not negate the fact of receipt of adequate notice nor do they toll the running of the time limits for filing a petition of appeal.

In fact, as pointed out above, there is no competent proof in the instant case that the retention was ever actually under review or would be reversed through negotiation.

The next issue, then, is whether the circumstances warrant relaxation of the rule and allow the petition to be filed after the 90 days has lapsed. The governing regulation provides as follows:

> 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 his or her discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.
>
> [*N.J.A.C.* 6A:3-1.16.[4]]

The 90-day rule may only be relaxed under exceptional circumstances or if there is a "compelling" reason to do so. *Kaprow, supra*, 131 *N.J.* at 590. Certain cases are

[3] The State Board reversed the Commissioner's decision on the grounds that a letter written by the *pro se* petitioners within the 90-day limitations period constituted a petition of appeal. Since petitioners were not advised that they had filed their papers in the wrong office until after the 90-day period had expired, the State Board found it inequitable to hold the petitioners had failed to file a petition in a timely manner. The State Board's decision did not, however, reverse the legal principle stated above.

[4] *N.J.A.C.* 6A:3-1.16, effective April 3, 2000, is the recodification of *N.J.A.C.* 6:24-1.15. However, the language in both regulations is substantially the same.

excepted from the rule, which include "cases involving (1) 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). The expenditure of public funds is not a sufficient public interest to justify a waiver or relaxation of the 90-day rule. *Elmwood Park Bd. of Educ. v. Farrell*, 95 *N.J.A.R.*2d (EDU) 375, 378. Moreover, the authority to relax or waive the 90-day rule is rarely invoked and is generally unsuccessful unless strict adherence would be inappropriate, unnecessary or where injustice would occur. *DeMaio v. New Providence Bd. of Educ.*, 96 *N.J.A.R.*2d (EDU) 449, 453 (*citing Gordon v. Passaic Bd. of Educ.*, 1985 *S.L.D.* 1929, 1931, *aff'd,* A-3294-84 (App. Div. May 27, 1986), *certif. denied*, 105 *N.J.* 534 (1986)). On the other hand, the Appellate Division has held there is justification for relaxation of the 90-day rule where "the Commissioner's findings that [a] petitioner was reasonably led to believe that he could continue to informally seek relief and not be concerned about the time limitations for filing his formal petition are adequately supported by the record and that strict adherence to the 90-day time limitation . . . would result in individual justice not being served." *Brown v. Bd. of Educ. of the Vocational School in the County of Sussex*, A-4854-83T7 (App. Div. April 4, 1985).

Petitioners here assert that the limitations period should be relaxed since this case concerns issues of public importance that petitioners have consistently pursued. They allege that K.N.'s teacher harbored and acted upon a personal animus towards K.N. and that K.N. was the victim of discrimination based on his race, religion and/or ethnic background. They claim that his teacher's animus towards him affected the grades she gave him and that having such a teacher is a matter of public concern.

Having considered these arguments, I **CONCLUDE** that no compelling or exceptional circumstances exist to warrant relaxation or waiver of the 90-day rule. As pointed out by respondents, factually, there is nothing in the record that supports the existence of a viable discrimination claim. Although petitioners alleged discrimination in their petition of appeal, they have submitted no certifications by anyone possessing

personal knowledge of such discrimination. Moreover, as pointed out by respondents, petitioners may have another remedy, even if the petition of appeal is dismissed on timeliness grounds, under the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*

In sum, petitioners have failed to appropriately identify any substantial constitutional issue or one of fundamental public interest beyond that of concern to petitioners themselves regarding which grade K.N. would enter in the 2003-2004 school year. Further, petitioners have failed to demonstrate that strict adherence to the 90-day rule would be inappropriate, unnecessary and result in injustice.

As pointed out in *Bogart v. Board of Education of City of East Orange*, OAL Dkt. No. EDU 6245-82 (January 26, 1983), *aff'd*, Comm'r (March 14, 1983), by Administrative Law Judge Stephen G. Weiss:

> Obviously, every time an otherwise meritorious claim is time barred, for whatever reason, there is, in a general sense, an "injustice." . . . [T]he 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.

Further, as pointed out above, there is no evidence here to support the fact that petitioners were reasonably led to believe that they could continue to informally seek relief and not be concerned about the time limitation for filing their petition. They have failed to demonstrate that they were lulled into a false sense of security that continuing to argue their position would in some way extend the 90-day time limitation.

Finally, as pointed out by respondents, in *Le Mee v. Board of Education of Village of Ridgewood,* 1990 *S.L.D.* 663, 671, 673, where the petitioner argued before the Commissioner that the 90-day limitations period should be relaxed because "the

possibility of age discrimination and improper evaluations in a public school system is of sufficient public importance to override strict adherence to the letter of the law," the Commissioner stated that:

> In this case . . . the alleged violations were individual ones committed against petitioner alone, and were not embodied in any policy or procedure of the district that might result in harm to others if her individual claim were to remain unexamined. Indeed, they were the actions of one man who was not alleged to have discriminated against others in petitioner's circumstances or to have acted at anyone's behest other than his own. In this type of situation, if actions of the sort alleged by petitioner were taken against other staff members, these would be appealable to the Commissioner, who could then address them on their merits and order appropriate remedies as necessary. By the Commissioner's declining to reach the merits in this instance, only petitioner is affected and only to the extent that her deliberate delay in filing has forfeited her right to relief in this forum.
>
> Such being the case, the Commissioner concurs with the ALJ's assessment that the greater public interest in this matter lies with enforcement of the 90-day rule and dismissal of petitioner's appeal as untimely.

As pointed out by respondents, here too, the alleged discrimination claimed by petitioners was an individual one committed against K.N. alone and not embodied in any policy or practice of the district that might result in harm to another if petitioners' claims remain unexamined.

Finally, I am compelled to point out that in essence the claim asserted by petitioners entails whether K.N. should have been promoted to the sixth grade for the 2003-2004 school year. Practically, failure to dismiss the petition of appeal at this late date will result only in a hearing on an issue that at this point is moot. The 2003-2004 school year is over. This is not a situation in which the "equities" call for relaxation of the rule. Strict adherence to the rule will not result in the requisite injustice warranting that it be relaxed.

Conclusion

Based upon the above, I **CONCLUDE** that summary decision on the timeliness of the appeal is appropriate. Petitioners have failed to set forth specific facts showing that there is a genuine issue of material fact necessitating a hearing on that issue. I **CONCLUDE** that petitioners' claim was not timely filed pursuant to *N.J.A.C.* 6A:3-1.3(d) and that the circumstances present here do not warrant relaxation of the 90-day rule pursuant to *N.J.A.C.* 6A:3-1.16.

Order

It is hereby **ORDERED** that respondents' motion for summary decision is **GRANTED** and petitioners' 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 (45) 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 (13) 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, 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.

June 17, 2004
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

June 17, 2004
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JUN 18 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

al

166-04

#166-04

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning "Abbott" Board of Education appealed the Department of Education's determination with respect to funding for the district's 2004-05 preschool program.

Of the nine issues in dispute, only two remained following settlement negotiations between the parties -- additional funding for special education teachers and additional funds for an extra half hour of preschool teachers' salaries so that children will receive the full six hours of daily instructional time required by existing regulation. On these remaining issues, noting that the State is not mandated to exclusively fund preschool in the *Abbott* districts, the ALJ concluded the Department used the basic funding formula and petitioner was not entitled to more favorable treatment. Petitioner must utilize other potential funding and exhaust municipal revenues before applying for supplemental aid. As to the funding of the extra half hour of instructional time, the ALJ found that the Department is only responsible for assuring funding for a six-hour "educational component." If petitioner wants to expand its preschool program beyond six hours, it must look elsewhere for funding.

The Commissioner adopted the ALJ's decision as his own.

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

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

April 21, 2004

Richard E. Shapiro, Esq.
5 Mapleton Road
Princeton, NJ 08540

Allison C. Eck
Deputy Attorney General
Division of Law – Box 112
Trenton, NJ 08625-0112

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY V. NJ STATE DEPARTMENT OF EDUCATION (EARLY CHILDHOOD EDUCATION), AGENCY DKT.NO. 53-2/04, OAL DKT. NO. EDU 01707-04

Dear Parties:

We are enclosing a copy of the decision of the Commissioner of Education, dated April 21, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/ dec ltr/phillipsburgEDU.doc
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library

Accordingly, for the reasons expressed therein, the Initial Decision is adopted, with the minor corrections noted in respondent's exceptions as quoted above, as the final decision in this matter.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 4/21/04

Date of Mailing: 4/21/04

* Pursuant to *P.L.* 2003, *c.*122, "Abbott" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court. In accordance with the June 24, 2003 Order of the Supreme Court, such appeals must be filed within six days of the Commissioner's decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1707-04
AGEGENCY DKT. NO. 53-2/04

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Allison Colsey-Eck, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: March 18, 2004 Decided: March 29, 2004

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by the Phillipsburg Board of Education ("Phillipsburg" or "Board") from the denial of its request for state funding of certain items contained in its preschool budget for the 2004-2005 fiscal year ("FY '05"). Pursuant to the mandate of

the New Jersey Supreme Court, Abbott school districts must provide high-quality preschool programs to their three- and four-year old children and the Commissioner of Education ("Commissioner") must "ensure" that such programs are adequately funded and "assist" local districts in implementing them.[1] Originally, the Board had challenged the amount of funding in nine separate categories.[2] Although the majority of these issues have been satisfactorily resolved, there remain two issues still in dispute.

First, the parties disagree on whether the costs for special education teachers serving disabled children in regular preschool classrooms should be funded through the preschool budget or through the district's K-12 budget. Phillipsburg contends that the New Jersey Department of Education ("Department") has failed to provide adequate funding for its preschool-disabled inclusion population as part of its preschool budget. The Department, on the other hand, maintains that Phillipsburg already receives sufficient funding for this purpose through district-wide state aid and that to include it again as part of the preschool budget would result in counting the same costs twice.

Second, Phillipsburg claims that the Department must pay for an additional half hour of preschool teachers' salaries so that children will receive the full six hours of daily instructional time required by existing regulation.[3] Board witnesses contend that the extra half-hour is necessary so that teachers may monitor the arrival and departure of school buses without reducing actual instructional time. Since the Department has approved funding for six hours of instructional time, it insists that Phillipsburg has sufficient money in its budget to provide the service.

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[1] *Abbott v. Burke*, 153 *N.J.* 480, 505-508 (1998) ("*Abbott V*") and *Abbott v. Burke,* 163 *N.J.* 95, 120 (2000) ("*Abbott VI*").

[2] Specifically, these areas were (1) transportation; (2) special education positions, services, resources and programs; (3) salaries and benefits for teachers; (4) salaries and benefits for relief teachers; (5) salaries and benefits for janitors; (6) lunchroom aides; (7) laundry service; (8) technology coordinator; and (9) television coordinator.

[3] In *Abbott V*, the Supreme Court directed the Commissioner to exercise his power to require all Abbott districts to provide half-day preschool for three- and four-year olds. 153 *N.J.* at 508. Current regulations have increased the amount of time to a full-day program, including "a six-hour educational component." *N.J.A.C.* 6A:10A-1.2.; *N.J.A.C.* 6A:10A-2.2(a).

expenses in its district-wide budget. Instructions for filling out the budget forms for FY'05 clearly say that preschool children with IEPs served in either self-contained or regular classrooms "are NOT funded per pupil by preschool program aid." Instead, the Department would reduce the district's preschool budget by "an amount equal to the total number of students with IEPs in regular classrooms . . . multiplied by the [Department]-approved district average per-pupil cost."

Allen Dupree, manager for policy research in the Department's Office of School Funding, explained that preschool disabled children are included in the annual enrollment count, which number is used to determine the categorical state aid granted to districts under the Comprehensive Education Improvement & Financing Act ("CEIFA").[9] Dupree, who holds a master's degree in public policy from Princeton University, testified that the total amount of aid to Phillipsburg for preschool handicapped children amounts to $15,888.72 per pupil.[10] Further, Dupree noted that this figure is conservative, since preschool disabled children are automatically classified as Tier II, although more severely disabled children may qualify for higher funding as Tier III or IV.[11] Moreover, the figure does not take into account federal funding available under the Individuals With Disabilities Education Act.[12] Thus, according to Dupree, removal of special education costs from preschool funding is necessary to avoid duplicate payments for the same expenses.

Even accepting Dupree's state aid numbers, Phillipsburg predicts a shortfall of $172,505 in its FY'05 preschool budget. In addition, Phillipsburg complains that much of the state aid considered by Dupree was "frozen" at October 15, 2000 enrollment

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[9] "Resident enrollment" under CEIFA includes "handicapped children between three and five years of age who are receiving [special education] services," but excludes preschool children who are not handicapped. *N.J.S.A.* 18A:7F-3. Early Childhood Program Aid is based on "modified district enrollment," which also includes preschool disabled students. *Id.*

[10] Dupree gave a breakdown of the various components of this sum: T&E Amount of $7,913.00; Special Education (Tier II) of $3,260.00; Supplemental Core Curriculum Standard Aid of $123.00; Early Childhood Program Aid of $506.00; Consolidated Aid of $109.72; and Educational Opportunity Aid of $3,977.00.

[11] *N.J.S.A.* 18A:7F-19.

figures and does not consider increases in enrollment.[13] As of October 15, 2000, Phillipsburg had an enrollment of 10 preschool disabled children, whereas Phillipsburg projects 12 preschool disabled children for 2004-05. Dupree pointed out, however, that *overall* Tier II elementary enrollment had actually declined between FY'02 and FY'05 (although funding has remained steady), so that there should be a sufficient cushion in the budget to accommodate any extra handicapped students.

Much of the apparent disagreement between the parties results from a different understanding of their respective legal obligations. Phillipsburg urges that the State should pay for whatever special education services are written into the IEPs of preschool handicapped children by the local child study team. John Consentino, director of special services in the district, said that the IEP "drives" special-education services, which must be adequately funded.

In contrast, Susan Bruder, a project development specialist in the Office of Early Childhood Education, described the Department's goal of improving the quality of preschool education and thereby reducing excessive reliance on special education services. Toward that end, the Department's recommended model emphasizes use of experienced "master teachers" to provide training and support for preschool classroom teachers.[14] At first glance, it appears unlikely that every preschool handicapped child enrolled in an inclusion classes would happen to require additional in-class support. Nonetheless, Bruder acknowledged that she has no reason to believe Phillipsburg is over-classifying children or prescribing in-class support for children who do not need it.

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[12] 20 *U.S.C.A.* §1411, -1433. District witness William Poch quantified IDEA preschool to be approximately $21,100.

[13] Aid for the first four items enumerated in footnote 10 are derived from October 15, 2000 enrollment data, while the last two items are derived from more recent enrollment data.

[14] Districts must furnish "master teachers at a ratio of no more than 20 preschool classrooms for each master teacher." Their duties include modeling, coaching, observing and providing feedback to teachers in preschool programs. *N.J.A.C.* 6A:10A-2.2(a)(7).

I **FIND** that the Department properly applied its written guidelines to exclude special education costs from the preschool program budget and include such costs in the K-12 budget. Because preschool disabled children are included in the annual enrollment count leading to other sources of state aid, this procedure serves the reasonable function of preventing double counting of the same costs. Proofs establish that Phillipsburg will receive aid of $15,888.72 per child. If Phillipsburg still has unmet needs, it has other avenues of relief, including applying for additional Abbott v. Burke aid.

(2) Extra Half-Hour of Preschool Instruction

In the course of its review, the Department discovered that Phillipsburg was providing only five and-a-half hours per day of preschool instruction. Consequently, the Department approved an additional half-hour of preschool teachers' salaries to bring Phillipsburg into compliance with the state standard of six hours per day.

Judy Leh, a school social worker employed by the Board as an administrator, felt that it would be "a good idea" to add another half-hour to the preschool day (bringing the total to six and-a-half hours) so that the instructional time would not be devoted to the daily routine of loading students on and off school buses. It takes about fifteen minutes for the children to exit the bus in the morning and fifteen minutes for them to board the bus in the afternoon. Leh has observed this arrival and departure process, which she describes as "very helter-skelter" and of "lesser quality" instructional time. She is not a teacher, however, and admits that Phillipsburg's past practice has been to treat this activity as instructional time. Phillipsburg also counts lunchtime as part of the instructional day.

Department specialist Susan Bruder holds a master's degree in early childhood education and is certified as a nursery school teacher. Familiar with the programmatic aspects of a preschool program, Bruder explained that they "simulate the life rhythms of a three- or four-year old" and are geared to imparting adaptive skills such as self-regulation and orderly transitioning. Although Leh had not yet received training in

Phillipsburg's new preschool curriculum, Bruder is fully acquainted with its content. Bruder confirmed that the district's new curriculum regards arrival and departure time as "an integral part of the [school] day."

I **FIND** that Phillipsburg has received sufficient state funding to provide six hours of quality preschool instruction and is not entitled to more money from the Department to extend teacher coverage for an additional half hour. Curricula designed for younger children, including the version chosen by Phillipsburg, treat arrival and departure from class as a teaching opportunity and, therefore, as valuable "instructional time." Early childhood experts consider this period as part of the learning experience.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Phillipsburg's appeal from its preschool budget must be denied, without prejudice to Phillipsburg's ability to apply later for supplemental aid to defray special education costs if there are insufficient resources in its K-12 budget.

In *Abbott V*, the New Jersey Supreme Court recognized that a strong preschool program "will have a significant and substantial positive impact on academic achievement in both early and later school years." 153 *N.J.* at 506. Ever since then, New Jersey has been a leader in providing quality preschool education to disadvantaged children. A timely national survey ranked New Jersey as spending "more money per child enrolled and more money per 3 year-old statewide than any other state" and "second in the nation for spending per 4-year old." *The State of Preschool: 2003 State Preschool Yearbook published by The National Institute for Early Education Research*, at 42.

Earlier this month, the Appellate Division clarified the role of the Commissioner in ensuring quality preschool programming in every Abbott district. In light of the fact that the guaranty of a through and efficient education in the state constitution applies to children "between the ages of five and eighteen," the appellate panel refrained from

deciding whether the right to a preschool education for three- and four-year olds is a matter of constitutional compulsion. *Millville Bd. of Educ. v. New Jersey Dep't of Educ.*, 2004 *WL* 444025 (*N.J.Super.* A.D.) Rather, the requirement that preschool be made available in the Abbott districts was deemed to be a court-fashioned remedy "necessarily imposed to redress the prior constitutional deprivation for children in the Abbott districts upon reaching the age of five." *Millville*, at 4.

That being so, the Appellate Division concluded that the New Jersey Supreme Court "did not intend to require exclusive state funding of preschool in the Abbott districts." *Id.* Quoting language from *Abbott V*, the Appellate Division construed the Commissioner's responsibility in terms of a duty to "ensure" and "assist" in the adequate funding of preschool programs in Abbott districts. *Id.* Thus, the Appellate Division upheld the Commissioner's position that full funding of Abbott preschool programs "cannot be viewed as promises or expectations of dollar-for-dollar State funding regardless of resources available in the local district budget." *Millville*, at 2.

Here the Commissioner is simply requiring Phillipsburg to utilize other potential funding and to exhaust municipal revenues, including local tax levies, before applying for supplemental aid. Certainly the Commissioner did not act arbitrarily or unreasonably when he imposed internal controls to prohibit districts from collecting money twice for the same purpose. Likewise, the Department's regulations, embodying its commitment to assure that the district has funds necessary to implement a high quality preschool program, *N.J.A.C.* 6A:10-2.4(a)(8), does not imply a complete state assumption of all special education costs.

Special education is basically a distinct concern, with separate sources of funding, from preschool programming. Federal law encourages districts to educate disabled students in the "least restrictive environment." See *Oberti v. Board of Educ. of Clementon Sch. Dist.*, 995 *F.*2d 1204 (3rd Cir. 1993). Guidelines promulgated by the Department reflect this approach and promote inclusion of children with disabilities in general education preschool programs "to the maximum extent appropriate." *Abbott Preschool Program Implementation Guidelines* (Feb. 2003), at 39. Phillipsburg is to be

commended for insuring that all or nearly all of its disabled preschoolers are enrolled in general education classes. Adherence to these standards, however, does not alter the basic funding formula or entitle Phillipsburg to more favorable treatment.

Understandably, Phillipsburg may be disappointed with the lack of any assurance that additional funding for special education will be provided as supplemental aid. No reason exists, however, to doubt the sincerity of the Commissioner's commitment to assist Abbott districts in procuring funds genuinely necessary to provide quality preschool programming. Indeed, last year the Commissioner restored enough money to fund these same teaching positions as a result of Phillipsburg's 2003-2004 budget appeal. *Phillipsburg Sch. Dist. v. N.J. Dep't of Educ.*, OAL Dkt. No. EDU 5501-03 (Sept. 26, 2003), *adopted* (Comm'r Oct. 20, 2003), *modified on other grounds*, Dkt. No. A-1253-03T2 (N.J. App. Div. March 10, 2004) (unreported).

With respect to the extra half hour of instructional time, the Department is only responsible for assuring funding for a six-hour "educational component." Funding is available through the Department of Human Services for an additional four hours of "wraparound" preschool programming offering childcare services for working parents. *N.J.A.C.* 6A:10A-1.2. Having ensured that Phillipsburg has adequate funding for a daily six-hour educational component, the Department has fulfilled its legal obligation. If Phillipsburg wants to expand its preschool program beyond six hour, it must look elsewhere for such funding.

Order

It is **ORDERED** that Phillipsburg's request for additional preschool funding 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 the time allowed under the existing orders of the New Jersey Supreme Court 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.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 29, 2004
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

March 29, 2004
DATE

E-mailed Initial Decision to the parties on:

March 29, 2004
DATE

APPENDIX

List of Witnesses

1. Judy Leh, principal of the early childhood program, Phillipsburg public school district

2. John Consentino, administrator of special services, Phillipsburg public school district

3. William Poch, school business administrator/board secretary, Phillipsburg public school district

4. Allen Dupree, manager for policy research and analysis, New Jersey Department of Education

5. James Turek, coordinating budget manager for northern region, New Jersey Department of Education

6. Susan Bruder, program development specialist, New Jersey Department of Education

List of Exhibits

(**Boldface denotes exhibits marked into evidence)**

No.		**Description**
P-1	Id.	Shift Tours for two janitors (Shimer School)
P-2		**Special Education Inclusion Costs**
P-**2**	**(a)**	**Revised Special Education Inclusion Costs**
	(b)	**Second revised Special Education Inclusion Costs**
P-3	Id.	Three-Year Technology Plan Checklist
P-4	Id.	Special Request-Technology Coordinator
P-5	Id.	Self-Assessment Validation System for Abbott Preschool Programs
P-6	Id.	"Meaningful Differences In the Everyday Experience of Young American Children," by Betty Hart and Todd R. Risley

P-7	Id.	"The Phillipsburg Promise: Improving Literacy and Parent and Community Involvement Through Educational Television Programming," by Zena Beth Fialkowski
P-8	Id.	Special Request Form for PSD TV Project
P-9	Id.	Parent Evaluations
P-10	Id.	Activities and Scheduling Associated with PSD TV
P-11	Id.	Additional Justification for .5 Janitors
P-12		**Document entitled "Special Education and Inclusion"**
P-13		**Breakdown of preschool disabled children by class for the 2003-2004 school year**
P-14		**Count of preschool disabled children as of October 15, 2000**
P-15		**2004-2005 district one-year programmatic budget worksheet, dated March 4, 2004**
P-16		**Agreement between the Phillipsburg Board of Education and the Phillipsburg Education Association, Inc. for July 1, 2003 to June 30, 2006**
R-1-69		**Preschool Teaching and Learning Expectations: Standards of Quality**
R-70-128		**Abbott Preschool Program Implementation Guidelines Office of Early Childhood Education**
R-129-150		**District One-Year Budget Instructions and Guidance School Year 2004-2005**
R-151-191		**Three-Year Operational Plan Revisions and District One-Year Programmatic Budget Instructions for School Year 2004-2005**
R-192-269		**Three-Year Operational Plan Revisions and District One-Year Programmatic Budget Instructions for School Year 2004-2005**
R-270-282		**January 6, 2004 Approval Letter**
R-283-284	Id.	February 14, 2003 amendment letter
R-285-294		**January 15, 2004 Approval Letter**

R-295	Id.	December 16, 2003 memo to Susan Bruder from Judith Leh
R-296-297	Id.	December 20, 2003 letter to Judith Leh from Susan Bruder
R-298	Id.	Email from Judith Leh to Susan Bruder dated February 3, 2004
R-299	Id.	Email from Susan Bruder to Judith Leh dated January 17, 2004
R-300	Id.	Emails between Susan Bruder and Rebecca Dilts dated December 14 and 15, 2004
R-301-309	Id.	National Association for the Education of Young Children article on Technology and Young Children
R-310-352	Id.	Annenberg Public Policy Center, University of Pennsylvania, "The 1998 State of Children's Television Report"
R-353-355	Id.	Article on Children's Television Workshop
R-356-365.	Id.	International Reading Association and National Association for the Education of Young Children position on "Learning to Read and Write: Developmentally Appropriate Practices for Young Children, pt. 1"
R-366-368	Id.	District Special Request Form for the 2003-2004 school year for PSD TV Project
R-369-395	Id.	Promise TV Take Home Totes Parent Evaluations
R-396-401	Id.	Activities associated with the Promise TV Take Home Totes Project
R-402-405	Id.	Scheduling information on PSDTV Channel 50
R-406-407		**Special education funding information**
R-408-420		**Salary information including handwritten notes, copies of salary guides and applicable pages from the budget**
R-408a-409a		**Revised pages 409 and 409**
R-421	Id.	Excerpt from the American School & University report on maintenance and operations costs

OAL DKT. NO. EDU 1707-04
AGENCY DKT. NO. 53-2/04

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Department filed "exceptions" to the Initial Decision, noting only that it sought to correct the record of exhibits listed on page 13 of the Initial Decision. Specifically, the Department clarifies that the exhibit identified as "R151-R191" is properly titled the "Three-Year Operational Plan Instructions and Forms, School Years 2003-2004 through 2005-2006." Additionally, the exhibit identified as "R270-R282" is an approval letter dated January 6, 2003, rather than 2004.

Pursuant to *N.J.A.C.* 1:1-19.1(d), the Initial Decision is the final decision in this matter with respect to those issues resolved between the parties. (Initial Decision at 2) With respect to the two issues remaining in dispute, how costs for special education teachers serving preschool disabled children should be funded and whether the Board's request for funds to pay for an additional one-half hour of teachers' salaries was properly denied, the Commissioner is satisfied upon a full and independent review of this record, that the findings and conclusions of the Administrative Law Judge (ALJ) are amply supported and should not be disturbed.

167-04

#167-04

M.A., on behalf of minor child, S.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, UNION COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

April 19, 2004

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

April 21, 2004

Maureen Anderson, Pro Se
105 Tussel Lane
Scotch Plains, NJ 07076

Casper P. Boehm, Jr., Esq.
17 Main Street – Box 1118
Sayreville, NJ 08872

M.A., ON BEHALF OF MINOR CHILD, S.A. V. BOARD OF EDUCATION OF SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, UNION COUNTY, AGENCY DKT. NO. 87-3/04, OAL DKT. NO. EDU 03038-04

Dear Parties:

We are enclosing a copy of the decision of the Commissioner of Education, dated April 19, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/ dec ltr/MAscotchplains.doc
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library ✓

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENCY RELIEF

OAL DKT. NO. EDU 3038-04

AGENCY DKT. NO. 87-3/04

M.A. ON BEHALF OF MINOR CHILD, S.A.,

Petitioner,

v.

BOARD OF EDUCATION OF SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, UNION COUNTY,

Respondent.

M.A., *pro se*, petitioner

Casper P. Boehm, Jr., Esq., for respondent

BEFORE **ROBERT J. GIORDANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, M.A., filed a request for emergent relief by way of letter to the Commissioner of Education dated February 10, 2004, seeking credit for her son, S.A., for courses taken through home instruction, by certified district teachers, provided at her own expense. The matter was transmitted by the Commissioner of Education to the Office of Administrative Law (OAL) on March 8, 2004. The matter was scheduled for oral argument on the request for emergent relief on March 15, 2004.

On March 15, 2004, petitioner appeared before the undersigned. Appearing for respondent, Board of Education of Scotch Plains/Fanwood School District, was Casper P. Boehm, Jr., Esq., counsel to the Board. The matter was converted into a conference, and lengthy discussions took place at that time. At the conclusion of the conference, the petitioner indicated she would likely withdraw the request for emergent relief. She was directed to advise the undersigned within the next several days whether she intended to proceed with the matter further. If so, a hearing on the request for emergent relief would be rescheduled as soon as possible.

On March 16, 2004, petitioner faxed a letter to the undersigned advising that she was withdrawing the request, "due to the fact that I am financially unable to secure legal counsel to pursue my son's rights for an education." I rejected that request and conferenced the matter by telephone with the parties on March 17, 2004. Petitioner was advised that she did not need an attorney to proceed. The matter was rescheduled for oral argument on March 22, 2004.

Respondent submitted an answer to the emergent relief application with supporting certification of Thomas J. Beese, Jr., Director of Special Services. The undersigned heard arguments of the parties and the record was thereafter closed.

FACTUAL DISCUSSION

M.A. is the mother of the minor child, S.A., who is seventeen years of age. Together, they reside in the Borough of Scotch Plains, New Jersey. As of the 2001-2002 school year, S.A. was a student enrolled in the ninth grade at the Scotch Plains/Fanwood High School. There were apparently incidents involving S.A. and other students in the high school, commencing in or about November 2001. The District conducted an investigation of the incidents and determined that S.A. was the instigator of the incidents. He was the subject of disciplinary procedures by the school. As of April 2002, S.A. no longer attended the school, allegedly because of anxiety related to

the incidents with other students. The mother has refused to return the child to the school and requests rather an alternative to the attendance at the high school.

Petitioner herein has on two separate occasions filed petitions for relief but has withdrawn those petitions. She has previously requested a placement in another school district. By letter dated February 25, 2004, Beese advised petitioner that there were several options available to her and her son. She could home school S.A. with private tutors at her own expense. There would be no transcript of those academic courses provided by the District. According to Beese, this option was declined by petitioner.

Another option was that the District would provide home instruction if there were documentation of a psychiatric evaluation and recommendation that indicates S.A. is unable to attend school. According to Beese, petitioner also declined this option.

According to the letter from Beese, the District offered S.A. the opportunity to attend the high school where he would be provided a "tailor-made schedule" in highly competitive academic courses. The District offered to provide a shadow to help relieve S.A. of any anxiety. This offer was declined, according to Beese.

S.A. was evaluated by the child study team (CST), with a recommendation of classification as emotionally disturbed. The evaluation was completed and a CST meeting was held in October 2002. Petitioner was offered a placement in New Providence High School as a classified student. This offer was declined.

In light of the time of year, S.A. was also afforded the option of returning to the Scotch Plains/Fanwood High School, to be enrolled in half-year electives, so that some credits could be obtained. Petitioner declined this offer.

LEGAL DISCUSSION

Consistent with the N.J. Const. (1947), Art. VIII, § IV, par. 1, every parent having custody and control of a child between the ages of 6 and 16 years shall cause such

child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school. *See, N.J.S.A.* 18A:38-25. *See also, N.J.S.A.* 18A:38-26. *Cf. Everson v. Bd. of Ed. of Ewing Twp.*, 133 *N.J.L.* 350, 355 (E. & A. 1945), *aff'd*, 330 *U.S.* 1 (1946), where three exceptions to the compulsory education statutes are described: physical disability of the child, mental disability of the child and adequate private teaching.

However, the board of education has an equally compelling responsibility to provide an appropriate environment at the school. *Venezia v. Board of Education of Township of Ocean*, 92 *N.J.A.R. 2d* (EDU) 370. School authorities are obligated to take reasonable precautions for the safety and well-being of the students. *Jackson v. Hankinson*, 51 *N.J.* 230 (1968).

The New Jersey Administrative Code regulations provide in pertinent part that where a motion for a stay or emergent relief is filed, it shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying the petition's claim is settled;
>
> 3. The petitioner has the likelihood of prevailing on the merits of the underlying claim;
>
> 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).]

CONCLUSIONS

It is clear that the petitioner has concerns regarding the safety and welfare of her child, S.A. It is equally clear that the District has an obligation to provide an appropriate environment at school. From the evidence adduced at the oral arguments, and the

papers submitted in support of the respective positions, it is clear that the Board has made efforts to address the concerns of petitioner. There was an investigation that led to the imposition of discipline against S.A. Petitioner did not appeal that determination.

Now petitioner seeks, by way of a request for emergent relief, to have credits transcribed to the District transcript for the student, S.A., for instruction to be provided at the expense of the petitioner. The District has advised petitioner that the Board would not accept home instruction in lieu of attendance in the classroom setting, absent either a physical or mental disability.

The District has also advised petitioner that home schooling may be an option, and that readmittance thereafter would be accepted upon a District assessment test to determine the appropriate level for placement.

From a review of the factual backdrop, I **CONCLUDE** that petitioner has failed to meet the four-prong standard for the granting of relief. The child is currently seventeen years old and may not be compelled in any event to attend the public schools. It is further not clear that there is any settled legal right underlying petitioner's claim for credits for private instruction. In fact, it is more likely than not that petitioner has no likelihood of prevailing on the merits of the underlying claim.

Finally, in balancing the equities and interests of the parties, it is clear that the respondent District will suffer greater harm than the petitioner if such relief is granted. The District is ready, willing and able to provide an appropriate public education to S.A., if he will avail himself of such education. Petitioner has utterly failed to establish, by even a scintilla of the evidence, the entitlement to the relief sought here. The directive to afford District credits for private instruction would be contrary to the education laws of the State, and would set an untenable precedent.

The District is ready to accept the student back and will make all reasonable accommodations to address the concerns of the parent. Respondent has even conducted CST evaluations that would ultimately provide for a special education

placement under the IDEA. However, there is no legal authority for the District to compel the acceptance of the CST recommendation.

The petitioner has advised that there is no private instruction currently, and that she will be moving prior to the next school year. She will enroll her son in the new school district at that time. For this and all of the foregoing reasons, I **CONCLUDE** that petitioner's request for emergent relief is unfounded.

ORDER

It is hereby **ORDERED** that the petition for emergent relief is and shall be **DISMISSED**. The parties acknowledge that no other issues remain upon the resolution of the within emergent relief matter.

This order on application for emergency relief may be adopted, modified or rejected by the **DEPARTMENT OF EDUCATION**, 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 (45) days following the entry of this order. If the **DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) 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.

3/23/04
DATE

ROBERT J. GIORDANO, ALJ

md

OAL DKT. NO. EDU 3038-04
AGENCY DKT. NO. 87-3/04

M.A., on behalf of minor child, S.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, UNION COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this matter and the recommended Order of the Office of Administrative Law (OAL) have been reviewed.

Upon review, the Commissioner concurs, for the reasons set forth in the OAL Order, that petitioner herein has failed to meet the established criteria for grant of emergent relief. He further notes the parties' concurrence that, upon resolution of petitioner's emergent application, no further issues remain in this matter.

Accordingly, the Commissioner adopts the recommended Order of the OAL as his final decision in this matter. For the reasons expressed in the Order, petitioner's motion for emergent relief is denied and the underlying matter is dismissed in its entirety.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/19/04
Date of Mailing: 4/21/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

179-04

I79-04

G.A., on behalf of minor children, R.A., K.A. AND R.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

April 22, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9351-03

AGENCY DKT. NO. 269-8/03

G.A. ON BEHALF OF MINOR CHILDREN, R.A., K.A. AND R.A.,

Petitioners,

v.

BOARD OF EDUCATION OF SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

Respondent.

Robert H. Greenwood, Esq., for petitioner

Joanne L. Butler, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: March 8, 2004 Decided: March 8, 2004

BEFORE **ROBERT J. GIORDANO**, ALJ:

On October 1, 2003, this matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13. After a conference held on November 19, 2003, a hearing was scheduled for hearing on December 17 and continued on December 22, 2003.

During the course of the hearing, the parties advised that they had resolved this matter. On March 8, 2004, the parties submitted the attached Stipulation of Settlement and Mutual Dismissal and Board Resolution 1794B indicating the terms of agreement, which are incorporated herein by reference.

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

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

2. The settlement disposes of the 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. Accordingly, I approve the settlement and **ORDER** that the parties 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 (45) days and unless such time is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

3/8/04
DATE

ROBERT J. GIORDANO, ALJ

Receipt Acknowledged:

3-12-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 15 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

md

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 MAR -8 P 12:19

SCHENCK, PRICE, SMITH & KING
10 Washington Street P. O. Box 905
Morristown, New Jersey 07963-0905
(201) 539-1000
Attorneys for South Orange and
Maplewood Board of Education

GEORGE ATTOR, for himself and on behalf of his minor children, Rosemary, Ken, and Richard,

Petitioner,

v.

BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

OAL DKT. NO. EDU 9351-03

Agency Ref. No. 269-8/03

STIPULATION OF SETTLEMENT AND MUTUAL DISMISSAL

Petitioner George Attor and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood, herein stipulate and agree as follows:

1. The domicile of petitioner for purposes of his children's entitlement to attend the schools of the South Orange and Maplewood School District is, as of December 19, 2003, understood and acknowledged by both parties to be the Township of Irvington and not the Township of Maplewood.

2. Petitioner's children will be educated as follows:

a. Rosemary, presently in her senior year at Columbia high School, will be permitted to continue at Columbia through June 30, 2004 or the date of her graduation, whichever occurs sooner;

b. Kenneth, presently in 8th grade, will be permitted to remain enrolled through the current semester, which ends January 23, 2004, after which he will no longer be enrolled in the District; and

c. Richard, a special education student, presently attending Washington North in North Bergen, a day facility, will become the educational responsibility of the Township of Irvington as of December 23, 2003, and the South Orange and Maplewood School District shall take all appropriate steps to arrange for the transition of responsibility for Richard's education to the Township of Irvington as of that date.

3. Petitioner will pay to the South Orange and Maplewood School District the sum of $2,000.00.

4. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

5. The parties waive any and all claims which were or could be asserted in the within action or any other action, including attorneys fees and damages pursuant to any federal or State educational, constitutional or civil rights claims, including 42 U.S.C. 1983, and specifically release the other party from any claims arising out of or related to these claims.

6. As a result of the foregoing, Petitioner George Attor withdraws his Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant Board hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

7. This Stipulation of Settlement and Mutual Dismissal shall be presented to Judge Giordano for his approval.

2/23/04
GEORGE ATTOR Date

2/26/04
SOUTH ORANGE/ MAPLEWOOD BOARD OF EDUCATION Date

00673367

SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, NEW JERSEY
PUBLIC BOARD MEETING
March 1, 2004

RESOLUTION 1794B

FOR ACTION

SUBJECT: APPROVE CONFIDENTIAL STIPULATION OF SETTLEMENT – G.A.

BE IT RESOLVED THAT the Board of Education authorizes the Board President to execute a settlement agreement with G.A. on behalf of R.A., K.A. and R.A. which permits R.A. to continue her senior year at Columbia High School at no tuition and provides for the withdrawal of K.A. and R.A. from district schools.

MOTION made by Mr. Frazer, seconded by Mr. Betheil, to approve Resolution 1794B.

ROLL CALL: Motion 1794B passed; 8 yes, 0 no.

I, Karla Milanette, 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 March 1, 2004 by the roll call vote set forth above and remains in full force and effect.

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 MAR -8 P 12: 19

Karla Milanette, Board Secretary

OAL DKT. NO. EDU 9351-03
AGENCY DKT. NO. 269-8/03

G.A., on behalf of minor children, R.A., K.A. AND R.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Mutual Dismissal and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Deputy Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 4|22|04

Date of Mailing: 4|23|04

178-04

178-04

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" Board of Education appealed the Department of Education's determination with respect to funding for the District's 2004-05 preschool program. Two issues remained to be decided: whether the Department's decision arbitrarily excluded adequate funding for the education of preschool disabled students for the 2004-05 school year and whether the Department's decision arbitrarily limited salary increases for all early childhood staff for the 2004-05 school year to amounts below prior or existing collective bargaining agreements.

The ALJ concluded that the Board did not demonstrate that its preschool program would be inadequately funded; that the Department's methodology for funding the District's preschool program was consistent with the laws and regulations governing the process; and that the Department's method was a reasonable means of preparing the preschool budget and should be sustained. As to the staff salaries, the ALJ concluded that the Department did not arbitrarily limit salary increases in the preschool budget because they were in line with what the Board requested; they did not prejudice the negotiations; and they are subject to increase when the actual contractual increases are negotiated. Petition was dismissed with prejudice.

The Commissioner adopted the Initial Decision as his own.

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.

April 22, 2004

Yut'se Thomas has been the Director of the Office of School Funding at the Department for the last four years. She explained that the FY 2002 level was chosen because that was the last year the Comprehensive Education Improvement and Financing Act (CEIFA) formula was applied before level funding was instituted. The CEIFA formula is based upon resident enrollment in the District in October 2000. Pursuant to *N.J.S.A.* 18A:7F-3, the definition of "resident enrollment" includes handicapped children between three and five years of age who are receiving services under *N.J.S.A.* 18A-46.6. Non-disabled preschool students are not included in the resident enrollment. *N.J.S.A.* 18A:7F-3.

In accord with this definition, the Department had the Districts include handicapped preschool children when calculating the "T & E amount" in the regular District budget rather than in the preschool budget. This amount is defined as:

> the cost per elementary pupil of delivering the core curriculum content standards and extracurricular and cocurricular activities necessary for a thorough regular education under the assumptions of reasonableness and efficiency contained in the Report on the Cost of Providing a Thorough and Efficient Education;
>
> [*N.J.S.A.* 18A:7F-3]

Thus far, it appears that the Department's method is not inconsistent with the statutory and regulatory requirements. Using them as its basis, the Department calculated the per-pupil funding for Tier II preschool students in the regular District budget in the following manner. This includes all of the available sources of funding for these students. (At no time did the District dispute the figures below for purposes of this hearing, although they may be subject to dispute in the context of the District's FY 05 K-12 budget.)

Table 1

Funding Generated by Preschool Special Education Student

Funding Category	Per-Pupil Funding
T & E Revenue (FY 2002)	$8,309.00

Special Education – Tier II (FY 2002)	$3,260.00
Supplemental Core Curriculum Standards Aid (FY 2002)	$684.00
Early Childhood Program Aid (FY 2002)	$817.00
Consolidated Aid (FY 2004)	$109.72
Education Opportunity Aid (FY 2005)	$3,766.00
Total	$16,945.72

The total of items in this table is exclusive of federal I.D.E.A. funds to be received.

Thomas testified that the $3,260 in Tier II revenue is aid for special education. Therefore, the preschool handicapped children will receive it. The Supplemental Core Curriculum Standards Aid is given to assist Districts with high property tax rates. The Early Childhood Program Aid is given to Districts on a sliding scale based upon the concentration of low income population in the District. If the projected number of Tier II students for the 2004-2005 school year is not more that the number enrolled in the 2001-2002 school year, the funding should be sufficient.

Parenthetically, based upon data submitted by the District, the whole Tier II elementary enrollment has in fact been falling from the actual October 2000 enrollment used by the District in its calculations. Dr. Frank D'Ambra, Supervisor of Special Services for the District, testified that referrals for the preschool program have recently increased dramatically but he did not specify what proportion of these were inclusion students. The District estimated the number of these student to be 48 in FY 05.

In addition, the District receives Consolidated Aid and Educational Opportunity Aid for these students. Educational Opportunity Aid is given for the first time in FY 2005. It is meant to bridge the gap between the Abbott districts and the others.

Once the Department calculated the per-pupil amount, $16,945.72, for the preschool Tier II students, it looked at the number of these children projected by the District to be in the preschool program in FY 2005. It accepted the District's estimate of 48. The Department rounded off the per-pupil amount to $16,946 and multiplied it by 48, giving an amount of $813,408 for all 48 students. Therefore, since the costs for

these children, including the costs of teachers and aides, were already accounted for in the regular District budget, there is no reason to duplicate them in the preschool budget.

Using the District One-Year Abbott Preschool Program budget worksheet, as modified on March 4, 2004, the requested funding for the preschool program, including seven special education teachers, aides, materials and related services for Tier II students in the program, was $23,766,855.

Funding for related services for inclusion students is also part of the $813,408 in the regular K-12 budget for the preschool program. As a result, the Department excluded all expenses relating to the inclusion students thereby reducing the budget to $23,160,687, a decrease of $606,192.

As of the date of hearing, the District was unable to reasonably estimate the necessary funding for related services that the inclusion students will receive in preschool since that will be based upon their individual IEPs which had not as yet been completed for the 2004-2005 school year.

The amount the Department excluded from the preschool budget for inclusion students was calculated as follows. The District estimated the per-pupil cost of all preschool students, including the Tier II students, to be $12,629. The Department deducted funding at this rate for the 48 inclusion students in the amount of $606,192 (48 x $12,629) as a duplication of revenues.

There is, however, available funding of $813,408 in the regular District budget for the purpose of educating the 48 Tier II inclusion students in the preschool program. As a result, the Department demonstrated that, with the information now available, there will be a surplus of $207,216 ($813,408 - $606,192) of funding for the preschool rather than a shortfall as alleged by petitioner. The $213,441 surplus calculated in the Department's exhibit in evidence is based upon a worksheet last modified on January 14, 2004. In either case, both calculations show a surplus rather than a deficit.

Petitioner argues that local funding should not be used to calculate preschool aid and therefore the Tier II preschool students should not have been included in the K-12 budget. It relies upon the FY 04 Appropriations Act and Governor McGreevey's budget message for this assertion. According to the limited portion of the FY 04 Appropriations Act provided by petitioner, it appears that preschool students and one-half of the full-day kindergarten enrollments are excluded from calculating the per-pupil costs solely for the purpose of calculating parity aid, such as Educational Opportunity Aid, not for purposes of calculating the per-pupil component of T&E revenue or other aid to special needs students. The FY 04 Appropriations Act does not demonstrate an intent to repeal *N.J.S.A.* 18A:7F-3 and must be read in *pari materia* with that legislation.

The District presented no evidence that parity aid was not calculated in the correct manner according to statute. It only argued that T&E per-pupil funding and other aid should have been calculated in the same way, which, as seen above, is not the law.

Finally, if petitioner's argument is pushed to its logical conclusion, then half of the District's full-day kindergarten students should be excluded by law in calculating per-pupil funding in the District's K-12 budget, surely an unintended result for the District.

It was the burden of the District to show that the Department's method is arbitrary, capricious, and/or contrary to law. I **CONCLUDE** that the District has not demonstrated that its preschool program will be inadequately funded. I **CONCLUDE** that the Department's methodology for funding the Passaic preschool program is consistent with the laws and regulations governing the process. I further **CONCLUDE** that the Department's method is not arbitrary or capricious but is a reasonable means of preparing the District's preschool budget and should be sustained. The District's desire to have certainty of funding at a given level and at an earlier time does not make the Department process arbitrary and capricious. *See, City of Passaic Board of Education v. New Jersey Department of Education,* A-1484-03T3, (App. Div. March 12, 2004).

The next issue on appeal is whether the January 15 decision arbitrarily limited salary increases for all early childhood staff for the 2004-2005 school year to amounts below prior or existing negotiated collective bargaining agreements.

The salary increases in issue here are those relating to two collective bargaining agreements expiring on August 31, 2004. The first is for teachers, social workers, aides, and other certificated and non-certificated staff. It expires on August 31, 2004 with a 5% increase for the 2003-2004 school year. The second contract is for custodians which expires on August 31, 2004 with a 5% contractual increase for the 2003-2004 school year.

The remaining two collective bargaining agreements, for administrators and secretaries, are in effect until August 31, 2005. These were not capped and are in the preschool budget at the contractual rates for the 2004-2005 school year.

Although the District argues that the Department artificially capped salary increases at 2.64%, the CPI, for the two unions with contracts to be negotiated as of August 31, 2004, the record does not support this.

James Turek, Abbott Program Services Budget Manager and Coordinator of all northern major Abbott Districts, testified as a witness for the Department. He is now also Acting Director of State Operated School Districts. Turek stated that the Department capped increases for preschool providers at 2.88% but he appeared puzzled when asked if the State capped negotiated contract salaries at 2.64%.

He explained that the District only asked for a 2.88% increase for salaries in its proposed preschool budget and the Department conditionally granted a 2.64% increase, the rate of inflation, pending the outcome of the collective bargaining negotiations in August 2004. These negotiations have not commenced at this time. Turek said that, in its preschool budget request, the District used the 2.88% figure "for

everything" but he had no explanation for this. He pointed out that the difference between 2.64% and 2.88% is minimal.

Dr. Henry Lee, the Business Manager of the District, believed that the August 2004 negotiations would lead to an increase of about 5%. He based this upon the contractual increases for other school districts in the area as compiled by the New Jersey School Boards Association in a document entitled "Salary Rates in Perspective." After a cursory review of this document, Turek opined that none of the increases in this document were for contracts beginning in the 2004-2005 school year, most were in about the 4% range, and that Newark and East Orange, the districts most heavily relied upon by Passaic, were not really comparable due to their greater size among other things. Lee explained that, even so, Passaic had to remain competitive with these districts in order to attract good employees.

Turek said that the 2.64% only provided a floor on the prospective rate of salary increases. After the District negotiates increases that are both reasonable and fair to the employees covered, it can apply to the Department for additional funding to cover these increases and the Department will consider the requests.

This position does not appear arbitrary. The Department should not place itself in a position that effectively authorizes unreasonable contractual increases by pre-approving rates higher than the CPI.

In response to testimony by the Department's witnesses that Passaic voluntarily requested salary increases of 2.88%, the District recalled its witness, Angela Gomez, Fiscal Specialist for Early Childhood Programs, in rebuttal. The intended effect of her testimony was to show that the 2.88% increase requested was not a choice but was forced upon the District by the Department. Gomez, however, testified that she had attended meetings with Department in 2003 where the budget guidelines were distributed. She heard the 2.88% figure mentioned and assumed that it was also related to the guidelines for salary increases.

In this context, she asked Kathleen Priestley, Education Program Development Specialist for the Department, whether, if the District used the 2.88% figure, it could later apply for an increase in funding to meet the budget after the collective bargaining agreements were negotiated. When Priestley assured her that this could be done, the Passaic budget was submitted with a request of 2.88% for salary increases. Based upon the testimony of this witness, I **FIND** that the Department did not force the District to request salary increases at the 2.88% level. If there were a misunderstanding with respect to this request, there is no evidence that Priestley was aware of it. From the testimony of Gomez, it appears that Priestley simply answered her question as asked.

I **FIND** that the Department did not arbitrarily limit salary increases as alleged. I **FIND** that it approved an increase in salaries close to that which the District requested. I **FIND** this increase is subject to increase when fair and reasonable contractual increases are negotiated. I, therefore, **CONCLUDE** that the Department did not arbitrarily limit salary increases in the Passaic preschool budget because they are in line with what the District requested, they do not prejudice the negotiations, and they are subject to increase when the actual contractual increases are negotiated.

Based upon all of the above, I **CONCLUDE** that the appeal of the District should be dismissed because there is no relief to which the District is entitled.

It is, therefore, **ORDERED** that the Board's Verified Petition of Appeal is hereby **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 the time allowed under the existing orders of the New Jersey Supreme Court 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.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 29, 2004
DATE

EDITH KLINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

March 29, 2004
DATE

E-mailed Initial Decision to the parties on:

March 29, 2004
DATE

APPENDIX

Witnesses:

For Petitioner:

Maria Garcia

Angela Gomez

Dr. Henry Lee

For Respondent:

Yut'se Thomas

James Turek

Exhibits:

Joint:

J-1 Letter, Frede and MacInnes to Holster, January 15, 2004

J-2 Abbott Preschool Program budget worksheet, as modified on January 14, 2004

J-3 Abbott Preschool Program budget worksheet, as modified on March 4, 2004

For Petitioner:

P-1 Settlement Rates in Perspective

P-2 No Exhibit

P-3 J-1

P-4 J-2

P-5 J-3

P-6 Memorandum, Inclusion Classrooms

P-7 Table, Cost of Inclusion Teachers

P-8 No Exhibit

P-9 Early Childhood Education, Statement of Inclusion Costs

P-10 District One-Year Budget Instructions and Guidance, School Year 2004-2005

For Respondent:

R-1 Calculation of Funding Generated by Preschool Disabled Students in Passaic City

OAL DKT. NO. EDU 1706-04
AGENCY DKT. NO. 55-2/04

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and the Department's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were considered by the Commissioner in reaching his decision.

In its exceptions the Board claims that, given the Board's understanding that it has the ability to seek supplemental funding for special education needs in the Board's district-wide budget, and given its understanding of the Initial Decision that salary increases in its preschool budget are subject to increases when the actual contractual increases are negotiated, the final decision in this matter should state that the petition in this matter "is dismissed 'without prejudice' to the Board's ability to pursue funding for special education and salary increases from the Department at a later date." (Board's Exceptions at 1)

Moreover, the Board contends that the District's local share or local tax levy that is included in the calculation of Parity Aid (Education Opportunity Aid In the Governor's FY 2005 budget) is limited to K-12 enrollment in that "both the FY04 Appropriations Act and

the Governor's budget message state that 'enrollments shall be calculated at their full-time equivalent and reduced by preschool....'" (*Id.* at 2) Thus, the Board asserts, local revenues are already included in the Parity Aid calculations for K-12 students and are, therefore, not available to fund special education costs, such as inclusion teachers and related services, for preschool disabled students. (*Ibid.*) The Board, therefore, urges the Commissioner to clarify that "the Parity (or Education Opportunity) Aid calculation cannot be double-counted as revenue for purposes of funding any gaps in preschool funding between State aids and the needed special education funding for preschool disabled inclusion students." (*Id.* at 3)

The Department sets forth its position that the Administrative Law Judge (ALJ) properly dismissed the within petition with prejudice. (Department's Reply at 1) In support thereof, the Department avers that any appeal regarding supplemental funds the District may seek from the district-wide budget for increases in funding for preschool inclusion students and salaries would not be based on the January 15, 2004 letter, which concerns the District's 2004-05 preschool program budget but, rather, it would be an appeal of the supplemental funding provided by the Department for the District's 2004-05 district-wide budget. (*Id.* at 2) In that the subject of this appeal is the Department's preschool budget funding as set forth in the January 15, 2004 letter, not its 2004-05 district-wide budget, the issue of supplemental funding for preschool inclusion students and salaries was not an issue before the ALJ and is not an issue before the Commissioner. (*Id.* at 2-3)

With respect to the issue of the availability of local revenue for preschool education funding, the Department asserts that "the Department did not include local tax levy as part of its calculation of state education aid generated by preschool disabled students.***" (*Id.* at 3) The Department, therefore, concludes that the District's "local tax levy is irrelevant to the

methodology applied by the Department***." (*Id.* at 4) Moreover, the Department maintains that the Board erroneously assumes that preschool inclusion students are not counted for purposes of determining how much Parity Aid it will receive for the 2004-05 school year. (*Ibid.*) The Department contends that "[t]he exclusion of preschool students from the enrollments used in calculating the per pupil regular education expenditure of each Abbott district in the Appropriations Act and the Governor's Budget Address does not include preschool inclusion students," noting that the Core Curriculum Standards Aid, Special Education Aid, Supplemental Core Curriculum Standards Aid, Consolidation Aid and Educational Opportunity Aid a district receives is based on the resident enrollment of a school district. (*Id.* at 5) In that *N.J.S.A.* 18A:7F-3 states that "'[h]andicapped children between the ages of three and five years of age and receiving programs and services pursuant to *N.J.S.A.* 18A:46-6' are included in the school district's resident enrollment," the Department argues, preschool inclusion students are thus counted in the district's resident enrollment and are included in determining the amount of Core Curriculum Standards Aid and Supplemental Core Curriculum Standards Aid. (*Id.* at 5-6)

In further support of its argument, the Department points to Table 1 (Exhibit R-1, page 1) entitled "Funding Generated by Preschool Special Education Student," pointing out that a preschool inclusion student would generate $8,309 in Core Curriculum Standards Aid and $684 in Supplemental Core Curriculum Aid for the District. (*Ibid.*) Additionally, the Department asserts that the ALJ correctly reasoned that the "'FY04 Appropriations Act does not demonstrate an intent to repeal *N.J.S.A.* 18A:7F-3'" and thus "'must be read in *pari materia'* with the Appropriations Act." (*Id.* at 7) Accordingly, the Department asserts, in that preschool inclusion students are included in a district's enrollments to determine its regular education expenditures and the per pupil regular education expenditures are part of the calculation to determine Parity

Aid, preschool inclusion students must be included in determining the amount of Parity Aid the district will receive. (*Ibid.*) The Department further asserts that there is nothing to prevent the District from utilizing parity aid to educate its preschool inclusion students. (*Ibid.*)

Upon a thorough and independent review of the record, the Initial Decision, the Board's exceptions and the Department's reply thereto, the Commissioner is satisfied that the findings and conclusions of the Administrative Law Judge (ALJ) are amply supported and should not be disturbed. In so determining, the Commissioner rejects the Board's assertion that the final decision in this matter should be modified to reflect that the within petition is dismissed "without prejudice," to the Board's ability to pursue funding for special education and salary increases from the Department at a later date. The Commissioner finds that there is no basis to reserve the Board's rights in this case as the matter has been fully and fairly litigated and there are no remaining issues to be resolved with respect to the Board's appeal of the Department's January 15, 2004 letter regarding the District's 2004-05 preschool program budget. Moreover, nothing precludes the Board from seeking any additional funds it believes it is eligible to receive under applicable law.

With respect to the Board's claim that "the initial decision incorrectly decided the issue of the availability of local revenue for preschool special education funding" (Board's Exceptions at 2), the record demonstrates that the local tax levy was not included by the Department in calculating State Education Aid generated by preschool disabled students. Accordingly, the local tax levy is not relevant to the methodology applied by the Department in calculating the District's State Education Aid. Turning to the Board's claim that the District's local tax levy included in the calculation of Parity Aid is limited to K-12 enrollment and, thus, is not available to fund special education costs for preschool disabled students, the Commissioner

finds that, although the FY04 Appropriations Act and the Governor's message state that "enrollments shall be calculated at their full-time equivalent and reduced by preschool...," the ALJ correctly concluded that the FY04 Appropriations Act and the Governor's message must be read in concert with *N.J.S.A.* 18A:7F-3, which states that handicapped students between the ages of three and five are to be included in a district's resident enrollment. (Initial Decision at 8) Moreover, the figures set forth in Table I support the Department's contention that it included preschool children in the District's enrollments in determining the District's regular budget rather than in the preschool budget. (*Id.* at 5-6) Since per pupil regular education expenditures are part of the calculation to determine Parity Aid, therefore, the Commissioner agrees with the ALJ that the Department's inclusion of preschool disabled inclusion students in determining the amount of Parity Aid the District will receive is consistent with the laws and regulations governing the process. (*Id.* at 8)

Accordingly, for the reasons expressed therein, the Initial Decision is adopted, as clarified above, as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4|22|04

Date of Mailing: 4|22|04

* Pursuant to *P.L.* 2003, *c.*122, "Abbott" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court. In accordance with the June 24, 2003 Order of the Supreme Court, such appeals must be filed within six days of the Commissioner's decision.

177-04

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" Board of Education appealed the Department of Education's determination with respect to funding for the district's 2004-05 preschool program.

Of the two issues in dispute – funding for certain special education costs and funding for transportation, only one remained following settlement negotiations between the parties. On the remaining issue of special education costs, the ALJ concluded that petitioner failed to meet its burden of demonstrating that the Department's calculation of funding for preschool inclusion students was arbitrary, capricious or violative of the Abbott mandates.

The Commissioner adopted the ALJ's decision as his own.

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

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JAMES E. McGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

April 22, 2004

Richard E. Shapiro, Esq.
5 Mapleton Road
Princeton, NJ 08540

Jason Michael Ross
Deputy Attorney General
Division of Law – Box 112
Trenton, NJ 08625-0112

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY, AGENCY DKT. NO. 57-2/04, OAL DKT. NO. EDU 629-04

Dear Parties:

We are enclosing a copy of the decision of the Commissioner of Education, dated April 22, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/ dec ltr/PerthAmboyEDU.doc
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 629-04

AGENCY DKT. NO. 57-2/04

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, EARLY CHILDHOOD,

Respondent.

Richard E. Shapiro, Esq., for the petitioner

Jason Michael Ross, Deputy Attorney General, for the respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: March 25, 2004 Decided: March 29, 2004

BEFORE **DOUGLAS H. HURD**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On February 13, 2004, Petitioner, the Board of Education of Perth Amboy Public Schools, filed a Verified Petition appealing the Department of Education's determination of funding for its early childhood plan. The Verified Petition seeks review by the Commissioner of

Education of the January 15, 2004 decision denying certain funding for the pre-school program. Specifically, the issues raised by the District include the Department's denial of (1) funding for certain special education costs and (2) funding for transportation.

The matter was transmitted to the Office of Administrative Law, where it was filed on February 18, 2004. On February 19, 2004, the Department filed its Answer to the Verified Petition. Thereafter, the parties settled the transportation issue. The only issue in dispute concerned the funding of certain special education costs. A hearing on this issue was held on March 24, 2004. The record closed on March 25, 2004, with the submission of post-hearing briefs.

ANALYSIS

On or about November 13, 2003, the District submitted to the Department its one-year operational budget for the 2004-2005 school year, one-year operational budget for its early childhood providers for the 2004-2005 school year, and revisions and updates to its three-year operational plan. (J-2). Pursuant to the District's submitted preschool budget, the District is projecting to serve 30 inclusion students and 24 self-contained students in 2004-2005.

By letter dated January 15, 2004, the Department notified the District that it had reviewed the District's Preschool Operational Plan for 2004-2005. In that letter, the Department approved a total budget in the amount of $11,413,627. By letter dated March 3, 2004, the Department amended the funding based on more information regarding transportation. The Department approved a new total budget in the amount of $11,758,085.

The District contends that the Department's proposed funding results in a deficit to the District in the amount of $484,550 between the actual costs to the District and the Department's funding for the costs of educating preschool disabled inclusion students. Pursuant to the District's submitted preschool budget, the District is projecting to serve 30 inclusion students in 2004-2005. The district seeks funding for 4 inclusion teachers and 8 paraprofessionals to serve these 30 inclusion students. The 4 inclusion teachers and 8 paraprofessionals could serve up to 48 inclusion students in the event the enrollment of inclusion students increases during the

school year. The District also challenges the Department's funding of the preschool inclusion students in the State aid generated in the district-wide K-12 budget, and not in the preschool budget.

The Department takes the position that the preschool inclusion students are included in the District's general K-12 budget, which more then covers the per pupil costs of the child's participation in the preschool class. I find and conclude that the Department's method of funding preschool inclusion students is valid and consistent with *N.J.S.A.* 18A:7F-3. With respect to the funding of the 4 inclusion teachers and 8 paraprofessionals, the Department contends that there is nothing in the law that mandates the State provide aid to the District for these costs. In addition, the Department highlights that preschool disabled students generate State aid differently than non-disabled preschool students. This means that preschool disabled students receive additional funding, including Core Curriculum Standards Aid, Supplemental Core Curriculum Standards Aid, Special Education Categorical Aid, Consolidated Aid, Education Opportunity Aid and ECPA – calculated using the "modified district enrollment." R-1 sets forth the amount of aid that such a preschool disabled student would receive through all of these funding sources. Not included are federal funds that may be available under IDEA.

I agree with the Department's position set forth above regarding the additional funding provided to preschool disabled students. The Department makes another important point with respect to the funding provided to the District. As R-1 demonstrates, there has been a steady decline in the number of Tier II elementary students in the District. The analysis and funding provided to the District is based primarily on the number of such students in the District in FY2002. Since that number has gone down from 230 to 128 Tier II elementary students and since that funding provided is similar to the funding provided in FY2002, then the District has funding sufficient to cover the needs of the projected preschool disabled students for 2004-2005.

CONCLUSION AND ORDER

For the foregoing reasons, the District failed to meet its burden to demonstrate that the Department's calculation of funding for preschool inclusion students was arbitrary, capricious or

violative of the Abbott mandates. Accordingly, I hereby **ORDER** the District's Verified 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 the time allowed under the existing orders of the New Jersey Supreme Court 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.

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 the other parties.

March 29, 2004
DATE

DOUGLAS H. HURD, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

3/29/04 mgm
DATE

Mailed to Parties:

APR 01 2004
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/cad

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 March 3, 2004, letter from the Department

P-2 District document regarding costs for inclusion teachers

P-3 March 5, 2004, letter from the Department

P-4 February 4, 2004, letter from the District

P-5 District Document regarding costs

For Respondent:

R-1 Department's memorandum with tables

Joint Exhibits:

J-1 Final August 15, 2003, District One-Year Budget Instructions and Guidance

J-2 Abbott Preschool Operational Plan Revisions

J-3 Budget Approval and Plan, dated January 15, 2004

WITNESSES

For Petitioner:

Mary Sperlazza, Supervisor of Early Childhood

Valerie Anderson, Director of Special Services

John Rodecker, Superintendent

Richard Grobelny, Assistant Business Administrator

For Respondent:

Alan Dupree, Manager Office of School Funding

OAL DKT. NO. EDU 629-04
AGENCY DKT. NO. 57-2/04

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. In its exceptions, to which petitioner did not reply, the Department requested that the Initial Decision be corrected to reflect that Core Curriculum Standards Aid, Supplemental Core Curriculum Standards Aid, Special Education Categorical Aid, Consolidated Aid and Education Opportunity Aid are calculated using a district's "resident enrollment," rather than its "modified district enrollment" as stated by the ALJ at page 3 of the Initial Decision.

Upon careful and independent review, the Commissioner fully concurs with the Administrative Law Judge (ALJ) that the Department's method of funding district preschool inclusion students is neither arbitrary and capricious nor contrary to law.

Accordingly, for the reasons expressed by the ALJ as corrected herein, the Initial Decision of the OAL, dismissing the Petition of Appeal, is adopted as the final decision in this matter.

IT IS SO ORDERED. [1]

COMMISSIONER OF EDUCATION

Date of Decision: 4|22|04

Date of Mailing: 4|22|04

[1] Pursuant to *P.L.* 2003, *c.*122, "Abbott" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court. In accordance with the June 24, 2003 Order of the Supreme Court, such appeals must be filed within six days of the Commissioner's decision.

180-04

MARIA AMMERATA,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

April 26, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05303-00

AGENCY DKT. NO. 165-5/00

MARIA AMMERATA,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Alan S. Porwich, Esq., for petitioner (Feintuch, Porwich and Feintuch, attorneys)

Charlotte Kitler, Esq., for respondent (General Counsel, State-Operated School District of Jersey City)

Record Closed: March 8, 2004 Decided: March 10, 2004

BEFORE **THOMAS E. CLANCY**, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on June 24, 2000, 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.

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Settlement.

Having reviewed the contents of the attached Stipulation of Settlement, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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 (45) 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.

3/10/04
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

Receipt Acknowledged:

3-12-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 15 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

da

FEINTUCH, PORWICH & FEINTUCH
721 Newark Avenue
Jersey City, New Jersey 07306
(201) 656-8600
Attorneys for Petitioner

MARIA AMMERATA, Petitioner, vs. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL Dkt. No. EDU 5303-00 Agency Ref. No. 165-5/00 **STIPULATION OF SETTLEMENT**

THIS MATTER having been brought before the office of Administrative Law by Feintuch, Porwich & Feintuch, attorneys for petitioner, with Charlotte Kitler, Esq., appearing for respondent, and the parties having adjusted the differences between them as a result of the Division of Workers' Compensation ruling on the length of petitioner's temporary disability in Maria Ammerata vs. Jersey City Board of Education, C.P. No. 2000-30391, and for good cause being shown,

IT IS HEREBY STIPULATED AND AGREED that Respondent shall restore all days which were deducted from Petitioner's sick leave bank on account of Petitioner's absence from work from March 28, 2000 through April 17, 2000.

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE ABOVE STIPULATION.

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner

By: _____
ALAN S. PORWICH
DATED: 3/8/04

_____
CHARLOTTE KITLER, ESQ.
Attorney for Respondent
DATED: 3/4/04

State of New Jersey
Department of Labor
DIVISION OF WORKERS' COMPENSATION

(CONTINUATION)
ORDER
- ☐ JUDGMENT
- ☒ APPROVING SETTLEMENT
- ☐ DISMISSAL
- ☐ DISCONTINUANCE

CASE NO.'S 2000-30391
2000-27947

D.O. Jersey City

Permanent Disability *(Describe Percentages. Nature and extent of Disability, and Members Involved)*
7½% partial total, neuropsychiatric, for ~~residuals~~ anxiety disorder

DISABILITY AWARDED Petitioner rec'd full wages

TEMPORARY: _____ Weeks at $ _____ = $ _____ less $ _____ paid = Balance due $ _____

PERMANENT: 45 Weeks at $ 144 = $ 6480— less $ -0- paid = Balance due $ ~~6480—~~ 6480—

Medical Bills *(Doctors and/or Institutions)*

All authorized medical pd by Respondent
Petitioner found to be temporarily disabled between March 28, 2000 and April 17, 2000 for purposes of petitioner's sick leave bank deductions which are in dispute in action filed with Commissioner of Education.

☐ ORDER FOR DISTRIBUTION ATTACHED
☐ ADDENDUM ATTACHED

MEDICAL FEE ALLOWED *(Expert and/or Testimonial)*	TAX IDENTIFICATION NUMBER	TOTAL AMT. ALLOWED	PAYABLE BY PETITIONER	PAYABLE BY RESPONDENT
Dr. B. Johnson (Sall/Myers)		300	150	150

ATTORNEY (S) FEE	TOTAL	PAYABLE BY PETITIONER	PAYABLE BY RESPONDENT
Feintuch, Borwich & Feintuch	1296	518	778

STENOGRAPHIC SERVICE	TOTAL	PAYABLE BY PETITIONER	PAYABLE BY RESPONDENT
Advanced Reporting Services	~~115~~ 230		~~115~~ 230

(JUDGE OF COMPENSATION) 2/25/04 (DATE)

WE HEREBY CONSENT TO THE ENTRY AND FORM OF THIS ORDER AND ACKNOWLEDGE A COPY.

(PETITIONER'S ATTORNEY)

(RESPONDENT'S ATTORNEY)

Maria Annunziata
PETITIONER *(Where Applicable)*

WC(DO)-100.1 (R-3-01)

OAL DKT. NO. EDU 05303-00
AGENCY DKT. NO. 165-5/00

MARIA AMMERATA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/26/04

Date of Mailing: 4/26/04

184-04

#184-04

BETH D. GREEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

April 28, 2004

Sanford R. Oxfeld, Esq.
Oxfeld Cohen, LLC
50 Commerce Street
Newark, NJ 07102-4003

John H. Watson, Esq.
63 Washington Street, Suite 200
East Orange, NJ 07017

BETH D. GREEN V. BOARD OF EDUCATION OF ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, AGENCY DKT.NO. 438-10/01, OAL DKT. NO. EDU 09658-01

Dear Parties:

We are enclosing a copy of the decision of the Commissioner of Education, dated April 28, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/ dec ltr/GreenEssexCounty.doc
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library
OAL Clerk

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

OAL DKT. NO. EDU 9658-01
AGENCY DKT. NO. 438-10/01

BETH D. GREEN,

Petitioner,

v.

BOARD OF EDUCATION ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Oxfeld, Cohen, attorneys)

John H. Watson, Jr., Esq., for respondent

Record Closed: February 24, 2004 Decided: March 11, 2004

BEFORE **RICHARD McGILL,** ALJ:

This matter is an appeal by Beth D. Green from a determination by the Board of Education Essex County Educational Services Commission concerning the effective date of her resignation from employment and its impact on her salary and fringe benefits. The matter was transmitted to the Office of Administrative Law on December 19, 2001, for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a written Stipulation of Settlement 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 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 (45) 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.

Mar. 11, 2004
DATE

Richard McGill
RICHARD MCGILL, ALJ

Receipt Acknowledged:

3/15/04
DATE

Kathleen Duncan /gp
DEPARTMENT OF EDUCATION

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 22 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

Sanford R Oxfeld, Esq.
Oxfeld Cohen, P.C.
60 Park Place, 6th Floor
Newark, NJ 07102

Attorney(s) for the Petitioner

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 FEB 24 A 8:59

Beth D Green, Petitioner, Vs. Board of Education of the Educational Services Commission, Essex County, Respondent	OFFICE OF ADMINISTRATIVE LAW OAL Docket No: EDUOR 09658-01N **STIPULATION OF SETTLEMENT AND RELEASE**

IT IS HEREBY STIPULATED and agreed by and between Beth D Green, Petitioner, and the Board of Education, Respondent, in full settlement of this matter, as follows:

1. This matter shall be marked settled and dismissed with prejudice, but without costs to either party.

2. Each party hereby releases the other from any claims of any kind, whether known or unknown, whether statutory or common law, from the beginning of time until this date. Green specifically releases any claim she may have under the school laws (including, but not limited to, a claim before the Commission of Education docketed 438-10/01) or any other claim of any kind arising from Green's employment with the Essex County Educational Services Commission, or the termination of that relationship.

3. In exchange for the above, Green is to receive the sum of $5,119.58, less all appropriate deductions.

4. This settlement reflects the desire of the parties to resolve this matter amicably. Neither party hereby admits that the other party was correct or that its position lacked merit.

1/12/04
Dated

Beth D Green
Beth D Green, Petitioner

2/6/04
Dated

Jacqueline A. Young
For the Essex County
Educational Services Commission

OAL DKT. NO. EDU 9658-01
AGENCY DKT. NO. 438-10/01

BETH D. GREEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the proposed settlement agreement does not identify the title of Jacqueline A. Young, who signed the agreement on behalf of the Essex County Educational Services Commission. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating Jacqueline A. Young to sign the agreement on its behalf, and the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Stipulation of Settlement and Release consistent with the concerns set forth

above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/28/04

Date of Mailing: 4/28/04

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

181-04

181-04E

C.A. and B.A., on behalf of minor child, G.A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLE, CAPE MAY COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

April 27, 2004

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

April 27, 2004

Michael P. Stanton, Esq.
Taht, Stanton & McCrosson
618 West Avenue
Suite 201
Ocean City, New Jersey 08226

James B. Arsenault, Jr., Esq.
Cooper, Levenson, April, Niedelman
& Wagenheim, P.A.
Court House Commons
601 Route 9 South, Suite A-3
Cape May Court House, New Jersey 08210

Dear Parties:

C.A. AND B.A., ON BEHALF OF MINOR, G.A. V. BOARD OF EDUCATION OF MIDDLE TOWNSHIP, CAPE MAY COUNTY, AGENCY DKT NO. 111-3/04, OAL DKT NO. EDU 2384-04, COMMISSIONER DECISION NO. 181-04E

We are enclosing a copy of the decision of the Commissioner of Education dated April 27, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/pp:o/dec ltr/c.a.&b.a.-181-04E
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library
OAL Clerk

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 2384-04
AGENCY REF. NO. 111-3/04

C.A. & B.A. O/B/O G.A.,
Petitioners,
v.
BOARD OF EDUCATION
OF MIDDLE TOWNSHIP,
CAPE MAY COUNTY,
Respondent.

Michael P. Stanton, Esq., for petitioners, (Taht, Stanton & McCrosson, attorneys)
James B. Arsenault, Jr., Esq., for respondents (Cooper Levenson April Niedelman & Wagenheim, attorneys)

Record Closed: April 7, 2004 Decided: April 8, 2004

BEFORE **ANA C. VISCOMI,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners appeal from respondent's removal of G.A. from the school for remainder of the school year after he brought two knives to the school and was charged with making terroristic threats to another student while in a computer "chat" room. Petitioners also contest the adequacy

of the educational program being provided at their home during the period of suspension and seek emergent relief in the form of an immediate return to the school as a full time student. Petitioners filed their request for emergent relief on or about March 31, 2004, and the matter was transmitted to the Office of Administrative Law (OAL) on April 5, 2004 for a hearing as a contested case pursuant to *N.J.S.A.* 52:14F-1 to –13 and *N.J.S.A.* 52:B-1 to –15. The matter was scheduled for an emergent relief hearing on April 7, 2004. At the request of counsel, oral argument was conducted by telephone as no testimony would be presented in support or opposition to the pending emergent relief application. The record was closed on the same date.

FACTUAL DISCUSSION

The following facts are not contested and therefore shall constitute the Findings of Fact.

G.A. is a 17-year-old senior student at the Middle Township High School in Cape May County. On the evening of February 18, 2004 he was engaged in a computer "chat room" discussion with another student, M.P., who has been classified as a special education student. During the course of the chat room discussion with M.P., G.A. indicated on several occasions that he would cut M.P.'s penis with his knife. In addition, he also indicated "tomrrow u r dead (sic)." During the chat room exchange, M.P. asked G.A. if was "serious" with regard to these threats. G.A. responded, "i am goin to get u! (emphasis in original)." On the following day, based upon a search of G.A.'s locker, two knives were retrieved and taken by the Middle Township Police Department. Those knives measured 3¼-inch blade and 4-inch blade respectively.

Middle School Principal David Salvo immediately suspended G.A. for a period of ten days pending review by Middle Township Superintendent of School, Michael Kopakowski. Based upon the review, school administration recommended G.A. be suspended throughout the remainder of the school year. The Board of Education convened a hearing on March 9, 2004. Petitioners appeared and participated in that hearing. They were represented by counsel. The recommendation of G.A.'s psychologist, John McInerney, PhD., dated March 19, 2004 was considered. McInerney indicated in his affidavit that "there is no indication that G.A. is a danger to himself or others." It is his opinion that "a degree of relative immaturity in social problem

solving is the most likely explanation of his involvement in alleged threats toward another young man." As a result of the hearing, the Board voted to impose suspension through the end of the school year as had been recommended by the school administrators.

Instruction in the home began on the last week of February 2004. Respondent school district concedes that from March 1 through March 12, G.A. received five hours of instruction per week instead of the requisite minimum of ten hours. Respondent school district concedes that G.A. is entitled to some compensatory education. Petitioner also contends that the home bound education is also deficient in that the school district is utilizing a Physics teacher in order to provide G.A. with all of his instruction in the areas of Physics, Engineering Design, Algebra, Art, English and physical education. Respondent asserts that utilization of the Physics teacher is appropriate in the highly technical subject areas; however, is prepared to supplement that instruction with a teacher more qualified to provide language arts and literacy instruction.

LEGAL ANALYSIS

The standards for emergent relief are set forth in *Crow v. DeGioia,* 90 *N.J.* 126 (1982), *N.J.A.C.* 6A:3-1.6. In order to prevail, the petitioner must demonstrate the following:

> (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 interest of the parties are balanced, the petitioner will suffer greater harm then the respondent will suffer if the requested relief is not granted.

The four-prong test must be read in the conjunctive and not the disjunctive. Thus, if the petitioner fails to show as part of the emergent relief application that he or she cannot meet one of these requirements, then emergent relief must be denied.

Petitioner asserts that the suspension of G.A. for the rest of the school year is tantamount to an expulsion as he is scheduled to graduate high school. Petitioner further asserts that the school district did not consider an alternative in consideration that G.A.'s four-year disciplinary

record shows no infraction involving any sort of violent or threatening behavior. The suspension should have been a "temporary exclusion" as suspension is defined at *N.J.A.C.* 6A:16-1.3. Petitioner asserts that G.A. was not afforded proper due process in that no evaluation of G.A. by respondent was conducted. As such, the only evaluation is that which was requested by the parents as performed by Dr. McInerney, who has opined that "there is no indication that G.A. is a danger to himself or others." G.A. has voluntarily submitted to drug testing on a weekly basis and will continue to do so at least through the end of the school year. In addition, G.A. has attended counseling sessions with a licensed psychologist and participates in a peer behavior group. Petitioners contend that in consideration of how they have responded to this matter as well as the lack of disciplinary problems in the past, that the suspension served by G.A. to date is sufficient to impress upon him the seriousness of his offense. By continued suspension which petitioners contend is tantamount to expulsion, they assert that G.A. is suffering irreparable harm by not be able to finish his senior year after 11½ years in the Middle Township School system with his peers. They also assert that in balancing the rights of the respondent to keep their school safe, with the rights of G.A. to attend school, they lean in the favor of G.A.

Respondent asserts that in consideration of school policy and *N.J.S.A.* 18A:37-2.3 G.A. could have been expelled. The School District recommended the suspension through the end of the year and the Board agreed. Due process was satisfied as petitioner was informed of the charges and afforded a full hearing. G.A. was represented by counsel, and testified on his own behalf. In addition, his psychologist's opinion and recommendation was considered.

Respondent asserts that although petitioner is correct that in the first few weeks ten hours of in-home instruction were not provided by the school district, petitioners have failed to establish that he will suffer irreparable harm if the requested relief is not granted. Respondent is prepared to provide compensatory education.

With regard to the last prong of the *Crowe* test, balancing of the equities demonstrates that if the requested relief is granted and G.A. is permitted to return to school, this negates the Board's obligation and responsibility to its students and sends an inappropriate message to the victim, M.B., as well as the other students that conduct as that of G.A. would be tolerated.

Based on the foregoing, I **FIND** and **CONCLUDE** that petitioner has not demonstrated that he is entitled to the emergent relief requested. I **FIND** and **CONCLUDE** that petitioner will not suffer greater harm then the respondent will suffer if the requested relief is not granted. The school district has a policy that permits a student to be suspended for up to one-year for the possession of a weapon. Respondent school district has not only an interest but an obligation in securing the safety of its student body. The incident forming the basis for this petition occurred on February 18 and 19, 2004. G.A. is expected to graduate and has been accepted at the Philadelphia College of the Sciences for September 2004. He can complete his studies with in-home instruction with some slight modifications. Petitioners have not asserted that G.A.'s performance has suffered and indeed, on certain days of scheduled instructions, the documentation reflects G.A. was unavailable as he was working. G.A. will not suffer irreparable harm if he is not permitted to participate in commencement exercises.

DECISION AND ORDER

Based upon the foregoing, emergent relief is hereby **DENIED**, and this matter is hereby scheduled for a plenary hearing before the Honorable Bruce Gorman.[1] In addition, I hereby **ORDER** respondent School District to immediately initiate an in-home instruction program that consist of no less than ten-hour per week instruction. In addition, the English course shall be taught by the appropriate certified instructor. A minimum of 15 hours of compensatory instruction shall also be provided to G.A.

This order on application for emergent relief shall remain in effect until issuance of the decision in the matter. The plenary hearing has been scheduled before the Honorable Bruce Gorman on April 13, 2004, at 9:00 a.m., at the Office of Administrative Law, Atlantic City, New Jersey.

[1] So as not to inconvenience the parties and the witnesses as they are from Cape May County, this matter is being transferred to the OAL Atlantic City office to be heard before ALJ Gorman who hears cases in that office.

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 (45) 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 (45) 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 8, 2004
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

/tmp

OAL DKT. NO. EDU 2384-04
AGENCY DKT. NO. 111-3/04

C.A. and B.A., on behalf of minor child, G.A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLE, CAPE MAY COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this interim matter and the recommended Order Denying Emergent Relief issued by the Office of Administrative Law (OAL) have been reviewed.

Upon review, the Commissioner concurs, for the reasons fully set forth in the OAL Order, that petitioners herein have not met the standard for grant of emergent relief. He further concurs that, notwithstanding denial of petitioners' motion, a directive ensuring adequate home and compensatory instruction for G.A. during the pendency of his suspension is appropriate under the circumstances of this matter.

Accordingly, for the reasons expressed therein, the Commissioner adopts the recommended Order of the OAL as his final decision on petitioners' motion for emergent relief and directs that this matter duly proceed to its scheduled plenary hearing.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/27/04

Date of Mailing: 4/27/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

#187-04

F.A., on behalf of minor child, E.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's residency determination that her sister, E.O., was not entitled to a free public education in the District.

The ALJ concluded that petitioner met her burden of proof under *N.J.S.A.* 18A:38-1b(1) that E.O. was domiciled in the District; that petitioner was supporting her *gratis*; and that E.O.'s parents living in Peru were incapable of supporting her. The ALJ concluded that E.O. was entitled to a free public education in the District.

The Commissioner adopted the Initial Decision as his own and ordered the Board to continue to admit E.O. into its public school system free of charge.

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.

April 30, 2004

STATE OF NEW JERSERY
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 09607-03

AGENCY DKT. NO. 326-9/03

F.A., ON BEHALF OF MINOR CHILD, E.O.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

Respondents.

F.A., *Pro se*

Amy DePaul, Esq., (Chasan, Leyner, Bariso & Lamparello, attorneys) for respondents

Record Closed: March 17, 2004 Decided: March 19, 2004

BEFORE **CAROL I. COHEN**, ALJ:

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

The petitioner, F.A. appeals from the denial by the Board of Education of the City of Clifton, Passaic County (respondent) of her application to allow her sister (E.O.) to be educated in the Clifton School System. Clifton denied the petitioner's application on August 29, 2003, based on the fact that the application

did not meet the statute's requirements of family or economic hardship. The petitioner filed her appeal on September 12, 2003. The respondent filed its answer on September 17, 2003. The matter was filed with the Office of Administrative Law (OAL) on October 16, 2003. On November 21, 2003, I sent a letter to the parties scheduling a hearing date for March 2, 2004. On January 6, 2004 the clerk's office sent a notice to the petitioner. However, the numbers on the address were transposed. According to the petitioner, she did not receive this notice. Therefore, she did not appear at the hearing scheduled for March 2, 2004. I contacted the petitioner and through an interpreter rescheduled the matter for March 17, 2004. The matter was heard on that date.

ISSUES

1. Whether the petitioner is supporting the child gratis for longer than the school year as required by *N.J.S.A.* 18A:38-1b(1).

2. Whether the child's parents are incapable of supporting or providing care for the child due to a family or economic hardship.

FINDINGS OF FACT

Based on the testimony presented and the documentary evidence submitted, and having had an opportunity to observe the witness and to assess her credibility, I make the following **FINDINGS OF FACT:**

1. F.A. began living in Clifton two years ago. At first she lived at 523 Lexington Avenue, Clifton, but she moved last year to her present location at 576 Clifton Avenue, 1st Floor. F.A., her sister E.O., her grandmother, her aunt, her aunt's husband and family all lived together at this address.

2. E.O. is the sister of the petitioner F.A. Their parents live in Peru. The parents are separated. F.A.'s parents do not have a telephone. Her

father comes and goes. Sometimes he lives with the mother, sometimes on his own or with others. Their mother lives in a home with three other families. The mother does not work. She has a drinking problem and she has not taken care of her children for many years.

3. E. O. moved in with her grandmother, when she was three years old. Her grandmother took care of E.O. from that time, until she arrived in United States in May 2001. The grandmother, who had cared for E.O. in Peru, is now also living in Clifton with F.A.

4. E.O. originally, when she came to United States, lived with her aunt in Passaic. However, her aunt got married and her new husband did not want the responsibility for E.O. In addition, the apartment was too small for them all to live in. Therefore, E.O. came to live with her sister F.A.

5. Neither E.O.'s father nor mother send any support to F.A. to care for E.O. In fact, when F.A. is able to contact her parents, both of them ask for the money from her. Any money she sends to her mother is spent on alcohol.

6. The petitioner attempted to get custody of E.O. and filed papers in court. However, at the time of the filing, she was informed by the clerk that she needed to get a letter from E.O.'s parents saying that they wanted to turn over custody to F.A.. F.A. understood that without this letter she really could not prevail.

7. F.A. contacted her parents, but her mother refused to sign such a document, saying that E.O. was old enough to sign any papers by herself. Her father said that E.O. should be out working and sending money to him.

8. F.A. did not pursue getting custody of E.O. after filing the initial papers, because it was her belief that without her parents' consent she would not be able to obtain custody.

9. F.A. expects E.O. to stay with her permanently. E.O. does not go back to Peru to visit. E.O. is presently in the 11th grade and is doing well in school.

LEGAL DISCUSSION

Public education must be provided free to persons over six and up to twenty years of age, who are domiciled within the School District - *N.J.S.A.* 18A:38-1(a). Under section b(1) of this statute, there are certain requirements for any person who is kept in the home of another person domiciled within school district. These requirements state that:

> The petitioner must show that they are supporting the child gratis and will assume all personal obligations for the child relative to school requirements; that he intends so to keep supporting the child gratuitously for a longer time than merely through the school term ...that the child's parents or guardian are not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The petitioner shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria.

It is clear from the testimony that F.A. is caring for her sister, E.O., because there is no one else to care for her. She is not receiving money from E.O.'s parents, nor other members of the family. It is also clear that E.O.'s parents are unable to support her. Her mother and father are both unemployed and her mother is an alcoholic. Her father is absent from the home a good portion of the time. E.O. is living with her sister and will remain with her for the foreseeable future. It is clear that E.O.'s motive for moving in with her sister was

not solely to attend school in the district, but rather she needed a place to live. Her sister was willing to take her in and be responsible for her care and her economic needs.

CONCLUSION

Thus, I **CONCLUDE** that the petitioner has met her burden of proof under *N.J.S.A.* 18A:38-1b(1), that E.O. is domiciled within the district and that F.A. is supporting her gratis and assumes all personal obligations for her. E.O.'s parents are incapable of supporting her. I therefore **CONCLUDE** that F.A. is providing care for E.O. due to family and economic hardships.

ORDER

Based on the foregoing, I hereby **ORDER** that the relief sought by F.A. be granted and that E.O. is entitled to a free education in the Clifton Public Schools.

I further **ORDER** that the District's application for tuition reimbursement 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 (45) 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 (13) 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, 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.

3/19/04
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on: 3/19/04

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 24 2004

DATE

OFFICE OF ADMINISTRATIVE LAW

Id

EXHIBITS

For Respondents:

R-1 Application

R-2 Denial

R-3 Appeal

R-4 Answer

R-5 Custody Complaint Docket No.71402

Witnesses:

Fanny Arocho

OAL DKT. NO. EDU 09607-03
AGENCY DKT. NO. 326-9/03

F.A., on behalf of minor child, E.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon careful and independent review of the record of this matter, the Commissioner concurs that petitioner has demonstrated that E.O. is entitled to attend school in the Board's District, free of charge, pursuant to *N.J.S.A.* 18A:38-1b(1).

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein. The Board is hereby ordered to continue to admit E.O. into its public school system free of charge.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/30/04

Date of Mailing: 4/30/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

186-04

#186-04

M.O.M., on behalf of minor child, V.M.M., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioning aunt challenged the Board's residency determination that her nephew, V.M.M., was not entitled to a free education in respondent's school district.

In light of the testimony of the witnesses and the record, the ALJ found that V.M.M.'s father's support was *de minimus*; that petitioner proved by a preponderance of credible evidence that she supported V.M.M. *gratis*; and that a family hardship did exist to allow V.M.M. to move in with his aunt. The ALJ concluded that V.M.M. was entitled to a free public education in respondent's district.

The Commissioner adopted the Initial Decision as his own, concurring with the ALJ that V.M.M. was entitled to a free education unless and until his circumstances change.

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.

April 28, 2004



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 05412-03
AGENCY DKT. NO. 141-5/03

M.O.M. ON BEHALF OF MINOR CHILD
V.M.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,
Respondent.

Michaelene Loughlin, Esq., for petitioner (Loughlin & Latimer, attorneys)

Robert T. Tessaro, Esq., for respondent

Record Closed: February 10, 2004 Decided: March 18, 2004

BEFORE **LESLIE Z. CELENTANO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals the residency determination made by respondent Board of Education of the Borough of Fort Lee ("District" or "Board"). The Board has counterclaimed for tuition.

The matter was transmitted to the Office of Administrative Law (OAL) on June 3, 2003, 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 to -13. A hearing was commenced on August 11, 2003, however the proceedings were terminated when petitioner, who was *pro se* at the time, requested an opportunity to seek counsel to represent her. The hearing was rescheduled for October 1, 2003, and was adjourned on September 30, 2003, at the request of petitioner, who had not yet obtained counsel. The matter was then set down for hearing on January 6, 2004, and the hearing was held on that date. Witnesses who testified and documents marked into evidence at the time of hearing are listed in the attached appendix. The record closed with receipt of the parties' post-hearing briefs.

ISSUE

At issue is whether V.M.M. is entitled to a free public education in respondent's school district because he is domiciled in the district. More particularly at issue is whether petitioner is supporting V.M.M. gratis, as if he were her own child, and whether V.M.M. is residing with petitioner due to a family or economic hardship.[1] Further, if V.M.M. is not entitled to a free public education in the district, the amount of tuition owed by petitioner must be determined.

TESTIMONY

V.M.

V.M., petitioner's brother and V.M.M.'s father, currently resides in New York City with his wife and one of his four children. V.M. is the oldest of eleven siblings, ten of whom are still alive and nine of whom live in the United States. Over the course of several years, the nine siblings moved to the United States from Peru. When residing in Peru all of the siblings lived together in a house with their parents and all of their children. When residing in Peru, the family had a financial arrangement whereby everyone contributed to the support of the entire family unit. The house in which V.M. and his

siblings, their families and his parents resided was owned entirely by the parents and was built by the family. V.M. came to the United States in 1989 at the age of thirty-eight, and left his wife and children behind in Peru. He lived with his sisters who had come to the United States before him. V.M. secured a job as a maintenance man, originally working for his brother-in-law and his brother, who had immigrated before him. V.M. regularly sent money home to his wife and children, and also to his parents. After moving here it was his practice to collect money from all of his brothers and sisters who were living in the United States, and send it, along with his funds, home to his parents. V.M. testified that his sister M.O.M., the petitioner, came to the United States in 1991 without her children, who remained in Peru with their grandparents. In 1992 V.M.'s parents came to the United States along with M.O.M.'s children. All of the siblings in the United States helped to pay for the parents' passage to this country. V.M.'s parents, M.O.M. and M.O.M.'s children lived with V.M.'s two sisters for approximately one year, and eventually located their own apartment, also in New York City. In 1993, V.M.'s wife and four children moved to the United States. One of V.M.'s daughters went to live with one of his sisters and his oldest son went to live with V.M.'s brother; the two younger children stayed with V.M. and his wife in a one-bedroom apartment in New York. The family funds, which continued to be pooled, paid V.M.'s rent.

In 2002 three of V.M.'s brothers, S.M., W.M. and O.M., purchased a two-family house in Fort Lee. At the time of this purchase, family meetings were held and it was determined that each family member needed to increase the amount he or she contributed to the pooled funds each month, because the mortgage was more than they had been paying collectively as rent in New York. V.M.'s father is eighty years old and his mother is seventy-nine.

When V.M.'s parents moved to Fort Lee, his contribution to the family fund was $60 per week for food, which he gave to his mother each week, and $150 per month towards the mortgage to help pay for his parents' housing. The mortgage money was paid to his brother S.M., one of the owners of the property. V.M. gave his brother these

[1] The Notice of Final Ineligibility dated April 14, 2003, sets forth only one reason for the denial, *i.e.*, that petitioner was not supporting V.M.M. gratis. However, considerable testimony was received regarding the issue of family hardship and, accordingly, that issue will be addressed.

funds during the day when they worked together for a real estate company in New York. V.M. and S.M. were in charge of maintenance for thirty buildings owned by the company.

V.M. described the apartment in which he lives in New York as small and containing a bedroom, kitchen, living room, closet and bathroom. When his family moved to the United States to join him, his son V.M.M. and one daughter lived in the apartment with V.M. and his wife. His other two children each lived with one of V.M.'s other siblings. At the time, he shared a bedroom with his wife and their daughter and V.M.M. slept in the living room. The overcrowding and the sleeping arrangements became problematic and aggravated V.M.'s diabetes, because of his inability to rest between the two jobs he holds. V.M. works at a maintenance job cleaning and maintaining buildings from 7:30 a.m. until 2:30 p.m., and then works as a doorman and porter in a building across the street from his own building from 4:00 p.m. until midnight.

V.M. testified that after his three brothers bought the house in Fort Lee, which their parents and his sister M.O.M. had planned to move into, it was also determined that V.M.M. would move to Fort Lee and live with petitioner and her children. After V.M.M. moved in with petitioner, V.M.'s monthly contribution to the family fund for food for his parents and the mortgage costs did not increase. Also following V.M.M.'s move to Fort Lee, V.M. and his wife no longer claimed V.M.M. as a dependent on their tax return; rather, petitioner claimed V.M. as a dependent.

In response to correspondence received from Dr. Vincent J. Taffaro, the assistant superintendent of the District, V.M. telephoned Mr. Taffaro and spoke to him briefly. V.M. testified that he was advised by Taffaro to confirm in writing what he had said in the conversation. Accordingly, V.M. asked petitioner's son J.P.M. to draft a letter for him indicating that he supports the family in the manner he does. V.M. told J.P.M. that a letter should also be drafted for petitioner's signature. J.P.M. prepared an undated letter (P-4), which V.M. testified he signed and gave to petitioner to return to the District.[2] Petitioner's son J.P.M. is sixteen years old. V.M. testified that in the last sentence of his letter (P-4), which states, "I am still providing financial support," he meant to convey that he continues

[2] The District apparently never received this correspondence.

to contribute to the family fund, as do all of his siblings, in order to assist in the support of their parents.

V.M. testified that he has had diabetes for more than twenty years, and he is under the care of a physician. He asked his physician, Maria Tulpan, M.D., to write a letter confirming his medical condition, and in response to a request from respondent, on October 18, 2002, Dr. Tulpan prepared a letter which was forwarded to the District (P-5).

V.M. testified that he had some English instruction in high school in Peru, but didn't pay much attention to it, never knowing that he would emigrate to the United States. He never used the English language in Peru and started attending English classes upon arriving in the United States. He stopped going to these classes when he procured his second job. V.M. reads some English, and can understand English words that are similar to their Spanish counterparts. He testified that his conversation with Dr. Taffaro was in English and that he understood some of the words and was able to capture what was being discussed.

On cross-examination, V.M. confirmed that he filed a Schedule C with his 2002 1040 Federal Income Tax Return (P-1), indicating a profit or loss from business. He said he takes the garbage out for the building he is in and is paid $150 a month for the minimum amount of time involved. He indicated that he filed a Schedule C because he knew of no other way to declare the income and knew he had to declare it somehow. V.M.'s second job is as a doorman in a ten-story building across the street from where he lives. He is a member of a union. He has been employed as a doorman for twelve years. V.M. testified that some tenants of the building do speak Spanish. He is able to converse in English with the others where the conversation is related to his work.

V.M. testified that he prepared his own tax return and was able to do so after working as an accountant and auditor in Peru for eleven years. When he came to New York a Spanish-speaking individual taught him to do his own tax return and he translated every line from Form 1040 into Spanish so that he could learn to prepare it.

V.M. stated that he knows of a joint bank account between petitioner and V.M.M., however he does not know the balance in the account nor the source of the funds. V.M. has never asked about the account because petitioner handles all of V.M.M.'s affairs. V.M.M. does not stay with V.M. at all but he does visit, for example, on Christmas day, however there is not room for him to stay over. Prior to moving to Fort Lee to live with petitioner, V.M.M. attended Catholic schools in New York City and V.M. paid tuition of $430.00 per month for that schooling. V.M.M. moved to Fort Lee at the start of his second year in high school.

V.M. testified that he provides no support for V.M.M. other than his contribution to the family fund.

S.M.

S.M., brother of V.M. and of petitioner, is one of the owners, together with W.M. and O.M., of the property purchased in Fort Lee. He testified that the house was purchased primarily for their parents and is a two-family house. W.M. lives on the first floor with his wife and two daughters, and residing on the second floor are S.M.'s parents, petitioner, petitioner's son and V.M.M.[3] All of the siblings contributed to the rental expenses of the others when residing in Manhattan and now all of the siblings contribute to the cost of the mortgage in Fort Lee, and also contribute funds for food. Each sibling gives his or her share of food money directly to their mother, and S.M. collects all of the mortgage monies, adds his in, and remits everything to W.M., who pays the mortgage.

On cross-examination S.M. testified that he learned in early August 2002 that V.M.'s son V.M.M. was moving in with petitioner and her children. S.M. testified that the house in Fort Lee was purchased for $645,000 and that a mortgage was obtained in the amount of $430,000. The current monthly payment is approximately $4,400 including real estate taxes. All of the siblings contribute to the mortgage and food costs of the family in varying amounts. For example, W.M. pays more than anyone towards the mortgage because he and his family live in part of the house. Petitioner also pays more than the other siblings because she too lives in part of the house with her son and V.M.M.

[3] Petitioner's daughter also resided with her until moving to New York in May 2003.

The determination as to how much each sibling would pay was made before V.M.M. moved to Fort Lee and remained the same after he moved in with petitioner.

W.M. pays the utility bills for charges incurred in his portion of the house, and the utility bills for charges incurred in the portion of the house occupied by petitioner, her parents, her son and V.M.M. are paid out of the family fund.

M.O.M.

Petitioner has two children of her own, a daughter, M.M.S., born in 1985 and a son, J.P.M., born in 1987. When petitioner came to the United States in March 1991 without her children, she was thirty-two years old. In August 1992 her children came to the United States with her parents. Petitioner had no English instruction in Peru and did not speak English at any time in Peru. She studied English here in a course offered at church for two weeks and can read a few words that are familiar to her. However, she cannot read an English newspaper. When she resided in Peru all of the older siblings who worked contributed to the household and those who had already emigrated to the United States also sent money home to Peru. When petitioner arrived in New York she lived with her two sisters, and remained with her sisters when her parents and children came to the United States. She eventually moved out of her sisters' apartment and into another apartment in the same building with her children and parents. All of her siblings gave her money for food and rent during that time.

Petitioner moved to Fort Lee on July 29, 2002, into a house owned by three of her brothers. The house was bought primarily for her parents, and she moved there with her parents. Petitioner testified that in July 2002 the siblings had three meetings regarding the purchase of the house. At the first meeting the determination to buy the house was made. At the second meeting the amount each sibling was to contribute was determined, and at the third meeting those amounts were raised. Each agreed to pay more than they had paid when the family resided in New York because the arrangements were more expensive now. V.M.M. moved in with petitioner in early August 2002, however V.M.'s contribution to the family fund was not increased. When V.M.M. moved in with petitioner,

no time limit was set, as it was contemplated that V.M.M. would always live with her. V.M.M. has expressed a desire to attend college in New Jersey.

Petitioner works as a housekeeper in a hotel and also in a daycare center in the hotel. She claims V.M.M. as a dependent on her tax return because he lives with her and she provides for his needs. Soon after V.M.M. moved in with her petitioner sought to register her son and V.M.M. for school in Fort Lee. She spoke to the secretary at the Board and was provided with a package of application papers to complete and return. The papers sought the children's birth dates, prior school records, address verification, and copies of utility and phone bills. Petitioner returned the application to the secretary, who accepted her son's application and provided her with an affidavit to complete for V.M.M. (P-7). Petitioner testified that her son J.P.M. read her the application and told her what to fill in. She indicated in the affidavit that V.M.M. was residing with her because his parents' apartment was not large enough to accommodate him and she has room in her home for V.M.M. Her son J.P.M. instructed her how to write the answer to question #5 (P-7 at 9). After completing the affidavit and having V.M. sign it and his signature notarized, petitioner returned the affidavit to the Board.

When petitioner received Dr. Taffaro's letter of September 23, 2002 (P-3) she asked her son to read it and explain it to her, and thereafter showed it to V.M. so that he could obtain a letter from his doctor, which the Board was seeking. V.M. obtained the letter from his physician (P-5) and petitioner provided it to the Board. Petitioner also testified that V.M. instructed J.P.M., petitioner's son, to prepare a letter indicating that he (V.M.) supports the family, which was what he understood Dr. Taffaro's instructions to be. Accordingly, J.P.M. was instructed to draft a letter indicating that V.M. contributes to the support of the whole family, as had been the custom for years. This is not what J.P.M. actually wrote in the letter of October 20, 2002 (P-8).

Petitioner testified that her son J.P.M. also prepared the undated letter that V.M. testified he signed and sent back to petitioner for forwarding to the District (P-4). Petitioner testified that she sent this letter in a separate envelope, but on the same day, as the letter of October 20, 2002 (P-8).

Petitioner recalled receiving the November 18, 2002, letter from the District indicating that V.M.M. is not eligible to attend District schools because V.M. provides full financial support for V.M.M. After she had her son J.P.M. explain the letter to her she went to speak with Dr. Taffaro to ask why the letter states that V.M. is supporting V.M.M., when in fact it is the entire family that contributes to his support. Dr. Taffaro asked her to provide proof that she supports V.M.M. and petitioner produced her tax return, which Dr. Taffaro looked at and returned to her. Petitioner thereafter provided a copy of the tax return to the Board, together with records of the bank account she maintains with V.M.M. These documents were provided after January 31, 2003, the date of petitioner's tax return.

Petitioner's portion of the house in Fort Lee has three bedrooms: one for her parents, one that is shared by her son and V.M.M., and one that is hers. Petitioner supports V.M.M. exactly as she supports her own son.

Attached to a letter written on November 24, 2002, on petitioner's behalf to the Board is a list of the contributions to the family fund made by each of the siblings each month. That list reflects the following payments:

Name	Weekly Food	Mortgage
V.M.	$60.00	$150.00
*W.M.	$50.00	$1,500.00
N.M.	$30.00	$300.00
G.M.	$30.00	$300.00
M.O.M.	$100.00	$680.00
W.M.	$50.00	$300.00
*S.M.	$50.00	$385.00
*O.M.	$40.00	$385.00
A.M.M.	$30.00	$300.00

*owners of the Fort Lee property

Petitioner testified that V.M. has lived in his apartment for approximately six or seven years and that prior to that time, she lived in the apartment with her parents and

her two children. When she moved to Fort Lee, V.M. took over the apartment. Petitioner's tax return reflects an income of $22,845, which partially supports petitioner, her son and her nephew (and her daughter until May of last year, when her daughter moved to New York). Petitioner also relies upon the family fund to assist with her living expenses. Petitioner testified that although her October 20, 2002, letter indicates that V.M. provides "full financial support" for V.M.M., this was not what she had instructed her son to write. She testified that the letter was intended to convey that V.M. continues paying financial support for the benefit of everyone in the house, as he had done before V.M.M. moved into the house, and she signed that letter believing that was what J.P.M. had written. Her son J.P.M. prepared the undated letter (P-4) on his computer and faxed it to V.M.'s computer. V.M. signed it and returned it to petitioner, who then sent it to the Board. She said that the sentence reading "I am still providing financial support" was intended to convey that V.M. continued to contribute to the family fund to defray the expenses of all of those residing in the house in Fort Lee. Petitioner has, on her own, paid for driving lessons for V.M.M. at a cost of $210, some miscellaneous school fees, school lunches, incidentals, clothing, movies, etc. The only help V.M. provides is the monthly contribution he makes to the family pool. Petitioner maintains a joint bank account with V.M.M. which has approximately $800 in it. She stated that she opened the account in both of their names because V.M.M. was a minor and the bank would not permit the account to be in his name alone. V.M.M. deposited $500 to open the account, which he had received as gifts from aunts, uncles, grandparents, etc. Petitioner's parents' only income is what they receive from the family fund.

Vincent J. Taffaro

Vincent Taffaro testified that he is the assistant superintendent for the District and oversees the registration office, including admission of affidavit students. Carol Frate is the registration officer. Taffaro became aware of an application received on behalf of V.M.M. in August 2002. The process of reviewing affidavit applications includes review for completeness, review by the Board attorney and, ultimately, review by the affidavit committee, which makes its determinations based upon the law. Applications are accepted or rejected, or more information is sought. The initial review of V.M.M.'s application resulted in a request for further clarification. The Board sought more

information regarding V.M.'s illness and the financial status of V.M.M. Taffaro testified that after receiving the October 20, 2002, letter (P-8), which indicated that V.M. supports V.M.M., the Board replied on November 18, 2002, stating that based upon the October 20, 2002, letter V.M.M. was not eligible to attend District schools. Taffaro had a vague recollection of briefly speaking with and thereafter briefly meeting with petitioner, at which time she showed him her tax returns. Taffaro told petitioner to file the documents with the Central Registration Office. Taffaro also acknowledged receipt of the November 24, 2002, letter written on behalf of petitioner by a friend of hers, but determined to reject V.M.M.'s application based upon the statutory criteria. The final ineligibility letter, dated April 14, 2003, states that V.M.M. is not permitted to attend District schools because petitioner is "not supporting him gratis."

Carol Frate

Carol Frate is the central registration officer for Fort Lee and responsible for affidavit applications. She processes approximately twenty to forty such applications each year. After receiving the application in question she met with petitioner, who had her son and V.M.M. with her, and explained to her the various forms that needed to be completed. The documents completed by petitioner included an affidavit stating that there was no need for an interpreter (R-2), and this was signed by both petitioner and V.M. Ms. Frate also had a conversation with a friend of petitioner and V.M. who had prepared the November 24, 2002, letter on their behalf.

FACTS

Based upon the evidence presented at the hearing and having had the opportunity to observe the witnesses and assess their credibility, I **FIND** the following **FACTS**:

1. Petitioner M.O.M. is the paternal aunt of V.M.M. V.M. is the father of V.M.M. V.M.M. moved in with M.O.M. in early August 2002 and was enrolled by M.O.M. in Fort Lee High School, where he remains a student.

2. Petitioner resides and is domiciled in Fort Lee, New Jersey, in a two-family home purchased by three of her brothers, S.M., W.M. and O.M. W.M. resides on the first floor of the home with his wife and two daughters and M.O.M. resides on the second floor with her parents, her son and V.M.M.

3. V.M. resides in New York City in a one-bedroom apartment with his wife and one of his four children. V.M. is one of eleven siblings, ten of whom are still alive and nine of whom reside in the United States. V.M. and his siblings moved to the United States from Peru over the course of several years. When residing in Peru all of the siblings lived together in one house, along with their parents and all of their children. V.M. moved to the United States in 1989, leaving behind his wife and children. When V.M.'s family joined him in 1993, V.M., his wife, one of his daughters, and V.M.M. all lived in a one-bedroom apartment. V.M. and his wife and daughter shared the bedroom, and V.M.M. slept on the couch. The overcrowding and sleeping arrangements became problematic and aggravated V.M.'s diabetes because of his inability to rest between the two full-time jobs he holds. V.M. works as a maintenance man from 7:30 a.m. until 2:30 p.m. and then as a doorman from 4:00 p.m. to midnight. His income for calendar year 2002 was $51,986.

4. V.M. and his siblings have a financial arrangement whereby each of the siblings contributes to the support of the entire family unit. V.M.'s elderly parents have no other means of support.

5. In 2002, three of the siblings, S.M., W.M. and O.M., purchased a two-family home in Fort Lee, New Jersey. At the time of the purchase it was determined that each sibling's contribution to the family fund needed to be increased from what it had been because living expenses were greater in New Jersey than they had been in New York.

6. The home in Fort lee was purchased with the intent that M.O.M. would reside in one unit with the siblings' parents and her children, and W.M. would reside in the other unit with his family. It was thereafter determined that V.M.M.

would also move into M.O.M.'s unit. Prior to V.M.M. residing with M.O.M., V.M.'s weekly contribution to food on behalf of his parents was $60 and his contribution to the mortgage was $150. These amounts remained the same following V.M.M.'s move to the house in Fort Lee.

7. Also following V.M.M.'s move to Fort Lee, V.M. and his wife no longer claimed V.M.M. as a dependent on their tax return; rather, M.O.M. claimed V.M. as a dependent. V.M. provides no support for V.M.M. other than his contribution to the family fund.

8. The nine siblings contribute to the mortgage and food costs of the family in varying amounts as follows:

Name	Weekly Food	Mortgage
V.M.	$60.00	$150.00
*W.M.	$50.00	$1,500.00
N.M.	$30.00	$300.00
G.M.	$30.00	$300.00
M.O.M.	$100.00	$680.00
W.M.	$50.00	$300.00
*S.M.	$50.00	$385.00
*O.M.	$40.00	$385.00
A.M.M.	$30.00	$300.00

*owners of the Fort Lee property

9. W.M.,[4] who resides with his family in one half of the two-family home, pays the largest share of the mortgage costs. The contribution of V.M. to the mortgage, at $150 per month, which is the least of all the siblings' contributions, is 50 percent of the next lowest monthly mortgage contribution made by one of the siblings.

[4] There are two siblings with the initials W.M., one male and one female. It is V.M.'s brother who is referenced herein.

10. M.O.M. is employed as a housekeeper and as a daycare center worker. She earned $22,845.00 last year. At the time of the purchase of the home in Fort Lee by three of the siblings, a meeting was held among all of the siblings to determine the amount each would contribute to the greater expenses of the Fort Lee residence. V.M.'s contribution to the family fund was not increased. Also, when V.M.M. moved in with M.O.M. in early August 2002, V.M.'s contribution was not increased.

11. Based upon affidavits executed by V.M. and M.O.M. indicating that V.M. was not supporting V.M.M., the Board permitted V.M.M. to enroll in school in the District starting with the first day of the 2002-2003 school year. V.M.M. has remained in Fort Lee High School since that time. However, on November 25, 2002, the Board determined that V.M.M. did not meet the qualifications for enrollment as an affidavit student based upon M.O.M.'s letter of October 20, 2002 (P-8) indicating that V.M. provides full financial support.

12. Neither V.M. nor M.O.M. speaks English, and each has relied on M.O.M.'s son, J.P.M., age sixteen, to translate correspondence for them and draft correspondence on their behalf.[5] J.P.M. read the package of documents provided by the Board to M.O.M. and V.M. J.P.M. instructed M.O.M. as to how to complete the application. V.M. also signed the affidavits following J.P.M.'s instructions and the documents were returned to the Board. V.M. then had a telephone conversation with Dr. Taffaro, the assistant superintendent of the District, and understood that Taffaro wanted a letter stating that V.M. continues to support his family. Accordingly, J.P.M. was instructed by V.M. to draft a letter indicating that V.M. contributes to the support of the whole family, as had been the custom for many years (P-8). J.P.M. also prepared the undated letter that V.M. signed and returned to the District relative to his diabetes and the fact that his apartment was too small to accommodate V.M.M. (P-4). The letters were intended to convey that V.M. continues paying financial support for the benefit of all of the residents of the Fort Lee home. V.M. and M.O.M. each signed the respective letters believing that this was what J.P.M. had written.

[5] Their testimony was presented with the aid of an interpreter.

13. In addition to drawing on the family fund, M.O.M. has paid many expenses on behalf of V.M.M. out of her own pocket, including $210 for driving lessons, any school fees, the cost of V.M.M.'s lunches at school, and money for incidentals, clothing, and recreational activities. M.O.M. supports her nephew in the same manner as she supports her own son, from the family fund and from her own earnings.

LEGAL DISCUSSION AND CONCLUSION

The statute governing this matter, *N.J.S.A.* 18A:38-1, provides in pertinent part as follows:

> 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;
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If

> in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Accordingly, the "affidavit student" provision authorizes boards of education to challenge the validity of affidavits submitted by parents and relatives or friends to determine if the pupil is entitled to a free education in the particular district. The statute was amended in 1977 to prevent the following situation:

> Parents sometimes attempt to send their children to schools in districts other than their own without actually changing their residences. It is a very simple matter for a parent to request a relative or friend who resides within the district to provide the child with an official address within the district for purposes of school attendance.
>
> Further, if the friend or relative agrees to sign an affidavit, the school district must accept the child as a student within the system.
>
> [Statement to Senate Bill No. 1464–L. 1977, c. 373.]

The current dispute, however, does not present a situation analogous to that which the Legislature intended to prevent by enacting the "affidavit student" law.

Based upon the "affidavit student" law, petitioner is required to satisfy a four-prong test by demonstrating that (1) petitioner is domiciled within respondent's school district; (2) petitioner is supporting V.M.M. gratis; (3) V.M. is not capable of supporting or providing care for V.M.M. due to family or economic hardship; and (4) V.M.M. is not residing with petitioner solely for the purpose of receiving a free public education in respondent's school district. The burden of proof is on the petitioner to demonstrate each and every element. *N.J.S.A.* 18A:38-1(b).

The first prong is not at issue in this dispute, as the record is clear that M.O.M. resides within the respondent's school district. Moreover, there is no evidence in the record even suggesting that V.M.M. is residing with M.O.M. solely for the purpose of receiving a free public education in respondent's school district. Accordingly the first and fourth prongs of the statutory requirements have been satisfied and I so **FIND**.

With regard to the second prong, the term "gratis" is not defined within the statute. *Black's Law Dictionary* 708 (7th ed. 1999) defines "gratis" to mean "free; without compensation." In the context of *N.J.S.A.* 18A:38-1(b)(1) the term means that a person undertakes the support of a child without charging or seeking reward.

Respondent claims that it strains credulity to suggest that M.O.M., with earnings of less than $23,000 per year, supports herself, V.M.M. and her son, the one child remaining in her home, while V.M., with annual earnings of nearly $52,000, does not contribute to the support of V.M.M. Respondent also alleges that the letters submitted by V.M. and M.O.M. clearly indicate that V.M. is supporting V.M.M.

Petitioner argues that V.M. contributes only to the family fund, and in the same amount each month as before his son V.M.M. moved in with M.O.M. He asserts that M.O.M. provides for all of V.M.M.'s needs. Moreover, M.O.M. declares V.M.M. as a dependent on her income tax returns and V.M. does not, because he is not supporting V.M.M.

In the matter *of E.L. v. Board of Education of Morris Hills Regional School District*, EDU 3172-97, Initial Decision (January 3, 2000), *aff'd and modified*, Comm'r (February 15, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>, the administrative law judge held that although the mother had ample means to support her daughter and contributed $200 per month to the grandparents for the child's living expenses, the petitioner nevertheless met the "gratis test," finding that the motivation of the grandparents "arose solely out of love and concern for their grandchild and was not dependent on making money." In the within matter the motivation of M.O.M. and her eight siblings appears to be the same, as each of them contributes to V.M.M.'s support by virtue of the family fund.

In the matter of *Board of Education of East Brunswick v. J.R.*, 96 *N.J.A.R.*2d (EDU) 285, 287, the Commissioner upheld a ruling that if the grandparents provide "a substantial portion of the financial support" for their grandchild, that was sufficient to satisfy the gratis test. In that matter, the parents were divorced, the mother and step-father had busy schedules, and the child's natural father made support payments which

the grandmother deposited into a bank account for the child, who lived with her. Additionally, the mother paid for the child's clothing, diapers, medical, dental and drug expenses. The Commissioner nevertheless agreed with the recommendation that the grandparents had assumed all obligations relative to the child's school requirements and concluded that the criteria set forth in *N.J.S.A.* 18A:38-1(b)(1) had been met.

In other matters, the fact that a child was covered under his parent's medical insurance did not undermine the "gratis" nature of the caretaker's support. *See R.A. v. Board of Educ. of Ewing Township*, 95 *N.J.A.R.*2d (EDU) 49, 50; *J.B. v. Board of Educ. of Ocean Township*, 96 *N.J.A.R.*2d (EDU) 628. Occasional small gifts are not enough to alter the fundamental relationship among the parties. *J.B., supra,* 96 *N.J.A.R.*2d (EDU) at 630 (winter coat, some jeans and shirts and some dress clothes). The receipt of Social Security survivor benefits "does not, in itself, disqualify [the child] from school attendance within the intendment of the law's *gratis* support requirement." *Gunderson v. Board of Educ. of Brigantine*, 95 *N.J.A.R.*2d (EDU) 39, 42. Payment of child support by a biological father does not undermine grandparents' status as supporting their grandchild "gratis" where the grandparents contributed more than half of their grandchild's living expenses, a substantial portion of her support, and enough to claim the child as a dependent on their income tax return. *E.L., supra,* EDU 3172-97, Initial Decision (January 3, 2000), *aff'd and modified*, Comm'r (February 15, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>.

CREDIBILITY FINDINGS

It is the obligation and responsibility of the undersigned to weigh the credibility of the witnesses in this matter in order to make a determination. Credibility is the value that a fact finder gives to a witness's testimony. The word contemplates an overall assessment of a witness's story in 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). Credible testimony is testimony that must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. *State v. Taylor,* 38 *N.J. Super.* 6, 24 (App. Div.

1955). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. *Barnes v. United States*, 412 *U.S.* 837, 93 *S. Ct.* 2357, 37 *L. Ed.* 2d 380 (1973).

There is no mechanical formula for determining the truth. One factor to determine which party's version of the incident has the "reasonable probability of truth" is that the "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). Further, "[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). Also, it is the function of the trier of fact to determine credibility based on the internal consistency or improbability of the witnesses' testimonies using experience and everyday affairs to give additional guidance. Whether petitioner has met the burden of proving each element of the statute depends on the credibility of the evidence. Thus, I have also considered factors such as the witnesses' demeanor, as well as external measures of credibility.

Resolution of the contradictions and incongruities in testimony can only be accomplished by assessing the credibility of the witnesses. Accordingly, in determining credibility I considered the following customary criteria:

- The appearance and demeanor of each witness;
- The manner in which the witness testified;
- The interest of the witness in the outcome of the proceeding, if any;
- The means of the witness to obtain knowledge of the facts;
- The power of discernment of the witness;
- The ability of the witness to reason, observe, recollect and relate;
- The possible bias, if any, in favor the side for whom the witness testified;
- The extent to which, if at all, each witness was either corroborated or contradicted, supported or discredited by other evidence;

- Whether the witness testified with an intent to deceive this administrative tribunal;
- The reasonableness or unreasonableness of the testimony the witness has given; and
- Any and all other matters in the evidence that serve to support or discredit the testimony of the witness.

In the within matter the Board's determination was based on M.O.M.'s letter to the Board (P-8) and on V.M.'s letter (P-4), each of which state that V.M. is providing financial support for V.M.M. M.O.M. and V.M. testified that in each instance they intended to convey that V.M. was continuing to contribute as he had done for years to the family fund, and that neither letter written by M.O.M.'s son J.P.M., and not translated literally to either M.O.M. or V.M. before submission, was intended to convey that V.M. was providing all of the support for V.M.M. I **FIND** the testimony of M.O.M. and V.M. to be believable, credible and persuasive. The statutory requirement of gratis support by a person domiciled in the district does not contain any language prohibiting any contribution whatsoever by a parent, nor does the case law construe gratis as prohibiting some money being received on the child's behalf from the parent. Based upon all of the foregoing, I **CONCLUDE** that the support contributed by V.M. for V.M.M. is *de minimis*, and that petitioner has proven by a preponderance of the credible evidence that she supports V.M.M. gratis, thereby satisfying the second prong of the statute.

The remaining requirement is that a family or economic hardship exist that prevents V.M. from supporting or providing care for V.M.M. The Board contends that petitioner has not proven that a family hardship exists. In the matter *of K.M. v. Board of Education of Ocean Township*, 96 *N.J.A.R.*2d (EDU) 632, a fourteen-year-old student had been living with her mother and brother in a two-bedroom apartment in Neptune, N.J. The student and her brother shared a bedroom, which was deemed inappropriate by the family as the student reached her teenage years. The student's mother could not afford a three-bedroom apartment, so the student moved into the grandmother's home in Ocean Township. The Commissioner, in these circumstances, found that a sufficient economic hardship existed to justify the student's enrollment in the Ocean Township district schools. In the matter of *McClean v. Board of Education of Township of Ocean*, 96 *N.J.A.R.*2d

(EDU) 632, it was found to be inappropriate for a child entering adolescence to share a bedroom with her brother when their parents could not afford a larger apartment. Under the circumstances a hardship was found to exist. In the matter of *Y.I.S. v. Northern Valley Regional High School District*, EDU 10964-97, Initial Decision (December 6, 2001), *adopted*, Comm'r (January 8, 2002), *aff'd*, State Board (May 1, 2002) <http://lawlibrary.rutgers.edu/oal/search.html>, the travel schedule and working hours of a single parent were found to constitute a hardship.

In the case at bar, V.M.M. moved in with M.O.M. because there was no suitable living arrangement alternative. His parents and sister lived in a one-bedroom apartment in New York City, and other members of his family, who had contributed to his support all of his life, including his grandparents with whom he had been raised, were moving into a two-family home in Fort Lee, New Jersey. The decision was made that it was best for V.M.M. to move in with his grandparents, his aunt M.O.M. and his cousin, with other family members residing in the remainder of house, all of whom he was very close with and had lived with all of his life.

V.M. works two full-time jobs and, as corroborated by information provided by his treating physician, suffers from type II diabetes, hyperlipidemia and hypertension, and needs to be able to rest at home. It was difficult for V.M. to rest at home between his two full-time jobs because V.M.M. had returned from school by that time, often with friends, and sometimes practiced his piano. The overcrowding and the lack of suitable sleeping arrangements, combined with the medical condition of V.M., clearly rise to the level of family hardship. Under these circumstances there can be no doubt that V.M.M.'s move to M.O.M.'s home in August 2002 was because a legitimate family hardship existed, and I so **FIND**.

Based upon all of the foregoing, I **CONCLUDE** that petitioner has met the burden of proving that these circumstances constitute a family hardship, thereby satisfying the third prong of the test.

In the matter of *Gunderson, supra*, 95 *N.J.A.R.*2d (EDU) 39, 42, the Commissioner articulated the purpose of the statute and the January 1994 amendment as follows:

> In interpreting a statute, the Commissioner must look to the fundamental purpose for which the legislation was enacted, and where a literal reading will not accord with that purpose, the spirit of the law will control over its letter. *N.J. Builders, Owners & Managers Association v. Blair*, 60 *N.J.* 330, 333 (1972). Moreover, the meaning of a statute is to be gathered from the mischief sought to be eliminated as well as the proposed remedy. *Brewer v. Porch*, 53 *N.J.* 167, 174 (1969); *San-Lan Builders, Inc. v. Baxendale*, 28 *N.J.* 148, 155 (1958).
>
> The amendments to *N.J.S.A.* 18A:38-1 effectuated by *P.L.* 1993, *c.* 380 were intended to ease the burden on local boards of education attempting to remove illegally enrolled students, specifically those living with a parent or guardian who claims to be, but is not, domiciled within the district, and those living with a person other than the parent or guardian in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile. (See Sponsor's Statement, Senate Education Committee Statement and Governor's Conditional Veto Message to Senate Bill No. 1447 of 1993, enacted as *c.* 380)
>
> The intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living arrangements may not be as contemplated by the statutory scheme . . . . To hold otherwise harms a party the Legislature never meant to penalize, unreasonably places form over substance and overlooks the substantial State interest in ensuring the education of all its children.

All of the surrounding circumstances conclusively support a finding that the second and third prongs of the four-part test have been met. Since V.M.M. moved in with M.O.M., his father has not claimed him as a dependent on his tax return, but M.O.M. has. V.M. contributes partially to V.M.M.'s support via the family fund, which he has contributed to all of his adult life and which is primarily for the support of his aging parents. V.M.'s siblings contribute far more to the family fund and therefore far more to V.M.M.'s support than V.M. does.

Based upon all of the foregoing, I **CONCLUDE** that V.M.M. is entitled to a free public education in the District.

ORDER

It is **ORDERED** that V.M.M. is eligible to receive a free public education in the Fort Lee 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 (45) 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 (13) 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, 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 18, 2004
DATE

LESLIE Z. CELENTANO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

March 18, 2004
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 22 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

da

APPENDIX

Witnesses

For Petitioner:

V.M.

S.M.

M.O.M.

For Respondent:

Vincent J. Taffaro

Carol Frate

Exhibits

For Petitioner:

P-1 Form 1040 U.S. Individual Income Tax Return 2002 for V.M.

P-2 Letter to M.O.M. from the District dated November 18, 2002

P-3 Letter to M.O.M. from the District dated September 23, 2002

P-4 Letter addressed to "To Whom it May Concern" from V.M. (undated)

P-5 Letter addressed to "To Whom it May Concern" from Maria Tulpan, M.D., dated October 18, 2002

P-6 Copy of M.O.M.'s W-2 Wage and Tax Statement for 2002 and Form 1040 U.S. Individual Income Tax Return for 2002

P-7 Affidavits signed by V.M. and M.O.M.

P-8 Letter addressed to "To Whom it May Concern" from M.O.M. dated October 20, 2002

P-9 Letter to Vincent J. Taffaro, Assistant Superintendent, from M.O.M. (prepared by a friend) dated November 24, 2002

For Respondent:

R-1 Deed to 251 Maple Avenue, Fort Lee, New Jersey, dated July 23, 2002

R-2 Statement of M.O.M. that she does not need a language interpreter to complete the affidavits dated August 19, 2002

OAL DKT. NO. EDU 05412-03
AGENCY DKT. NO. 141-5/03

M.O.M., on behalf of minor child, V.M.M,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge that V.M.M. satisfies the criteria of *N.J.S.A.* 18A:38-1(b) and is, thus, entitled to a free education in respondent's school district unless and until his circumstances change so as to alter such entitlement.

Accordingly, the Initial Decision of the OAL is adopted, for the reasons expressed therein, as the Commissioner's final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/28/04
Date of Mailing: 4/29/04

* [1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

#185-04

BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION *ET AL.*,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Board alleged that the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA) was being misapplied to the District and that the Department was violating applicable statutes and regulations regarding the amount of aid to be disbursed.

The ALJ found that there was no genuine issue of material fact and the matter could be decided by summary decision. Respondent argued, and, subsequent to filing of the petition, the District conceded based on the *Hammonton* Appellate Division decision, that it properly calculated the District's state aid pursuant to the Fiscal Year '04 Appropriations Act, under which each school district in New Jersey was entitled to receive the same amount of state aid it received during the 2002-03 school year. Petition was dismissed.

The Commissioner adopted the Initial Decision as his own.

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

April 28, 2004

Frederick A. Jacob, Esq.
Jacob & Ferrigno
600 West Main Street – Box 429
Millville, NJ 08332

Cindy Campbell
Deputy Attorney General
Division of Law – Box 112
Trenton, NJ 08625-0112

BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER COUNTY V. N. J. STATE DEPARTMENT OF EDUCATION, ET AL, AGENCY DKT.NO. 278-7/03, OAL DKT. NO. EDU 08072-03

Dear Parties:

We are enclosing a copy of the decision of the Commissioner of Education, dated April 28, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/ dec ltr/BOEWoodburyGloucester
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(On Motion for Summary Judgment - Unopposed)
OAL DKT. NO. EDU 8072-03
AGENCY DKT. NO. 278-7/03

BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER COUNTY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, ET AL,
Respondent.

Frederick A. Jacob, Esq., for petitioner

Cindy Campbell and Allison Eck, Deputy Attorneys General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: March 4, 2004 Decided: March 15, 2004

BEFORE **W. TODD MILLER**, ALJ

STATEMENT OF THE CASE

On September 15, 2003, petitioner, Woodbury Board of Education ("District"), filed an action with the Commissioner of Education ("Commissioner") alleging that the Comprehensive Educational Improvement and Financing Act of 1996 ("CEIFA") was being misapplied to the

district and that the Department of Education was violating the applicable statutes and regulations regarding the amount of aid to be disbursed. On October 21, 2003, the matter was transmitted to the Office of Administrative Law ("OAL") 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 December 16, 2003, a telephone prehearing conference was held wherein the parties agreed to submit cross-motions for summary judgment regarding the contested issues. On January 30, 2004, respondent, Commissioner of Education, filed its initial Motion for Summary Judgment. On March 2, 2004, petitioner submitted a letter indicating that it was not opposing the Commissioner's Motion for Summary Judgment. Therein, the letter provides:

> In light of the budgetary language in both the 2002-03 and 2003-04 Appropriations Bill and the State Board of Education and Appellate Division Decisions in the *Hammonton* case, the Woodbury Board of Education will not oppose the Attorney General's Motion for Summary Judgment. (Letter of Frederick A. Jacob, Esquire, counsel for the Woodbury Board of Education, March 2, 2004)

Accordingly, upon receipt of the district's March 4, 2004, letter, the record closed.

SUMMARY OF RELEVANT FACTS

The district alleges that its CEIFA aid for the 2003-2004 year is being misapplied, in violation of *N.J.S.A.* 18A:7F-1, *et seq.* More particularly, the district asserts that its 2003-2004 aid calculation, pursuant to CEIFA, should, in effect, be increased over its 2002-2003 aid calculation.

The Commissioner contends that the appropriation for 2003-2004 is confined or limited to the aid provided in the prior fiscal year (2002-2003). Respondent cites the Fiscal Year 04 Appropriation Act, L. 2003, c.122, which provides, as follows:

> Notwithstanding any other law or regulation to the contrary, each district shall receive no less of a total state aid amount payable for the 2003-2004 school year than the sum of the district's total state aid amount payable for the 2002-2003 school year for the following eight categories: Core Curriculum Standards Aid, Supplemental Core Curriculum Standards Aid, Early Childhood Program Aid,

> Instructional Supplemental Aid, Demonstrably Effective Program Aid Rewards and Recognition, Stabilization Aid, Stabilization Aid II, Stabilization Aid III, Large Efficient District Aid, Aid for Districts with High Senior Citizen Populations, Regionalization Incentive Aid, District Learning Network Aid, Adult and Postsecondary Education Grants, Bilingual Education Aid, Special Education Aid, County Vocational Program Aid, Transportation Aid, School Choice and Aid for Enrollment Adjustments, taking into consideration the June 2003 payment in July 2003.

The Commissioner further contends that, during the 2003-2003 school year, the district received a total of $8,522,279.00 in state aid. Accordingly, the Commissioner contends that the fiscal year 2003-2004 aid calculation was appropriate and petitioner'sreceipt of $8,612,548.00 was appropriately and lawfully calculated.[1]

LEGAL DISCUSSION AND ANALYSIS

The rules governing practice in the OAL provide that a Motion for Summary Decision may be granted if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. This provision mirrors the language of Rule 4:46-2 and the Supreme Court's decision in *Judson v. Peoples Bank and Trust Co. 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 Co. 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 disputed issue in favor of the non-moving party.

[1] The District's consolidated aid was $159,204.00, together with an additional $6,990.00 in other aid, causing a slight increase over the fiscal year 2002-2003 calculations.

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).

Based on the Briefs and Affidavits presented by the parties, I **FIND** that there is no genuine issue of material fact and the matter can be decided on Summary Decision. In fact, petitioner does not oppose the Commissioner's Motion to dismiss its petition.

The Commissioner asserts that it properly calculated the district's state school aid pursuant to the Fiscal Year 04 Appropriations Act and CEIFA. The Commissioner contents that each school district in New Jersey is only entitled to receive the same amount of state aid it received during the 2002-2003 school year. In other words, the Commissioner contends that the Fiscal Year 04 Appropriations Act trumps CEIFA for the 2003-2004 school year. In support for its contention, the Commissioner relies upon *Hammonton Board of Education v. New Jersey Department of Education, et al*, unreported, (slip op. at 15) (App. Div. 2003) (A-3836-01T5). The Commissioner argues that where the legislature has mandated funding for a particular program, the program may be implicitly suspended where the legislature fails to fund that program in a subsequent year. *Hammonton, supra*, (slip. op. at 16). The Appellate Division, in *Hammonton*, squarely addresses this issue. Therein, the Appellate Division stated that:

> The current appropriations act at issue in this case, the FY03 Appropriation, L. 2002, c.38 (FY03) has the full effect of law and expresses a "definite legislative intent." Citing *City of Camden,* 82 *N.J.* at 142. To the extent that the two enactments - CEIFA and FY03 - are irreconcilable, they cannot co-exist. Our courts, consistent with federal statutory interpretation, have declined to apply the Doctrine of "Implied Repeal." *Id.* See also *Friends of Earth v. Armstrong*, 485 *F.2d* 1, 16 (10th Cir. 1973) (holding "The Supreme Court has consistently stated that judicial construction is disfavored as a means of establishing a repeal of legislation.") Because appropriations acts have "a life limited to its fiscal year," our courts have been sensitive to the impact of appropriations laws upon existing laws, choosing to characterize the effect appropriations on standing legislation as an implied "suspension rather than an implied repeal."

The import of the Commissioner's position, as well as the language contained in *Hammonton, supra*, is that the legislature's failure to provide additional funding for the fiscal year 2003-2004 results in an implied suspension of CEIFA. This issue was addressed by the

Appellate Division in *Hammonton*, and the same rationale is applicable to the present facts and circumstances. Accordingly, for the balance of reasons set forth in the Commissioner's Motion for Summary Judgment, together with the rationale provided by the Appellate Division in *Hammonton*, I **FIND** and **CONCLUDE** that the Commissioner's Motion for Summary Judgment, that is dismissing the petition filed by the District must be **GRANTED**. The Motion is granted based upon the existing law, together with the fact that the Motion was unopposed by the District.

ORDER

For the reasons set forth above, it is hereby **ORDERED** that the petition filed by the Board of Education of the City of Woodbury, Gloucester County, disputing or contesting the Commissioner of Education's CEIFA calculations for fiscal year 2003-2004 as being inappropriate or in violation of the applicable statute 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 (45) 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 (13) 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, 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.

3-15-04
DATE

W. TODD MILLER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

3-15-04
DATE

Mailed to Parties:

MAR 19 2004
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sd

DOCUMENTS RELIED UPON

Respondent's Brief in Support of Motion for Summary Judgment dated January 29, 2004.

Letter of Petitioner's counsel, Frederick A. Jacob, Esquire, dated March 2, 2004

Hammonton Board of Education v. New Jersey Department of Education, et al, unreported, (slip op.) (App. Div. 2003) (A-3836-01T5)

OAL DKT. NO. EDU 8072-03
AGENCY DKT. NO. 278-7/03

BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION *ET AL.*,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner fully concurs with the analysis and conclusion of the Administrative Law Judge finding, for reasons conceded by petitioner, that the instant matter is appropriately dismissed on a summary basis.

Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 4/28/04
Date of Mailing: 4/28/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

189-04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(CONSOLIDATED CASES)

ARLENE C. ALLEN, BERNIE BUETTNER, RICHARD ESANDRIO, JOHN A. MAIKOS, BARBARA OBERDING, CARMINE N. VITOLO AND SHARON WEISKOPF,
Petitioners,
v.
CLARK TOWNSHIP BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDU 1445-02
AGENCY DKT. NO. 449-10/01

DOROTHY BARRANGER, DENIS BORAI, ALLAN CZAYA, ARLENE DELLACERRA, SUSAN DOUGHERTY, LEONARD FERRARA, THOMAS GALISZEWSKI, HARVEY GOLDBERG, PAMELA HARTKOPF, THOMAS KAPTOR, BETTY MELCHIOR, LORRAINE OLSZEWSKI, JUDY ROTHWELL, EDWARD SAN FILLIPO, LOIS SAVAGE, GENE STRYKER, KAREN VINACOUR, AND ILENE ZELKIN,
Petitioners,
v.
CLARK TOWNSHIP BOARD OF EDUCATION
Respondent.

OAL DKT. NO. EDU 1357-03
AGENCY DKT. NO. 372-11/02

#189-04

ARLENE C. ALLEN, BERNIE BUETTNER, RICHARD ESANDRIO, JOHN A. MAIKOS, BARBARA OBERDING, CARMINE N. VITOLO AND SHARON WEISKOPF v. BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, UNION COUNTY **AND** DOROTHY BARANGER, DENIS BORAI, ALLAN CZAYA, ARLENE DELLACERRA, SUSAN DOUGHERTY, LEONARD FERRARA, THOMAS GALISZEWSKI, HARVEY GOLDBERG, PAMELA HARTKOPF, THOMAS KAPTOR, BETTY MELCHIOR, LORRAINE OLSZEWSKI, JUDY ROTHWELL, EDWARD SAN FILIPO, LOIS SAVAGE, GENE STRYKER, KAREN VINACOUR AND ILENE ZELKIN v. BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, UNION COUNTY

SYNOPSIS

In consolidated matters, petitioners, tenured teachers formerly employed by the Union County Regional High School District No. 1, alleged respondent Clark School Board, their new employer when the Regional District was dissolved effective June 30, 1997, violated their rights under *N.J.S.A.* 18A:6-31.5 and 13-64 when it improperly calculated their compensation for sick leave upon retirement. Petitioners contended they were entitled to compensation for sick leave accumulated while employed by the Regional School District, at the rate provided in the collective bargaining agreement in effect at the time.

The ALJ concluded that payment for accumulated sick leave, like salary is compensation for services rendered during periods that were covered by the most recent collective negotiations agreement with the Regional District. Once that level of compensation was established, the protections of the tenure law were implicated. Thus, the ALJ concluded that affected staff members must be retained at the accumulated sick leave benefit level established through the last most recent contract with the Regional District, until such time as that level would be reached through subsequent contract negotiations, whereupon the staff members would be placed on the level of the other employees and accorded equal treatment thereafter. The ALJ ordered the Clark Board to recalculate the payment of accumulated sick leave for petitioners.

The Commissioner rejected the Initial Decision. The Commissioner determined that payment for accumulated sick leave was not protected pursuant to *N.J.S.A.* 18A:13-64 either as a tenure right or an "other similar benefit" under that provision. Upon full consideration of the language of *N.J.S.A.* 18A:13-64, its legislative intendment, and applicable case law, the Commissioner held that payment for accumulated sick leave is not preserved and protected by this statute but, rather, is a contractual benefit subject to collective bargaining negotiations. Summary decision was granted to the Board; consolidated petitions 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.

April 30, 2004

Luanne M. Peterpaul, Esq., for petitioners (Peterpaul, Clark & Corcoran, P.C., attorneys)

Michael J. Gross, Esq., for respondent (Kenney, Gross, Kovats and Campbell, attorneys)

Record closed: December 18, 2003 Decided: February 2, 2004

Before **ROBERT J. GIORDANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, Arlene C. Allen, Bernie Buettner, Richard Esandrio, John A. Maikos, Barbara Oberding, Carmine N. Vitolo and Sharon Weiskopf, hereinafter referred to as Allen, *et als.*, were employed as tenured teachers by the Union County Regional High School District No. 1. until the Regional School District was dissolved effective June 30, 1997. Allen, *et als.* selected the Clark School District as their new employer pursuant to the staff selection process approved by the Commissioner of Education and the State Board of Education. Each of these petitioners retired from employment with the Clark Board of Education effective June 30, 2001. In or about September 2001, the Clark Board of Education authorized the payment to these petitioners for unused accumulated sick leave as calculated by the Board. These petitioners dispute the calculation, asserting that they are entitled to compensation for sick leave accumulated while employed by the Regional School District, at the rate provided in the collective bargaining agreement in effect at the time.

Petitioners, Dorothy Barranger, Denis Borai, Allan Czaya, Arlene Della Cerra, Susan Dougherty, Leonard Ferrara, Thomas Galiszewski, Harvey Goldberg, Pamela Hartkopf, Thomas Kaptor, Betty Melchior, Lorraine Olszewski, Judith Z. Rothwell, Edward SanFillipo, Lois Savage, Karen Vinacour, and Ilene Zelkin, hereinafter referred to as Barranger, *et als.*, were employed as tenured teachers by the Union County Regional High School District No. 1. until the Regional School District was dissolved

3. While they were employed by the Regional District, petitioners Allen, *et als.*, and Barranger, *et als.*, were members of a negotiations unit represented by the Union County Regional Federation of Teachers, Local 3417, AFT, AFL-CIO (the UCRFT).

4. Article 17 of the 1995-97 Collective Negotiations Agreement between the Regional District and the UCRFT provided in relevant part as follows (Joint Exhibit A):

> O. Commencing with the 1988-1989 school year, any teacher who has served in the district for twenty-five (25) years or longer, who has reached age fifty (50) and has not reached age fifty-five (55), or any teacher who has served in the district for fifteen (15) years or longer at age fifty-five or older, shall be entitled to be paid for accumulated sick days within twelve (12) months from the date of leaving the district on the following basis:
>
> 1995-96 school year: $60 per day for up to 250 days
> 1996-97 school year: $65 per day for up to 250 days

5. On May 14, 1996, voters in the six municipalities which comprised the Regional District approved the dissolution of the Regional District in a referendum. Thereafter, the Commissioner of Education determined that the dissolution of the Regional District would be effective July 1, 1997.

6. In approximately December 1996, petitioners Allen, *et als.*, and Barranger, *et als.*, selected the Clark School District as their employer pursuant to the staff selection process which the Commissioner of Education, and subsequently, the State Board of Education, approved in *Stagaard v. Contini*, 97 *N.J.A.R.* 2d (EDU) 217, *aff'd* in relevant part *State Board, S.B.* #88-96 (State Board decision, Oct. 1, 1997).

7. Petitioners Allen, *et als.*, were employed by the Clark Board as tenured teachers in 1997-1998, 1998-1999, 1999-2000 and 2000-2001 school years.

8. Petitioners Barranger, *et als.*, were employed by the Clark Board as tenured teachers in 1997-1998, 1998-1999, 1999-2000, 2000-2001 and 2001-2002 school years.

9. During the 1996-97 school year, the Clark Education Association (CEA) was the exclusive negotiations representative for all certified employees of the Clark Board of Education, prior to the effective date of deregionalization.

10. Article XI of the Collective Negotiations Agreement between the Board and the Clark Education Association for the 1996-97 school year, provided in relevant part as follows (Joint Exhibit B):

> C. 1. Any employee who retires according to the Teacher Pension and Annuity Fund of the Public Employment Retirement System, in order to receive immediate benefits and not merely deferred retirement by submitting a letter of retirement after July 1, 1996 through June 30, 1997, shall receive twenty-five ($25) dollars per day for each unused accumulated sick day for up to and not to exceed 150 days and not to exceed $3750. Said payment shall be made in one (1) lump sum payment.

11. In June 1997, the CEA was decertified and the Clark Federation of School Employees was certified as the collective negotiations representative for the 1997-98 school year. The provisions of Article XI remained in full force and effect until a new agreement was reached between the Board and the successor Federation (CFSE) for the 1998-2001 school years. In the 1998-2001 contract, the provisions of Article XI remained the same, except for effective dates.

12. While they were employed by the Clark Board of Education during the 1997-98 school year and beyond, petitioners Allen, *et als.*, and Barranger, *et als.*, were members of a negotiations unit represented by the successor Federation, the Clark Federation of School Employees, Local 3417, AFT, AFL-CIO (CFSE).

13. Petitioners Allen, Buettner, Esandrio and Oberding retired from employment by the Board and under the Teachers Pension and Annuity Fund, effective July 1, 2001. Petitioners Maikos and Vitolo retired from employment by the Board and under the Teachers Pension and Annuity Fund, effective June 30, 2001. Petitioner Weiskopf retired from employment by the Board and under the Teachers Pension and Annuity Fund, effective March 1, 2001.

14. The records of the Board indicate that Petitioners Allen, *et als.*, had the following amounts of unused accumulated sick leave upon their respective retirements:

a. Petitioner Allen had 164.5 days of unused accumulated sick leave upon retirement. 152.5 days of the unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Allen was employed by the Regional District from September 1964 until the dissolution of the District, effective June 30, 1997. She was 54 years of age at the time of dissolution.

b. Petitioner Buettner had 161 days of unused accumulated sick leave upon retirement. 170 days of the unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Buettner was employed by the Regional District from September 1977 until the dissolution of the District, effective June 30, 1997. He was 51 years of age at the time of dissolution .

c. Petitioner Esandrio had 297 days of unused accumulated sick leave upon retirement. 265.5 days of the unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Esandrio was employed by the Regional District from September 1964 until the dissolution of the District, effective June 30, 1997. He was 54 years of age at the time of dissolution.

d. Petitioner Maikos had 331 days of unused accumulated sick leave upon retirement. 305 days of the unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Maikos was employed by the Regional District from September 1970 until the dissolution of the District, effective June 30, 1997. He was 54 years of age at the time of dissolution.

e. Petitioner Oberling had 221 days of unused accumulated sick leave upon retirement. 206 days of the unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Oberling was employed by the Regional District from September 1966 until the dissolution of the District, effective June 30, 1997. She was 61 years of age at the time of dissolution.

f. Petitioner Vitolo had 86 days of unused accumulated sick leave upon retirement. 228.5 days of the unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Vitolo was employed by the Regional District from September 1967 until the dissolution of the District, effective June 30, 1997. He was 51 years of age at the time of dissolution.

g. Petitioner Weiskopf had 132 days of unused accumulated sick leave upon retirement. 119 days of the unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Weiskopf was employed by the Regional District from September 1969 until the dissolution of the District, effective June 30, 1997. She was 51 years of age at the time of dissolution.

15. All of the aforesaid amounts of unused accumulated sick leave upon retirement included days accrued while petitioners Allen, *et als.*, were employed by the Regional District, as well as days accrued during the years petitioners Allen, *et als.*, were employed by the Clark Board of Education, less any days used during their employment in Clark.

16. On September 18, 2001, the Board sent payment vouchers to petitioners for their unused accumulated sick leave as calculated by the Board. The vouchers indicated that petitioners were paid $25 per day up to a maximum of 150 days. Petitioners Allen, Buettner, Esandrio, Maikos and Oberding received the maximum amount $3,750, while petitioner Weiskopf received $2,300 and petitioner Vitolo received $2,150. Copies of the Board's payment vouchers issued to these petitioners and signed by them are attached hereto as Joint Exhibits C-I.

17. Petitioners Barranger, *et als.*, retired from employment by the Board and under the Teachers Pension and Annuity Fund, effective June 30, 2002, with the exception of Barranger, who retired from employment by the Board and under the Teachers Pension and Annuity Fund, effective July 1, 2002, Zelkin, who retired from employment by the Board and under the Teachers Pension and

Annuity Fund, effective January 1, 2002 and Melchior, who retired from employment by the Board and under the Teachers Pension and Annuity Fund, effective August 1, 2002.

18. The records of the Board indicate that petitioners Barranger, *et als.*, had the following amounts of unused accumulated sick leave upon their respective retirements:

    a. Petitioner Barranger had 73 days of unused accumulated sick leave upon retirement. 74 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Barranger was employed by the Regional District from November 1975 until the dissolution of the District, effective June 30, 1997. She was 61 years of age at the time.

    b. Petitioner Borai had 205 days of unused accumulated sick leave upon retirement. 160 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Borai was employed by the Regional District from September 1972 until the dissolution of the District, effective June 30, 1997. He was 55 years of age at the time.

    c. Petitioner Czaya had 241 days of unused accumulated sick leave upon retirement. 172 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Czaya was employed by the Regional District from September 1969 until the dissolution of the District, effective June 30, 1997. He was 50 years of age at the time.

    d. Petitioner DellaCerra had 172 days of unused accumulated sick leave upon retirement. 187 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner DellaCerra was employed by the Regional District from September 1964 until the dissolution of the District, effective June 30, 1997. She was 55 years of age at the time.

e. Petitioner Dougherty had 266 days of unused accumulated sick leave upon retirement. 206 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Dougherty was employed by the Regional District from September 1968 until the dissolution of the District, effective June 30, 1997. She was 51 years of age at the time.

f. Petitioner Ferrara had 322 days of unused accumulated sick leave upon retirement. 274 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Ferrara was employed by the Regional District from September 1967 until the dissolution of the District, effective June 30, 1997. He was 53 years of age at the time.

g. Petitioner Galiszewski had 455 days of unused accumulated sick leave upon retirement. 376 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Galiszewski was employed by the Regional District from September 1966 until the dissolution of the District, effective June 30, 1997. He was 55 years of age at the time.

h. Petitioner Goldberg had 283 days of unused accumulated sick leave upon retirement. 241 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Goldberg was employed by the Regional District from September 1966 until the dissolution of the District, effective June 30, 1997. He was 52 years of age at the time.

i. Petitioner Hartkopf had 308.5 days of unused accumulated sick leave upon retirement. 238.5 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Hartkopf was employed by the Regional District from September 1968 until the dissolution of the District, effective June 30, 1997. She was 50 years of age at the time.

j. Petitioner Kaptor had 247 days of unused accumulated sick leave upon retirement. 263 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Kaptor was employed by the Regional District from September 1968 until the dissolution of the District, effective June 30, 1997. He was 55 years of age at the time.

k. Petitioner Melchior had 436.5 days of unused accumulated sick leave upon retirement. 375 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Melchior was employed by the Regional District from July 1966 until the dissolution of the District, effective June 30, 1997. She was 68 years of age at the time.

l. Petitioner Olszewski had 237 days of unused accumulated sick leave upon retirement. 190.5 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Olszewski was employed by the Regional District from September 1975 until the dissolution of the District, effective June 30, 1997. She was 64 years of age at the time.

m. Petitioner Rothwell had 388.5 days of unused accumulated sick leave upon retirement. 315.5 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Rothwell was employed by the Regional District from September 1969 until the dissolution of the District, effective June 30, 1997. She was 55 years of age at the time.

n. Petitioner SanFillipo had 258.5 days of unused accumulated sick leave upon retirement. 219 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner SanFillipo was employed by the Regional District from September 1969 until the dissolution of the District, effective June 30, 1997. He was 49.75 years of age at the time.

o. Petitioner Savage had 210 days of unused accumulated sick leave upon retirement. 156 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Savage was employed by the Regional District from July 1980 until the dissolution of the District, effective June 30, 1997. She was 62 years of age at the time.

p. Petitioner Stryker had 230 days of unused accumulated sick leave upon retirement. 198 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Stryker was employed by the Regional District from November 1972 until the dissolution of the District, effective June 30, 1997. He was 48 years of age at the time.

q. Petitioner Vinacour had 130 days of unused accumulated sick leave upon retirement. 93 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Vinacour was employed by the Regional District from September 1973 until the dissolution of the District, effective June 30, 1997. She was 57 years of age at the time.

r. Petitioner Zelkin had 60 days of unused accumulated sick leave upon retirement. 77 days of unused accumulated sick leave were carried from the Regional District, following deregionalization on June 30, 1997. Petitioner Zelkin was employed by the Regional District from January 1969 until the dissolution of the District, effective June 30, 1997. She was 51 years of age at the time.

19. All of the aforesaid amounts of unused accumulated sick leave upon retirement included days accrued while Petitioners Barranger, *et als.* were employed by the Regional District, as well as days accrued during the years Petitioners were employed by the Clark Board of Education, less any days used during their employment in Clark.

20. The Board sent payment vouchers to Petitioners Barranger, *et als.* for their unused accumulated sick leave as calculated by the Board. Petitioners Borai, Czaya, DellaCerra, Dougherty, Ferrara, Galiszewski, Goldberg, Hartkopf, Kaptor, Olszewski, Rothwell, SanFillipo, Savage, and Stryker, received the maximum amount $3,750. Petitioner Barranger was paid $1,463.87, while Petitioner Vinacour received $3,250, Zelkin received $1,287.50 and Melchior received $3,854.

LEGAL DISCUSSION

The matter is now before this tribunal on cross-motions for summary decision. When considering a motion for summary decision, the administrative law judge (ALJ) must determine whether, based on the proceedings, discovery and affidavits submitted, a genuine issue of material fact exists which must be decided by a full evidentiary hearing. A contested matter can be summarily disposed of before an ALJ without plenary hearing in instances where undisputed material facts, as developed on motion or otherwise, indicate that a particular disposition is required as a matter of law. *In the Matter of Robros Recycling Corp.* 226 *N.J. Super.* 343 (App. Div. 1988). In this matter, the parties have stipulated to the material facts extant. The resolution of the issue raised by these cross-motions rests on analysis of legal principles. Thus, the matter is ripe for summary disposition.

Respondent asserts that the issue in the within matter has already been litigated in *Nadasky, et al. v. Board of Education of the Township of Clark*, OAL Dkt. EDU 7375-99, and the doctrine of *res judicata* and collateral estoppel apply. That assertion is without merit. Collateral estoppel as applied in New Jersey is "that branch of the broader law of *res judicata* which bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." *State v. Gonzalez*, 75 *N.J.* 181, 186 (1977); *Plainfield v. Public Service Electric and Gas Company*, 82 *N.J.* 245, 257 (1980). "It is well settled that where a judgment of a court of competent jurisdiction directly determines a right, question or fact directly put in issue, such judgment estops the parties or their privies from thereafter relitigating the same issue in a subsequent proceedings between them,

regardless of its nature or form." *Washington Township v. Gould*, 39 *N.J.* 527, 533 (1963). The issue to be addressed herein has not been fully adjudicated in *Nadasky*. The Commissioner in *Nadasky* found that the factual circumstances presented did not constitute grounds for relaxation of the 90-day rule. There was no determination of the right, question or fact put in issue beyond the application of the 90-day rule. The parties are entitled to a disposition on the merits of the claims.

Petitioners are seeking payment from the Clark School District for accumulated and unused sick days that were accrued while they were employed as tenured teachers in the Union County Regional High School District, which was dissolved effective June 30, 1997. Petitioners assert they have a statutory right to be paid at the contractual rate established by the collective negotiations agreement in effect at the time the days were accumulated, *i.e.*, when the Regional District employed them. Petitioners maintain that several statutory provisions, when read in *pari materia*, either protect or preserve all rights of petitioners herein to leave of absence, tenure, seniority, pension and accumulated sick leave. *N.J.S.A.* 18A:6-10; *N.J.S.A.* 18A:13-64; *N.J.S.A.* 18A:28-5. The tenure statutes prohibit the reduction of compensation of a tenured employee without just cause, as defined therein. Petitioners argue that the word "compensation" as used in the tenure statutes includes the payment for accumulated, unused sick leave upon retirement.

Clearly, respondent recognizes the right of these employees to leave of absence including time accumulated while employed by the Regional District. Petitioners were all given credit for the accumulated sick time accrued during tenure with the Regional District. Further, respondent does not contest the entitlement of these tenured teachers to be paid for unused accumulated sick time, since payment has been tendered to each of them. Respondent asserts, however, that petitioners fail to recognize the distinction between the statutory right to accumulate (and carry over to a new employing district in a situation such as this) sick days, and the contractual benefits addressing the payment upon retirement for those days remaining unused.

The legislature has provided a statutory scheme by which constituent districts may obtain the dissolution of a limited purpose regional school district. *N.J.S.A.* 18A:13-51 *et seq*. The statutory scheme contemplates that the constituent districts shall assume the indebtedness of the dissolved Regional District, as calculated in accordance with the statute. *N.J.S.A.* 18A:13-52. There is no dispute that the provisions of *N.J.S.A.* 18A:13-64, pertaining to the dissolution of a limited purpose regional school district, are generally applicable to the petitioners herein. As tenured employees of the dissolving Regional District, they became employees of the constituent district, respondent Clark Board of Education. Pursuant to this statute,

> all of their rights of tenure, seniority, pension, leave of absence and other similar benefits shall be recognized and preserved and any periods of prior employment in the regional district shall count toward the acquisition of tenure to the same extent as if all such employment had been under the withdrawing district or in any of the constituent districts in the event of a dissolution.

It is beyond contention that the statute and relevant decisions addressing the application of the statute require that the constituent district may not reduce the salary of tenured employees of a dissolving regional district.

> Rather, in those instances where the appropriate step and placement would result in a reduction in salary, the affected staff member must be retained at the current salary level until such time as that level would be reached through ordinary guide movement, whereupon the staff member would be placed 'on guide' and accorded normal movement thereafter.
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> [*Stagaard v. Contini*, 97 *N.J.A.R. 2d* (EDU) 217.]

In making that determination, the Commissioner of Education stated that *N.J.S.A.* 18A:13-64 "must be applied in a manner which preserves the continued employment and accrued rights of such staff, but does not result in the wholesale disruption of existing districts." *Id. at* 218.

The petitioners in *Stagaard* sought a declaration, in part, that

> *N.J.S.A.* 18A:13-64 will ensure retention of prior benefits such as carry over of accumulated sick days and payment on retirement for unused sick days, and in

> either case, that the law will not permit tenured teachers to be reduced in compensation (Count IV)....

The Commissioner in *Stagaard* held that:

> ... determination will turn on *N.J.S.A.* 18A:13-64, which requires that pension, leave and other benefits are to be preserved, and on the protections of *N.J.S.A.* 18A:28-5, which will not permit a reduction in salary for tenured staff members. The Commissioner has previously addressed this issue in the matter of *Board of Education of the Central Regional High School District v. Board of Education of Lacey Township et al., Ocean County*, 1980 *S.L.D.* 553. Therein, the Commissioner specifically directed that staff transferring to a withdrawing constituent district from a regional district were to be placed on the salary guide of the constituent district at the step and level appropriate for their years of service in the regional district, that their rights of leave and other similar benefits were to be preserved, and that they were to be accorded all other benefits held by employees of the constituent district.
>
> [*Stagaard, supra*.]

While the *Stagaard* decision clearly established the guidelines for treatment of the salary, among other rights of the staff members of the dissolved Regional District, it left unresolved the very issues addressed herein. These two significant issues are whether *N.J.S.A.* 18A:28-5 contemplated compensation other than salary, and whether in any event, the provisions of *N.J.S.A.* 18A:13-64 contemplated the preservation of the right to payment for sick leave days accumulated while at the Regional District.

Essential to the resolution of the first issue is the analysis of various statutes and the case law interpreting those statutes in addressing the components of a teacher's compensation. Salary is indisputably a primary component of compensation of a teacher. So, too, may be other employment benefits. The courts have held that

> absent allegations of bad faith or unlawful purpose, a tenured teacher's seniority rights are not triggered when a school board abolishes the teacher's position and assigns the teacher to teach different subjects within his or her certification without reducing the teacher's salary or other employment benefit.
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> [*Carpenito v. Rumson Board of Education*, 322 *N.J. Super.* 522 (App. Div. 1999) (emphasis added).]

The employment benefit of longevity is one component that has been recognized as compensation. While there are considerations made as to the creditability of longevity pay to the calculable income for pension purposes, longevity payments are considered compensation. *Wilson v. Bd. of Trustees of PFRS*, 322 *N.J. Super.* 477 (App. Div. 1998). Several cases have held that sick leave payments are a form of compensation as well. The Appellate Division recognized as much when that court stated, " ... our concern is that sick leave pay and other forms of deferred compensation have long been considered 'additional compensation upon retirement' subject to mandatory negotiation." *Matter of School Board of Morris*, 310 *N.J. Super.* 332 (App. Div. 1998). The court in *Morris* discussed facts of another case strikingly similar to those in that case, where the Illinois Appellate Court held that a union could not bargain away the right of an employee to accumulated sick leave compensation granted in prior collective bargaining agreements. The Appellate Division cited *Lawrence v. Board of Education of School District* 189, 152 *Ill. App. 3d* 187, 105 *Ill. Dec.* 195, 197, 503 *N.E.* 2d 1201, 1203 (1987), where it observed:

> ... the plaintiff, a school attendance officer, brought suit against the Board of Education claiming that he was wrongfully denied payment of sick leave compensation at the time of his retirement. During most of plaintiff's employment, the applicable collective bargaining agreements allowed employees to accumulate sick leave time and receive severance pay upon retirement consisting of a percentage of the accrued compensation. Prior to plaintiff's retirement, however, the union and the Board entered into a collective bargaining agreement that eliminated the right to receive accumulated sick leave time upon retirement. *Id. at* 198, 503 N.E. 2d at 1204. At the time of plaintiff's retirement, he was informed that he would not be receiving his severance pay because it was not permitted under the collective bargaining agreement then in effect. *Ibid.* Plaintiff was successful at trial, and the Board appealed. As phrased by the court, the question presented was "whether the plaintiff should be entitled to receive compensation for such accumulated sick leave days when at the time of the retirement there were no contractual provisions in the collective bargaining agreement allowing for such payment." *Id. at* 201, 503 *N.E. 2d at* 1207. In affirming the judgment, the court reasoned:
>
> "We conclude that the retirement benefit sought by plaintiff can be characterized as a form of deferred compensation in that plaintiff worked days when he was ill in order to accumulate the sick leave days as a retirement benefit.... [We] find that the 'merit pay' for accumulated sick leave days under the previous terms of the collective bargaining agreements vested upon the date that plaintiff fulfilled the service condition. Once that service condition was fulfilled, the benefit derived from plaintiff's term of service was vested and could only be divested by failure to satisfy the eligibility requirements."

[*Id. at* 203, 503 *N.E. 2d at* 1209 (citation omitted).]

Additional guidance related to the resolution of this issue is found in the matter of *Greenway v. Board of Ed. Of the City of Camden*, 129 *N.J.L.* 461 (1943). In *Greenway*, the court addressed the issue of salary increments not yet accrued under a salary schedule that was enacted as "a rule of the board" in the exercise of managerial function, and it contained an express reservation of the power of amendment and repeal. The *Greenway* Court, in considering the prior Tenure Law, *N.J.S.A.* 18:13-17, held:

> ... the right of revision and repeal is subject to the injunction against 'a reduction of salary' except for just cause, embodied in sec. 1 of the act of 1909, supra, now *R.S.*1937, 18:13-17, *N.J.S.A.* 18:13- 17. But unaccrued increments under a salary schedule adopted pursuant to sec. 106 of the General School Law of 1903, supra, do not take the classification of 'salary' within the intendment of sec. 18:13-17, supra. In the local legislative usage the terms are mutually exclusive. Increments, as used here, are the periodic, consecutive additions or increases which do not become a part of the salary of the teacher until they accrue under the rule making such provision; and, until the accrual, the modification or repeal of the rule so providing does not constitute a reduction of the current salary.

[*Id. at* 464.]

Next is the issue of whether *N.J.S.A.* 18A:13-64 contemplates that the payment for accumulated sick leave is a "similar benefit" to be recognized and preserved. In the instant case, the petitioners contend that the right to deferred compensation for accumulated sick leave cannot be withheld. It is argued that the teachers' right to receive deferred compensation is "vested" and cannot be taken away absent express consent. Respondent contends that the teachers had no guaranty that their right to such benefits would extend beyond the period governed by the previous collective negotiations agreement with the Regional District. It argues among other considerations that, under the prior agreement with the Regional District, leaving the district was the condition that triggered the right to obtain payment for accumulated sick leave. Respondent thus asserts that absent leaving the district during the period governed by the previous collective negotiations agreement while having met the conditions for obtaining an accrued interest, the teachers had only a mere expectancy that was subject to negotiation. Any leave accumulated by petitioners while employed by the Regional District must be treated as if it had been accumulated in Clark.

A factor considered by the courts in addressing the treatment of accumulated sick leave is whether teachers' accumulated sick leave constitutes a vested right. In this context, the Appellate Division has held that accumulated sick leave compensation could not be divested through collective negotiations absent knowing and intentional waiver by the individuals who were adversely affected. In that case neither party had proposed retroactive caps. *Matter of School Board of Morris, supra, at* 347. The Court in *Morris* declared:

> We think there is no profit in dealing in labels such as "vested right," "accrued interest" or "mere expectancy." None fits precisely, and it would be a mistake to choose one and be driven by the choice to an inevitable consequence. *See Spina v. Consolidated Police and Firemen's Pension Fund Comm'n,* 41 *N.J.* 391, 401, 197 *A.2d* 169 *(1964).* However the teachers' right to sick leave compensation is phrased, we are satisfied that the Commission's policy barring divestment absent a knowing waiver was reasonable and within its statutory powers.
>
> [*Supra at* 343].

The Appellate Court in *Morris* noted that the Supreme Court has protected similar rights against invasion. The *Morris* Court cited *Gauer v. Essex County Div. of Welfare*, 108 *N.J.* 140, 144, (1987), where Essex County attempted to discontinue certain health insurance benefits that had been granted to retired welfare workers because other classes of retired employees were not entitled to such benefits and *N.J.S.A.* 40A:10-23 purported to require uniform distribution. It was noted in *Morris* that the Supreme Court prohibited the County from rescinding its policy. In reaching this conclusion, the Supreme Court stressed that the retired workers had "served out their employment and retired" relying upon the compensation scheme granting continued health benefits. *Id. at* 147-48.

The Morris Court also cited *Owens v. Press Publishing Co.*, 20 *N.J.* 537 (1956), where the Supreme Court considered whether the right to severance pay survived the expiration of a collective bargaining agreement. The plaintiffs had been discharged after the collective bargaining agreement had terminated, but claimed that they had earned the right to severance pay as a form of deferred compensation. *Id. at* 542-43. The defendant contended that the plaintiffs' interest in severance pay was not a "vested

right" because the plaintiffs had not been discharged during the period covered by the collective bargaining agreement. *Id. at* 543. Characterizing severance pay as "terminal compensation measured by the service given during the subsistence of the contract," the Supreme Court held that the deferred compensation "was not conditioned upon the employee's discharge from service within the term of the collective bargaining agreement." *Id at* 548. The Court reasoned that "once the right [came] into being it ... survive[d] the termination of the agreement." *Ibid.*

Additionally, in *State Troopers Fraternal Assoc. of New Jersey, Inc. v. New Jersey*, 149 *N.J.* 38 (1997), a group of former state troopers sought to recover a retroactive pay adjustment under a collective negotiations agreement that was reached with the State after the troopers had resigned in good standing. The troopers claimed that, because of an unwritten retroactive past practice of the State Police, the agreement provided for the retroactive pay adjustment. During the course of the collective negotiations, the State had adopted a regulation that prohibited retroactive pay increases to all state employees who resigned from state employment before the execution of a collective negotiations agreement. The Supreme Court held that the former troopers were entitled to the retroactive pay increase up to the date the regulation was promulgated. *Id. at* 55-56. This result was said to be mandated because the former troopers had relied on the continuation of the past practice when they decided to resign before the new agreement was signed. However, as to the question of whether the retroactive pay increase was a vested right, the Supreme Court held that, in that context, it was not. Recognizing that certain contractual rights may qualify as vested rights, the Court declined to so characterize the pay increase there as a vested right. The State's important interest in safeguarding revenues was sufficient to satisfy the Court that the private interest of the troopers was not vested in the constitutional sense, thus the State could impair it retroactively.

Respondent raises the issue of the enforceability of the contractual provision as an illegal "early retirement incentive". *Fair Lawn Education Association v. Fair Lawn Board of Education*, 161 *N.J. Super.* 67 (App. Div. 1978), *aff'd,* 79 *N.J.* 574 (1979). That case involved the contractual provision in the collective negotiations agreement that provided for an additional lump sum payment of $6,000 to any teacher who met

certain age requirements if he notified the board in writing before April 1, 1977 of his intention to retire prior to September 1, 1977. The *Fair Lawn* court observed that:

> This payment was in addition to the benefits provided under the Teachers' Pension Law. For the following year there is a graduated payment schedule based on age, which, in effect, penalizes a teacher who delays retirement by decreasing the amount of the retirement benefit. It is apparent that the plan was designed to induce the early retirement of older, more highly compensated teachers, to make way for younger teachers, who would be paid less commensurate with their education, experience and length of service. The rationale for the payment of such supplemental retirement benefits is that the older teachers would be rewarded for lengthy service and the board would effect a saving by a reduction in salaries.
>
> [*Id at* 70.]

The Appellate Division held that the early retirement remuneration plan included in the collective negotiations agreement between the Fair Lawn Education Association and the Fair Lawn Board of Education is *ultra vires*, void and unenforceable. *Fair Lawn, supra,* at 74-75. The court determined that this provision would impair the actuarial integrity of the Teachers' Pension Fund and will impose an unfair and improper burden on its other members.

Respondent also asserts that payment for accumulated sick leave is subject to collective negotiations and that, by defining such payment as compensation, the court would undermine the PERC Act. *N.J.S.A.* 34:13A-1 *et seq.* In this regard, the courts have construed the various statutes in *pari materia*, in an effort to reconcile conflicts between Title 18A and the Employer-Employee Relations Act. The Supreme Court considered the obligation of a board of education under an expired contract in *Board of Educ. of Tp. of Neptune in County of Monmouth v. Neptune Tp. Educ. Ass'n*, 144 *N.J.* 16 (1996). The Court, declaring that the payment of fourth year of salary increments following expiration of three-year contract violated the state education law, held:

> ... courts have continued to hold that specific education statutes preempt labor law. Thus, in *Galloway Township Bd. of Educ. v. Galloway Township Educ. Ass'n*, 78 *N.J.* 25, 51, 393 *A. 2d* 218 (1978), we decided a labor issue by reference to an education statute that "applies to command that conclusion." Similarly, in *Board of Educ. v. Piscataway Maintenance & Custodial Ass'n*, 152 *N.J. Super.* 235, 245, 247-48, 377 *A.2d* 938 (App. Div. 1977), the court rejected a claim that the 1974 amendment should change the result in Dunellen and

> decided that "the general provisions of the Employer-Employee Relations Act ... should yield to specific sections of the Education Law dealing with the subject." *See also Rockaway Tp. Educ. Ass'n, supra,* 120 *N.J. Super.* at 569, 295 *A.2d* 380 ("It cannot be argued, therefore, that Title 18A, 'Education,' ... has been superseded."); *Orlando v. Board of Sch. Estimate,* OAL Dkt. EDU 4550-83 (Comm'r of Educ., Sept. 6, 1984) ("The salary schedules ... while they may have been negotiated in good faith [and are valid under labor law], fall outside the clear provisions of [Title 18A] and are of no effect").
>
> [*Id. at* 24.]

The Supreme Court, in *State v. State Supervisory Emp. Ass'n*, 78 *N.J.* 54, (1978), also addressed the issue of negotiability of terms and conditions of employment in light of specific statutes or regulations setting or controlling a particular term or condition of public employment. The Court there held that:

> ... where a statute or regulation mandates minimum level of rights or benefits for public employees but does not bar public employer from choosing to afford them greater protection, proposals by employees to obtain that greater protection in a negotiated agreement are mandatorily negotiable and a contractual provision affording employees rights or benefits in excess of that required statute or regulation is valid and enforceable. However, where statute or regulation sets maximum level of rights or benefits for employees on particular term or condition of employment, no proposal to affect that maximum is negotiable nor would any contractual provision purporting to do so be enforceable. Where a statute sets both a maximum and a minimum level of employee rights or benefits, mandatory negotiation is required concerning any proposal for a level of protection fitting between and including such maximum and minimum.
>
> [*Id. at* 81-82.]

Clearly, the New Jersey statutes grant teachers in the state the right to tenure. The Tenure Act defines the conditions under which teachers are afforded that right to tenure. The Act makes tenure a mandatory term and condition of employment. It therefore supersedes contractual terms. *Spiewak v. Board of Educ. of Rutherford*, 90 *N.J.* 63, 72, (1982). In the instant case, the Tenure Act effectively establishes minimum levels of compensation, but does not bar the negotiation of higher levels of such compensation. The statute simply requires that once the level of compensation is set, that compensation may not be reduced except for just cause.

CONCLUSIONS

There are many examples of "extra compensation" not includable in the income creditable for retirement and death benefits in the pension system. *N.J.A.C.* 17:4-4.1. This non-exhaustive list includes overtime pay; bonuses; and lump-sum payments for longevity, holiday pay, vacation, compensatory time, accumulated sick leave, or any other purpose. The regulation points out clearly that such payments, while "compensation", are simply not creditable for pension purposes. So while a contract provision may run afoul of the pension statutes for creating an early retirement incentive, in order to find a contract provision to be *ultra vires* and unenforceable there must be a showing that the provision was an inducement to premature retirement. *Fair Lawn, supra,* at 73. Nothing presented in the instant case compels the conclusion that the provision contained in Article 17 of the 1995-97 Collective Negotiations Agreement is designed to encourage or induce early retirement.

At issue, then, in the instant case is the threshold question of whether payment for accumulated sick leave is compensation. It is apparent that the courts have expressed an underlying concern for the protection of an employee's right to deferred compensation. A collective negotiations agreement is the result of the mutual agreement of the parties. However, the courts have made it clear that deferred compensation generally survives the expiration of the term of the agreement. By enacting *N.J.S.A.* 18A:28-5, the legislature has provided to tenured teachers protection from reduction in compensation. If the legislature intended to limit that protection to the interest in salary, the language in that statute could have easily referenced "salary" rather than "compensation". The wording of the Tenure Act is to be applied as written in the absence of a contrary legislative intent. *Spiewak v. Board of Educ. of Rutherford*, 90 *N.J. at* 74. I **CONCLUDE** that payment for accumulated sick leave, like salary, is in fact compensation for services rendered during periods that were covered by the most recent collective negotiations agreement with the Regional District.

Respondent nevertheless argues that the union had the right to negotiate away the teachers' interest in deferred payment for accumulated sick leave and that the provision does not create a vested right. And although the petitioners' request for relief would seem to concur that subsequent negotiations may reduce the level of benefit on a prospective basis, that view is inconsistent with the conclusion that payment for accumulated sick leave is compensation. Viewing the contract provision regarding payment for accumulated sick time as compensation, it is unnecessary to characterize the interest as a vested right, accrued interest, or mere expectancy. Once the parties established the level of compensation, the protections of the tenure law were implicated. I **CONCLUDE** that such contract provision creates an interest tantamount to salary, which, by statute, cannot be reduced during tenure except for just cause under the tenure statute. *See Stagaard v. Contini.* Applying the rationale provided by the Commissioner of Education in *Stagaard* to payment for accumulated sick leave, I further **CONCLUDE** that affected staff members must be retained at the accumulated sick leave benefit level established through the last most recent contract with the Regional District, until such time as that level would be reached through subsequent contract negotiations, whereupon the staff member would be placed on the level of the other employees and accorded equal treatment thereafter. The impact of this rationale on the local school board is limited and calculable. This calculable interest is one assumed by the constituent districts in connection with the dissolution sought by them.

ORDER

Based on the foregoing, I hereby **ORDER** that the respondent, Clark Township Board of Education, recalculate the payment of accumulated sick leave for petitioners Allen, *et als.*, and Barranger, *et als.*, in accordance with Article 17(O) of the 1995-97 Collective Negotiations Agreement between the Regional District and the UCRFT. Petitioners Allen, *et als.*, and Barranger, *et als.*, are entitled to be paid for accumulated sick days at the rate of $65 per day for up to 250 days of accumulated sick leave accrued during employment at both the Regional District and the Clark 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 (45) 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 (13) 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, 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.

2/2/04
DATE

ROBERT J. GIORDANO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

2/2/04
DATE

Mailed to Parties:

FEB 3 2004
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NOS. EDU 1445-02 AND EDU 1357-03 (CONSOLIDATED)
AGENCY DKT. NOS. 449-10/01 AND 372-11/02

ARLENE C. ALLEN, BERNIE BUETTNER, RICHARD ESANDRIO, JOHN A. MAIKOS, BARBARA OBERDING, CARMINE N. VITOLO AND SHARON WEISKOPF,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, UNION COUNTY,

RESPONDENT.

AND

DOROTHY BARANGER, DENIS BORAI, ALLAN CZAYA, ARLENE DELLACERRA, SUSAN DOUGHERTY, LEONARD FERRARA, THOMAS GALISZEWSKI, HARVEY GOLDBERG, PAMELA HARTKOPF, THOMAS KAPTOR, BETTY MELCHIOR, LORRAINE OLSZEWSKI, JUDY ROTHWELL, EDWARD SAN FILIPO, LOIS SAVAGE, GENE STRYKER, KAREN VINACOUR AND ILENE ZELKIN,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4. Petitioners filed reply and cross-exceptions. Reply to petitioners' cross-exceptions filed by the Board was not considered herein as *N.J.A.C.* 1:1-18.4 makes no provision for replies to cross exceptions.

The Board's exceptions charge that the Initial Decision is undeniably wrong and urge that, because this matter was decided on stipulated facts, without benefit of testimony, the Commissioner conduct a *de novo* review of the purely legal issues involved which, without question, will lead to a rejection of the grossly erroneous Initial Decision. (Board's Exceptions at 5) In this regard the Board advances the following three arguments:

I. THE ADMINISTRATIVE LAW JUDGE (ALJ) ERRED BY REJECTING THE BOARD'S ARGUMENT THAT PREVIOUS LITIGATION ON THIS ISSUE HAS A BINDING EFFECT HEREIN.

The Board argues that the ALJ mistakenly concluded that the instant matter was not *res judicata* as a result of the Commissioner's decision in *Nadasky et al. v. Board of Education of the Township of Clark, Union County,* decided by the Commissioner July 9, 2001, dismissed for failure to prosecute State Board, October 5, 2001, because *Nadasky* was ultimately decided on procedural rather than substantive grounds. Such a suggestion, the Board proffers, wholly "ignores the jurisdictional and historical setting of *Nadasky* and these consolidated matters." (Board's Exceptions at 7) To the contrary, it posits, *Nadasky*, as here, involved petitioners challenging the Clark School District's refusal to pay them for accumulated, unused sick time pursuant to the terms of the Union County Regional School District contract at the time of their subsequent retirement from the Clark School District; was litigated on cross-applications for summary decision, based on stipulated facts identical to the ones in this matter except as to

the identity of the petitioners; and was decided without hearing. Notwithstanding that the ALJ ultimately dismissed the *Nadasky* petition as a consequence of the petitioners' failure to pursue their claim in a timely manner pursuant to the 90-day rule, the Board alleges, her initial decision addressed the substantive issue and she made the following legal holding with regard to petitioners' claim:

> The Appellate Division has pointed out, as recently as 1998, that reimbursement for unused sick time is a matter which is not preempted by statute and may be negotiated as a term and condition of employment. *Alford v. Board of Education of Buena Regional School District*, 310 *N.J. Super.* 147, 155 (App. Div. 1998) Furthermore, as Respondent points out, the Commissioner has held that in *N.J.S.A.* 18A:13-64, providing that the rights of tenure, seniority and pension, for example, are transferable, there is no indication in the statute that its intent was to require the establishment of two levels of compensation and benefits for comparable levels of training and experience. *Board of Education of Central Regional High School District v. Board of Education of Lacey Township, et al*, 1980 *S.L.D.* 553 (Commissioner Decision, June 6, 1980). Clearly, to pay these three tenured employees at a more generous rate than other tenured employees at the time of retirement would result in two levels of compensation for similarly situate[ed] employees. Finally, the very fact that there is a choice between provisions in two contracts is a clear indication that the nature of the issue to be determined is contractual.
> *Nadasky,* Initial Decision at 9.
> (Board's Exceptions at 8-9)

The Board points out that petitioners' exceptions to this decision addressed both the procedural and substantive determinations of the ALJ. Upon review of the decision and exceptions, the Commissioner

> expressly rejected Petitioners' argument that relaxation of the 90-day Rule was appropriate by reason of "substantial constitutional or other issue of fundamental public interest." Commissioner's Decision at 19. So noting, the Commissioner ultimately held, "for the reasons stated in the Initial Decision and herein, the Petition of Appeal is hereby dismissed." (*Id.* at 9)

Pursuant to *N.J.S.A.* 52:14B-10(c), the Board argues, the Commissioner has the authority and obligation to adopt, reject or modify each and every finding of fact, conclusion of law or policy interpretation contained in the Initial Decision. His wholesale adoption of the *Nadasky* decision, without rejection or dismissive comment on any of its content, necessarily signifies his agreement with each factual finding and legal conclusion, including the above-detailed excerpt. (*Ibid.*) Consequently, the Board proffers, as the determination of the very issue involved in this case was previously made in *Nadasky,* the instant litigation is *res judicata* and collateral estoppel prevents the ALJ from reopening this matter.

II. THE ALJ ERRED IN DETERMINING THAT PAYMENT FOR ACCUMULATED, UNUSED SICK LEAVE UPON RETIREMENT IS "COMPENSATION" AS DEFINED FOR PURPOSES OF STATUTORY TENURE PROTECTION.

The gravamen of the ALJ's decision here, the Board argues, is that the negotiated amount of payment for unused sick leave upon retirement is "compensation" within the intendment of the Tenure Laws and, therefore, like salary, can never be reduced from its maximum level. Such a determination, it avers, is unquestionably wrong as it operates to eviscerate the PERC Act and the underlying principles of public employee negotiations, is unsupported by statutory, regulatory or case law and fully fails to recognize the nature of this benefit and the serious pragmatic consequences which would result upon acceptance of this premise. (Board's Exceptions at 13)

Collective Bargaining Under the PERC Act: Consideration of the ALJ's decision vis-à-vis collective negotiations pursuant to the PERC Act evidences an overreaching interpretation which contradicts the very laws it seeks to enforce. The ALJ's reliance on his conclusion that payment for unused sick leave at retirement is "compensation" falling within the protections of *N.J.S.A.* 18A:28-5, and, consequently, rejection of the Board's argument that such

payment is a negotiable issue and that limitations on negotiations are contrary to public policy, endangers the fundamental principles of collective bargaining negotiations. (Board's Exceptions at 14-15) The Board cites *Bd. of Edu. of Neptune v. Twp. Education Assoc.*, 144 *N.J.* 16, 23-24 (1996) (*citing Red Bank Bd. of Educ. v. Warrington*, 138 *N.J. Super.* 564, 569 (App. Div. 1976), for the proposition "that the New Jersey School Laws and the PERC Act must be read *in pari materia,* in a manner mindful of the legislative intent and that they be 'unitary and part of a harmonious whole.'" It avers that neither the courts nor quasi-judicial agencies can ascribe meaning to any statute or regulation "which would render another statute or regulation moot or unenforceable." (Board's Exceptions at 14) Here, the Board posits, utilizing the ALJ's overly broad definition of "compensation" would operate to eviscerate the express provisions of the PERC Act and lead to dramatically more far-reaching consequences than the instant controversy between these parties, notably

> [i]f benefits such as the payment for sick leave at retirement are "locked in" at their maximum level, the necessary result is that the issue can no longer be negotiated between the parties, or, at a minimum, cannot be applied equally to its employees. For example, if a contract provision grants 100% per diem payment for 100% of unused sick time at retirement, the Association's reading of "compensation" would forever bar the parties to such an agreement from negotiating a cap or reduction of that benefit. However, while sick leave itself is statutory, clearly the payment for such leave at retirement is negotiable. To define such payments as tenurable "compensation" would undermine the PERC Act, and the effects upon Collective Bargaining Agreements, particularly those in post-dissolution districts, would range from confusing to truly convoluted. (*Ibid.*)

The Board submits that PERC case law holds that all fringe benefits are mandatorily negotiable. *Montville Board of Education*, P.E.R.C. No. 76-51, 2 *NJPER* ¶230. Fringe benefits, it proffers, include such things as health insurance coverage, timing and amount of bereavement leave, number of personal days, tuition reimbursement and a wide variety of

other issues. Because all fringe benefits undeniably have value to employees, acceptance of the ALJ's expansive definition of "compensation" protected by tenure, would prevent any of them from being negotiable but, rather, would operate to afford employees the maximum value of each of these benefits, effectively freezing negotiations at the maximum level for each of them, an outcome which is diametrically opposite to the express provisions and underlying intent of the PERC Act. The Board further argues, *citing City of Somers* Point, P.E.R.C. No. 77-48, 3 *NJPER* ¶99; *Union City Board of Education*, P.E.R.C. No. 84-79, 10 *NJPER* 46 (¶15026 1983); *Alford v. Buena Board of Education*, 310 *N.J. Super.* 147, 155 (App. Div. 1998); *Township of Edison*, P.E.R.C. No. 84-89, 10 *NJPER* ¶15063 (1984); that it is well-established under PERC case law that payment for sick leave at retirement is a negotiable issue. Moreover, it submits, neither the Appellate Division nor the Supreme Court has ever held that payment for sick leave upon retirement is beyond the scope of collective negotiations, preempted by School Law or cannot be reduced through parties' bargaining negotiations. Although the ALJ correctly recognized that the PERC Act and the School Laws must be read *in pari materia,* he proceeded to conclude that *N.J.S.A.* 18A:28-5 provides protection which precludes bargaining negotiation on benefits which PERC and the Appellate Division and Supreme Court in interpreting the Act have specifically found are mandatory subjects of negotiation. The obvious consequence of the acceptance of the ALJ's decision here, the Board argues, would be to "effectively invalidate the PERC Act, and make negotiations mandatory only to the extent that negotiations *increase* the value of a benefit," an outcome which cannot be tolerated. (emphasis in text) (Board's Exceptions at 15)

Statutes and Regulations: The Board next argues that the major difficulty in this matter arises from the lack of a definition of "compensation" either in the Tenure Laws, *N.J.S.A.* 18A:28 *et seq.* or in the "General Definitions" section of Title 18A. Notwithstanding, it submits,

the pension provisions, also contained in Title 18A, read *in pari materia* with the tenure laws, supply guidance with respect to the legislative intent in this regard. The Definitions provision of this section, *N.J.S.A.* 18A:66-2, defines "compensation" thusly:

> d. "Compensation" means the contracted salary, for services as a teacher as defined in this article, which is in accordance with established salary policies of the member's employer for all employees in the same position but shall not include individual salary adjustments which are granted primarily in anticipation of the member's retirement or additional remuneration for performing temporary or extracurricular duties beyond the regular school day or the regular school year. (Board's Exceptions at 17)

Recognizing that the Tenure Laws contain no definition of "compensation," the ALJ, without explanation, ignored the definition contained in *N.J.S.A.* 18A:66-2, despite the fact that it is the only such definition contained in the Education Laws which must be read *in pari materia* with other provisions in that Title. Rather, he chose to rely on the Police and Fireman's Retirement System pension regulations, *N.J.A.C.* 17:4-4.1, wholly inapplicable to the instant matter, to support his "determination that payment for sick leave at retirement is 'extra compensation,' subject to the tenure laws but not includable in pension." However, a review of the parallel regulation contained in the Teachers' Pension and Annuity Fund Regulations, *N.J.A.C.* 17:3-4.1(a) belies the ALJ's conclusion in this regard. This provision, the Board advances, "sets a distinction between "compensation" and "extra compensation" – the former is, like salary and rolled-in longevity, creditable for all purposes; the latter, such as lump-sum payments and bonuses, is not. Thus, it argues, payments for longevity, accumulated educational credits and salary would be included in "compensation," but other emoluments of a teacher's employment which are not part of the "regular, periodic installments in accordance with the payroll cycle," such as negotiated lump-sum payments for accumulated sick leave at retirement, would be excluded. (Board's Exceptions at 18)

Case Law: The Board proposes that a review of applicable case law fully "belies the ALJ's determination that Petitioners are entitled to a permanent 'lock-in' of their 1995 level of payment for sick leave at retirement under the Tenure Laws." (Board's Exceptions at 19) Unquestionably, it proposes, a tenured teaching staff member's contractual salary is the primary component of his or her "compensation," which, absent a RIF or tenure charges, cannot be reduced under any circumstances. However, in addition to salary, the Board recognizes that other payments have been found to constitute compensation, *i.e.*, longevity increments – an increase in a teacher's salary in consideration of long-term service to the Board (*Middletown Board of Education*, P.E.R.C. No. 99-72, 25 *NJPER* 122 (¶30053 1999) and payments for additional education (*Green Township Board of Education*, P.E.R.C. No. 99-73, 25 *NJPER* 124 (¶30054 1999). This remuneration, like salary, is made as a part of payroll and, once awarded, becomes a component of the teacher's tenure-protected salary. (Board's Exceptions at 19-20) In contrast, it advances, remaining "customary and incidental," negotiable benefits paid to teachers are excluded from the scope of "compensation" for purposes of tenure protection, *i.e.*, early retirement inducement payments (*Fair Lawn Education Association v. Fair Lawn Board of Education*, 161 *N.J. Super.* 67 (App. Div. 1978, *aff'd* 79 *N.J.* 574 (1979)); "customary" overtime (*McLean v. Glen Ridge Board of Education*, 1977 *S.L.D.* 311); lump sum payment to department chair at the end of the school year, notwithstanding that it was contractually defined as "extra compensation." (*Bishop v. Bd. of Trustees, TPAF*, 4 *N.J.A.R.* 179 (1980). The Board argues that these and other benefits such as health insurance, personal days, and payment for sick leave at retirement are rightfully excluded as "compensation" because "these benefits are not part of the employee's regular compensation, but are, rather, lump-sum or sporadic payments incident to employment [which] are not protected by the tenure laws." (Board's Exceptions at 20)

Furthermore, the Board claims that in *Hyman v. Teaneck Board of Education, 1983 S.L.D.* 699, *rev'd on other grounds* State Board at 1985 *S.L.D.* 1940, *aff'd* App. Div. A-3508-84T7 (App. Div. 1986), *certif. den.* 104 *N.J.* 469 (1986), the Commissioner examined the intended scope of tenure protection in the context of a tenure challenge by three auxiliary teachers, and held:

> [t]here are only a few statutorily mandated benefits: sick leave, accumulation of sick days, disability, and military service credit. All other benefits are a matter of contract. I FIND that all petitioners herein receive not only statutory sick leave benefits, but in addition receive...child rearing leave, bereavement leave, family illness leave, personal days, health and dental insurance, tuition payments and pension...any benefits other than those mandated by statute are within the discretion of the Board to grant in a negotiated contract and *cannot be required as a matter of law.*
> 1983 *S.L.D.* at 719-720 (emphasis added).
> (Board's Exceptions at 21)

Also particularly instructive in this regard, the Board submits, is the Appellate Division's decision in *Alford, supra,* a case which, it avers, stands for the proposition that "sick leave accumulated by a teacher in a defunct or former district is to be treated as if it had been accumulated in the new district." (Board's Exceptions at 21) This holding, standing alone, it claims, evidences the necessity of rejection of the ALJ's decision in this matter. Additionally, it professes, the *Alford* court's decision connotes an "understanding that the 'bundle of rights' involved in sick leave reimbursement are distinct from the 'bundle' making up salary. *Id.* At 157." (*Id.* at 22) Of significant import in this regard, it proffers, is the language utilized by the court in its decision with respect to its discussion of payment for accumulated sick time:

> [t]he court began with the premise, arising out of *N.J.S.A.* 18A:28-6.1, that all transferred teachers were to "receive *compensation and benefits* based on the *Receiving* District's contractual agreements." *Id.* at 150 (*emphasis added*). Clearly, the Appellate Division intended for the receiving district, here Clark, to dictate, via its existing Collective Bargaining Agreement, the benefits to which transferring teachers are entitled.***

> Ultimately, the *Alford* court concluded that the transferred teachers have a right to share in the negotiated *benefit* of sick leave reimbursement, *Id.* at 150, in the identical manner as all other employees of the Receiving District. (emphasis in text)
> (Board's Exceptions at 22)

The Board tenders that this language clearly evidences the Appellate Division's understanding that sick leave payments at retirement are a) a negotiable issue; and b) governed by the receiving district's bargaining agreements, in direct opposition to the conclusion of the ALJ in this matter that benefits of a sending district "travel" with transferring teachers. (*Ibid.*)

The Board charges that, in reaching his conclusion that sick leave payment upon retirement is "compensation" protected by tenure, the ALJ wholly ignores these "developed tenets of New Jersey law" and, instead, purports to ground his conclusion in the Commissioner's decision *Stagaard v. Contini*, 97 *N.J.A.R.* 2d (EDU) 217 and *Matter of School Board of Morris*, 310 *N.J. Super.* 332 (App. Div. 1998). (*Id.* at 23) His reliance on *Stagaard* in this regard is curious as he clearly recognized that "[w]hile the *Stagaard* decision clearly established the guidelines for treatment of the salary, among the other rights of the staff members of the dissolved Regional District, it left unresolved the very issues addressed herein." Initial Decision at 16 (*Ibid.*) Moreover, on appeal to the State Board the *Stagaard* petitioners sought guidance on the definition of "similar benefits" referenced in *N.J.S.A.* 18A:13-64. The State Board expressly refused to define such benefits, holding:

> Constituent districts are required to maintain the salary of tenured teaching staff members when establishing their levels of compensation under the salary guides of those districts. In so doing, however, we decline in this context to delineate what, if any, additional benefits former employees of the regional district may be entitled to under the education laws beyond those expressly enumerated in *N.J.S.A.* 18A:13-64.
> *Stagaard*, State Board Docket No. SB #88-96, October 1, 1997, at 15. (Board's Exceptions at 24)

Therefore, the Board argues, contrary to the apparent belief of the ALJ, *Stagaard* is extremely limited in its precedential impact on the instant matter. (*Id.* at 25) With regard to the ALJ's reliance on *Morris, supra*, the Board urges that this is similarly misguided as it wholly ignores the fact that the *Morris* court refers to payment for sick leave at retirement as "additional" payment upon retirement, as do the pension statutes previously cited. Moreover, the ALJ's equating such payments, like salary, to tenurable compensation fails to consider the end of the very sentence he cited, *i.e.*, "these payments are 'additional compensation upon retirement subject to mandatory negotiation' Initial Decision at 17, citing *Morris, supra.*" (*Ibid.*) Acknowledgement of the negotiability of this issue, the Board professes, cannot logically be reconciled with the ALJ's conclusion that these monies are protected by *N.J.S.A.* 18A:28-5. (*Ibid*) Finally, in this regard, the Board points out that the ALJ noted the *Morris* court's reliance on *Lawrence v. Board of Education of School District 198*, an Illinois decision. Inasmuch as this case, along with the others outside New Jersey jurisdiction cited by the *Morris* court, were admittedly "not directly on point," (*Morris, supra,* at 347), they provide minimal assistive value in this matter. (*Ibid.)*

III. THE ALJ ERRED IN REJECTING THE ARGUMENT THAT ARTICLE 17.0 OF THE 1995-1997 COLLECTIVE BARGAINING AGREEMENT BETWEEN PETITIONERS AND UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1 IS INAPPLICABLE TO THIS MATTER AND/OR UNENFORCEABLE.

The Board charges that petitioners cannot reasonably claim a right to payment for sick leave at retirement pursuant to Article 17.0 of the 1995-1997 Collective Bargaining agreement between petitioners and the Union County Regional District because they never did and never will satisfy the triggering mechanism giving rise to a payment obligation pursuant to

that provision. (Board's Exceptions at 29) The clear language of Article 17.0, it argues, evidences that operation of this provision is triggered "when, and only when, a member of the Union County Federation left that District during the 1995-1996 or 1996-1997 school year." (*Id.* at 30) The Board maintains that all parties agree that, pursuant to education law, none of the within petitioners ever legally "left" the Regional District. Additionally, it is now impossible for them to leave that District which no longer exists. (*Ibid.*) Consequently, the Board argues, it is obvious that petitioners' right to compensation pursuant to Article 17.0 was dependent upon his or her chosen time of retirement. In this regard, it advances, a petitioner choosing to retire during the period of the 1995-1997 Agreement would have been entitled to payment pursuant to this Article, as would a petitioner retiring upon the dissolution of the Regional District. After dissolution, however, the 1995-1997 Bargaining Agreement no longer governed the terms of petitioners' employment, "and it became legally and pragmatically impossible for any Petitioner to leave that District." (*Ibid.*) Irrespective of this "logical conundrum" with regard to the Regional District Bargaining Agreement, it avers that petitioners' claim is also barred by the controlling Clark Collective Bargaining Agreement. Sick time accumulated by petitioners, it professes, must be treated as if it were accumulated in Clark. The Clark Bargaining Agreement provides that retiring employees are entitled to payments, pursuant to Clark Article XI, when they retire pursuant to the TPAF or PERS systems. (*Id.* at 31) The Board proffers, petitioners can claim no entitlement to payment under the defunct Regional's 1995-1997 contract for their 2001-2002 retirement from the employ of the Clark Board of Education. (*Ibid.*)

In their reply and cross-exceptions, petitioners propound three points:

I. JUDGE GIORDANO PROPERLY CONCLUDED THAT PAY FOR UNUSED SICK LEAVE IS "COMPENSATION" THAT CANNOT BE REDUCED.

Petitioners first urge that the ALJ correctly concluded that payment for unused sick time is properly categorized as "compensation," pointing out that this categorization is one which has been recognized by New Jersey courts. In support of this assertion, they cite to *Maywood Education Association v. Maywood Board of Education*, 131 *N.J. Super.* 551 (1974) and *Matter of School Board of Morris,* 310 *N.J. Super.* 332 (App. Div. 1998), *cert. den.* 156 *N.J.* 407 (1998), wherein they allege these courts repeatedly and explicitly refer to pay for accumulated sick days as "compensation." (Petitioners' Reply and Cross-Exceptions at 2-4) Furthermore, in a matter *specifically* involving education law, *Caponegro v. State Oper. Sch. Dist.*, 330 *N.J.Super.* 148 (App. Div. 2000), where, among other things, at issue was the question of whether former employees of the takeover district could be denied payment for accumulated sick leave, the court, citing *Morris, supra,* stated:

> ...a contractual right to *compensable* accumulated leave is typically characterized as deferred *compensation* since it constitutes remuneration for services already rendered, and, to the extent already earned, is not subject to unilateral divestment by the employer. (at 156) (emphasis supplied) (Petitioners' Reply and Cross-Exceptions at 5)

Petitioners emphasize that the *Caponegro* court went even further, recognizing that Federal and State constitutions prohibit impairment of the obligation of contract, this court opined:

> we have no doubt that the vested-rights portion of the package – the accumulated vacation days and sick leave – could not, in any case, have been constitutionally withheld. (at 154) (*Ibid.*)

Petitioners, therefore, conclude that "the withholding of the deferred compensation earned by Petitioners raises constitutional issues." In this regard, petitioners advance that the constitutional infirmity of the retraction of a vested contractual benefit was addressed in *State Troopers Fraternal Ass'n v. New Jersey*, 149 *N.J.* 38 (1997), wherein the Court examined a contractual commitment to pay retroactive salary increases to troopers who resigned and the effect of a

regulation enacted subsequent to their resignations which purported to deny them retroactivity. Because these individuals justifiably relied on the commitment which had existed at the time of their retirement, the Court found that depriving them of this vested contractual benefit would work a "manifest injustice," which this Court defined as a "nonconstitutional equitable doctrine designed to prevent unfair results that do not necessarily violate a constitutional provision." *State Troopers, supra,* at 54 (Petitioners Reply and Cross-Exceptions at 6) Petitioners urge that the "manifest injustice doctrine" is appropriately applicable in the instant matter in that

> [t]he deferred compensation Petitioners earned is a present fixed interest that was vested pursuant to a valid contract. The Board promised to compensate petitioners if they performed as requested. Petitioner's [sic] performed the conditions bargained for by their employer. When they performed the conditions precedent to entitlement their right became vested. That vested right is constitutionally protected from impairment. To paraphrase the rationale of *Caponegro*, the financial obligation of the Board and Petitioner's [sic] concomitant right to compensation for unused sick days were fixed prior to dissolution.
> (*Id.* at 7)

II. *N.J.S.A.* 18A:13-64 MANDATES THAT "ALL ...RIGHTS OF TENURE...LEAVE OF ABSENCE AND OTHER SIMILAR RIGHTS SHALL BE RECOGNIZED AND PRESERVED" IN A WITHDRAWING DISTRICT. PAY FOR UNUSED SICK DAYS IS ONE OF THE RIGHTS RECOGNIZED AND PRESERVED BY *N.J.S.A.* 18A:13-64.

Petitioners argue that the intent of *N.J.S.A.* 18A:13-64 is to ensure that all employees are "held harmless" upon dissolution of a school district "and *all* tenure, seniority, pension and similar rights and benefits are recognized and *preserved.*" (emphasis supplied) (Petitioners' Reply and Cross-Exceptions at 8) They maintain that because tenure rights, such as protection from reduction of compensation, are expressly preserved by this statutory provision, and given that payment for unused sick days is "compensation," "pay for unused sick leave is among the enumerated rights listed in the statute." (*Id.* at 10) In the alternative, petitioners

advance that in addition to the enumerated rights protected by *N.J.S.A.* 18A:13-64, it also preserves "other similar rights." "It cannot," they posit, "be seriously denied that pay for unused sick days [is] 'similar' salary." (*Ibid.*)

In response to respondent's contention that because payment for unused sick days is a contractually negotiable issue it is, therefore, not preserved by *N.J.S.A.* 18A:13-64, petitioners submit:

> Pay for unused sick days is negotiable, but that does not remove the protection afforded by *N.J.S.A.* 18A:13-64. It is a form of deferred compensation for which concessions are traded in the collective negotiating process. But negotiability has no bearing on whether sick leave pay is protected by *N.J.S.A.* 18A:13-64.*** Salaries too are negotiable, yet salaries are protected by *N.J.S.A.* 18A:13-64. So, too, "leaves of absence" and "seniority" are negotiable, and they are protected. Moreover, negotiability is constrained when deferred compensation is involved.***
>
> The fact that pay for unused sick days is negotiable does not remove that benefit from the protection of *N.J.S.A.* 18A:13-64. Neither does the fact that the benefit derives from contract rather than a specific statute.
>
> > Stating the problem in terms of incorporation in the labor contract or as a statutory benefit begs the question. Rather, attention should be directed to the purpose of the statute and its relevance and materiality to the employment. *Lavin v. Hackensack Board of Ed.*, 90 *N.J.* 145 (1984, at p. 150.
> > (*Id.* at 12)

III. THE CLARK CONTRACT DOES NOT ENTITLE CLARK TO IGNORE THE BENEFITS ACCRUED BY PETITIONERS UNDER THE REGIONAL CONTRACT.

Petitioners cite to *Board of Education v. Buena Regional*, 300 *N.J. Super.* 415 (App. Div. 1997), *certif. den.* 151 *N.J.* 406 (1997) where the court considered the rights of

transferred teachers to longevity pay and the impact of a negotiated collective bargaining agreement and determined that the agreement was of no effect, finding:

> [t]he Buena Educational Association had no authority to enter into a collective negotiating agreement which relinquished the transferred–teachers' right guaranteed by *N.J.S.A.* 18A:28-6.1 to receive full credit for their prior service in the Newfield district. at 424.
> (Petitioners' Reply and Cross-Exceptions at 13)

Consequently, petitioners argue, subsequent collective bargaining agreements in Clark cannot operate to divest petitioners of benefits accrued by them at the regional district preserved by *N.J.S.A.* 18A:13-64. Moreover, petitioners contend,

> Clark has assumed the role previously performed by Regional to educate high school pupils in the Clark district. Clark has assumed valuable assets formerly owned by the Regional District. Clark has, for all practical purposes, become a successor, *pro tanto* of the Regional District. As such, it is responsible for the obligation to Petitioners incurred by the Regional District.
> (*Id.* at 15)

Upon his independent and comprehensive review of the record and after full consideration of the parties' exceptions, the Commissioner determines, for the reasons detailed below, to reject the ALJ's determination that the within petitioners have a right, protected by *N.J.S.A.* 18A:13-64, to be paid for unused sick leave at the contractual rate established by the collective bargaining agreement in effect at the time they were employed by the Regional District.

Initially, however, the Commissioner concurs with the ALJ that this matter is not *res judicata* as a consequence of the *Nadasky, supra*, decision. The Board's exception argument in this regard is found to be without merit. Because *Nadasky* was decided and dismissed by the Commissioner *solely* on procedural grounds, it was unnecessary for him to reach to or discuss the ALJ's dicta on the merits of that case.

Turning to the adjudication of this matter, *N.J.S.A.* 18A:13-64, which establishes the rights of employees of a regional district in the event of a withdrawal from or a dissolution of a regional district, in pertinent part, specifies:

> [a]ll employees of the regional district shall continue in their respective positions in the withdrawing district, or in each of the constituent districts in the event of a dissolution, and all of their rights of tenure, seniority, pension, leave of absence and other similar benefits shall be recognized and preserved and any periods of prior employment in the regional district shall count toward the acquisition of tenure to the same extent as if all such employment had been under the withdrawing district or in any of the constituent districts in the event of a dissolution.***

The underlying purpose of this provision was considered and addressed in *Board of Education of the Central Regional High School District v. Board of Education of Lacey Township and the Central Regional Education Association and Ronald Villano, individually, Ocean County*, 1980 *S.L.D.* 553, 565, wherein it was recognized "that the Legislative intent [of this provision] was to protect the employment rights of those employees [of the regional district affected by the withdrawal] who have provided good and faithful service to the school district." Full consideration of this statute and its legislative intendment demonstrate that it was designed to operate, upon the dissolution of a regional district, as a "save harmless" provision to preserve and protect benefits earned by affected individuals by virtue of their service in such regional district. *Balwierczak et al v. Board of Education of Berkeley Heights, Union County,* decided by the Commissioner December 8, 1999, *aff'd* State Board May 3, 2000. However, it is, likewise, clear that *N.J.S.A.* 18A:13-64 "must be applied in a manner which preserves the continued employment and accrued rights of such staff, but does not result in the wholesale disruption of existing districts ***[or] confer extraordinary rights upon regional staff and effectively usurp the

managerial prerogative of the constituent boards of education." *Stagaard v. Contini*, 97 *N.J.A.R.*2d (EDU) 217, 219.

With this background in mind, the Commissioner finds and concludes that the ALJ has apparently misperceived the issue in this case. At issue here is not whether payment for unused sick leave is nomenclaturally identified as some kind of "compensation" by courts, cited by the ALJ and petitioners, which were reviewing other wholly distinguishable questions, situations or statutes, by courts outside our jurisdiction, or by Police and Fireman Retirement System regulations but, rather, whether such payment is "protected" by the tenure laws and *N.J.S.A.* 18A:13-64. The Commissioner fully concurs with the Board's comprehensive exception arguments in this regard, finding these entirely consistent with prior *education* case law which addressed and resolved, either explicitly or implicitly, this very issue.

First, in *Central Regional,*[1] *supra,* the petitioners argued that *N.J.S.A.* 18A:13-64 protected all of their regional fringe benefits not specifically enumerated in that statute. They supported this argument, as do the instant petitioners, by contending that a reduction of salary or fringe benefits would be in contravention of *N.J.S.A.* 18A:6-10 which specifically prohibits any reduction of a tenured employee's compensation. Upon consideration of such a contention, the Commissioner held:

> The Commissioner agrees that those rights of tenure, seniority, pension, leave of absence, and other such benefits addressed in 18A:13-64 are in fact transferrable, however, the Commissioner does not conclude that the intent of 18A:13-64 was to require the withdrawing district to establish, in effect, two levels of compensation and benefits for comparable levels of training and experience, one for its long time employees and one for its newly acquired employees.

[1] Notwithstanding that this case involved withdrawal from a regional district rather than a dissolution, as here, the statute at issue, *N.J.S.A.* 18A:13-64 and its legislative intent, *i.e.*, to ensure that all employees are held harmless upon a withdrawal or dissolution, are the same in either situation.

> The Commissioner therefore directs the Lacey Township Board of Education to place those employees transferred from the Central Regional School District at the step and level of the Lacey Township salary schedule appropriate for their years of service in the regional district and to fully recognize and preserve "all of their rights of tenure, seniority, pension, leave of absence and other similar benefits" *and to provide them with all other benefits which are accorded employees of the Lacey Township School District.* (emphasis supplied) *Central Regional* 1980 *S.L.D.* at 571.

Thus, more than 24 years ago, the Commissioner found that payment for accumulated sick leave, along with other contractual benefits enjoyed by petitioners in their regional district employment, was not entitled to protection under the governing statute but, rather, these employees were to be accorded all benefits provided to employees in their new constituent district.[2]

More recently, the State Board was confronted with this issue in *Stagaard v. Contini*, decided by State Board October 1, 1997. In its application of *N.J.S.A.* 18A:13-64 as required in *Stagaard*, the State Board, initially, observed:

> Our duty in construing the statute involved here is to determine and effectuate the intent of the Legislature. The principal source of such intent is the legislation itself. However, the policy behind the statute, concepts of reasonableness and the legislative history are also among the sources to be used to determine legislative intent.
>
> We have therefore reviewed the statute at issue with close and careful consideration of its language, structure, purpose and history, as well as prior decisional law. (citations omitted) *Staagard* slip opinion at 11.

In the State Board's decision, the Commissioner concludes, contrary to the position espoused by the parties, it was implicitly determined that payment for accumulated sick leave was not entitled to protection or preservation pursuant to *N.J.S.A.* 18A:13-64 either as a tenure right or under the "other benefits" provision of that statute. First, the decision in *Stagaard* evidences that the State Board accepted that the tenure entitlement of the petitioners in that matter was satisfied by the

[2] The Commissioner does not find the *Central Regional* result at all altered by the fact that the instant petitioners are, at this time, seeking the preservation of only one of their Regional District benefits.

preservation of their salary. Had the State Board found any other claimed right of petitioners in that matter to be one which was protected by tenure, they would have identified and included it. Therefore, the Commissioner concludes that "compensation" for purposes of the protections provided by *N.J.S.A.* 18A:6-10 and *N.J.S.A.* 18A:13-64 has implicitly been defined as "salary."

Next, *citing Hyman v. Board of Education of the Township of Teaneck*, decided by the State Board, March 6, 1985, *aff'd* Docket No. A-3508-84T7 (App. Div. 1986), *cert. denied*, 104 *N.J.* 469 (1986), the State Board declined "to delineate what, *if any*, additional benefits former employees of the regional district may be entitled to under the education laws beyond those expressly enumerated in *N.J.S.A.* 18A:13-64." (emphasis supplied) Stagaard slip opinion at 15. It must be noted that in *Hyman*, when faced with the question of benefits which may be owed to the supplemental teachers in that case, the State Board, after reviewing language from the Supreme Court's decision in *Spiewak v. Rutherford Bd. of Ed.,* 90 *N.J.* 63 (1982), found:

> the decision in *Spiewak* is based on an analysis of the tenure statutes. Although the court acknowledged that supplemental teachers may be entitled to additional benefits, it clearly stated that such benefits, unlike tenure rights, are primarily a matter of contract. Thus, we conclude that the decision in *Spiewak* does not grant to supplemental teachers any *statutory* entitlement to benefits beyond that which may be conferred on them by existing statutes. (emphasis in text) (*Hyman,* 1985 *S.L.D.* at 1942-1943)

Again, because the *Stagaard* petitioners were specifically seeking payment for unused sick leave as an entitlement pursuant to *N.J.S.A.* 18A:13-64, if the State Board had accepted this as an "other similar benefit," necessitating preservation within the intendment of that statute, they would not have declined to so find. The Commissioner, therefore, concludes that the instant petitioners are protected with respect to the preservation of all of their statutorily mandated benefits. However, there is no reasonable interpretation of *N.J.S.A.* 18A:13-64 or *Central*

Regional and *Stagaard* which could establish that the Legislature additionally intended to preserve and protect their contractual benefits. Therefore, the Commissioner determines that payment for accumulated sick leave is not protected pursuant to *N.J.S.A.* 18A:13-64 either as a tenure right or as an "other similar benefit" under that provision.

As persuasively argued by the Board, to find otherwise would lead to preposterous consequences:

> [i]f benefits such as the payment for sick leave at retirement are "locked in" at their maximum level, the necessary result is that the issue can no longer be negotiated between the parties, or, at a minimum, cannot be applied equally to its employees. For example, if a contract provision grants 100% per diem payment for 100% of unused sick time at retirement, the Associations reading of "compensation" would forever bar the parties to such an agreement from negotiating a cap or reduction of that benefit. However, while sick leave itself is statutory, clearly the payment for such leave at retirement is negotiable. To define such payments as tenurable "compensation" would undermine the PERC Act, and the effects upon Collective Bargaining Agreements, particularly those in post dissolution districts, would range from confusing to truly convoluted.
> (Board's Exceptions at 14)

Moreover, acceptance of the ALJ's premise would operate to eviscerate the underlying legislative intent of the governing statute. As found by the Appellate Division in *Alford v. Board of Education of Buena,* 310 *N.J. Super.* 147 (App. Div. 1998),[3] it must be remembered

> that the polestar is equality of treatment of transferred teachers from the sending district to the receiving district. Fundamental fairness and common sense demand that two teachers of equal seniority and service teaching side-by-side in a school district should be treated equally unless there is a clear and unequivocal demonstration of intent to treat such teachers differently. (at 157)

[3] This case dealt with the question of whether, pursuant to *N.J.S.A.* 18A:28-6.1, another "save harmless" provision which governs the protected rights of teaching staff members upon the discontinuance of a school, teachers "received" by a new school district as a result of the discontinuance of school activities by a "sending" district are entitled to reimbursement for unused sick time consistent with the same benefit received by the teachers in the "receiving" district.

The Commissioner, upon full consideration of the language of *N.J.S.A.* 18A:13-64, its legislative intendment, and applicable case law, holds that payment for accumulated sick leave is not preserved and protected by this statute but, rather, is a contractual benefit subject to collective bargaining negotiations.[4]

Accordingly, the Initial Decision of the OAL is rejected. Summary decision is hereby granted to the Board and the within consolidated Petitions of Appeal are dismissed.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 4/30/04

Date of Mailing: 4/30/04

[4] As the Commissioner has determined that petitioners' right to the benefit they seek is not conferred by the School Laws, discussion with respect to the validity of the Regional District contract or whether and how petitioners' rights under this contract could be "waived," is unnecessary.

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

190-04

#190-04

F.J-L., on behalf of minor child, P.P., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY, :

RESPONDENT. :

:

COMMISSIONER OF EDUCATION

DECISION

April 15, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3471-02
AGENCY DKT. NO. 51-2/02

F.J-L., ON BEHALF OF MINOR CHILD, P.P.,
Petitioner,
v.
BOARD OF EDUCATION OF HILLSIDE,
UNION COUNTY,
Respondent.

Jennifer A. Klear, Esq., for petitioner (Drinker, Biddle & Reath, attorneys)

Robert F. Varady, Esq., for respondent (LaCorte, Bundy, Varady & Kinsella, attorneys)

Record closed: February 17, 2004 Decided: March 1, 2004

BEFORE **ROBERT J. GIORDANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was scheduled for hearing on November 18, 2003 at the Office of Administrative Law (OAL), 33 Washington St., Newark New Jersey.[1] At that time,

[1] The matter was subject to a previous Order entered on January 10, 2003, by the Honorable William Jeremiah, ALJ, dismissing Dr. William Librera and the State Board of Education as parties to the action.

Jennifer A. Klear, Esq., advised the undersigned that her client contacted her the afternoon of November 17 to advise that he did not want to go to trial. Ms. Klear was reluctant to withdraw the petition on behalf of her client, since he might not fully appreciate the ramifications.

Robert F. Varady, Esq., moved for dismissal of the matter. In that regard, he outlined a chronology of the proceedings. A prehearing conference was conducted in the matter on March 10, 2003. Thereafter, the matter was scheduled for hearing on May 16, 2003. At the request of both counsel, the matter was adjourned to June 26, 2003. On June 26, 2003, the parties reached a tentative settlement of the matter. Petitioner, now 18 years of age, was to be evaluated for the purpose of determining the appropriate alternative educational program.

Petitioner would be tested, and the appropriate educational program would be developed. The parties agreed that placement in a vocational technical school might be appropriate. Petitioner had an appointment for July 23, 2003, including an initial conference with the child study team to determine whether or not to conduct an evaluation (R.-1). Petitioner failed to appear for this scheduled appointment, and the school representatives contacted him at his home telephone number. He explained that he thought the appointment was 9:00 p.m., but he was unable to make the appointment in any event. The appointment was rescheduled for July 30, 2003 at 9:00 a.m. at Hillside High School (R-2). Once again, petitioner failed to appear for this scheduled appointment. A school representative contacted petitioner and advised him that he could come in at 11:00 a.m. that morning. The members of the child study team waited until 12:00 p.m., but petitioner failed to appear.

As such, the parties advised that the matter should be rescheduled for hearing. After several adjournments, the matter was finally rescheduled for hearing on November 18, 2003. At that time, Ms. Klear advised that her client had notified her that he did not want to pursue the matter. Petitioner was not present at the hearing.

The matter was adjourned to permit counsel for petitioner to make an application for recovery of costs for an expert witness. On February 17, 2004, the undersigned received a letter from Ms. Klear advising that she decided to forego the motion to recover expert witness fees in the case. Thereafter, the record closed.

CONCLUSIONS

The foregoing recitation of the procedural history is undisputed. I **CONCLUDE** that petitioner has failed or refused to take the necessary steps to move his contested case to resolution. Pursuant to *N.J.A.C.* 1:1-14.6(h), the administrative law judge may render any ruling or order necessary to decide any matter presented to him which is within the jurisdiction of the transmitting agency or the agency conducting the hearing. Accordingly, I **CONCLUDE** that the within matter shall be dismissed for lack of prosecution.

ORDER

For all of the foregoing reasons, it is hereby **ORDERED** that the appeal of petitioner is and shall 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 (45) 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 (13) 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, 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.

Robert J Giordano

March 1, 2004
DATE

ROBERT J. GIORDANO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

3-02-04 mkd
DATE

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

EXHIBITS

R-1 Notice of A Planning Meeting, Initial Evaluation, July 9, 2003

R-2 Notice of A Planning Meeting, Initial Evaluation, July 23, 2003

OAL DKT. NO. EDU 3471-02
AGENCY DKT. NO. 51-2/02

F.J-L., on behalf of minor child, P.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION
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.

Upon careful and independent review of the record, the Commissioner concurs that this matter is properly dismissed for lack of prosecution. Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/15/04

Date of Mailing: 4/30/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

198-04

#198-04

N.S. AND J.S., on behalf of minor child, A.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged the Board's residency determination that their son, A.S., was a nonresident of the District and was not entitled to a free public education.

The ALJ found that the matter was ripe for summary decision since petitioners met the requirements of *N.J.S.A.* 18A:38-1 and *N.J.A.C.* 6A:28-2.4. *Citing P.B.K.*, the ALJ found that A.S. had a relative domiciled in the United States who had legal guardianship over A.S. and who was willing to support him *gratis* while petitioners were in India and would be unable to care for A.S. The ALJ granted petitioners' motion for summary decision. A.S. was entitled to a free education in the District.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

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.

May 7, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6861-03

AGENCY DKT. NO. 318-9/03

N.S. AND J.S. ON BEHALF OF MINOR CHILD, A.S.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY

Respondent.

David Rubin, Esq., for petitioners (David Rubin, attorney)

Anthony B. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl and Clarkin, attorneys)

Record Closed: March 17, 2004 Decided: March 23, 2004

BEFORE **STEVEN C. REBACK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about September 22, 2003, the petitioners, N.S. and J.S. on behalf of J.S., filed a petition of appeal before the Commissioner of Education in New Jersey challenging a determination arrived at by respondent, the North Brunswick Township Board of Education (hereinafter "North Brunswick") determining that J.S. was a nonresident of the school district, as required under *N.J.A.C.* 6:28-2.4(a)(2).

By answer filed on September 22, 2003 before the Commissioner of Education, the petitioners essentially deny the underlying assertions giving rise to the decision by North Brunswick, which concluded that A.S. did not reside within the school district.

Following the filings of the pleadings, the Commissioner of Education transmitted the matter to the Office of Administrative Law 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 October 2, 2003.

After conferences were conducted in the matter, it was agreed that the case would proceed on motion for summary decision filed on behalf of the petitioners on or about January 23, 2004. On February 9, 2004, counsel for New Brunswick responded by letter brief, and by March 17, 2004, no reply having been submitted by Mr. Rubin, the record in these proceedings closed.

As part of his assertions in opposition to the motion for summary judgment, counsel for New Brunswick initially argues that the absence of discovery makes the petitioner's application premature. That consideration will be addressed in respect to determining whether there are or are not genuine issues of material fact.

ISSUES AND BURDEN OF PROOF

The fundamental issue to be addressed in this motion for summary decision is whether the petitioners can establish the criteria for granting a motion for summary decision, pursuant to court rule, *R.* 4:46-2, and the New Jersey Uniform Administrative Procedure Rules, *N.J.A.C.* 1:1-1.1 to –21,6, which are essentially the same.

THE FACTS

Unless otherwise noted, the following is a substantially uncontradicted narrative of the facts in these proceedings. It should be noted that in his responsive brief submitted on February

9, counsel for New Brunswick has acknowledged that irrespective of the issue of discovery, the general facts as outlined by Mr. Rubin in his letter brief are not in dispute and are accepted.

Accordingly, I **FIND**:

Petitioners, N.S. and J.S., on behalf of their son, A.S., a minor, brought this summary decision motion against respondent, North Brunswick Township Board of Education, in order to allow A.S. to attend North Brunswick Public School.

On or about August 14, 2003, petitioners, residents of the State of Florida, requested by letter that the respondent accept A.S. as a student at the North Brunswick High School. As stated in the letter from the petitioners, the purpose of relocating A.S. was that the petitioners would be in India on business for eight (8) months, and A.S. would reside with his cousin, N.S. The petitioners further stated that relocation was in the best interest of A.S's education.

On or about August 25, 2003, the respondent denied the request of the petitioners citing to New Jersey Department of Education/School Attendance Residency/Domicile; Chapter 28/6A:28-2.4. The respondent alleged that the petitioners did not state any hardships for the relocation.

On or about September 15, 2003, petitioners submitted a Petition of Appeal from the Determination of Non-Residency and affidavits stating that N.S., a resident of North Brunswick, was assuming responsibility for the support of A.S. and that N.S. would not be reimbursed for the support expenses. The affidavits further stated that A.S. has no one else who can care for A.S. while the petitioners are in India.

A Petition of N.S., for legal guardianship of A.S., was thereafter filed with the Surrogate of Middlesex County resulting in letters of guardianship being issued on October 16, 2003.

The respondent alleges that the guardianship was an attempt to circumvent the hardship criteria of the "affidavit pupil" exception, and filed a complaint in Superior Court seeking a determination that the guardianship order should be revoked. On or about January 9, 2004,

Middlesex County Assignment Judge Robert A. Longhi upheld the guardianship order as valid and appropriate under the relevant provisions of Title 3B. Despite this holding, the Superior Court judge made no determination of the effect guardianship would have on the residency issue, for school law purposes, and reserved to the respondent its right to present argument to the Commissioner on that point.

Petitioners argue that summary decision should be granted because guardianship was established in Superior Court, and because A.S. is now a resident and domiciled with his cousin in North Brunswick, A.S. should be entitled to enrollment in the North Brunswick public school.

Respondent argues that since no discovery has occurred, material issues of fact remain, precluding the grant of Summary Decision. Specifically, the respondent feels that discovery is necessary to establish (1) why A.S., a resident of the State of Florida, came to New Jersey to complete his high school education, (2) what relatives, if any, were available in Florida to allow A.S. to complete his education, presumably at the high school which he had attended the previous year, and (3) what resources were available for A.S. in Florida in order to meet education costs in that state as opposed to relocating him to the State of New Jersey solely for the completion of his senior year in high school.

DISCUSSION

Where Petitioners challenge the board's residency determination, is the matter ripe for summary decision and, if so, should Petitioners' motion be granted?

A. Is the matter ripe for summary decision

In accordance with the New Jersey Uniform Administrative Procedure Rules, *N.J.A.C.* 1:1-1.1 to –21.6, any party may move for summary decision upon all or any of the substantive issues in a case at any time after a case is deemed contested. *N.J.A.C.* 1:1-12.5(b). To grant a motion for summary decision, it must be examined whether "the papers and discovery... together with the affidavits... 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." *Ibid.*

A motion for summary decision is similar to the standard for summary judgment found at *R.* 4:46-2. The motion for summary judgment shall be served with briefs, a statement of material facts, with or without supporting affidavits. *R.* 4:46-2(a). The statement of material facts shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the moving party contends there is no genuine issue, together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. *Ibid.*

The New Jersey Supreme Court has held that when deciding 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.
>
> [*Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 540 (1995).]

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). Thus, the critical 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." *Brill, supra*, 142 *N.J.* at 533. *Citation omitted.*

In the instant case, if it is determined that the petitioners have met the criteria set forth in *N.J.S.A.* 18A:38-1 and *N.J.A.C.* 6A:28-2.4, then all other facts would be immaterial and summary decision should be granted.

B. Whether further discovery is necessary?

Under the *Uniform Administrative Procedures Rules* ("UAPR") discovery is designed to provide litigants with access to facts that support or undermine their position or the position of their adversary. 37 *New Jersey Practice, Administrative Law and Practice Second Edition*, §4.39 (Steven L. Lefelt) (2000). The *New Jersey Court Rules* favor an expansive approach to discovery rooted in the belief that justice is more likely to be achieved when there has been full disclosure and all parties are conversant with all available facts. *Payton v. New Jersey Turnpike Auth.*, 148 *N.J.* 524, 535 (1997) (*citing Catalpa Inv. Group, Inc. v. Franklin Tp. Zoning Bd. of Adjustment,* 254 *N.J. Super.* 270, 273 (Law Div. 1991)). For example, *R.* 4:10-2(a) provides that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Pressler, *Current N.J. Court Rules*, *R.* 4:10-2 (2002). Any information that is relevant to the controversy and is not protected by a privilege is generally discoverable. *See State v. Cusick*, 219 *N.J. Super.* 452, 530 (App. Div. 1987). Therefore, when faced with a discovery request, the initial determination should be whether the documents and/or information sought through discovery are relevant.

The relevancy standard applicable in determining whether to permit discovery is broader in scope than the evidentiary standard. With respect to discovery, the test of relevancy is whether the subject matter to be discovered is useful. *Gureghian v. Hackensack Hospital*, 109 *N.J. Super.* 143 (Law Div. 1970)(*citing Myers v. St. Francis Hospital*, 91 *N.J. Super.* 377 (App. Div. 1966)). The term "relevant" encompasses any matter "that bears on or that reasonably could lead to other matter[s] that could bear on any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 *U.S.* 340, 351, 98 *S. Ct.* 2380, 57 *L. Ed.* 2d 253 (1978). It encompasses not only matters that would necessarily be admissible in evidence but also information reasonably calculated to lead to admissible evidence. *Berrie v. Berrie*, 188 *N.J. Super.* 274, 278 (Ch. Div. 1983). Therefore, if the information requested by the respondent is admissible or reasonably calculated to lead to admissible evidence, then it is relevant and discoverable.

In the instant case, the questions posed by the respondent would be relevant if they could be useful and could lead to admissible evidence. Even if the respondent's questions are deemed

relevant, if they are not material and can not be used to support or undermine their position or the position of their adversary, then summary decision would be appropriate.

C. Should Petitioners' motion for summary decision be granted?

The New Jersey statute, *N.J.S.A.* 18A:38-1, provides criteria a public school is required to follow in providing a student, over (5) five and under twenty (20) years of age, free education. Specifically, *N.J.S.A.* 18A:38-1(b)(1) provides that:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for a longer time than merely through the school term, ..., and upon filing by the child's parents or guardian with the secretary of the board of education a sworn statement that his is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district.

Additionally, the New Jersey Administrative Code, *N.J.A.C.* 6A:28-2.4, states that:

> (a) A district board of education shall admit to its schools, free of charge, the following persons over five and under 20 years of age:
>
> 1. Any student domiciled within the district;
>
> i. A student is domiciled in the district when he or she is living with a parent or legal guardian[i] whose permanent home is located within the 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

[i] "A guardian of the person of a minor has the powers and responsibilities of a parent who has not been deprived of custody of his minor and unemancipated child, except that a guardian is not legally obligated to provide for the ward from his own funds." N.J.S.A. 3B:12-51

residences elsewhere.

ii. ...

[Emphasis added.]

If the language of a statute is plain, unambiguous, and uncontrolled by other parts of the regulation, the words of the statute are to be given their ordinary and well-understood meaning. *Fahey v. Jersey City*, 52 *N.J.* 103, 106-07 (1968); *Safeway Trails, Inc. v. Furman*, 41 *N.J.* 467, 478 (1964); *Lane v. Holderman*, 23 *N.J.* 304, 313 (1957). A regulation is subject to the same rules of construction as a statute and should be construed according to the plain meaning of the language. *Medford Convalescent and Nurs. Ctr. v. Div. of Med. Assist. and Health Servs.*, 218 *N.J. Super.* 1, 5 (App. Div. 1985).

In the instant case, the petitioners' have met the requirements of *N.J.S.A.* 18A:38-1 and *N.J.A.C.* 6A:28-2.4, by supplying a letter and an affidavit to the respondent stating that they are presently in India for a minimum of eight (8) months and would be unable to care for A.S. Additionally, the petitioners set forth in their affidavits that there is no one, other then N.S., the petitioners' nephew, who can care for A.S. The petitioners' and N.S.'s affidavits further state that A.S. will be kept in the home of N.S., a domiciled resident of North Brunswick and legal guardian of A.S., and that N.S. will not be receiving payment from the petitioners' for the cost of A.S.'s care.

Despite the plain meaning of *N.J.S.A.* 18A:38-1 and *N.J.A.C.* 6A:28-2.4, there is limited precedent available to assist in the determination of this matter. In *P.B.K. v. Bd. of Educ. of the Borough of Tenafly*, 343 *N.J. Super.* 419 (App. Div. 2001), a U.S. citizen, E.Y., lived with his parents and attended a private school in South Korea until his father lost his job. E.Y. was sent to live with his aunt and uncle who were domiciled in Tenafly, New Jersey and who agreed to cover all of E.Y.'s expenses. *Id.* at 421. E.Y., who was fifteen years of age at the time of arrival in Tenafly, sought enrollment in the ninth grade of the Tenafly School District. *Ibid.* The Tenafly Board of Education rejected E.Y.'s enrollment stating, "'the desire to be educated in the United States is not a 'personal or financial hardship' under *N.J.S.A.* 18A:38-1(a).'" *Id.* at 422. After the Tenafly Board of Education rejected E.Y.'s enrollment, E.Y.'s aunt and uncle obtained

legal guardianship over E.Y. *Id.* at 424. The State Board of Education then found that E.Y. was domiciled in Tenafly, and was therefore entitled to a free education in Tenafly. *Id.* at 424, 425. The Board of Education appealed the State Board's decision arguing that, "The letter of guardianship is not determinative of the student's right to a free education in Tenafly public schools." *Id.* at 425. The appellate court stated that, "with E.Y.'s parents over half a world away, ample reason existed for a formal guardianship aside from satisfying the conditions of *N.J.S.A.* 18A:38-1(a)." *Id.* at 428. Additionally, the court held that E.Y. was entitled to a free education in the Tenafly School District. *Ibid.*

In the instant case, similar to *P.B.K.*, A.S. has a relative domiciled in the United States who has legal guardianship over A.S., and who is willing to support A.S. gratis. Furthermore, like *P.B.K.*, if A.S.'s cousin resided in any other district in the United States; it would be that district that A.S. would be attempting to enroll in. Since N.S. is domiciled in North Brunswick, and has obtained legal guardianship over A.S., A.S. should be granted a free education in North Brunswick.

CONCLUSION

The matter is ripe for summary decision. Since petitioners' have met the requirements of *N.J.S.A.* 18A:38-1 and *N.J.A.C.* 6A:28-2.4, the petitioners' summary decision motion should be granted.

Accordingly, it is **ORDERED** that the determination of respondent's school district that A.S. is not a resident as required under regulation be and is hereby **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 (45) 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 (13) 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, 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.

3/23/04
DATE

STEVEN C. REBACK, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

3/23/04
DATE

Mailed to Parties:

MAR 30 2004

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

OAL DKT. NO. EDU 6861-03
AGENCY DKT. NO. 318-9/03

N.S. AND J.S., on behalf of minor child, A.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and petitioners' reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

The Board reiterates its objection to this matter being decided on summary judgment, an issue raised in proceedings before the Administrative Law Judge (ALJ), contending that the matter is not ripe for summary judgment because discovery is incomplete. (Board's Exceptions at 1) In support thereof, the Board cites *J. Josephson, Inc. v. Crum & Forster*, 293 *N.J. Super.* 170, 203 (App. Div. 1996), claiming that "[o]ur Appellate Division has specifically stated 'our case law has made plain, as a matter is not "ripe" for summary judgment where discovery is incomplete.'" (*Ibid.*) The Board claims that no discovery whatsoever has occurred in this matter, and that the facts sought by the Board are relevant and material with

respect to whether a legitimate financial and/or family hardship exists as alleged by petitioners. (*Id.* at 2)

Moreover, the Board avers that the ALJ overlooked the inconsistencies in petitioners' statements and that "[c]ontradictory factual statements by the Petitioners cannot be used to create or avoid a material question of fact." (*Ibid.*) In this regard, the Board points out that, by letter of August 14, 2003, A.S.'s parents indicated that A.S. would be moving in with his cousin the week of August 21, 2003 and requested that their son be accepted at North Brunswick High School "in the best interest of his education." (*Ibid.*) After the Board denied the parents' request on September 15, 2003 for A.S. to attend school free of charge in the District, A.S.'s father submitted an affidavit stating that he and A.S.'s mother lived in Orlando, Florida, and that A.S. had lived with them until June 2003, at which time A.S. went to live with his cousin and his wife, petitioners in this matter.[1] (*Ibid.*) The Board claims that A.S.'s father never explained the discrepancy of when his son actually began living with petitioners or when he and A.S.'s mother left for India for their business venture. (*Ibid.*) Additionally, the Board contends that it was only after A.S. was denied admission to the District that N.S. petitioned for guardianship, and that, absent further discovery, there will be no way to determine whether guardianship was done solely to circumvent the applicable residency statutes. (*Ibid.*)

Additionally, the Board argues that petitioners have not met the affidavit requirements of *N.J.S.A.* 18A:38-1 and *N.J.A.C.* 6A:28-2.4 in that: 1) *N.J.S.A.* 18A:38-1(b)1 mandates that the child's parents file a sworn statement stating that they are not capable of supporting or providing care for the child due to a family or economic hardship, and the affidavit

[1] There is some confusion in the Initial Decision caused by references to petitioners as A.S.'s parents. Petitioners in this matter are A.S.'s cousin, N.S., and his wife, J.S. A.S.'s father is H.S. and his mother is V.S.

provided is "filed solely by the child's father, not both parents" (*Ibid.*);[2] and 2) "the record reveals no evidence of any economic hardship or family hardship which would warrant A.S.'s attendance at North Brunswick High School free of charge." (*Id.* at 2-3) The Board also takes issue with the ALJ's reliance on *P.B.K., supra*, arguing that, in *P.B.K.,* the Appellate Division relied on substantial credible evidence in making its determination that the student in that matter was entitled to attend school in the Tenafly School District free of charge, as opposed to the instant matter where the Board has been barred from engaging in even minimal discovery to determine if such facts exist. (*Ibid.*)

In response, petitioners argue that, "once legal guardianship was granted to N.S., any fact-sensitive issues that may have required a plenary hearing under the hardship standard of *N.J.S.A.* 18A:38-1(b) became moot" in that, "at that point, A.S. became entitled to attend the North Brunswick schools as a matter of law by virtue of *N.J.S.A.* 18A:38-1(a), since his 'legal guardian' was domiciled there." (Petitioners' Reply at 1-2) Moreover, *citing R.C.P. v. Board of Education of the Ramapo-Indian Hills Regional High School District, Bergen County,* decided by the Commissioner August 18, 2000, *aff'd* State Board January 3, 2001, petitioners submit that, as the ALJ concluded in *R.C.P.*, under *N.J.S.A.* 18A:38-1(a) motivation for obtaining guardianship is not an issue. (*Id.* at 2) Petitioners further argue that the law recognizes a number of ways, including guardianship under Title 3B, in which adults other than natural parents assume the rights and responsibilities of parenthood, and that, once guardianship is established in this fashion, "it is none of the school district's business what the motivation might be." (*Ibid.*)

[2] The Commissioner observes that all references to filing a sworn statement with respect to the inability of supporting or providing care for the child due to a family or economic hardship in *N.J.S.A.* 18A:38-1 and *N.J.A.C.* 6A:28-2.4 specify that such affidavit must be filed by the student's *parent* or legal guardian.

Upon a thorough and independent review of the record, the Initial Decision, the Board's exceptions and petitioners' reply thereto, the Commissioner has determined to adopt the Initial Decision in this matter for the reasons expressed therein. In so determining, the Commissioner notes his concurrence that summary decision is appropriate in this instance in that there is no genuine issue as to any material fact and petitioners are entitled to prevail as a matter of law. With respect to the discovery sought by the Board, the Commissioner points out that the relevancy standard applicable to a determination as to whether to permit discovery is whether the subject matter to be discovered is admissible or reasonably calculated to lead to admissible and useful evidence. (Initial Decision at 6) *See, also, Gureghian, supra; Oppenheimer Fund, Inc., supra; and Berrie, supra.* Even assuming, *arguendo*, that the Board's questions are relevant, the Commissioner does not find the answers to the Board's questions raise any genuine issue as to any material fact, nor would the answers to the Board's questions, considered in the light most favorable to the Board, support its position or undermine petitioners' position so as to alter the decision herein. *See Brill, supra*, at 540.

Moreover, the Commissioner finds the inconsistency raised by the Board concerning conflicting statements made by A.S.'s parents in their letter of August 14, 2003 and A.S.'s father's affidavit with respect to whether A.S. moved into his cousin's home in June 2003 or August 2003 *de minimus* in that the Board does not dispute that, at the time A.S. began attending school in the District in September 2003, A.S. was residing in the North Brunswick School District with his cousin.

As in *P.B.K., supra*, A.S., an American citizen, has a relative domiciled in the United States who has legal guardianship over him and who is willing to support A.S. while his

parents are away on business in India. The Commissioner points out that, under *N.J.S.A.* 18A:38-1(a) and *N.J.S.A.* 6A:28-2.4(a)1, a district is required to provide a free public education to any person under the age of 20 who is domiciled within the school district. *N.J.S.A.* 6A:28-2.4(a)(1)(i) clarifies that:

> A student is domiciled in the district when he or she is living with a parent or *legal guardian* whose permanent home is located within the district.*** (emphasis supplied)

Notwithstanding the Board's assertion that petitioners became legal guardians of A.S. solely to circumvent the residency statutes, *N.J.S.A.* 18A:38-1(a) and *N.J.S.A.* 6A:28-2.4(a)1 do not provide for an assessment of the motivations for obtaining legal guardianship. Moreover, the Commissioner points out that the Appellate Court in *P.B.K., supra*, a case strikingly similar to the matter herein, rejected this same argument by the Tenafly Board in *P.B.K,, supra,* finding that, "with E.Y.'s parents over a half a world away, ample reasons existed for a formal guardianship aside from satisfying the conditions of *N.J.S.A.* 18A:38-1(a)." *P.B.K, supra,* at 428. In that A.S. is domiciled in North Brunswick with his legal guardian, therefore, the Commissioner finds that he is entitled to a free public education in the North Brunswick School District, pursuant to *N.J.S.A.* 18A:38-1(a) and *N.J.S.A.* 6A:28-2.4(a)1.

Moreover, for the period of A.S.'s attendance in the District's schools from the beginning of classes in September 2003[3] until October 16, 2003, the date Petitioner N.S. obtained guardianship of A.S., the Commissioner concludes that A.S. was entitled to free public

[3] The record is silent on the actual date A.S. began attending school in the District. However, when the petition in this matter was filed on September 5, 2004, an acknowledgement letter was faxed to the Board that same date notifying the Board of the filing of the within petition and reminding the Board that, pursuant to *N.J.S.A.* 18A:38-1, "no child shall be denied admission to the district during the pendency of proceedings." The Board's Answer, dated September 16, 2003, states that "***upon receipt of the Petition, A.S. has been temporarily admitted as a student at the North Brunswick Township High School." (Answer at 1, No. 1) Accordingly, it appears that A.S. began attending school in the District at the beginning of the school year in September 2003.

education in the District's schools, pursuant to *N.J.S.A.* 18A:38-1(b), in that petitioners have established that A.S.'s parents are not capable of supporting him or providing care for him due to a family hardship and that A.S. is not residing with petitioners solely for the purpose of receiving a free public education in the District. In so determining, the Commissioner points out that the affidavits filed by petitioners and A.S.'s father establish that petitioners are supporting A.S. *gratis* and intend to do so for at least as long as A.S.'s parents are traveling in India, that A.S.'s parents are unable to care for him because they will be in India for a minimum of eight months on business and that it would be disruptive to their son academically, emotionally and socially to require him to leave the United States and travel in India during his senior year. (Petitioners' Motion for Summary Decision, Exhibit 5a at 3 and Exhibit 6a at 4-5) In this matter, as in *P.B.K, supra*:

> This is not an instance when a child and the parents or guardian establish a convenient residence in another school district to take advantage of academic or athletic programs. No other school in the United States existed for E.Y. other than the school district of his uncle and guardian. *P.B.K. supra*, at 427.

Accordingly, as amplified above, the Initial Decision in this matter is adopted for the reasons expressed therein.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 5/7/04

Date of Mailing: 5/7/04

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

199-04

#199-04

J.S., on behalf of minor child, C.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CALDWELL-WEST CALDWELL, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

May 7, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1084-03
AGENCY DKT. NO. 327-10/02

J.S. ON BEHALF OF C.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CALDWELL-WEST CALDWELL, ESSEX COUNTY,

Respondent.

Stephen J. Christiano, Esq., for petitioner

Joseph A. DeFuria, Esq., for respondent (Gaccione, Pomaco & Beck, attorneys)

Record Closed: March 18, 2004 Decided: March 22, 2004

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

This matter involves an appeal by petitioner J.S. on behalf of C.S. from a residency determination by respondent Board of Education of the Township of Caldwell-West Caldwell (the "Board"). Petitioner filed a Petition of Appeal on October 16, 2002 and the Board filed an Answer and Counterclaim on November 15, 2002,. The Department of Education subsequently transmitted the matter to the Office of Administrative Law (OAL) where, on January 9, 2003, it was filed for a hearing and determination as a contested case.

Following prior adjournments of the hearing scheduled for May 12, 2003 and June 27, 2003 at respondent's request, and the hearing scheduled for October 27, 2003 at petitioner's request, the matter was scheduled to be heard on December 8, 2003.

Counsel for the parties appeared at the OAL on December 8, 2003 and engaged in discussions toward an amicable resolution of the matter. Under letter dated January 20, 2004, counsel for the Board submitted a Stipulation of Settlement setting forth the terms of agreement and subsequently submitted a certified copy of the minutes of the executive session of the Board on January 5, 2004 relating to this matter, which the undersigned received on March 18, 2004. The aforesaid Stipulation and minutes are attached hereto and incorporated herein by reference.

Having reviewed the record and the terms of the settlement, 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 the 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 (45) 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.

March 22, 2004
DATE

MARGARET M. MONACO, ALJ

Receipt Acknowledged:

3-26-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 3 0 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

OAL DKT. NO. EDU. 1084-03
AGENCY DKT. NO. 327-10/02

J.S., on behalf of minor child, C.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CALDWELL-WEST CALDWELL, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the Board President of the Caldwell-West Caldwell Board of Education signed the agreement on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement[1] and designating the Board President to sign the agreement on its behalf, and the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Stipulation of Settlement consistent with the concerns set forth above.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/7/04
Date of Mailing: 5/10/04

[1] It is noted that although the parties' agreement purports to conclusively resolve this matter, the appended January 5, 2004 Board minutes reflect that the case has been put on "hold."

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 JAN 22 P 12: 29

Christiano and Christiano
49 Mt. Pleasant Avenue
West Orange, NJ 07052
(973) 736-1636
Attorneys for Petitioner

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
OAL DOCKET NO. EDU 1084-03

J.S., ON BEHALF OF MINOR CHILD, C.S.,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF CALDWELL-WEST CALDWELL, ESSEX COUNTY,

Respondent.

STIPULATION OF SETTLEMENT

The parties having amicably adjusted the differences between them, it is hereby stipulated as follows:

1. Petitioner withdraws his petition of appeal.
2. Respondent withdraws its counterclaim.
3. Petitioner and his wife shall apply for custody of C.S. as soon as possible.
4. Respondent shall be advised of the custody determination regarding C.S. as soon as possible..

5. The parties reserve their rights to initiate actions for prospective relief.

6. This settlement is subject to approval by the Commissioner of Education.

7. This stipulation of settlement constitutes the entire agreement of and understanding between the parties.

Dated: December 12,2003

James Sayers, Petitioner

BOARD OF EDUCATION OF
CALDWELL-WEST CALDWELL

By: _____
President

ATTEST:

_____
Secretary

BOARD OF EDUCATION CALDWELL-WEST CALDWELL

HARRISON SCHOOL BUILDING
Gray Street, West Caldwell, New Jersey 07006

RONALD P. SKOPAK
BOARD SECRETARY – BUSINESS ADMINISTRATOR

TELEPHONE 973-228-3360

PRIVATE EXECUTIVE SESSION, JANUARY 5, 2004
SUPERINTENDENT'S OFFICE, HARRISON SCHOOL, GRAY STREET, WEST CALDWELL

Sayers Residency Issue

The Administration reported that there was an agreement reached with the grandparents and the Judge requiring the grandparents to apply for custody of the child. This case will be on hold to see if the grandparents obtain legal custody.

CERTIFIED TO BE A TRUE COPY OF THE MINUTES
OF THE PRIVATE EXECUTIVE SESSION
OF THE BOARD OF EDUCATION
HELD AT THE DATE, TIME AND PLACE ABOVE WRITTEN

Ronald P. Skopak
Board Secretary/Business Administrator

/reso

193-04

GEORGE KUROCKA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

May 3, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3663-03
AGENCY DKT. NO. 142-5/00

GEORGE KUROCKA,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,
Respondent.

Margaret A. Miller, Esq., for petitioner (Weiner Lesniak, attorneys)

Nancy I. Oxfeld, Esq., for respondent (Oxfeld Cohen, attorneys)

Record closed: March 12, 2004 Decided: March 16, 2004

BEFORE **ROBERT J. GIORDANO**, ALJ:

On April 22, 2003, this matter was transmitted to the Office of Administrative Law (OAL) by way of an appeal filed by petitioner George Kurocka. Petitioner challenges the action of respondent Board of Education of the City of Linden, Union Township, charging him sick days for work-related injury and/or illness.

After two adjournments, a hearing was scheduled on February 23, 2004 at the OAL, 185 Washington Street, Newark, New Jersey. Prior to the hearing date, the parties advised the undersigned that they had resolved the matter. The parties submitted the attached Settlement Agreement, indicating the terms of settlement, which are incorporated herein by reference. The Linden Board of Education approved the settlement agreement on February 18, 2004.

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

1. The parties have voluntarily agreed to the settlement as evidenced by the acknowledgement of such on the record, by 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 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 (45) 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.

3/16/04
DATE

ROBERT J. GIORDANO, ALJ

Receipt Acknowledged:

3/19/04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 22 2004
DATE

CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

md

OXFELD COHEN, PC
60 Park Place, 6th Floor
Newark, New Jersey 07102
Attorneys for Petitioner
(973) 642-0161

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY
OAL DKT. NO. EDUCA 03663-2003
Agency Ref. No. 142-5/00

GEORGE KUROCKA, JR.,	:	
Petitioner,	:	
-vs-	:	SETTLEMENT AGREEMENT
BOARD OF EDUCATION OF THE CITY OF LINDEN,	:	
Respondent.	:	

GEORGE KUROCKA, JR., Petitioner in this matter, and the Board of Education of the City of Linden, Respondent in this matter, hereby agree to resolve the issues in this matter upon the following terms:

1. The Respondent agrees to pay to the Petitioner the sum of $2,809.00;

2. The parties agree that this payment represents the entirety of any entitlement the Petitioner has or may have had to a lump sum payment for accumulated sick leave upon retirement, as provided for in Article XII, Leaves of Absence, Paragraph D4 of the agreement between the Linden Education Association and the Linden Board of Education for Maintenance Personnel, Custodians covering the

Period from July 1, 1998 through June 30, 2001, the agreement which applied at the time of the Petitioner's retirement effective May 1, 2003;

3. The Petitioner agrees to withdraw with prejudice his petition in this matter;

4. This agreement constitutes the entire agreement between the parties with regard to the matters at issue herein. This agreement may not be utilized by either party in any proceeding as support or proof of any contention raised by that party in this proceeding, and neither party is admitting any liability with regard to any of the allegations set forth in these proceedings.

LINDEN BOARD OF EDUCATION

By: _____
Joseph Martino, Superintendent

Date: 2-23, 2004

GEORGE KUROCKA, Jr.

By: _____
George Kurocka, Jr.

Date: 3-04, 2004

By: _____
Margaret A. Miller, Esq.
WEINER LESNIAK LLP
Attorneys for Respondent
Linden Board of Education

Date: February 23, 2004

By: _____
Gail I. Oxfeld, Esq.
OXFELD COHEN, PC
Attorneys for Petitioner,
George Kurocka, Jr.

Date: 3/9, 2004

Personnel Report
February 18, 2004

11. Unpaid leave of absence:

Name	Assignment	From	To	Reason
DelGuercio, Jacqueline	Secretary – Admin Blg.	2/2/04	2/17/04	Medical
Baran, Gwendolyn	School No. 4 – Soc. Worker	5/17/04	6/30/04	Child Rearing
Semeraro, Vita	Elem. – World Language	6/4/04	6/11/04	Personal
Krupski, Kimberly	School No. 1 – Gr. 3	5/3/04	6/30/04	Child Rearing
Hernandez, Sandra	School No. 10 – BL. K-5	5/19/04	6/30/04	Child Rearing
Famula, Jill	School No. 10 – Gr. 1	5/11/04	6/30/04	Child Rearing
Ziets, Catherine	School No. 8 – K	9/1/04	6/30/05	Child Rearing
Donachy, JoAnn	School No. 5 – Grade 2	5/5/04	6/30/04	Child Rearing
Pienciak, Gina	School No. 8 – P/T Aide	1/20/04	1/23/04	Illness
Bottino, Bernadette	LHS – English	4/30/04	6/30/04	Child Rearing
DiGregorio, Mark	School No. 8 – Custodian	1/23/04	3/4//04	Medical
Pires, Anthony	School No. 2 – F/T Para	2/10/04	3/1/04	Medical

12. Compensate staff listed for unused accumulated sick leave upon retirement as per the agreement with the Board:

Name	Sick
Kurocka, George	$2,809.00

OAL DKT. NO. EDU 3663-03
AGENCY DKT. NO. 142-5/00

GEORGE KUROCKA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and, accordingly, adopts the settlement agreement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/03/04

Date of Mailing: 5/03/04

192-04

SARAH DICKERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PITTSGROVE, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning teaching staff member alleged the Board's decision to withhold her increment for the 2003-04 school year was arbitrary and capricious.

The ALJ determined that the Board notified petitioner of its action to withhold her increment on May 8, 2003. Petitioner filed a deficient petition of appeal on August 15, 2003, beyond the 90-day requirement. The ALJ concluded that petitioner filed her appeal out of time pursuant to *N.J.A.C.* 6A:3-1.3(d). Moreover, the ALJ found no basis to relax the time limitations. Petition was dismissed.

The Commissioner adopted the Initial Decision as his own.

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.

May 3, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

(On Motion for Dismissal)

OAL DKT. NO. EDU 8679-03

AGENCY DKT. NO. 294-8/03

SARAH DICKERSON,

Petitioner,

v.

BOARD OF EDUCATION

OF THE TOWNSHIP OF PITTSGROVE,

Respondent.

Sarah Dickerson, petitioner, *pro se*

Gary D. Wodlinger, Esq., for respondent (Lipman, Antonelli, Batt, Dunlap, Wodlinger & Gilson, attorneys)

Record Closed: March 12, 2004 Decided: March 16, 2004

BEFORE **W. TODD MILLER**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an appeal by petitioner, Sarah Dickerson, a teaching staff member, wherein she asserts that respondent, Board of Education of the Township of Pittsgrove, (District) unfairly and arbitrarily withheld her salary increment for the 2003-2004 school year. The matter was transmitted to the Office of Administrative Law (OAL) on November 26, 2003. The Director of

the OAL assigned the undersigned to hear this matter pursuant to pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing telephone conference was held on February 2, 2004. The District asserted during the conference, and in its answer, that the action filed by petitioner was untimely pursuant to *N.J.A.C.* 6A:3-1.3(d) (90-day rule). The District also asserts in its answer that it denied petitioner a salary increase for reasons of merit, performance and discipline. A plenary hearing was scheduled for September 16 and 17, 2004. By motion filed February 17, 2004, the District moved to dismiss the petition as untimely pursuant to the 90-day rule. The motion to dismiss was unopposed by petitioner.

Pursuant to *N.J.A.C.* 1:1-12.2(c) opposition to a motion shall be filed no later than 10-days after receiving the moving papers. No action may be taken on the motion until 20-days after service of moving papers. The moving papers were mailed first class to all concerned on February 12, 2004. (See proof of service attached to moving papers). Petitioner has been afforded ample opportunity to respond. The motion must be decided within 45-days of submission. *N.J.A.C.* 1:1-12.5(c)

FACTS AND ARGUMENTS ASSERTED BY PETITIONER

In its supporting certification with exhibits, counsel for the District sets forth the following:

2. For good cause, respondent resolved to withhold petitioner's increment for the 2004-2005 school year on May 8, 2003, under authority granted them by *N.J.S.A.* 18A:29-14.

3. This resolution was the final action of respondent in connection with this matter and was communicated to petitioner by letter dated May 9, 2003.

4. Petitioner has admitted that she learned of the withholding on May 8, 2003. [Exhibit A]

5. *N.J.A.C.* 6A:3-1.3(d) requires a petitioner to file his or her petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or any other action by the district board of education which is the subject of the requested contested case hearing.

6. Ninety days from May 8, 2003, is August 6, 2003.

7. On August 15, 2003, petitioner filed a deficient petition of appeal with the Department of Education, Bureau of Controversies and Disputes (the "Bureau"). [Exhibit B]

8. On October 15, 2003, the Bureau acknowledged that respondent received Proof of Service correcting petitioner's deficiency, and proof of service on respondent on September 18, 2003 (130 days after final action). [Exhibit C]

9. Respondent filed its answer which was received by the Bureau on November 7, 2003, and by the petitioner on November 6, 2003.

10. The First Separate Defense of respondent's Answer stated that petitioner was time-barred for failing to timely comply with *N.J.A.C.* 6A:3-1.3(d).

11. Petitioner filed her response to respondent's Answer on January 8, 2004.

12. Her response to the First Separate Defense was as follows:

> My defense here is that I was so beaten down by the proliferation of advisements and their delivery at times which added to the stress which was being exerted on my [*sic*] by Dr. First that it took me some time to be able to reflect on my school year and to decide that I needed to file and appeal to the State. [Exhibit E]

13. The Commissioner of education has consistently held that the 90 day filing requirement is to be strictly construed and that "a showing of emotional stress alone, without the showing of circumstances amounting to genuine incapacity, is not enough to toll the time limit for appeal." [1] (Not to belittle the natural grief and stress induced by the passing of a loved one, it is also noted that petitioner attended the first day of the school year despite the fact that her sister had recently died and she had not yet attended the funeral. [Exhibit F].

14. The New Jersey Supreme Court has held that this 90 day "...limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws." [2]

15. In its Second Separate Defense, respondent argues that petitioner has not met any of the extraordinary circumstances for relaxing the rules governing controversies and disputes, *N.J.A.C.* 6A:3-1.1.6 and expand the time for filing her petition.

16. "The Commissioner has not only relaxed the ninety-day rule for substantial constitutional issues, but has also relaxed the bar in maters [*sic*] of significant public interest. The Commissioner has consistently determined, however, that to qualify as a matter of significant public interest, warranting waiver of the time bar the issue must be of 'fundamental

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[1] *Carol Unangst v. Board of Education of the Township of Redon, Sussex County*, OAL DKT. No. EDU 9828-98, Agency DKT. No. 434-9/98, decided May 1, 2003.

[2] *Kaprow v. Board of Education of Berkeley Township*, 131 N.J. 572, 583 (N.J. 1993)

public interest beyond that of concern only to the parties themselves." [internal citations omitted.][3]

17. Respondent argues that petitioner's appeal of the withholding of her increment is not constitutional and is of concern only to petitioner, and therefore does not warrant relaxing the 90-day rule for filing.

18. Since there was no valid reason for the delay in filing and no extraordinary circumstance or significant public interest to allow waiver, respondent respectfully requests that petitioner's petition be dismissed because it was procedurally defective and untimely filed.

See Certification of Gary D. Wodlinger, Esq. attached to District's motion.

LEGAL ANALYSIS AND DISCUSSION

N.J.A.C. 6A:3-1.3(d) prescribes that an appeal to the Commissioner must be filed "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 which is the subject of the requested contested hearing." The 90-day rule "provides a measure of repose, an essential element in the proper and efficient administration of the school laws." *Kaprow v. Board 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 cannot be challenged after ninety days." *Ibid.* Prompt filing of actions before the Commissioner serves to preserve the immediacy of the record and to stabilize existing relationships, thereby avoiding disruption of the educational process. *Le Mee* v. *Bd. of Educ. of Village of Ridgewood*, OAL Dkt. No. 6889-89 (Comm'r. May 3, 1990).

The Commissioner may exercise his authority under *N.J.A.C.* 6A:3-1.1.6 to relax application of the 90-day rule "where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." Exceptions to the 90-day rule should be granted sparingly, and only where there exist compelling circumstances to justify enlargement or relaxation of the time limit. See *Riely v. Board. of Educ. of Hunterdon Cent. High Sch. Dist*, 173 *N.J. Super.* 109 (App. Div. 1980). *Bogart v. Bd. of Educ. of East Orange*, OAL Dkt. No. EDU

[3] *Osman v. Board of Education of the Township of Delran, Burlington County*, Superior Court of New Jersey, Appellate Division, Docket No. A-439-02T5, Decided October 10, 2003.

6248-02 (Decided Jan. 26, 1983) *aff'd Comm. of Ed.* (March 14, 1983). If the rule were relaxed every time that a harsh result occurred, then the rule and its salutary public policy of encouraging prompt resolution of disputes would be nullified. *Pacio v. Bd. of Educ. of Lakeland Reg. High Sch. Dist.*, 1989 *S.L.D.* 2060 (Comm'r July 29, 1989). Equitable considerations which might allow relaxation of the rule include good faith discussions between parties to resolve the dispute, *Polaha v. Buena Reg. Sch. Dist.*, 212 *N.J. Super.* 628 (App. Div. 1986). The statute of limitations of *N.J.A.C.* 6A:3-1.3(d) is to be strictly applied. *Gordon v. Passaic Bd. of Educ.*, 1 875 S.L.D. 1929, *aff'd* A-3294-84T7 (App. Div. May 27, 1986) (unreported), *certif.. denied*, 105 N.J. 534 (1986); *Elmwood Park Bd. of Educ. V. Farrell*, 95 *N.J.A.R.*2d (EDU) 375, 377. The ninety day rule may only be relaxed under exceptional circumstances or if there is a compelling reason to do so. See *Kaprow, supra*, 131 *N.J.* at 590; *DeMaio v. New Providence Bd. of Educ.*, 96 *N.J.A.R.*2d (EDU) 449, 453. The authority to relax or waive the ninety day rule is rarely invoked and such relaxation is generally unsuccessful unless strict adherence would be in appropriate, unnecessary or where injustice would occur. *DeMaio, supra*, 96 *N.J.A.R.*2d (EDU) at 453.

In *Bogart, supra,* it was held that the ninety-day rule will be relaxed "only where there is come compelling reason for the same, such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties themselves." *Id.*, at 4.

Here, petitioner accrued knowledge of her claim on May 8, 2003, filed a deficient appeal with the Commissioner on August 15, 2003, (99-days) and served the District on October 15, 2003, (130-days) the petition. These facts are unopposed. They are derived from petitioners written submissions to the District or the Commissioner and are appended to the Districts motions papers as exhibits A, B, C and E. Since the motion is unopposed, exceptions to the 90-days rule have not been directly raised. However, after reviewing the appeal and having participated in the prehearing conference, the case does not raise constitutional issues or significant public interest matters that would justify relaxation of the 90-rule. (See prehearing Order dated February 2, 2004). Respondent raised that untimely appeal in its answer and during the prehearing conference. Respondent stated that it was going to file a dispositive motion. (See

paragraph 13, prehearing Order). Petitioner was provided sufficient notice and an opportunity to oppose this motion.

I **FIND** and **CONCLUDE** that the facts as set forth by the District are credible and reliable. The facts are derived and supported by written communications from petitioner. They demonstrate that petitioner filed her appeal out of time pursuant to *N.J.A.C.* 6A:3-1.3(d) (90-day rule). Since the motion was unopposed there in no basis to relax the time limitations.

ORDER

For the reasons set forth above, it is **ORDERED** that the District's motion to dismiss the appeal 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 (45) 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 (13) 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, 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.

3-16-04
DATE

W. TODD MILLER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

3/17/04
DATE

Mailed to Parties:

MAR 31 2004
DATE

DIRECTED BY
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sd

DOCUMENTS RELIED UPON

Prehearing order dated February 2, 2004

Respondent's motion papers with exhibits filed with the OAL on February 17, 2004

Petitioners and Respondent's pleadings attached to the transmittal

OAL DKT. NO. EDU 8679-03
AGENCY DKT. NO. 294-8/03

SARAH DICKERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PITTSGROVE, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4(a), in that the Initial Decision was mailed to the parties on March 31, 2004 and the exceptions were filed on April 14, 2004, outside the 13-day period prescribed by regulation. Accordingly, neither the exceptions nor the reply thereto is considered in the Commissioner's determination of this matter.

Upon careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge that this matter is untimely, pursuant to *N.J.A.C.* 6A:3-1.3(d), and there is nothing herein which warrants relaxation of the filing requirement. *N.J.A.C.* 6A:3-1.16.

Accordingly, the Initial Decision is adopted for the reasons expressed therein and amplified above. The Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/03/04

Date of Mailing: 5/03/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

191-04

EUGENE LEGGETT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

April 15, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4207-03

AGENCY DKT. NO. 72-3/03

EUGENE LEGGETT,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

Arnold M. Mellk, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Thomas W. Sumners, Jr., for respondent (Sumners, George & Dortch, attorneys)

Record Closed: February 2, 2004 Decided: February 24, 2004

BEFORE **STEVEN C. REBACK**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 13, 2003, 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.

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 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 (45) 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.

2/25/04
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

3-1-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

RECEIVED
STATE OF NEW JERSEY
2004 FEB -2 A 11:56

SUMNERS GEORGE
A Professional Corporation
849 West State Street
Trenton, NJ 08618
(609) 393-6604
Attorneys for Respondent, Trenton Board of Education

EUGENE LEGGETT, Petitioner, v. TRENTON CITY BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY Agency Docket No.: 72-3/03 OAL Docket No.: EDUOR 4207-03 ***STIPULATION OF SETTLEMENT***

The parties to the within matter agree that the matter shall be deemed settled and resolved, subject to the following terms and conditions:

1. It is agreed that Petitioner, Eugene Leggett, cannot be assigned any duties with respect to reading instruction during his employment with the Respondent, Trenton Board of Education, unless he possesses an appropriate teaching certificate in accordance with ***N.J.S.A.*** 18A:26-2 and ***N.J.A.C.*** 6:11-6.1 et. seq.

2. The parties agree that they have considered the merits of each other's position and agree that there is no admission of any wrongful conduct on either party.

3. The parties agree that each and every term of this agreement is material and an integral part of this agreement.

4. The Petitioner agrees to dismiss his Petition of Appeal in consideration for the Respondent's agreement that it will not longer assign him to duties with respect to reading instruction with the Trenton School District unless he possesses the appropriate valid teaching certificate as set forth above.

5. The parties agree that this agreement must be approved by Administrative Law Judge Steven C. Reback and the Commissioner of Education and that if either rejects any term or condition of this agreement, this agreement shall be deemed null and void and this matter shall remain or be returned to the Office of Administrative Law for resumption of the proceedings as a contested case.

6. The parties agree that this settlement is entered into voluntarily, without duress, and there are no other promises, agreements, or expectations that are not set forth herein.

Arnold M. Mellk, Esq.
Petitioner's Attorney

Eugene Leggett
Petitioner

Melvin L. Wyns
Secretary, Trenton Board of Education

Joyce M. Kersey
President, Trenton Board of Education

OAL DKT. NO. EDU 4207-03
AGENCY DKT. NO. 72-3/03

EUGENE LEGGETT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, although the Commissioner has no objection to the terms of the settlement, he notes that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the proposed settlement pursuant to *N.J.A.C.* 6A:3-1.13(d), nor was the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation.

Accordingly, the Commissioner is compelled to reject the proposed settlement and he hereby remands this matter to the OAL for expansion of the record, consistent with the concerns set forth above.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/15/04

Date of Mailing: 4/30/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

206-04

#206-04

V.C.M., on behalf of minor child, V.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

May 12, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4606-03
AGENCY DKT. NO. 215-6/03

V.C.M., O/B/O MINOR CHILD V.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE WEST WINDSOR PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY,
Respondent.

V.M., father of petitioner *pro se*,

James F. Schwerin, Esq., appearing for respondent, (Parker, McCay & Crisculo, P.A. attorney)

Record Closed: March 30, 2004 Decided: March 30, 2004

BEFORE **ISRAEL D. DUBIN**, ALJ:

This matter was transmitted to the Office of Administrative Law (hererinafter "OAL") on August 15, 2002, 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. It was scheduled for a hearing for June 23, 2003, at the OAL, Trenton, N.J. or that date the parties met and negotiated the matter.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1) after being placed under oath the parties stated that they understood and agreed to the terms of the matter.

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, as well as their testimony under oath.

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 (45) 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.

March 30, 2004
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

April 1, 2004
DATE

K Duncan (yb)
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 0 5 2004
DATE

Laura Sanders
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

Idd/mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement Agreement

Law Offices
PARKER McCAY & CRISCUOLO P.A.
1009 Lenox Drive
Building Four East
Suite 102A
Lawrenceville, NJ 08648
(609) 896-4222
Attorneys for West Windsor-Plainsboro
Regional School District

RECEIVED
2004 MAR 19 A 10: 28
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

V.C.M. o/b/o V.C.M. Petitioner vs. WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRIST, Mercer County Respondent	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency No. 215-6/03 SETTLEMENT AGREEMENT

IT IS HEREBY AGREED by and between the parties to this matter that it is settled pursuant to the terms placed on the record before the Hon. Israel Dubin, A.L.J., on August 19, 2003, which are as follows:

The total sum due and owing from the Mercandetti family ("Mercandetti") to the Board of Education ("Board") for tuition is $2,800, to paid as follows:

1. $250 to paid not later than August 22, 2003.

2. The remaining amount shall be paid in 24 equal installments of $106.25 due by the 10th of each month, with a grace period to the 20th of each month, the first payment due September 10, 2003.

3. Should any payment not be received by the 20th of the month in question, the Board will send a letter to Mercandetti. If payment is not received within 10 days of the date of such letter, the Board may proceed with such legal proceedings as it sees fit to collect the total sum outstanding without further notice to Mercandetti.

West Windsor Plainsboro Regional Board of Education

Vincent C. Mercandetti

Vincent Mercandetti

by: Stephen Smith, President

LS

OAL DKT. NO. EDU 4606-03
AGENCY DKT. NO. 215-6/03

V.C.M., on behalf of minor child, V.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the President of the West Windsor Plainsboro Board of Education signed the Settlement Agreement on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf, and the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Moreover, the Commissioner observes that the settlement included with the Initial Decision sets forth terms that were to be effectuated prior to approval of the settlement terms by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. The ALJ and the parties are cautioned against effectuating terms of a settlement agreement in controverted matters that have been duly transmitted to the OAL prior to its submission to, and approval by, the Commissioner.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/12/04

Date of Mailing: 5/13/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

208-04

#208-04

SUNDEE C. CATHEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

May 14, 2004

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

May 14, 2004

Charles I. Auffant, Esq.
661 Franklin Avenue
Nutley, NJ 07110

Harvey C. Johnson, Esq.
228 Cooper Street
Camden, NJ 08102

SUNDEE C. CATHEY Complete Copy OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY, AGENCY D of Commissioner's Decision). EDU 6589-03

Dear Parties:

We are enclosing a co sioner of Education dated, May 14, 2004, in the above-captioned matter. Ap ; other than State Department of Education employee contractual determinati / Jersey State Interscholastic Athletic Association, may be filed with the State Boa C. 6A:4-1.1 et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan (DNA)
M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/dec ltr/CatheyLawnside.doc
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library
OAL Clerk

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6589-03
AGENCY DKT. NO. 218-6/03

SUNDEE C. CATHEY,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,
Respondent.

Charles I. Auffant, Esq., for petitioner
Harvey C. Johnson, Esq., for respondent

Record Closed: March 22, 2004 Decided: March 30, 2004

BEFORE **JOSEPH LAVERY**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 18, 2003, 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, 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 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 (45) 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.

March 30, 2004
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

4-2-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 05 2004
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This is a Settlement Agreement and Mutual Release dated as of February 27, 2004, by and between (i) Borough of Lawnside, Board of Education and its present and former directors, officers, employees, agents, administrators, legal representatives, predecessors, successors, and assigns **thereof** (collectively **"Lawnside BOE"**) and (ii) Sundee C. Cathey and her respective heirs, executors, administrators, legal representatives, predecessors, successors, and assigns thereof **("Cathey"**):

In consideration of (i) **Cathey** agreeing to dismiss the pending proceeding before the Department of Education; (ii) the following Mutual Release hereby granted to **Lawnside BOE** by **Cathey**, (iii) a reference letter ("Reference Letter") from Lawnside BOE indicating Cathey's (a) start date and end date; (b) title of her position (c) duties; and (iv) for other good and valuable consideration, receipt of which is hereby acknowledged, **Lawnside BOE** hereby releases, discharges, and waives any and all claims and causes of action, whether asserted or unasserted and whether known or unknown, arising from or associated with the facts and circumstances set forth in the case entitled ***Sundee C. Cathey v. Boro of Lawnside, BOE Camden County before the Office of Administrative Law, OAL Docket No. EDVOR 06589-20038.***

In consideration of **Lawnside BOE;**

(i) giving Petitioner a reasonable opportunity to respond to the Observations that were conducted prior to her voluntary termination of employment;

(ii) appending such response to the applicable Observation and including such response in her employment file;

(iii) providing a reference letter ("Reference Letter")(draft copy is attached) to be used in connection with any third party request for employment information;

(iv) giving Petitioner an original execution copy of such Reference Letter and retaining an original execution copy in Respondent's files;

(v) providing Petitioner with a complete copy of her personnel and employment file;

(vi) return of the Lawnside Public School Teacher's Observation Report dated October 23, 2002 to its original form.

(vi) the release of Cathey from any further liability to Lawnside BOE arising from the facts and circumstances set forth in the Petition, and

(vii) for other good and valuable consideration, receipt of which is hereby acknowledged,

Cathey, hereby releases, discharges, and waives any and all claims and causes of action, whether asserted or unasserted and whether known or unknown, arising from or associated with that the facts and circumstances set forth in the case entitled ***Sundee C. Cathey v. Boro of Lawnside, BOE Camden County before the Office of Administrative Law, OAL Docket No. EDVOR 06589-20038***.

This Settlement Agreement and Mutual Release shall be binding upon the **Borough of Lawnside, Board of Education**, and its partners, principals, employees, agents, and attorneys, and the heirs, executors, administrators, legal representatives, predecessors, successors, and assigns of all of the foregoing; and **Sundee C. Cathey** and her respective heirs, executors, administrators, legal representatives, predecessors, successors, and assigns of all of the foregoing.

This Settlement Agreement and Mutual Release and may not be changed, amended, modified or altered, except in a writing signed by both **Lawnside BOE** and **Sundee C. Cathey.**

Each party shall bear its own costs, fees (including attorney fees) in connection with prosecution or defense of this matter.

This Settlement Agreement and Mutual Release has been executed pursuant to the laws of the State of New Jersey and shall be construed in

3

accordance with the laws of the State of New Jersey, without regard to its conflict of laws principles.

IN WITNESS WHEREOF, the undersigned have caused this Settlement Agreement and Mutual Release to be effective as of the date first above written.

By: Sundee C. Cathey
Sundee C. Cathey

Date: 2-26-04

T. Sandler
Witness

Borough of Lawnside, Board of Education

By: Cassandra T. Brown

Date: 3/17/04

Mary C. Johnson
ATTEST

OAL DKT. NO. EDU 6589-03
AGENCY DKT. NO. 218-6/03

SUNDEE C. CATHEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that an unidentified individual, Cassandra Brown, signed the Settlement Agreement and Mutual Release on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating Cassandra Brown to sign the agreement on its behalf, and the agreement is not signed by the Board attorney,[1] who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Moreover, Item Number iii refers to a reference letter to be used in connection with any third party request for employment information. Although Item Number iii states that

[1] The Board attorney's signature appears on the Settlement Agreement and Mutual Release only as a witness.

the draft copy of this letter is attached to the agreement, there is no such letter attached to the Settlement Agreement and Mutual Release.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement and Mutual Release consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/14/04

Date of Mailing: 5/14/04

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

#208-04

SUNDEE C. CATHEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

May 14, 2004

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

May 14, 2004

Charles I. Auffant, Esq.
661 Franklin Avenue
Nutley, NJ 07110

Harvey C. Johnson, Esq.
228 Cooper Street
Camden, NJ 08102

SUNDEE C. CATHEY V. BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY, AGENCY DKT. NO. 218-6/03, OAL DKT. NO. EDU 6589-03

Dear Parties:

We are enclosing a copy of the decision of the Commissioner of Education dated, May 14, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/dec ltr/CatheyLawnside.doc
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library
OAL Clerk

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6589-03
AGENCY DKT. NO. 218-6/03

SUNDEE C. CATHEY,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,
Respondent.

Charles I. Auffant, Esq., for petitioner
Harvey C. Johnson, Esq., for respondent

Record Closed: March 22, 2004 Decided: March 30, 2004

BEFORE **JOSEPH LAVERY**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 18, 2003, 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, 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 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 (45) 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.

March 30, 2004
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

4-2-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 05 2004
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This is a Settlement Agreement and Mutual Release dated as of February 27, 2004, by and between (i) Borough of Lawnside, Board of Education and its present and former directors, officers, employees, agents, administrators, legal representatives, predecessors, successors, and assigns **thereof** (collectively **"Lawnside BOE"**) and (ii) Sundee C. Cathey and her respective heirs, executors, administrators, legal representatives, predecessors, successors, and assigns thereof **("Cathey")**:

In consideration of (i) **Cathey** agreeing to dismiss the pending proceeding before the Department of Education; (ii) the following Mutual Release hereby granted to **Lawnside BOE** by **Cathey**, (iii) a reference letter ("Reference Letter") from Lawnside BOE indicating Cathey's (a) start date and end date; (b) title of her position (c) duties; and (iv) for other good and valuable consideration, receipt of which is hereby acknowledged, **Lawnside BOE** hereby releases, discharges, and waives any and all claims and causes of action, whether asserted or unasserted and whether known or unknown, arising from or associated with the facts and circumstances set forth in the case entitled ***Sundee C. Cathey v. Boro of Lawnside, BOE Camden County before the Office of Administrative Law, OAL Docket No. EDVOR 06589-20038.***

2004 MAR 22 P 12:18

In consideration of **Lawnside BOE;**

(i) giving Petitioner a reasonable opportunity to respond to the Observations that were conducted prior to her voluntary termination of employment;

(ii) appending such response to the applicable Observation and including such response in her employment file;

(iii) providing a reference letter ("Reference Letter")(draft copy is attached) to be used in connection with any third party request for employment information;

(iv) giving Petitioner an original execution copy of such Reference Letter and retaining an original execution copy in Respondent's files;

(v) providing Petitioner with a complete copy of her personnel and employment file;

(vi) return of the Lawnside Public School Teacher's Observation Report dated October 23, 2002 to its original form.

(vi) the release of Cathey from any further liability to Lawnside BOE arising from the facts and circumstances set forth in the Petition, and

(vii) for other good and valuable consideration, receipt of which is hereby acknowledged,

Cathey, hereby releases, discharges, and waives any and all claims and causes of action, whether asserted or unasserted and whether known or unknown, arising from or associated with that the facts and circumstances set forth in the case entitled ***Sundee C. Cathey v. Boro of Lawnside, BOE Camden County before the Office of Administrative Law, OAL Docket No. EDVOR 06589-20038***.

This Settlement Agreement and Mutual Release shall be binding upon the **Borough of Lawnside, Board of Education**, and its partners, principals, employees, agents, and attorneys, and the heirs, executors, administrators, legal representatives, predecessors, successors, and assigns of all of the foregoing; and **Sundee C. Cathey** and her respective heirs, executors, administrators, legal representatives, predecessors, successors, and assigns of all of the foregoing.

This Settlement Agreement and Mutual Release and may not be changed, amended, modified or altered, except in a writing signed by both **Lawnside BOE** and **Sundee C. Cathey.**

Each party shall bear its own costs, fees (including attorney fees) in connection with prosecution or defense of this matter.

This Settlement Agreement and Mutual Release has been executed pursuant to the laws of the State of New Jersey and shall be construed in

accordance with the laws of the State of New Jersey, without regard to its conflict of laws principles.

IN WITNESS WHEREOF, the undersigned have caused this Settlement Agreement and Mutual Release to be effective as of the date first above written.

By: Sundee C. Cathey
Sundee C. Cathey

Date: 2-26-04

Witness

Borough of Lawnside, Board of Education

By: Cassandra T. Brown

Date: 3/17/04

ATTEST

OAL DKT. NO. EDU 6589-03
AGENCY DKT. NO. 218-6/03

SUNDEE C. CATHEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that an unidentified individual, Cassandra Brown, signed the Settlement Agreement and Mutual Release on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating Cassandra Brown to sign the agreement on its behalf, and the agreement is not signed by the Board attorney,[1] who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Moreover, Item Number iii refers to a reference letter to be used in connection with any third party request for employment information. Although Item Number iii states that

[1] The Board attorney's signature appears on the Settlement Agreement and Mutual Release only as a witness.

the draft copy of this letter is attached to the agreement, there is no such letter attached to the Settlement Agreement and Mutual Release.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement and Mutual Release consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/14/04

Date of Mailing: 5/14/04

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

209-04

#209-04

A.C., on behalf of minor child, K.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MT. EPHRAIM, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

May 14, 2004

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

May 14, 2004

Anthony Coan, Pro Se
12 George Street
Mount Ephraim, NJ 08059

Frank P. Cavallo, Esq.
Parker, McCay & Criscuolo
Three Greentree Centre, Suite 401
Route 73 & Greentree Road
Marlton, New Jersey 08053

A.C., ON BEHALF OF MINOR CHILD, K.C. V. BOARD OF EDUCATION OF THE BOROUGH OF MOUNT EPHRAIM, CAMDEN COUNTY, AGENCY DKT. NO. 375-10/03, OAL DKT. NO. EDU 8874-03

Dear Parties:

We are enclosing a copy of the decision of the Commissioner of Education dated, May 14, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/dec ltr/ACMtEphraim.doc
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library
OAL Clerk

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8874-03
AGENCY DKT. NO. 375-10/03

A.C. o/b/o MINOR CHILD, K.C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MT. EPHRAIM, CAMDEN COUNTY,
Respondent.

A.C., petitioner, *pro se*

Frank P. Cavallo, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: March 15, 2004 Decided: March 30, 2004

BEFORE **JOSEPH F. MARTONE**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 12, 2003, 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. It was assigned to me on December 30, 2003, and I scheduled a telephone prehearing conference for February 3, 2004.

During the scheduled telephone prehearing conference, the parties agreed to a settlement of the matter. A Settlement Agreement has been prepared 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 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 (45) 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.

March 30, 2004
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

April 1, 2004
DATE

K Duncan (JB)
DEPARTMENT OF EDUCATION

APR 05 2004
DATE

Mailed to Parties:
Laura Sanders
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mph

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PARKER, MCCAY & CRISCUOLO
Three Greentree Centre, Suite 401
Route 73 & Greentree Road
PO Box 974
Marlton, New Jersey 08053
Attorneys for Respondent, Board of Education of the Borough of Mount Ephraim

ANTHONY COAN, on behalf of minor, child, Kristal Coan,	:	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY**
Petitioner,	:	
vs.	:	**AGENCY DOCKET NO. 375-10/03**
	:	**OAL DOCKET NO. EDUOS-08874-2003S**
BOARD OF EDUCATION OF THE BOROUGH OF MOUNT EPHRAIM,	:	**CIVIL ACTION**
	:	**SETTLEMENT AGREEMENT**
Respondent.	:	

WHEREFORE, the Petitioner, Anthony Coan, on behalf of his minor daughter, Kristal Coan, filed a Petition of Appeal with the Department of Education on or about October 14, 2003;

WHEREFORE, the Petition of Appeal sought payment of the costs of Kristal Coan's attendance at the Gloucester County Institute of Technology, Southern New Jersey Academy of Performing Art;

WHEREFORE, the Respondent, Borough of Mount Ephraim Board of Education filed an Answer on or about November 3, 2004, contesting the Petitioner's right to attend the

Gloucester County Institute of Technology.

WHEREFORE, the parties entered into settlement negotiations in an effort to resolve the outstanding issues;

NOW THEREFORE, IT IS on this 27th day of February 2004 AGREED as follows:

1. The Respondent, Borough of Mount Ephraim Board of Education, agrees to be financially responsible for the tuition charged by Gloucester County Institute of Technology for Kristal Coan's attendance at Gloucester County Institute of Technology Southern New Jersey Academy of the Performing Arts from January 1, 2004 through the remainder of the 2003-04 school year and continuing thereafter until Kristal Coan either graduates from the Gloucester County Institute of Technology or is no longer a resident of the Borough of Mount Ephraim School District.

2. The Petitioner, Anthony Coan will be responsible for tuition for Kristal Coan's placement at the Gloucester County Institute of Technology from September 1, 2003 through and including December 31, 2003.

3. The Petitioner, Anthony Coan shall be responsible for transporting Kristal Coan to and from the Gloucester County Institute of Technology. The Respondent, Borough of Mount Ephraim Board of Education shall bare no responsibility for Kristal Coan's transportation.

4. The Respondent, Borough of Mount Ephraim Board of Education shall reimburse Anthony Coan for one month's tuition covering the month of January, 2004, upon presentation of proof that the tuition had been paid directly by Anthony Coan to the

Gloucester County Institute of Technology.

We hereby agree to the terms and conditions set forth above.

ANTHONY COAN, Individually and
on behalf of his minor daughter, Kristal Coan

_____
, President
Borough of Mount Ephraim Board of Education

Gloucester County Institute of Technology.

We hereby agree to the terms and conditions set forth above.

ANTHONY COAN, Individually and
on behalf of his minor daughter, Kristal Coan

Kathryn E. Cain
, President
Borough of Mount Ephraim Board of Education

LAW OFFICE
PARKER, McCAY &
CRISCUOLO, P.A.

3d

OAL DKT. NO. EDU 8874-03
AGENCY DKT. NO. 375-10/03

A.C., on behalf of minor child, K.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MT. EPHRAIM, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the President of the Mr. Ephraim Board of Education signed the Settlement Agreement on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf, and the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/14/04

Date of Mailing: 5/14/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

#210-04

D.H., on behalf of minor children, B.M. and B.H., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent challenged the Board's residency determination that her children, B.M. and B.H., were not entitled to a free public education in the District for the 2002-03 and 2003-04 school years.

The ALJ concluded that petitioner, who claimed to be homeless, failed to sustain her burden of proof that B.M. and B.H. were domiciled in the District or that the District was the district of residence. The ALJ dismissed the petition and ordered petitioner to reimburse respondent the tuition owed.

The Commissioner adopted the Initial Decision as his own and directed payment for the period of B.M. and B.H.'s ineligible attendance in the District.

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

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

JAMES E. McGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

May 14, 2004

Dawn Hart, Pro Se
P. O. Box 2070
Livingston, NJ 07039

Rita F. Barone, Esq.
Purcell, Ries, Shannon, Mulcahy & O'Neill
One Pluckemin Way – Box 754
Bedminster, NJ 07921

D.H., ON BEHALF OF MINOR CHILDREN, B.M. AND B.H. V. BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY, AGENCY DKT. NO. 317-9/03, OAL DKT. NO. EDU 9659-03

Dear Parties:

We are enclosing a copy of the decision of the Commissioner of Education dated, May 14, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/dec ltr/DHSoOrange-Maplewood.doc
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY JUDGMENT

OAL DKT.NO. EDU 09659-03

AGENCY DKT. NO. 317-9/03

D.H., ON BEHALF OF MINOR CHILDREN, B.M., AND B.H.,

Petitioners,

v.

BOARD OF EDUCATION OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,

Respondents.

D.H., *pro se*

Rita F. Barone, Esq., (Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys) for respondent

Record Closed: March 17, 2004 Decided: April 1, 2004

BEFORE **CAROL I. COHEN**, ALJ:

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

The petitioner (D.H.) appealed from a decision on June 25, 2003, by the Board of Education of South Orange-Maplewood, Essex County, (respondent)

that B.H. and B.M. were not entitled to be educated in the District, because they had not provided proof of residency. The petitioner did not appear at the Board hearing scheduled for June 25, 2003. The petitioner filed an appeal with the Commissioner of Education on September 8, 2003 alleging that she was homeless, she was staying with family and friends and she planned to move back into the District. The matter was forwarded to the Office of Administrative Law (OAL) on October 17, 2003. It was set down for a hearing on March 16, 2004. On February 26, 2004 the respondent filed a Motion for Summary Decision. The District asked that the petitioner's Residency Appeal be dismissed with prejudice and that the petitioner reimburse the respondent for tuition for the 2002-2003 and 2003-2004 school year.

The attorney for the respondent appeared on the date of the hearing. The petitioner failed to appear. The attorney for the District stated that the Motion for Summary Decision had been sent both certified and regular mail to the petitioner. The regular mail was not returned. The certified mail was returned "Unclaimed". The court sent a letter to the petitioner on November 21, 2003, stating that a hearing would be held on March 16, 2004. The letter also stated that if either party wished to have a conference prior to the hearing, then they should contact my office. The letter was not returned and no response was forthcoming. In addition, the clerk's office sent out a hearing notice on January 6, 2004. At the hearing, the respondent requested that the petitioner's appeal be dismissed and that the relief sought by the respondent be granted. The court stated that it would hold the file for twenty-four hours, and if the petitioner failed to make contact, then it would entertain the respondent's application. At 2:30 p.m., on the day of the hearing, the petitioner called my chambers. She stated that her father had died a few days before and that the funeral had been that morning. I asked her, why she had not notified the court and her adversary before the court date to explain why she could not attend the hearing. She said that she was too distraught to do so. I pointed out that she had a history of not responding to hearing notices. She said that she had not appeared at the Board's hearing, because she had a disabled infant. I asked her if she had gotten the Motion for

Summary Decision from the District. She said that it was sent to her brother's house and she had just gotten it a week ago. She did not believe that she had to respond to the papers prior to the hearing. I stated that, since she did not have an attorney, I had not considered the motion prior to the hearing. However, she had not appeared at the hearing or notified the court that she would not attend. I informed D.H. that, prior to my considering whether I would reschedule the matter, I would need a notarized letter from the Funeral Home, stating that her father had died and the date of the funeral. It has been two weeks since the hearing date and the telephone call and I have not received a statement from the funeral home or D.H.

ISSUES AND LEGAL DISCUSSION

1. Whether the petitioner has sustained her burden of proof that B.M. and B.H. were domiciled in the South Orange-Maplewood School District, kept in a home and supported by another domiciled in the District or homeless and the District is the "district of residence"?

2. Whether the District is entitled to tuition reimbursement for the years 2002-2003 and 2003-2004?

The petitioner has the burden to produce documentation that her children were residents of the District, during the time in question. See *N.J.S.A.* 18A:38-1(b)(2). In most cases the domicile of the student is the same as the parent. *I.P. v. Board of Education of the Borough of Leonia,* 93 *N.J.A.R.*2d(EDU) 128, 132(1993); *B.W. v. Board of Education of the School District of South Orange-Maplewood*, OAL Docket No. (EDU) 01837-03. Since the District determined that B.M. and B.H. were not domiciled in the District, the petitioner had the burden, by a preponderance of the evidence, to show that the students were domiciled within the District. The petitioner failed to produce any proof, either in response to the Summary Decision Motion, or at the hearing that the children were either domiciled in the District or that they were homeless and South Orange-Maplewood was the District of residence prior to their homelessness.

Therefore, the court must find that the petitioner failed to sustain her burden of proof that the children are entitled to a free public education within the District.

Having found that the petitioner was not a resident of the District, the issue of the District's application for tuition reimbursement must be addressed. The respondent produced an Affidavit of Peter Horoschak, Superintendent of the South Orange-Maplewood School District. According to the Affidavit, the tuition for students attending Columbia High School was $10,001.00 per child for the 2002-2003 school year. The per diem cost for the 2003-2004 is $53.96 per child. In addition, each child attended a summer school program for the period of July 1 through August 7, 2003 for a total cost of $2,106.40 (See Supplemental Affidavit of Tiffani Barnes). Pursuant to *N.J.S.A.* 18A:38-1(b)(2), a District is entitled to reimbursement of tuition, if the student is attending school in the District and not domiciled there.

The rules governing practice in the OAL provide that a Motion for Summary Decision may be granted, if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. This provision mirrors the language of Rule 4:46-2 and the Supreme Court's decision in *Judson v. Peoples Bank and Trust Co. of Westfield,* 17 *N.J.* 67 (1954). Under *N.J.A.C.* 1:1-12.5(b), the determination to grant Summary Decision 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. *See Brill v. Guardian Life Insurance Co. of America,* 142 N.J. 520, 523 (1995). The petitioner has failed either by submitting a reply certification or through testimony at the hearing to provide any proof that B.M. and B.H. were domiciled in the District or had been domiciled there prior to their homelessness. Therefore, the petitioner has failed to raise a genuine issue of fact.

CONCLUSION

For the reasons previously stated, I therefore, **CONCLUDE,** that the petitioner has failed to sustain her burden of proof that B.M. and B.H. are domiciled in the District or that the District is the District of residence. I further **CONCLUDE** that respondent is entitled to be reimbursed for the tuition costs for B.M. and B.H. for the 2002-2003 school year at the rate of $10,001.00 per child. Further, they are entitled to reimbursement of the Summer Program tuition in the amount of $2,106.40. Finally, the District is entitled to reimbursement at the rate of $53.96 per day, per student for the 2003-2004 school year.

ORDER

It is hereby **ORDERED** that the petitioner's Residency appeal be dismissed with prejudice.

It is further **ORDERED** that the petitioner reimburse the respondent for tuition for the 2002-2003 school year in the amount of $20,002.00.

It is further **ORDERED** that the petitioner reimburse the respondent for the tuition for the 2003 Summer Program in the amount of $2,106.04.

It is further **ORDERED** that the petitioner reimburse the respondent for the tuition for the 2003-2004 school year at the rate of $53.96 from the first day of the school year until March 16, 2004, which totals 118 days. Based on this rate, the total due per child is $6,367.28 or $12,734.56 for the two children.

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 (45) 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 (13) 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, 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.

4/1/04
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on: 4/1/04

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 5 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

id

OAL DKT. NO. EDU 09659-03
AGENCY DKT. NO. 317-9/03

D.H., on behalf of minor children, B.M. and B.H., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed by the Deputy Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33. No exceptions were filed by the parties.

Upon review, the Deputy Commissioner concurs, for the reasons stated in the Initial Decision, that petitioner has failed to carry her burden of demonstrating B.M. and B.H.'s entitlement to attend school in South Orange-Maplewood free of charge.

Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter. The Petition of Appeal is dismissed, and petitioner is directed to pay to the respondent Board of Education, for the period of B.M. and B.H.'s ineligible attendance in the District, tuition in the amounts set forth by the Administrative Law Judge.

IT IS SO ORDERED. *

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 5/14/04

Date of Mailing: 5/17/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

JAMES E. McGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

May 12, 2004

Manuel R. Andia, Pro Se
114 Clifton Avenue
Clifton, NJ 07011

Anthony D'Elia, Esq.
Chasan, Leyner, Bariso & Lamparello
300 Harmon Meadow Blvd.
Secaucus, NJ 07094-3621

M.R.A., ON BEHALF OF MINOR CHILD, F.R.A. V. BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY, AGENCY DKT.NO. 86-3/03, OAL DKT. NO. EDU 11399-03

Dear Parties:

We are enclosing a copy of the decision of the Commissioner of Education, dated May 12, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/ dec ltr/MRABOEClifton.doc
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library

#204-04

M.R.A., on behalf of minor child, F.R.A.	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning uncle challenged the Board's residency determination that his nephew, F.R.A., was not entitled to a free public education in the District.

The ALJ concluded that petitioner had met his burden of proof under *N.J.S.A.* 18A:38-1b(1) that F.R.A., whose parents reside in Peru, was domiciled in the District and that petitioner was supporting him *gratis* due to family and economic hardships. The ALJ denied the Board's application for tuition reimbursement and ordered that F.R.A. was entitled to a free education in the Clifton Public Schools.

The Commissioner adopted the Initial Decision as his own.

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.

May 12, 2004

STATE OF NEW JERSERY
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11399-03

AGENCY DKT. NO. 86-3/03

M.R.A., ON BEHALF OF MINOR CHILD, F.R.A.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

Respondents.

M.R.A., *Pro se*

Georgea Shikar, Esq., (Chasan, Leyner, Bariso & Lamparello, P.C.) for respondents

Record Closed: March 29, 2004 Decided: March 30, 2004

BEFORE **CAROL I. COHEN**, ALJ:

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

The petitioner, M.R.A. appeals from the denial by the Board of Education of the City of Clifton, Passaic County (respondent) of his application to allow his nephew (F.R.A.) to be educated in the Clifton School System. F.R.A. came to the United States from Peru in February 2003. On March 7, 2003, the petitioner

filed an application on behalf of his nephew for him to attend the Clifton High School. On March 12, 2003, the Board of Education sent a denial letter to the petitioner. The letter stated that the sworn statement submitted by the petitioner did not establish economic and family hardship. On March 13, 2003, the petitioner appealed the decision of the board. On May 21, 2003, the Commissioner granted Summary Judgment to the petitioner. He deemed that, since the board of education had not filed an answer, they had admitted the statements made in the petition. On May 23, 2003, the respondent filed an answer to the original petition. On June 12, 2003, the respondent filed an appeal explaining that, through certain miscommunication, the petition was not forwarded to the Law Firm and that the board staff had been confused as to which employee should forward the document. The appeal asked that the decision of the Commissioner be vacated and the matter be remanded for a hearing. On November 7, 2003, the decision of the Commissioner was vacated and the matter was remanded for a hearing. The matter was filed with the Office of Administrative Law (OAL) on November 26, 2003. A conference call was held on December 26, 2003. At that time the petitioner asked that the original hearing date of January 9, 2004 be adjourned, because he was going to be out of the country. The respondent agreed to the adjournment. The matter was re-listed for March 24, 2004. However, on that day, the court received a phone call. The petitioner stated that he was sick and could not be present at the hearing. The matter was rescheduled for March 29, 2004 and was heard on that date.

ISSUES

1. Whether the petitioner is supporting the child gratis for longer than the school year as required by *N.J.S.A.* 18A:38-1b(1).

2. Whether the child's parents are incapable of supporting or providing care for the child due to a family or economic hardship.

3. Whether or not the District is entitled to tuition reimbursement.

FINDINGS OF FACT

Based on the testimony presented and the documentary evidence submitted, and having had an opportunity to observe the witness and to assess his credibility, I make the following **FINDINGS OF FACT:**

1. M.R.A. came to live in Clifton in 1986. He has owned a home at 114 Clifton Avenue, Clifton, New Jersey for sixteen years.

2. M.R.A. has a nephew, F.R.A., who is presently sixteen years of age and is in the eleventh grade at Clifton High School. F.R.A. has two brothers and two sisters, who live with his parents in Peru.

3. F.R.A.'s father is an engineer by trade, but he has been out of work for six years. From time to time he works as a farmhand. He occasionally comes to the United States illegally in order to earn money. F.R.A.'s mother does not work.

4. Since M.R.A. came to United States, he has sent money back to his family in Peru to help support them, as has his mother. However, two years ago he became unemployed and is no longer able to send money back to Peru to help his family. His brother's family (consisting of seven people) live in a two bedroom, one bathroom home, which is owned by M.R.A.'s mother in Peru.

5. M.R.A. brought two of his nephews to the United States, because his brother could not support his children. F.R.A. began attending the Clifton School System, in March 2003. F.R.A.'s brother, Jose, is handicapped. While Jose originally came to the United States with his brother, his uncle was unable to care for him and sent him back to Peru.

6. M.R.A. and his wife filed separate tax returns this year. M.R.A.'s wife claimed F.R.A. on her tax return as a dependent.

7. The sworn Affidavit signed by F.R.A.'s mother states, under reason for not capable of supporting or providing care for the child due to the following family or economic hardship, "my kid is living with my brother-in-law".

8. In answer to the question in J-1, "How long will the student be residing with the applicant in Clifton?", it states: "Until the parents come from Peru". The petitioner has stated that he intends to file to adopt F.R.A., though he has not done so to date. He expects F.R.A. to remain with him, until he completes college or until he gets married.

9. F.R.A. has not gone back to Peru, since he arrived in the United States. He has no intention to return there.

10. M.R.A.'s mother has made application for her son (F.R.A.'s father) and his family to come from Peru and live in the United States. However, there is no time frame as to when they would come and it could be many years. Even if the parents do come to the United States, M.R.A. expects that F.R.A. will continue to live with him.

11. According to the Affidavit submitted by Karen Perkins, the Business Administrator and Board Secretary, the amount spent in tuition payments for F.R.A. for the 2003 school year was 53 days at $7,509.00 per year for a total of $2,210.63; and for the 2004 school year 113 days at $7,597.00 per year for a total of $4,768.60.

LEGAL DISCUSSION

Public education must be provided free to persons over six and up to twenty years of age, who are domiciled within the School District - *N.J.S.A.* 18A:38-1(a). Under section b(1) of this statute, there are certain requirements for any person who is kept in the home of another person domiciled within school district. These requirements state that:

> The petitioner must show that they are supporting the child gratis and will assume all personal obligations for the child relative to school requirements; that he intends so to keep supporting the child gratuitously for a longer time than merely through the school term ...that the child's parents or guardian are not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The petitioner shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria.

It is correct, as pointed out by the District, that the sworn statement by F.R.A.'s mother does not clearly delineate any economic or family hardship, that would make F.R.A. eligible for a free education within the Clifton School System. However, the testimony given by M.R.A., which I **FIND** to be credible, paints a different picture. According to that testimony, M.R.A.'s brother, the father of F.R.A., has been unemployed for six years and has not been able to find any steady employment. In addition, his wife does not work. All seven members of the household are living together in a two-bedroom home, which is owned by M.R.A.'s mother. The family in United States had been chipping in to give money to F.R.A.'s parents in order to support the family. However, M.R.A. was unable to continue to do that because of his own loss of employment. What money does now go to the family in Peru is used by the rest of the family unit. In addition, while J-1 speaks in terms of F.R.A. staying with M.R.A. until his parents come from Peru, it is clear from the testimony, that this may be a long drawn out process taking over ten years, before they would come to the United States. In

the meantime, F.R.A. would be with M.R.A. and live at his home for many years to come. It is clear from the testimony presented that M.R.A. is supporting F.R.A. gratis and that F.R.A.'s parents do not have the economic ability to support their son and to provide for his needs. Further, it is apparent that F.R.A. did not just come to the United States in order to be educated in the Clifton School System. He also came here because his parents were not able to take care of him, because of their economic situation.

CONCLUSION

Thus, I **CONCLUDE** that the petitioner has met his burden of proof under *N.J.S.A.* 18A:38-1b(1), that F.R.A. is domiciled within the district and that M.R.A. is supporting him gratis and assumes all personal obligations for him. F.R.A.'s parents are incapable of supporting him. I therefore **CONCLUDE** that M.R.A. is providing care for F.R.A. due to family and economic hardships.

ORDER

Based on the foregoing, I hereby **ORDER** that the relief sought by M.R.A. be granted and that F.R.A. is entitled to a free education in the Clifton Public Schools.

I further **ORDER** that the District's application for tuition reimbursement 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 (45) 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 (13) 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, 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.

3/30/04
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on: 3/30/04

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 1 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

id

EXHIBITS

JOINT EXHIBITS:

J-1 Application

J-2 Affidavit

J-3 Application for admission

J-4 Letter from Clifton Board of Education

J-5 Letter to Commissioner

FOR PETITIONER:

P-1 Power of Attorney and Translation

P-2 Tax Returns-2003

FOR RESPONDENT:

R-1 Affidavit of Karen Perkins

OAL DKT. NO. EDU 11399-03
AGENCY DKT. NO. 86-3/03

M.R.A., on behalf of minor child, F.R.A.	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs, for the reasons stated by the Administrative Law Judge, that petitioner has demonstrated M.R.A.'s entitlement to attend school in the respondent's district free of charge pursuant to *N.J.S.A.* 18A:38-1b(1).

Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 5/12/04
Date of Mailing: 5/12/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

212-04

#212-04

THOMAS JAEGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

May 17, 2004

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

May 19, 2004

John R. Klotz, Esq.
Casey Building
935 Allwood Rd., Suite 220
Clifton, NJ 07012

Anthony D'Elia, Esq.
Chasan, Leyner, Bariso & Lamparello
300 Harmon Meadow Blvd.
Secaucus, NJ 07094-3621

THOMAS JAEGER V. BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY, AGENCY DKT. NO. 131-4/04, OAL DKT. NO. EDU 3608-04

Dear Parties:

We are enclosing a copy of the decision of the Commissioner of Education dated, May 17, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

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Jones Addo, State Library
OAL Clerk

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STATE OF NEW JERSEY
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2004 MAY -4 P 4:01

JOHN R. KLOTZ
Casey Building
935 Allwood Road, Suite 220
Clifton, New Jersey 07012
Attorney for Defendant
(973) 778-1200

OFFICE OF ADMINISTRATIVE LAW

THOMAS JAEGER,

Plaintiff,

OAL DOCKET NO. 03608-2004N

v.

ORDER

CITY OF CLIFTON BOARD OF EDUCATION, PASSAIC COUNTY

Defendant.

THIS MATTER having been opened to the Court by John R. Klotz, Esq., attorney for the plaintiff, Thomas Jaeger, for an Order staying further sanctions by Clifton High School and on notice to Anthony D'Elia, Esq., on behalf of the defendant, and the Court, having heard the arguments of counsel, and for good cause shown;

IT IS ON THIS 4th day of May, 2004

ORDERED, as follows:

1. Effective immediately, all disciplinary sanctions imposed upon the plaintiff by the administration of Clifton High School on March 18, 2004 are hereby STAYED until further order of this Court.

2. Effectively immediately, the plaintiff shall be permitted to participate in any and all pre and post graduation ceremonies, events, and activities.

3. Effectively immediately, the plaintiff shall be permitted to participate in all sporting activities including, but not limited to, the Clifton High School varsity vollcyball team.

4. The plaintiff shall otherwise comply with all ordinary rules and regulation of Clifton High School.

5. The defendant are noticed that they have 15 days from the date of this order to appeal.

HONORABLE BARRY FRANK, A.L.J.

6. The legal basis for this Order is that irreparable harm would come to petitioner should the actions taken by the school, principal and school board be implemented prior to a full hearing on the merits. The rules involved are conflicting and should be adjudicated by a court and it is likely that the petitioner, given the conflicting rules or regulations in effect, will prevail on the merits.

THIS ORDER on application for emergency relief may be adopted, modified or rejected by the Department of Education, 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 (45) days following the entry of this order. If Department of Education does not adopt, modify or reject this order within forty-five (45) 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.

BARRY N. FRANK, ALJ

md

NEW JERSEY IS AN EQUAL OPPORTUNITY EMPLOYER

OAL DKT. NO. EDU. 3608-04
AGENCY DKT. NO. 131-4/04

THOMAS JAEGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL), along with the recommended order of the Administrative Law Judge (ALJ) have been reviewed.

Upon his independent and careful review of the record, the Commissioner determines to adopt the ALJ's recommended order granting emergent relief in this matter, as he concurs, for the reasons articulated by the ALJ on the record, that petitioner has satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby granted. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/17/04
Date of Mailing: 5/19/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

216-04

#216-04

IN THE MATTER OF THE TENURE HEARING :

OF WILLIAM BLUST, SCHOOL DISTRICT : COMMISSIONER OF EDUCATION

OF WATCHUNG BOROUGH, SOMERSET : DECISION

COUNTY. :

_____:

SYNOPSIS

The Board certified tenure charges of unbecoming conduct and insubordination against respondent middle school teacher for alleged inappropriate comments and touching.

The ALJ found that students, especially female students, felt uncomfortable in respondent's classroom that had an atmosphere of sexually discriminatory conduct. Respondent himself admitted his habit of making comments regarding students' appearance and bodily characteristics and touching their shoulders, but he considered such habits innocent. The ALJ concluded that respondent did make inappropriate remarks and he was warned by his supervisor in June 2000 to be careful as to his actions and comments. The ALJ also concluded that he inappropriately touched female students, but not in an overtly sexual manner since the warning. The ALJ determined to follow the concept of progressive discipline. The ALJ ordered forfeiture of 120 days' pay withheld from him and the forfeiture of any increments due him for the 2001-02 and 2002-03 school years. Any further misconduct could lead to dismissal.

The Commissioner adopted the Initial Decision as his own and directed forfeiture of the 120 days' pay, as well as any increments due him for the 2001-02 and 2002-03 school 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.

May 20, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00386-03S
AGENCY DKT. NO. 31-1/03

IN THE MATTER OF THE TENURE HEARING OF WILLIAM BLUST, SCHOOL DISTRICT OF WATCHUNG BOROUGH, SOMERSET COUNTY.

Victor E. D. King, Esq., for petitioner School District of Watchung Borough

Nancy I. Oxfeld, Esq., for respondent William Blust (Oxfeld Cohen, attorneys)

Record Closed: March 1, 2004 Decided: April 5, 2004

BEFORE **JEFF S. MASIN**, ALJ:

The Watchung Borough Board of Education ("Board") filed tenure charges with the Commissioner of Education on January 23, 2003, seeking the removal of tenure status held by William Blust, a teacher employed by the District. The Commissioner transferred the charges for hearing to the Office of Administrative Law ("OAL") on February 6, 2003, pursuant to *N.J.A.C.* 52:14B-1 to –15 and *N.J.A.C.* 52:14F-1 to -13. A prehearing conference was held before this judge on February 20, 2003, and a prehearing order was issued on February 24, 2003. An amended prehearing order was issued on March 5, 2003. Following discovery and after a delay in the hearings due to an illness affecting one of the attorneys, hearings were held on September 22 and 24, 2003. The attorneys then ordered transcripts of the hearings. The submission of briefs was delayed due to illnesses and the move of one of the attorney's offices. The final reply brief was received on March 1, 2004, and the record closed on that date.

Charges

In its Statement of Charges dated January 3, 2003, the Board alleged that Mr. Blust had violated his professional responsibilities as a tenured teacher because,

he was insubordinate; to wit,

> Mr. Blust has continued to make comments found objectionable by the young women in his classes thereby creating an inappropriate and hostile educational environment in his classes;

he engaged in conduct unbecoming a tenured teacher; to wit,

> Mr. Blust has touched young women in his class in a fashion found unacceptable to them in violation of Board Policy and Federal law. Mr. Blust makes comments in class about clothing and physical appearance; and

he violated Board policy and law; to wit,

> Blust's verbal and physical behavior violates Board policy and law.

Dr. Catherine Rock, the Superintendent of the Watchung School District, testified that during the 1993-94 school year when she was the principal at the district's one elementary school, she spoke to Mr. Blust about jokes that he had told that had been deemed inappropriate by staff members who expressed their discomfort with his statements. He was advised on one or more occasions that he was not to tell jokes in the lunchroom as they were offensive to other members of the staff, chiefly to female members.[i] He also was cautioned about his use of sarcasm in his classes. Such comments could be hurtful to children. In 1999-2000, by which date Rock was the District's Superintendent, she transferred Blust to teach 7th and 8th grade social studies. She told him that he had to be careful about his demeanor and his comments to these older children.

[i] Dr. Patrick Parenty, Superintendent of the Warren Township School District, was formerly superintendent in Watchung from 1982-1998. Dr. Rock served as one of his principals. Dr. Parenty testified that he received complaints about Mr. Blust regarding off color jokes made in the presence of other staff members and spoke to Dr. Rock, who as he understood it spoke in turn to Blust and advised him about the inappropriateness of such remarks.

On June 22, 2000, Dr. Rock met with Blust. She prepared a summary of the conference on June 27, 2000. In the Statement of Charges this document is quoted in part and is also included as evidence supporting the charges. The document was admitted in evidence as P-1. The conference was held as the result of another conference held on June 21 with a mother and a 7th grade student, the latter a member of Blust's social studies class. While this student is not identified in the memorandum summarizing the conference, nevertheless, during this hearing the student, E.N.H., now in 11th grade, testified on behalf of the Board. The June 27, 2000, document sets forth concerns expressed by E.N.H. In summary, she advised that she was uncomfortable in Blust's class because he made comments to pupils and also acted in ways that made her nervous and discomforted because she was concerned that he might act similarly towards her. More specifically, she asserted that he would tell the class or individual students that, "If you don't smile, I'm going to come over and hug you." In addition, after a school performance of the play *Guys and Dolls* he commented to one of the girls in his class who had been one of "Hot Box" dancers in the show that he "liked her part in the play when the "Hot Box" dancers took off some of their costume." (P-1). According to the student's account, this remark caused three of the girls to go to the guidance counselor to report that the remark was inappropriate. However, according to the summary, although they had been told by the counselor to put their concerns in writing, these students never did so.

The summary states that in response to these allegations, Mr. Blust told Dr. Rock and the other participants in the meeting that he did make a comment about the "Hot Box" scene and that his remark was then followed by an inappropriate remark by a male student, whom he reprimanded for the comment.

In addition to the complaints already noted, the summary report also includes reference to the student (E.N.H.) advising that Blust put his hand on her shoulder at times, which made her uncomfortable. He also would come up behind a student and kick the desk to get their attention. While Blust recalled that he did touch males (although certainly not in an inappropriate fashion), he denied any recollection that he touched females, and advised that his kicking of desks was only to get a student "back on task."

Dr. Rock's written summary then contains her response to the above allegations and replies. She advised that

> In our discussion, I suggested you think more carefully before you make any public comments to the class that might be considered hurtful or offensive or may make an individual feel uncomfortable. It was, in fact, your comment about the "Hot Box" dancers, which led to the male student's offensive retort. Although you reprimanded him, the damage was already done. A teacher at the middle school level must understand that the students are at an extremely sensitive age and any "public comments" about an individual child should be avoided. Any reference to hugging or touching must be avoided. There is a "fine line" in the area of sexual harassment and you must be extremely aware of it. The perception of the child is the child's reality. . . . In summary you agreed to be more conscious of public comments. There was no other intention than humor in your comments. You will discontinue any touching (hand on shoulder) or off-handed remarks about hugs. I suggest you discontinue the kicking of desks. There are other means of focusing students that are less offensive to them . . . Please sign and return. This will be part of your personnel file. You may attach a response.

Blust replied in a letter dated September 18, 2000. Mr. Blust advised that as to the "Hot Box" dancers, he "never said anything more than something like 'I like you in the play'- a remark I repeated to each individual involved in the performance. It was a child who made the offensive remark, and I soundly rebuked him for it." He also "wanted to restate that I take great care to never touch any of the girls at any time." The desk kicking was something that has "always been seen as a joke and never as any sort of threat. It's just a bit of comic relief to break up the tedium of daily class work." Blust continued, "I strive to be fully aware of the sensitivities of the children with whom I work, and clearly I have established a close rapport with the vast majority, and will continue to develop positive relations with them. I hope this resolves the matter."

This recitation serves as background for the circumstances that ultimately led to the filing of tenure charges in January 2003. Dr. Rock testified to complaints received from a parent, Mr. F.B., during the spring of 2002. He complained in part about Blust's behavior during a so-called "lock-down," which is a procedure to be utilized in the event of such possible events as a terrorist or school violence situation. In such a case, a coded message is sent over the school's public address system and students are to gather inside the classroom, which is locked. The students are to gather in a corner out of sight of the window in the door, and are to remain quiet.

A note is to be placed on the outside window recording the number of students in the room. Mr. B., who testified at this hearing, reported to the school authorities that his chief concern was that Blust had initiated conversation during the lockdown by speaking to his daughter. He had also made "accusatory comments" to her, yelling about looking or not looking at the clock.

In addition to these concerns, Mr. B. reported to Dr. Rock that he had learned that there was a "hostile environment" for female students in Blust's class. His daughter and other young females in the class were uncomfortable and frightened. Mr. B. testified here that his daughter advised him that Blust yelled a lot and said things that were not appropriate. When he first learned that his daughter was upset about something regarding school and then heard her complaints about what occurred in Mr. Blust's class, he asked her if other students would confirm these claims and she said that they would. He then contacted other parents to see if what he was hearing from his daughter was accurate. Several students then told him of specific comments and he began to see that there was a "bad operating environment." He wanted to have a "sit down" with Blust and a meeting was arranged. This meeting confirmed nearly everything that had been reported to Mr. B. Although Blust reported that he knew where to draw the line in his comments to students, and he denied that he had referred to any student as "luscious legs" or to "sexy pants" (as had been reported to Mr. B.), nevertheless, he did agree that on Fridays he would tell students that "I'm grumpy and you can expect me to be yelling at you," and that he was trying to "prepare them for life that way because, you know, people aren't always kind and they get yelled at, so that's my way of preparing them." He also acknowledged that he did refer to female students as "beautiful" and as "gorgeous," among other things. "He said that he thought it was good to comment on how they looked, it made them feel better and he did not see anything wrong with it. If somebody got their hair cut he told them how well they looked; he thought it was conducive to creating a better classroom . . . ." B. concluded from this meeting that there was a hostile environment in Blust's classroom. B. acknowledged that neither his daughter nor any of the female students that he spoke to complained about Blust having touched them inappropriately.

Following his meeting with Mr. Blust, Mr. B. met with Mary Nunn, who served as the affirmative action officer for the district. He reported to her on the information he had gathered from his daughter and other parents and students, and about his conversations with Blust and with the school's principal, Dr. Plain. Nunn reported about her meeting with B. in a "Conference

Report" dated May 7, 2002. Following this meeting and her receipt of the report, Dr. Rock began interviews with students on May 10. These students were twelve or thirteen years old. Dr. Rock took notes of these meetings, which were produced at the hearing and admitted into evidence. She testified that her questioning of the students began with the question, "what is it like in your class." Some of these interviews were held during the summer. The evidential significance of this hearsay evidence will be assessed later in this opinion.

In addition to the information obtained from Mr. B.'s daughter, M., E.G., a female, reported that when girls came into class they were greeted with "hello, beautiful." K.B., a female student, reported that he commented, "I like those pants," to a female, and also said "hello, gorgeous" and "good bye, beautiful." He was moody and inconsistent, and when he got mad at a student he would not let the student explain him or herself. Girls and boys were treated in a disparate fashion. A.K., an eighth grade female student, reported that while she was in the seventh grade, Blust referred to her as "luscious legs" on more than one occasion. Dr. Rock could not recall from reviewing her notes whether this occurred in the first three months of the seventh grade or whether the student reported that the reference occurred over a period of three months in seventh grade. The student did report this comment to guidance counselor Ms. MacLeod, and after this complaint Blust did stop this reference, although Dr. Rock was not certain if MacLeod had spoken to Blust about the issue. Another female student, C.T., confirmed to Dr. Rock that the "luscious legs" comment was voiced about A.K.. Ms. K. also stated that Mr. Blust was moody and the students could never be certain from day to day what mood he would be in. He had nicknames for everyone. Girls were treated differently in his class. He "ruled" in the boys' favor more than he did the girls.

Mr. Blust's moodiness was confirmed by J.D., a male student. He recalled that Blust commented that a female, I.B., was "looking pretty today." He also would read words that appeared on girl's clothing. He recalled that several females had been embarrassed by the way in which Blust would on a regular basis sit on a stool, at eye level, and spread his legs apart. Dr. Rock did not write down in her notes the full explanation of this comment, only recording "embarrassed," but she related, "it has been mentioned before, about the spread legs apart with the genitalia." However, Dr. Rock also related that she was not certain if his reference to the exposure of his genitalia (that is, outlined through his pants) was mentioned during her first meeting with J.D. or at a subsequent interview with Board counsel at which she was in

attendance. Her notes for the first meeting did not mention the details of the "embarrassment." In her many observations of Blust as his principal over the years, Rock had never herself seen any evidence that Blust was deliberately exposing his genitals to anyone, even when she saw him sitting on a stool. However, she would "come in the classroom sideways. . . I do not recall finding his behavior objectionable any time I came in over the years that I've known him."

A female student, K.N., reported that Blust made comments that upset female students, such as referring to clothing, "nice shirt," and references to them as "beautiful" and "darling." Another female friend of hers had told Ms. N. that she was afraid to be alone with Blust for a makeup test. He was moody, joking and then all of a sudden changing his mood. The girls "are tense" and the boys joke around more with him. The notes also reflected that the student told her of an incident where Blust had yelled at a male student. C.S., another female student, told Rock that Blust made fun of her handwriting, saying that it was too large for a female, and mimicked it across the board with huge handwriting. She was "uncomfortable, afraid of him." C.S. also said that her older sister, M.S., who had Blust as a teacher of social studies when she was in seventh and eighth grade and was in high school at the time of the investigation, told her that she did not like Blust, that he read the writing on girl's shirts and that he had told a female, S.H., to stand up and turn around "I want to look at you."

A.B., a female, reported that although, students "got used to" Blust saying "hello beautiful," they, or she, still did not like it. Blust "makes you feel nervous" and yells a lot. He exhibited mood swings, first laughing then cranky. A male, T.G., also related that Blust would say "hello beautiful" to girls and he did not enjoy such remarks. B.C., a female, also reported comments made such as "beautiful" and "darling" to females, and stated that Blust would "look you up and down which made me feel very uncomfortable." This was "worse in the beginning and middle of the year." He also would comment "inappropriately" about clothing, as for instance, he commented that he liked jeans with ruffles.

K.T., a female, told Rock that Blust commented that she found it objectionable when Blust said to her, "would a kiss make it better," and when he blew kisses at her. She also recalled his sitting in a strange position that she said either "she" or "we've" gotten used to. She said that boys and girls were "definitely" subject to different treatment, and stated something that Rock recorded in her notes about either she, or another student, having said to another student (if

she was the one who commented) or to her (if another made the comment) about being afraid to be alone with Blust during a makeup test.

E.N.H., now an 11th grade student formerly taught by Blust while in 7th and 8th grade in school years 1998-99 and 1999-2000, testified that while she was his student she heard or observed actions such as Blust remarking to students if they were not smiling when they walked into his classroom that "I will kiss you if you don't smile." He would read the writing printed on girl's shirts, such as the name of a store. He would kick desks, as he did to her once during a test. "Everyday," he would state, "hello darling," as girls walked into the classroom, but not as boys entered and this made her feel uncomfortable. He would rest his arm on her shoulder if she brought a worksheet up to the desk for him to check. This went on "all year long" for two years. He would sit on a high stool with his legs wide open, which made her uncomfortable, as it did other girls. If a girl bent over to pick something up, "you could tell that he moved his head to look at her rear." As a result of these actions, she did not want to spend time in his classroom. However, she did "fine" in his class. As the result of a meeting that her mother requested with Dr. Rock, she advised Rock of these matters in May 2000. (P-8).

M.B., daughter of Mr. B, who is fourteen years old, testified that Mr. Blust was her teacher in both the second and the seventh grade. She confirmed the "hello, beautiful" remarks, made throughout the year in seventh grade and his reading of wording on female students' outfits, such as one student's that read, "you're cute" on the front. When Blust read the front, he responded, " I know I'm cute." When the student turned around, the back of the top read, "just kidding" on the back. She felt uncomfortable with these actions and did not think that Blust should have said this. She also confirmed that he was talking throughout the lockdown, when he was not supposed to be talking. She admitted that she had not complained about his comments until after the lockdown incident when she cried in response to his yelling at her about looking at the clock. Someone else told her parents what had happened.

William Blust testified that he has been a teacher in the Watchung District since 1972. Prior thereto he taught in East Orange for seven years. In Watchung he taught fourth through sixth grade for the most part and has also taught third and second. He was moved to the seventh and eighth grades to teach social studies in 1998. This was his first middle school experience. He recalled that in the early 1990's there was a discussion with Dr. Rock about comments made

by a teacher named Orso, but he did not recall the details. He did recall that an incident involving E.H. had occurred "toward the end of the seventh grade" when he kicked chairs. As he recalled the incident, he and a group of students whom he had previously taught in the second or third grade were reminiscing about "how we used to do this kind of fun activity and they remembered that and they were all singing out, 'kick my chair, Mr. Blust, kick my chair.'" This was something that "used to be done like during snack time when I had them in third grade, although I can't exactly remember why we did that, but it was a game to them and they were reminiscing. . . And so I obliged them. It was not, you know, it was certainly not any punitive or harmful or forceful thing."

Blust recalled having received P-1, the conference report prepared by Dr. Rock regarding the June 22, 2000, conference. He acknowledged that he may well have placed his hand on a female student's shoulder, as having "spent all those years in the lower grades, but more if they had been upset than anything else. Not as, you know, a common occurrence." He did not touch students after receiving this report, which he characterized as more of a "warning" than a discussion. Blust acknowledged that he had on occasion read the words contained on a student's shirt or top, such as shirts detailing rock concert tours with places listed where he had been. He denied reading brand names. He did sit on a stool nearly every day and either crossed his leg onto his knee or had both legs on the rungs of the stool. He was "absolutely not" trying to expose his private parts. He only heard of the suggestion of exposure after his suspension.

The respondent agreed that he did refer to girls as "beautiful"and also as "kiddo," "Hey there, you," and possibly "gorgeous." These words were used "just as greetings," and were not used with "consistency." He did not use these references toward any "particular" girls; "it was general to everyone, you know, by way of greeting." He "absolutely" denied using the term "luscious legs," explaining that there was a girl who had a nickname or name with the syllable "leg" in it "and who carried a gym bag embroidered, "Legs." He asked her if that was her nickname and she said that it was and "I asked her if I could call her that and she hesitated and so I sensed that I shouldn't and didn't. But certainly not 'luscious legs,' it's too long to say for a nickname."

Blust recalled that another girl was wearing a shirt that said, "you're cute." She was almost directly in front of him and he said, "Thank you." She turned around and the shirt then

read, "just kidding." He acknowledged that he was "sure" that he had said that he liked "those pants." He commented on students' clothing and "they felt free, also, to comment on mine," such as his lack of "cool shirts." He was never told that such talk was inappropriate.

Blust denied that he ever used the words, "I'll kiss it and make it go away," in his classroom, and if a female student said that he did, she may have been "wrong." However, he "may have" used the words, "I'll kiss it and make it better." As he recalled, "I think what I said was when you were a little kid I would've said, but now I can't, I just say, Go to the nurse," which is what she did.

The witness did recall that he had yelled at M.B. after the lockdown, because she was "drifting" and might have been distracting other students. He told her to "stay with us, be focused, don't be looking at the clock."

The respondent did attend annual sexual harassment meetings. He "understood them." Asked again on cross-examination about putting his hands on children, he replied, "As the policy became more clear and, you know, became longer term, yes, I mean, but old dogs die hard and it was difficult to change as the times have changed. So I guess I would say I slowly came into compliance."

Discussion

A tenured teacher may lose tenured status if he is found guilty of misconduct, that is, if he is shown to have failed to adhere to the standards of professional conduct reasonably expected of one licensed to educate students in the school systems of this state. A school board may proffer tenure charges to the Commissioner of Education, but the loss of tenure can only result from a decision of the Commissioner after the presentation of charges and supporting evidence.

It is patently clear that sexual harassment of students by a teacher, whether it is the result of *quid pro quo* conduct or the creation of a sexually hostile learning environment, is entirely inappropriate and may in some instances be actionable under the Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, and the federal Civil Rights statutes. Students are, in a certain sense, engaged in their "employment" when in attendance at school, for it is here where society

demands that these young persons spend much of their days for most of the year, learning the lessons that will assist them in later life. Similar to the standards that apply in the workplace, the general test for determining whether conduct violates the prohibitions against unlawful discrimination based upon gender can be whether a reasonable female student would see the conduct complained of as occurring because of her gender, being severe or pervasive and altering her "work" (here learning) environment in such a manner as to make that environment hostile or abusive. Yet, given the possibility that conduct may involve students at ages when their perception of events and conduct may not be mature enough to understand the implications of what occurs, it seems probable that the "reasonable female" aspect of the standard *Lehmann* test for workplace gender discrimination cannot be fully transplanted into the educational setting. *Lehmann v. Toys 'R' Us*, 132 *N.J.* 587 (1993). The "reasonable" societal understandings of proper conduct towards students of a given gender may need to be utilized where the student cannot fully understand that the conduct is not "reasonable" or proper. In the present case, given that the students involved are, or were, seventh and eighth graders when the conduct complained of occurred, the age/maturity factor is not as much of a problem as it might be if much younger students were involved.

A teacher proven to have sexually harassed students has engaged in conduct that is without doubt entirely outside the limits of professional propriety. However, while the Board's charges in this case do sound very much like those common to gender discrimination complaints and the Board's counsel has made extensive reference to the LAD context in his brief, it is also true that given the unique environment of an educational institution, conduct may be inappropriate for a teacher and thus subject that educator to professional sanction even if the evidence of proven misconduct may be insufficient under the applicable legal test to permit a finding of discriminatory conduct under the LAD and similar statutes. For instance, an action that might not be so severe or pervasive as to allow for a finding of a sexually hostile environment under the *Lehmann* test may nevertheless be sufficiently inappropriate to support a finding of unprofessional conduct that will subject a teacher to discipline. In the present matter, only the standards applicable for tenure cases apply; the case does not involve any claim for relief under the existing civil rights statutes.

The Board charges that Mr. Blust was insubordinate, made objectionable comments toward female students, inappropriately touched female students, violated Board policy and law

and created a hostile environment for female students. In his response to these allegations, Mr. Blust has not denied that he did some of the things that the Board asserts support its legal contentions. Based upon his admissions, I **FIND** that he did have a habit and custom of referring to female students as "beautiful." While he only acknowledged that he may possibly have used "gorgeous" when referring to female students, I **FIND** that he did use this term, which was indeed a term that Mr. B. reported Blust admitted using toward female students when B. and Blust had their conference in 2002. He also acknowledged that at times he would read the words contained on a female student's clothing and that he also commented from time to time on the clothing worn by female students. He acknowledged the possibility that he did tell female students, "I'll kiss it and make it better," although not "I'll kiss it and make it go away," a distinction as to the exact words employed that hardly seems to make a difference as to whether the comment was or was not an acceptable one for a teacher to make toward a student, especially students who were out of their early childhood. Again, I **FIND** that he did each of these things.

In his testimony Blust, who in June and September 2000 had been confronted by the June 27, 2000, memorandum which referred to the complaining female student's (E.N.H.) comment that Blust "put your hand on her shoulder at times," very specifically denied that he touched female students. However, he seemingly admitted that he in fact had occasionally touched children, which he had come to learn was not proper conduct through his attendance at annual sexual harassment classes. Without clearly specifying the details during an examination on the subject that was less than specific, he acknowledged that although he knew this to be improper, "it was difficult to change as the times have changed." He attributed this conduct to the years he spent in the lower grades, where apparently he would touch children as a means of attempting to comfort them if they were upset. Indeed, Dr. Rock's testimony about L.Z., a student of Blust's at least ten years ago, affirms that he did touch students at that time, although the touching was certainly not objectively "sexual" in nature [which does not mean that it may not have been perceived that way by some students, especially later on when he might have touched older students]. While from all this I am convinced that Ms. H. was truthful when she claimed that he touched her shoulder regularly prior to her complaint in May 2000, I **FIND** that there is no evidence that he continued to do so once he received the perceived "warning" contained in Dr. Rock's June 27 memorandum.

The evidence presented by the Board of the statements obtained from students, as well as the testimony of students, described conduct that largely concurs with Mr. Blust's admissions about the use of statements such as "hello, beautiful," "hello, gorgeous," and comments about clothing such as tops and pants. However, some of this evidence goes further than the conduct that Mr. Blust acknowledged in his testimony. For instance, they refer to his use of "darling," when addressing females. More significantly, A.K. reported that on more than one occasion during seventh grade he referred to her as "luscious legs," a comment confirmed by another female student, C.T.. Other reported behavior including his alleged obvious manner of looking at the rear of females who bent down to pick something up and his alleged "exhibitionist" manner of sitting on a stool with his legs spread apart. The respondent specifically denied this latter claim, responding that he never consciously sat in a manner calculated to expose or highlight his clothed genitalia to his students. He also denied using the term, "luscious legs," explaining that he instead asked if he could call a female student, "legs," because that word was embroidered on her gym bag.

While the Board presented some testimony from live student witnesses, such as female students E.N.H. and M.B., much of the Board's presentation about what Blust purportedly said to his students came from Dr. Rock, who testified as to the comments received by her when she interviewed students and recorded notes as to their statements about "what was it like in your class." As counsel for Mr. Blust noted, these out-of-court statements are hearsay, as they are clearly offered to prove the truth of the matters stated therein. Additionally, the witness testifying about these statements was not the declarant of those statements, but only the person to whom the out-of-court remarks were purportedly addressed. The use of such otherwise inadmissible hearsay in administrative hearings is permitted subject to the residuum rule. *Weston v. State*, 60 *N.J.* 36 (1972); *N.J.A.C.* 1:1-15.5 (b). That rule provides that while such evidence may be admitted, in order for ultimate findings of fact that are based upon that evidence to be legally supportable, there must be a residuum of competent evidence to support those findings in addition to the incompetent hearsay. However, significantly, "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." *Matter of Tenure Hearing of Cowan*, 224 *N.J. Super.* 737, 751 (App. Div. 1988), quoting *Weston, supra.*, at 52.

In the present matter, Mr. Blust's own admissions serve as a base of competent evidence that both establishes those matters that he admits and also serves to support, and indeed to validate, much of the material reported by Dr. Rock as having been stated by the students she interviewed. Additionally, given the enhanced credibility of the out-of-court statements, as they mirror in significant part what Blust acknowledges to be true, the allegations therein that are not directly admitted by Blust, such as his reference to A.K. as "luscious legs," may have some enhanced degree of reliability. This particular reference was reported to Rock not only by A.K., who was the student allegedly so referred to, but also by another student. Blust attempted to explain away the charge, but frankly his story about the word "legs" on the gym bag and his asking the student if he could call her "Legs" does not convince me that the students were wrong, either through poor memory or malicious intent to harm Blust, when they stated that the term he used to refer to A.K. was not simply "legs," but "luscious legs." The two-word reference fits well with the other remarks that he himself admits, such as references to females as "beautiful" and "gorgeous." While Blust said that he used these terms as "greetings," they are in fact terms that at least superficially address bodily characteristics and appearances, and given his bent for such remarks, it is entirely believable that he would use the "luscious legs" reference to a student whose physical characteristic apparently impressed him. Blust's admission that he did in fact engage a student about "legs" supports the hearsay references to him doing just that, and when the credibility of his explanation is addressed and his version is compared with that of students whose hearsay remarks have now been shown to be reliable, I am convinced that he said what A.K and C.T. reported. As for his characterization of terms as "greetings," even if one concedes that he did use these in that fashion, and even if the "luscious legs" reference was simply another "greeting," the use of such "greetings" to seventh and eighth grade female students by a teacher is grossly inappropriate. Even if Blust had no malicious or prurient intent towards or interest in these students, the use of terms such as these by a teacher to refer to teenage females in a classroom setting cannot be anything but inappropriate.

The evidence regarding the remark about the reference to the "Hot Box" dancers routine in *Guys and Dolls* is limited to Dr. Rock's comments about it in her memorandum to Blust. She seems to have accepted his position that while he did express some appreciation for the performance, it was a male student who then followed up with an inappropriate remark. I cannot say that it was inappropriate for a teacher to remark favorably to students about their performance in a school play, and as E.N.H. was not questioned about this incident when she

testified, I am not convinced by a preponderance of the credible evidence that Mr., Blust's remark went so far as to include the removal of clothing as something that he specifically commented upon.

Student after student reported to Dr. Rock, or testified, that they were made to feel uncomfortable by Blust, and while he is not charged with "moodiness," or with inconsistencies as a teacher that may have bothered his students, and his abilities as a teacher are not challenged other than in connection with his alleged creation of a gender hostile atmosphere, nevertheless, it is clear from the evidence that a significant part of the reason for the concern and discomfort that I **FIND** was in fact felt by both female, and even some male students, was the result of an atmosphere that was charged with sexually discriminatory conduct. Females were made to feel objectified, uncomfortable and concerned as to whether they were safe if alone with this teacher, who had a predilection for referring to their appearance, their clothing and even in some instances, their anatomy. While it must be clearly stated that there is no absolutely no evidence that Blust ever touched a student in an overtly sexual manner, or that he ever verbalized any overtly sexual thoughts or intentions, nevertheless I **FIND** that reasonable early teenage female students were made to feel uncomfortable because he zeroed in on them and addressed them in a manner that was directed to them, as females, regarding their appearance and bodily characteristics. By his own admission many of these actions were regular in occurrence, not one-time events, but perhaps "habits" and "customs" of his that in some cases preexisted his assignment to seventh and eighth grade social studies classes. In this sense these were pervasive conduct. Additionally, even viewed most favorably, they were inappropriate means of communication between a mature teacher and minor female students.

The record is replete with evidence that over the years Mr. Blust has received very positive evaluations and observation reports. No evidence exists that these ever contained any reference to any of the matters identified by the students, yet it must also be said that they also do not reflect the several comments and means of address that Mr. Blust himself acknowledges using, nor the touching of students during past years, no matter how innocent that may have been. This is especially important in light of the comment in Blust's brief that while E.N.H. alleged daily touchings, "there is no reference in any of the observations or year end evaluations done by the Respondent's principals which makes any reference to such a touching." Obviously, as he admits that he touched students, these observations and evaluations do not reflect all that he

has done over the years, and given the limited slice of time covered by observations and even by daily walks through the halls that may allow a very short look into a classroom, the lack of any such reference is not very significant. It is not so surprising that a teacher can engage in conduct that is less than appropriate and yet be viewed by his supervisors as a fine instructor, and indeed, but for certain limited periods and modes of conduct occurring therein, Mr. Blust may well be just that. While the evidence of his positive performance certainly must be considered when weighing the consequences that arise from any misconduct, when this evidence is considered against the credible evidence of inappropriate actions and the admissions made by Blust, this evidence simply does not serve to defeat the charges.

Based upon the evidence, I **CONCLUDE** that after being specifically notified, or even, as he seems to have perceived, "warned," in June 2000 to be careful as to his actions and "public comments" about individual students that might make students feel uncomfortable or be considered hurtful or offensive, Mr. Blust continued to address early teenage female students in inappropriate, personalized language that was directed only to those of the female gender, such as "beautiful," gorgeous," "darling" and "luscious legs" and thereby made female students (and incidentally some male students) uncomfortable and even fearful. While his intentions may have been motivated by innocent considerations, nevertheless by his conduct he created an inappropriate and hostile educational environment for these students. Thus, as he failed to comply with the direction and counseling provided by Dr. Rock, and coincidently with his own agreement to be more sensitive and careful, and failed to refrain from inappropriate gender-based harassment even after receiving sexual harassment training, he acted in an insubordinate manner. Charge 1 has been proven.

I **CONCLUDE** that the evidence supports the finding that prior to June 2000, Mr. Blust did inappropriately touch young female students. As noted, the only evidence about such touching clearly limits it to touching on the shoulder or other similar areas and there is absolutely no evidence of any touching, or any attempted touching, of females in an overtly sexual manner. As written, the second tenure charge does not specifically identify the timing of such inappropriate touchings, but by reference incorporates the description for Charge 1. This description itself contains detailed reference to the June 2000 Conference Report and the mention therein of touching (hand on shoulder). However, in this two-page description there is no reference to any evidence of post-June 2000 touching and no evidence of such has been

produced during the hearing. As such, while the historical record does require a finding that Blust did in the past improperly touch female students, as will be discussed below in connection with the penalty phase, the memorandum and meeting with Dr. Rock in June 2000 appears to have effectively ended this inappropriate conduct. **Charge 2, Specification 1, has therefore been proven as true only for the period prior to late June 2000.**

As for **Charge 2, Specification 2**, as described above, the evidence supports a finding that Mr. Blust did make comments about individual students' clothing and physical appearance, and he continued to do so even after June 2000. **This charge has been proven.**

Finally, the conduct proven demonstrates that Blust violated the Board's anti-discrimination policies designed to eliminate sexual harassment. **Thus, Charge 3 has been proven.**

Penalty

The penalty to be imposed upon the respondent for the several violations of professional standards and for the creation of a sexually hostile atmosphere in his classroom must be determined by weighing the nature and character of his offenses with the record of his prior performance. In addition, it must be clear that the message sent by the penalty to this respondent and to other professionals is a clear one, that such conduct cannot be tolerated. Sexual harassment of students at any age is intolerable; the teacher must serve as a role model for students who learn in the classroom not only what they are taught from books, but also what they see and hear from persons to whom they naturally look for guidance as to the correct manner of behavior. Demonstrating to students that it is okay to make comments to females about their appearance, clothing and physical attributes in public settings or in the course of everyday interaction with persons with whom one is not in a truly personal relationship sets a tone and delivers an impression that this conduct is acceptable to society, and male students may thus believe that such conduct can be carried on later in school and then in the business world, a lesson that can result in bitter consequences for both the victim and, indeed, the perpetrator of sexual harassment in later life. A teacher who cannot control his mouth and avoid such comments merits discipline.

While loss of tenure is the ultimate penalty that the commissioner can visit upon a teacher, and such loss of tenure can then lead to a loss of teaching credentials through action of the State Board of Examiners, after careful consideration of this case and the facts established herein, as well as other decisions of administrative law judges and of the Commissioner, I am convinced that the ultimate penalty is not necessary in this case. Despite the respondent's violations, and the fact that he was provided with a memorandum in June 2000 that he deemed a warning, even if it was not presented to him as a disciplinary step, the nature of the conduct since June, 2000 has been, while unacceptable, nevertheless free of any hint of overt sexuality in either word or deed and free from the touching that occurred before June 2000. It seems that Mr. Blust, while conceding that old habits were not easily shed, has learned not to touch students, and he now must learn once and for all to stop any references to female students that are even slightly related to their appearance, their physical attributes, and their clothing. In this case, I am convinced that the best course is to follow the concept of progressive discipline.

The Commissioner has previously found that punishment less than loss of tenure was appropriate in cases where teachers have been found to act similarly to this respondent. Indeed, in some instances the conduct has been somewhat more egregious than that in which Mr. Blust engaged. In *In the Matter of the Tenure Hearing of Henry Allegretti, School District of the City of Trenton, Mercer County*, EDU 6408-99, Initial Decision, (February 4, 2000), *affirmed with modification*, Comm'r. (March 22, 2000), *affirmed*, State Bd. of Ed. (August 4, 2000), <http://lawlibrary.rutgers.edu/oal/search.html>, the teacher was found to have displayed a condom and commented that it was too small for him, to have tapped or hit a female student on the buttocks with a book, to have translated several inappropriate words into French at the request of his students, to have commented upon the dress of females, to have referred inappropriately to an incident involving himself and a female cousin from his youth. These events occurred over a two-day period. The Commissioner imposed a loss of six months salary and ordered the withholding of increments for two years, while also requiring a fitness review before reinstatement. In *In the Matter of the Tenure Hearing of Christopher Wannamacher, Manchester Regional School District, Passaic County*, EDU 9126-99 (Remanded), EDU 7096-00, & EDU 1340-00, Initial Decision, (November 30, 2000), *affirmed with modification*, Comm'r. (February 26, 2001) <http://lawlibrary.rutgers.edu/oal/search.html>, the teacher commented upon personal appearance and clothing, including referring to one female as wearing a "nice bra," told a student that he would change her seat if she kissed the boy next to her with

whom she was having a dispute, told a student that another student could use the bathroom because she was cute and he was not, and told students that if their mother was pretty they would not have a problem. The Commissioner did not revoke tenure. Instead he withheld from Wannamacher an increment for one school year, which he deemed, "the appropriate sanction to impress upon Wannamacher that his conduct fell short of the 'self-restraint and controlled behavior' required of a teaching staff member, *In the Matter of the Tenure Hearing of Jacque L. Sammons*, 1972 *S.L.D.* 302, 321, and that, therefore, he must act with greater prudence in his comments to, and interactions with, students in his charge." *Wannamacher, supra.*, Commissioner's Decision on Remand, February 26, 2001.

Cases in which tenure has been removed tend to be those in which the teacher's comments have been more overtly sexual than the inappropriate "greetings" or "nicknames" or references used by Mr. Blust. Thus, in a case cited by the Board as evidence both of the propriety of tenure removal and the concern that a teacher previously cited for inappropriate actions can continue to act in a like manner if not stopped, *In the Matter of the Tenure Hearing of Wayne Slaughter, School District of Bridgeton, Cumberland County*, EDU 6140- 01, Initial Decision, (May 21, 2002), *affirmed*, Comm'r (July 8 2002), the Commissioner removed the tenure of a teacher who was found to have commented upon females' clothing and "what was inside it," who had asked a female student to have dinner with him during the summer as if they did so during the school year, other students might think something was going on; commented to a female that she had "beautiful eyes" and that he wanted to take her to dinner, and told another that she had big breasts and that he wanted to see her in her bathing suit at a summer camp he ran. He had previously been suspended by the Board due to allegations about some of these matters and reinstated after a psychiatric consultation. *See also In the Matter of the Tenure Hearing of Frank Roberts*, 94 *N.J.A.R.* 2d (EDU) 284, *aff'd* State Board 95 *N.J.A.R.* 2d (EDU) 349, *aff'd* App. Div. 96 *N.J.A.R.* 2d (EDU) 549; *In the Matter of The Tenure Hearing of Sheridan*, 92 *N.J.A.R.* 2d (EDU) 257, *aff'd* State Board 92 *N.J.A.R.* 2d (EDU) 393.

In deciding that Mr. Blust should not lose his tenure, I have taken into account the fact that he was previously told to stop telling offensive jokes in the presence of staff members and that he was told about the concerns that prompted E.N.H.'s complaint in May/June 2000. There is no evidence that he continued to make offending remarks to faculty after the early 90's, and as noted, the record is devoid of any evidence that he touched students after June 2000. Thereafter

his offenses have been limited to inappropriate personal remarks that have not exhibited the content or character of overt sexuality, overt intentions toward or interests in individual students, or that suggest or imply any malicious or prurient intent. While it is entirely understandable that his comments to young adolescent females made them uncomfortable about and less than trusting of him, given his long tenure, strong history of evaluations and his willingness to both admit most of his comments and apparent ability to refrain from inappropriate actions as demonstrated with regard to the touching issue, I am satisfied that this teacher does not need to lose his tenure. Nevertheless, given the need to assure that once and for all he learns the need for self-restraint, prudence and controlled behavior, he shall forfeit the 120 days of pay withheld from him and shall forfeit any increments due to him for the 2001-2002 and 2002-2003 school years. It is **SO ORDERED.**

Needless to say, Mr. Blust has exhausted his chances. Any further proven misconduct can only lead to one logical conclusion. It is trusted that, having shown some ability to mend his ways, this teacher will now fully comply with the Board's policies and will provide the utmost respect toward all of his students.

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 (45) 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 (13) 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, 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 5, 2004
DATE

JEFF S. MASIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

April 5, 2004
DATE

Mailed to Parties:

APR. 08 2004
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

P-1	Memorandum to Bill Blust from Catherine F. Rock, Ed.D., dated 6/27/00
P-2	Letter to Dr. Rock from Bill Blust dated 9/18/00
P-3	Sexual Harassment handout to teachers 2001-2002
P-4	Attendance Sheet dated 4/9/02 (Child Abuse, Drug Free School Zone, Harassment)
P-5	Parent Conference Report dated 5/7/02 with F.B. and Mrs. Nunn
P-6	Not in Evidence
P-7	Handwritten notes of interviews dated 5/10/02
P-8	Handwritten notes of E.H., May 2000
P-9	Letter from Mary T. Nunn to Frank Bisignano dated 12/20/02
P-10	E-mail message from Frank Bisignano to Blust dated 5/5/02
P-11	E-mail message from Frank Bisignano to "fplain" dated 5/7/02
P-12	Letter from Frank Bisignano to Victor E.D. King, Esq., dated 7/29/02

FOR THE RESPONDENT:

R-1 thru 25	Teacher Observation reports and Annual Performance Reports on William Blust from 1990 thru January 2002
R-26	Letter from Catherine F. Rock to William Blust dated 5/8/02

OAL DKT. NO. EDU 00386-03
AGENCY DKT. NO. 31-1/03

IN THE MATTER OF THE TENURE HEARING	:	
OF WILLIAM BLUST, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF WATCHUNG BOROUGH, SOMERSET	:	DECISION
COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the Board's reply thereto[1] are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record, which included transcripts from the hearing conducted on September 22 and September 24, 2003 at the OAL, together with exhibits, post-hearing briefs, exception and reply arguments, and based upon the credibility assessments of the Administrative Law Judge (ALJ), *N.J.S.A.* 52:14B-10(c), the Commissioner concurs with the findings and conclusions of the ALJ.[2] In so doing, the Commissioner notes that

[1] Although the Board refers to its submission as "Petitioner's Exceptions," such submission was not filed within the 13-day period required by regulation, *N.J.A.C.* 1:1-18.4, and the Board did not receive an extension of time in which to submit exception arguments. Rather, it is presumed that because the Board's filing was submitted within five business days of the filing of respondent's exceptions, that such filing is, in fact, *a reply* to respondent's exceptions.

[2] The Commissioner acknowledges that the ALJ's credibility determinations are entitled to his deference. *See In the Matter of the Tenure Hearing of Frank Roberts*, 96 *N.J.A.R.* 2d (EDU) 549, 550, *citing In the Matter of the Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div. 1989), *certif. denied,* 121 *N.J.* 615 (1989). The Appellate Division has affirmed this principle, underscoring that "[u]nder existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor based judgments." *Whasun Lee v. Board of Education of the Township of Holmdel*, Docket No. A-5978-98T2, decided by the New Jersey Superior Court, Appellate Division, August 7, 2000, slip op. at 14. Indeed, the Commissioner

> *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

the ALJ has thoroughly summarized the testimony and evidence on both sides, fully explaining how he weighed the proofs before him and why he credited, or discredited certain testimony.

Accordingly, the Initial Decision is adopted for the reasons expressed therein. Respondent shall forfeit the 120 days of pay already withheld, as well as any increments due him for the 2001-2002 and 2002-2003 school years. Further, pursuant to the ALJ's discussion at pages 15 and 16 of the Initial Decision, the Board is reminded of its responsibility "to assure that teaching staff members are provided with professional improvement plans in which actions are developed to correct deficiencies in the staff member's performance, in accordance with the requirements of *N.J.A.C.* 6:3-4.3." *In the Matter of the Tenure Hearing of Barbara Emri, School District of the Township of Evesham,* Burlington County, State Board Decision December 3, 2003, slip. op. at 8.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/04

Date of Mailing: 5/21/04

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sufficient, competent and credible evidence in the record. (emphasis added) *N.J.S.A.* 52:14B-10(c).

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

218-04

218-04

N.C.R., on behalf of minor child, L.M.M., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning aunt challenged the Board's residency determination that her nephew, L.M.M., was not entitled to a free public education in the District during the 2002-03 school year.

The ALJ concluded that petitioner, who failed to appear at hearing and failed to send anyone on her behalf, did not sustain her burden of proof that L.M.M. was a legal resident in the District. The ALJ dismissed the petition and ordered petitioner to reimburse the Board the tuition owed.

The Commissioner adopted the Initial Decision as his own and directed payment for the period of L.M.M.'s ineligible attendance in the District.

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.

May 21, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1353-03
AGENCY DKT. NO. 373-11/03

N.C.R. o/b/o L.M.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON,

Respondent.

No Appearance for or on behalf of petitioner

Anthony D'Elia, Esq., for respondent
(Chasan, Leyner, Bariso & Lamparello, attorneys)

Record Closed: March 25, 2004 Decided: April 6, 2004

BEFORE **STEPHEN G. WEISS**, ALJ:

This is a school residence case which was transmitted to the Office of Administrative Law by the Department of Education as a contested case on January 31, 2003 as a result of a challenge by N.C.R. on behalf of a minor child, L.M.M. (N.C.R.'s nephew) to a determination by the respondent Board of Education of the City of Clifton that L.M.M. was not a legal resident in that municipality during his attendance at school in the 2002-2003 school year and, therefore, tuition for the period of time he improperly attended school was due and owing to the Board. *See N.J.S.A.* 18A:38-1.

A plenary hearing was scheduled before the undersigned Administrative Law Judge on February 2, 2004 to provide the Board an opportunity to present evidence in support of its tuition reimbursement counterclaim. An earlier scheduled date in October 2003 was adjourned following the non-appearance of anyone by or on petitioner's behalf. Thus, the case was rescheduled.

On the rescheduled date, although notice to all had been provided, there was a failure of anyone to appear for petitioner. Board counsel then advised that he would submit an affidavit from the school business office attesting to the basis for the tuition refund counterclaim.

Subsequently, the affidavit of Karen Perkins, respondent's Business Administrator and Board Secretary, was submitted. In her affidavit, Ms. Perkins relates that she reviewed the business records in her office with respect to L.M.M.'s attendance and determined he had been enrolled in the school district at Clifton High School between September 8, 2002 and June 20, 2003. She further relates that the per pupil cost for L.M.M.'s attendance during that period was $41.71 per day. Accordingly, she then multiplied that daily rate by 180 school days, which resulted in a calculation that the total tuition due and owing was $7,507.80. That is the amount sought to be recouped by the Board in its counterclaim.

First, since no one appeared by or on behalf of petitioner, the petition of appeal is **ORDERED DISMISSED**.

Second, with respect to the Board's counterclaim, given the contents of Perkin's affidavit, a copy of which was sent both to L.M.M.'s mother and his aunt by certified mail, return receipt requested, the Board is entitled to recover the full amount of tuition sought - $7,507.80. Accordingly, for the reasons set forth, the petition of appeal is **ORDERED** to be **DISMISSED** and recovery by the Board on its counterclaim in the amount set forth above is upheld, said amount to be collected through an appropriate forum.

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 (45) 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 (13) 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, 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, 2004
DATE

STEPHEN G. WEISS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

APRIL 6, 2004
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 07 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

\mvh

APPENDIX

Exhibit List:

R-1 Affidavit of Karen Perkins, March 22, 2004

OAL DKT. NO. EDU 1353-03
AGENCY DKT. NO. 373-11/02

N.C.R., on behalf of minor child, L.M.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs, for the reasons stated in the Initial Decision, that petitioner has failed to carry her burden of demonstrating L.M.M.'s entitlement to attend the schools of Clifton free of charge.

Accordingly, for the reasons expressed therein, the Initial Decision dismissing the Petition of Appeal is adopted as the final decision in this matter. Petitioner is directed to pay to the respondent Board of Education, for the period of L.M.M.'s ineligible attendance in the District, tuition in the amount of $7,507.80.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 5/21/04

Date of Mailing: 5/21/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

219-04

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, COMMISSIONER OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board challenged respondent Department's determination regarding additional state aid for special education extraordinary costs.

Pursuant to a formula established in a July 31, 2002 memorandum, the Department reduced the aid by 50% because the District's actual surplus was greater than its projected surplus. The Department made a second reduction of 42.72% pursuant to language in the FY2002 Appropriations Act. The reductions resulted in a total of $211,947 in eligible extraordinary costs. The ALJ concluded that the 50% reduction based on the memorandum was a violation of the Administrative Procedure Act (APA), noting that the memo constituted rulemaking, and ordered the Department to provide the District with additional state aid for its 2001-2002 extraordinary special education costs without regard to any comparison of projected and actual budget surplus.

The Commissioner set aside the Initial Decision. The Commissioner determined that, notwithstanding that some of the *Metromedia* factors that need to be present to characterize agency action as rulemaking were present, the Department's action to reduce school districts' extraordinary special education aid based on projected surplus in relation to actual surplus for the 2001-02 school year simply "does not bear the characteristics" of administrative rulemaking. As to the issue of the surplus comparison formula being arbitrary and *ultra vires*, the Commissioner remanded the matter to OAL for further proceedings and expansion of the record as may be needed to resolve fully petitioner's claims and an appropriate remedy.

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.

May 21, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 47-03

AGENCY DKT. NO. 355-11/02

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,

Petitioner,

v.

COMMISSIONER OF EDUCATION AND THE NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

Robin Mahon, Esq., for petitioner

Kathleen Asher, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: April 2, 2004 Decided: April 6, 2004

BEFORE **DOUGLAS H. HURD,** ALJ:

PROCEDURAL HISTORY

Petitioner challenges Respondent's determination regarding additional State aid for special education extraordinary costs. The petition, dated November 4, 2002, was received by the Bureau of Controversies and Disputes on November 8, 2002. Respondent's answer was filed

with the Bureau on November 19, 2002. The matter was deemed a contested case and transferred to the Office of Administrative Law, where it was filed on January 9, 2003.

On February 3, 2004, the District filed a motion for summary decision. On March 3, 2004, Respondent filed a response and a cross-motion for summary decision. On March 8, 2004, the District filed a reply brief. On April 2, 2004, a certification was provided by the Respondent to clarify the calculation of extraordinary special education aid.

STATEMENT OF THE CASE

For 2001-2002, the District requested $992,182 in reimbursed extraordinary special education aid. Pursuant to a formula established in a July 31, 2002, memorandum, the Department reduced this amount by 50% because the District's actual surplus was greater then its projected surplus. Then, the Department made a second reduction, this time of 42.72% pursuant to language in the FY2002 Appropriations Act.[1] These reductions resulted in a total of $211,947 in eligible extraordinary costs.

The District contends that the 50% reduction must be set aside for failure to comply with the rulemaking requirements of the APA. In addition, the District contends that the 50% reduction is arbitrary and capricious. The Department contends it did not engage in rulemaking in this case, but rather acted under the authority of CEIFA and the Appropriations Act. The Department also contends that it did not act in an arbitrary and capricious manner.

For the reasons set forth below, I conclude that the 50% reduction based on the July 31, 2002, memorandum is a violation of the APA.[2] Thus, the Department must provide the District with the additional aid that it would have received but for application of the 50% reduction.

[1] The District does not contest the 42.72% reduction.

[2] The arbitrary and capricious issue is not reached in this Initial Decision since my conclusion regarding the APA violation is dispositive of this matter.

ANALYSIS

CEIFA is essentially a funding mechanism for districts' special education costs. Under CEIFA districts can request the Commissioner to grant additional State aid to reimburse the district's "extraordinary special education costs" -- those are the costs in excess of $40,000 that a district spends to educate an individual classified pupil, excluding transportation expenses. This aid was authorized by *N.J.S.A.* 18A:7F-19(b), which at the time of the contested action provided in relevant part as follows:

> In those instances in which the cost of providing education for an individual pupil exceeds $40,000, after an assessment by the review panel of placements and placement costs for the applicable school year, ... the district may apply to the commissioner for additional aid. A review panel established by the commissioner ... shall review the district's application and determine whether to grant the district's request based on factors including, but not limited to, an assessment of whether the district was spending appropriate amounts of regular and special education funds on special education pupils; the facts of the particular case or cases at issue; the district's level of compliance with regulatory requirements; and the impact of the extraordinary costs on the district's budget. *N.J.S.A.* 18A:17F-19(b).

On July 31, 2002, the Department sent a memorandum to all County Superintendents from Richard Rosenberg, Assistant Commissioner for the Department, confirming that the fiscal 2001-2002 extraordinary aid had been processed. The memorandum explained that reimbursements would be reduced for two reasons. First, the reimbursable eligible amount would be either 100% or 50%. Districts that had a projected budge surplus greater than its actual surplus received 100% of their requested amount. Districts with actual surplus greater than its projected surplus received 50% of their requested amount. East Brunswick's actual surplus was larger than its projected surplus. Second, these initial awards were then further prorated by 42.72% due to the large amount of reimbursements requested. This second reduction was made in accordance with language in the FY2002 Appropriations Act. As noted above, East Brunswick does not contest the 42.72% reduction.

Based on the formula set forth in the July 31, 2002, memorandum, the Department on August 12, 2002, notified the District that it received a total of $211,947 in eligible extraordinary

costs. The District initially requested $992,182. This amount was first reduced by 50% based on the actual surplus being larger then the projected surplus, and then was reduced again by 42.72% based on the large amount of reimbursements requested.

The issue in this matter is whether the Department engaged in improper rulemaking in violation of the APA when determining the method by which it would disburse extraordinary special education aid. More specifically, the issue is whether the formula in the July 31, 2002, memorandum regarding budget surplus is a rule as defined by the APA. If the formula for budget surplus is a rule then the Department violated the APA by not adhering to specific rulemaking procedures.

In *Metromedia Inc. v. Director, Division of Taxation*, 97 *N.J.* 313 (1984); the Supreme Court set forth six factors for determining when an agency action is the equivalent of a rule under the APA. The six factors "can, either singly or in combination, determine whether agency action must be executed through rule-making or adjudication." *Id.* at 332. Not all six factors need be present for the action to be considered rulemaking, and the factors should be weighed. *Matter of Request for Solid Waste Utility Customer Lists,* 106 *N.J.* 508, 518 (1987).

Applying the *Metromedia* factors to the instant matter, it is overwhelmingly clear that the surplus budget formula constitutes a *de facto* rule under *Metromedia*. Indeed, it is an "agency statement of general applicability and continuing effect that implements or interprets law or policy . . . ." *N.J.S.A.* 52:14B-2(e). The District's analysis of each factor is well reasoned and adopted herein. The Department's analysis, on the other hand, inexplicably focuses on the FY2002 Appropriations Act language that allowed for the 42.72% reduction. The District, however, does not contest the 42.72% reduction, but rather focuses on the surplus budget formula that resulted in a 50% reduction. It is unclear why the Department focused on the wrong target – the 42.72% reduction; nonetheless, applying the *Metromedia* factors to the surplus budget formula leads to the inescapable conclusion that the Department violated the APA.

ORDER

Based on the foregoing, the following is hereby **ORDERED:**

1. The District's motion for summary decision is **GRANTED** and the Department shall provide the District with additional State aid for its 2001-2002 extraordinary special education costs without regard to any comparison of projected and actual budget surplus; and

2. The Department's cross-motion for summary decision 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 (45) 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 (13) 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, 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, 2004
DATE

DOUGLAS H. HURD, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

4-6-04
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

APR 12 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

OAL DKT. NO. EDU 47-03
AGENCY DKT. NO. 355-11/02

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, COMMISSIONER OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and petitioner's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4.

Respondent's exceptions contend that: (1) the Administrative Law Judge (ALJ) erroneously held that its July 31, 2002 memorandum constituted rulemaking and, therefore, was violative of the Administrative Procedure Act (APA) and (2) even if such memorandum was considered rulemaking, the prospective relief awarded by the ALJ is inappropriate in this instance, since the 2001-02 school year ended on June 30, 2002 and there is no evidence on this record that the Board was harmed in future years as a result of the 2001-02 calculation. (Respondent's Exceptions at 6, 9)[1]

[1] That is, respondent argues that because petitioner does not claim that its subsequent years' funding was adversely affected by its 2001-2002 award, a retroactive monetary reward would be contrary to the holding in *Sloan v. Klagholtz*, 342 *N.J. Super.* 385, 396 (App. Div. 2001). There, the Appellate Division recognized that, in challenges brought pursuant to school funding statutes, the "courts are reluctant to grant retroactive monetary relief when a

In reply, petitioner counters that respondent's latter argument was not raised below and must be rejected because: (1) there is no record to support respondent's "fiscal stability" claim that "complying with the Initial Decision would require it to 'transfer funds or request an appropriation in order to fund the monetary remedy,'" (Petitioner's Reply at 2, citing Respondent's Exceptions at 9) and (2) there is no legal underpinning for such a position, where "the Department has not established the requisite grounds for departing from the 'traditional rule' that decisions are retrospective in nature." (*Id.* at 3, *citing Rutherford Educ. Assoc. v. Board of Educ.*, 99 *N.J.* 8, 21 (1985)) Moreover, with respect to the *Metromedia* factors, petitioner asserts that the Department addresses only the third factor, *i.e.*, whether the Department's statement was designed to operate prospectively. Metromedia, Inc. v. Director, Division of Taxation, 97 *N.J.* 313 (1984). Petitioner argues that respondent's prospective design was evident in its extraordinary aid application and related memoranda and such design cannot be nullified by the "happenstance" of a statutory amendment. (Petitioner's Reply at 9-10) Finally, petitioner raises in its reply alternative grounds for adopting the ALJ's recommended order, contending therein that the Department's use of a comparison surplus formula was arbitrary, capricious and unreasonable.[2]

Upon careful and independent review of the record herein, the Commissioner determines to set aside the Initial Decision of the ALJ for the reasons set forth below.

Initially, the Commissioner notes, as set forth in the Initial Decision, that the operative statute during the year in question authorized the reimbursement of extraordinary

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statute relating to government revenues or appropriations is held to be unconstitutional, because of the potential adverse impact of such relief upon public fiscal stability." (*Id.* at 396)

[2] Relevant rules permit reply arguments to include cross-exceptions or submissions in support of the Initial Decision. *N.J.A.C.* 1:1-18.4(d)

special education costs based on facts including, but not limited to: "an assessment of whether the district is spending appropriate amounts of regular and special education funds on special education pupils; the facts of the particular case or cases at issue; the district's level of compliance with regulatory requirements; and the impact of the extraordinary costs on the district's budget.***" *N.J.S.A.* 18A:7F-19(b). In this connection, respondent issued a memorandum directed to all Chief School Administrators dated December 7, 2001 offering school districts the opportunity to apply for extraordinary aid for the 2001-2002 school year, provided through the Comprehensive Educational Improvement and Financing Act (CEIFA). The memorandum stated, in pertinent part,

> The [application] review is based on analysis of the following factors: the program and placement costs for the 2001-2002 school year; amounts expended from regular and special education funds for eligible students; the facts of the particular case; the level of current compliance with regulations; the impact of the extraordinary costs on the district's budget; and other factors considered relevant to the individual application. A previous denial or approval of an extraordinary aid application is not a consideration in the determination. (Petitioner's Brief in Support of Motion For Summary Decision at Exhibit G)

The memorandum additionally referenced the extraordinary aid application and instructions which were available online. The instructions included the following provision:

> **In determining a district's eligibility for extraordinary aid, the Department will review the district's projected budget surplus and actual budget surplus in relation to the request. Districts will be funded for extraordinary costs as follows:**
>
> 1. Districts having an actual budget surplus less than or equal to their projected budget surplus will receive 100% of their extraordinary costs (costs in excess of $40,000).
>
> 2. Districts having an actual budget surplus greater than their projected budget surplus will receive 50%-100% of their extraordinary costs (costs in excess of $40,000). The percentage will be determined by the actual amount of funding available.

> **Districts having an actual budget surplus greater than their projected budget surplus and an actual budget surplus greater than 6% will receive 50% of their extraordinary costs (costs in excess of $40,000).** (emphasis in text) (*Ibid.*)

A completed application and required documentation were to be submitted to the County Superintendent of Schools no later than January 31, 2002.

Later, a memorandum was issued on July 31, 2002 from Assistant Commissioner Rosenberg to the County Superintendents, which stated, in relevant part:

> Please remember to tell districts that later this week they will receive official notification letters explaining the details of how their reimbursement amounts were derived, including reasons for any denials. In the meantime, please convey to districts that low reimbursement amounts can be attributed to an increase by almost $20 million in the requested amounts, while the appropriation remained at the prior year's level of $15 million. This resulted in a prorated amount of less than 50%. In addition, the reimbursable eligible amount was either 100% or 50% according to the following rule:
>
> | | |
> |---|---|
> | A. If Projected Surplus > Actual Surplus | 100% |
> | B. If Actual Surplus > Projected Surplus & < 6% | 50% |
> | C. If Actual Surplus > Projected Surplus & > 6% | 50% |
>
> (*Id.* at Exhibit H)

Petitioner maintains that the Department's determination to reduce school districts' extraordinary special education aid based on projected surplus in relation to actual surplus constitutes *de facto* rulemaking and is, therefore, invalid for failure to comply with the APA, which governs rulemaking activities in State agencies.

According to the APA, a "rule,"

> when not otherwise modified, means each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of any rule, but does not include: (1) statements concerning the internal management or discipline of

> any agency; (2) intraagency and interagency statements; [3] and (3) agency decisions and findings in contested cases. *N.J.S.A.* 52:14B-2(e)

As noted in the Initial Decision, the Supreme Court established six factors for determining when agency action is tantamount to rulemaking under the APA. "The *Metromedia* criteria *** essentially provide a test of when rulemaking procedures are necessary in order to validate agency actions or determinations." *Woodland, supra, at* 68. In this regard, one would consider whether the action:

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group;
> (2) is intended to be applied generally and uniformly to all similarly situated persons;
> (3) is designed to operate only in future cases, that is prospectively;
> (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;
> (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and
> (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. *Metromedia, Inc.* v. *Director, Div. of Taxation*, 97 *N.J.* at 331-332.

Applying these factors to respondent's decision to reduce CEIFA aid in accordance with actual surplus figures, the Commissioner initially finds that, even assuming,

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[3] An intraagency statement has been defined as "(1) a communication between agency members that (2) does not have a substantial impact on (3) the rights or legitimate interests of the regulated public." *Woodland Private Study Group v. State*, 109 *N.J.* 62, 75 (1987). Here, assuming that the local boards who actually applied for such extraordinary aid for the 2001-02 school year would constitute "the regulated public," the content of the memorandum issued by the Assistant Commissioner on July 31, 2002 reflected a clear intent to convey specific information to local boards of education which could reasonably concern legitimate economic interests, and, therefore, is unlikely to be considered an intraagency statement, within the intendment of the law.

arguendo, the number of districts meeting the statutory threshold to apply for extraordinary aid constitutes "a large segment of the regulated or general public,"[4] and notwithstanding that the approach taken by respondent was applied uniformly, this action, along with the memorandum of July 31, was clearly not intended to be "continuing effect," as required to meet the APA's definition of a rule. Rather, such action challenged by petitioner was designed to be effective solely for the 2001-02 school year. Indeed, the Assistant Commissioner assured in his July 31 memorandum, which is the statement petitioner challenges herein, "With the new statutory requirements we intend to make the fiscal 2002-03 reimbursement process an easier one for everyone involved." (Petitioner's Brief in Support of Motion For Summary Decision at Exhibit H) As noted by respondent, the statutory amendments, effective January 6, 2002, removed the factors, listed *supra*, for the Department to consider when awarding extraordinary special education aid. (Respondent's Exceptions at 9)

Further, the Commissioner finds that respondent's applied method for reimbursing districts for extraordinary special education costs in the 2001-02 school year does not "prescribe a legal standard or directive," as contemplated by *Metromedia*. That is, the methodology used by respondent neither prescribed nor proscribed specific conduct, did not, as noted above, direct future actions or proceedings to be taken by the agency, did not have the purpose of describing or implementing substantive agency policy,[5] and did not establish a

[4] It is noted, however, that the record does not include data on the number of districts that applied for, and received, reimbursement for extraordinary special education costs in the 2001-02 school year.

[5] Contrast, for example, rules adopted by the State Board of Education at *N.J.A.C.* 6A:24 "pursuant to N.J.S.A. 18A:4-15 and P.L. 1999, c.142 and P.L. 1996, c.138 in order to implement educational programs necessary to provide urban education reform initiatives that ensure that public school children *** from the poorer urban districts receive the educational entitlements guaranteed them by the Constitution and to meet the requirements of the decision of the New Jersey Supreme Court in *Abbott v. Burke*, decided May 21, 1998." *N.J.A.C.* 6A:24-1.1.

detailed set of procedures or eligibility requirements.[6] *Bullet Hole, Inc. v. Dunbar*, 335 *N.J. Super.* 562, 583-584 (App. Div. 2000). As such, the Commissioner finds that respondent's statement, although not formally expressed in "any official and explicit agency determination, adjudication or rule," *Metromedia, supra,* at 331, is more reasonably viewed as a method to calculate reimbursements for the 2001-02 school year, rather than an administrative agency's "interpretation of law or general policy." (*Id.* at 332)

The Commissioner recognizes that "[a]ll six of the *Metromedia* factors need not be present to characterize agency action as rulemaking, and the factors should not be merely tabulated, but *weighed.*" (emphasis added) *In re Solid Waste Util. Cust. Lists*, 106 *N.J.* 508, 518 (1987). Thus, notwithstanding that some of the *Metromedia* factors are present, upon weighing those factors, the Commissioner finds that respondent's action to reduce school districts' extraordinary special education aid based on projected surplus in relation to actual surplus for the 2001-02 school year simply "does not bear the characteristics" of administrative rulemaking, See, *Bullet Hole, Inc., supra*, at 586, the hallmark of which is "*the widespread, continuing, and prospective effect of an agency pronouncement****." (emphasis added) (*Metromedia*, *supra,* at 329. In so determining, the Commissioner is mindful that agencies may act informally, and the courts ordinarily defer to the procedure chosen by the agency in discharging its statutory duty. *In re Solid Waste, supra,* at 519.

The inquiry does not end here, however, since petitioner also contends that the Department's use of a surplus comparison formula was arbitrary and *ultra vires.* Because this issue was not considered by the ALJ in his Initial Decision, however, this matter is remanded to the OAL for further proceedings and expansion of the record as may be necessary to resolve

[6] Having so found, it is not necessary to reach the remaining condition that the legal standard or directive be "expressly provided by or clearly and obviously inferable from the enabling statutory authorization***." *Metromedia* at 331.

fully petitioner's claims and, if necessary, consider the appropriateness of a remedy, in accordance with the parties' exception and reply arguments.

Accordingly, the Initial Decision of the ALJ is set aside for the reasons set forth herein and the instant matter is remanded to the OAL for resolution of petitioner's remaining claims.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 5/21/04

Date of Mailing: 5/21/04

[7] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

221-04

V.L. and S.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KEYPORT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning father, V.L., and now-adult daughter, S.L., challenged the Board's residency determination, contending that S.L. is entitled to attend school in Keyport.

The ALJ found that petitioners failed to demonstrate that they are domiciled or resident in the district and ordered that the Board's decision to disenroll S.L. be affirmed. However, the ALJ declined to assess tuition for the time of S.L.'s ineligible attendance because the Board had not sought back tuition from other disenrolled students.

The Assistant Commissioner, to whom the matter was delegated pursuant to *N.J.S.A.* 18A:4-34, adopted in part and rejected in part the ALJ's decision. The Assistant Commissioner concurred that petitioners had not demonstrated S.L.'s entitlement to attend school in the district, but assessed tuition from the date of petitioners' appeal to the Commissioner on the basis that petitioners, unlike prior students who were promptly withdrawn from the district upon being confronted with evidence of ineligibility, availed themselves of the benefit of *N.J.S.A.* 18A:38-1 to obtain S.L.'s continued attendance in Keyport schools and cannot now disavow the statute's concomitant obligation for payment of tuition. The Petition was dismissed and petitioners were ordered to remit tuition to the Board for the period from January 5, 2004 through the filing date of the 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.

May 24, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 318-04
AGENCY DKT. NO. 1-1/04

V.L. and S.L.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF KEYPORT, MONMOUTH COUNTY,

Respondent.

Victor Lee and Sophia Lee,[1] petitioners, *pro se*

Joan M. Damora, Esq., for respondent, (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: March 26, 2004 Decided: April 7, 2004

BEFORE **BEATRICE S. TYLUTKI,** ALJ t/a:

STATEMENT OF THE CASE

This matter concerns the petition filed by the petitioners, Victor Lee and his daughter, Sophia Lee (hereinafter jointly referred to as "petitioners"), with the

[1] At the time the matter was initiated, Sophia Lee was a minor and, therefore, initials were used in the caption of the case. It is also noted that in a number of the exhibits in this matter, Victor Lee is identified as Shanquan Li.

Commissioner of Education (hereinafter referred to as "Commissioner") seeking to reverse the determination made by the Board of Education of the Borough of Keyport, Monmouth County (hereinafter referred to as "Board"), that Ms. Lee be removed from the Keyport High School. In response, the Board contends that the petitioners are not domiciled within Keyport Borough (hereinafter referred to as "Keyport"), and demand tuition for the period of time that Ms. Lee attends Keyport High School. In the petition, Mr. Lee opposed the payment of tuition on the basis that he was paying taxes in Keyport.

The Commissioner, on January 26, 2004, transmitted the matter to the Office of Administrative Law 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 –13. The matter was initially scheduled to be heard by another Administrative Law Judge and then was transferred to the undersigned. The hearing was adjourned on one occasion since Mr. Lee was out of the country. The hearing was also delayed since both parties had problems with the responses to their interrogatories, and I had telephone conferences to resolve the issues regarding the interrogatories on March 5 and 23, 2004.

The hearing took place on March 25 and 26, 2004, and the record in the matter closed on March 26, 2004.

The issue in this matter is whether the petitioners have been domiciled in Keyport from January 8, 2003 (date on which Ms. Lee was enrolled at the Keyport High School) to the end of the 2003-2004 school year. Pursuant to *N.J.S.A.* 18A:38-1b(1), the burden of proof is on the petitioners to show, by a preponderance of the evidence, that they are domiciled in Keyport for the period stated above.

Prior to the hearing, I informed the parties that, although usually the party with the burden of proof precedes first, in this matter, I was ordering the Board to present its case first. On the first day of the hearing, the Board presented the testimony of five witnesses and indicated that it was doubtful that the testimony of its sixth witness would be completed on that day. For the remainder of that day, I had the petitioners present

their exhibits. Prior to the hearing, the petitioners had indicated that they would have no witnesses. I completed making rulings as to the admissibility of the petitioners' exhibits at the beginning of the second day of the hearing.

At that juncture, the Board presented an oral motion for summary decision. Oral arguments as to the motion were placed on the record, and I indicated that I would render a decision based on the record before me.

FACTUAL FINDINGS

The Board presented the testimony of Colleen Rafter, the principal of the Raritan High School. Ms. Rafter testified that Ms. Lee enrolled as a sophomore at the Raritan High School on September 4, 2001. Ms. Rafter had been told by Mr. Lee that the family had lived in Holmsdale but were downsizing as a result of the September 11 tragedy, and had purchased a more affordable home in Hazlet Township. Mr. Lee provided the Raritan High School with a copy of a deed for a residency in Hazlet at 36 Village Green Way, dated August 28, 2001 (R-7).

Ms. Lee completed the 2001-2002 school year at the Raritan High School, and sometime in December 2002 or early January 2003, the father of a student who was having a dispute with Ms. Lee told Ms. Rafter that Ms. Lee was not living in Hazlet and that he had followed her after school to a house in Holmdel Township. Ms. Rafter called Mr. Lee regarding the allegation and Mr. Lee stated that they lived in Hazlet. Ms. Rafter told Mr. Lee that she would have to investigate the allegation and, on the next day, January 10, 2003, Ms. Lee withdrew from the Raritan High School and transferred to the Keyport High School (R-10).

When his daughter transferred to the Keyport High School, Mr. Lee told the school that he and his daughter were living in Keyport and provided the school with a copy of the lease, dated January 8, 2003, for an apartment, Number 33A, at the Green Grove Apartment complex in Keyport (hereinafter referred to as the "Keyport

apartment") (R-2, P-62). Recently, the petitioners have terminated the Keyport apartment lease and Mr. Lee has purchased a dwelling in Keyport (P-2, P-3).

Sandi Siegle, the Board's Attendance and Truant Officer, testified that she got a telephone message on September 24, 2003, stating that Ms. Lee did not live in Keyport. Ms. Siegle stated that she gets approximately six or seven such tips a year and that she investigates all the tips. On September 29 and September 30, 2003, Ms. Siegle was at the petitioners' Keyport apartment between approximately 6:45 a.m. and 8:10 a.m., and she did not see Ms. Lee leave the apartment. She was again at the petitioners' apartment three times the following week and she did not see Ms. Lee leave for school. On each of these days, Ms. Siegle checked and was told that Ms. Lee was at school.

At this point, Ms. Siegle reported her observations to the Keyport High School Principal Miguel Hernandez, who requested that she continue her investigation. Thereafter, she spoke to a young girl, approximately six years old, who lived in the apartment below the petitioners' Keyport apartment and to two adult neighbors, all of whom stated that no one lived in the petitioners' apartment. On about 20 occasions, Ms. Siegle went to the petitioners' apartment either early in the morning or in the evening. She would ring the doorbell and no one responded. Thereafter, she reported her findings to the principal.

Ms. Siegle conducted seven investigations regarding high school students during the 2003-2004 school year. Three of these students left the Keyport High School because they did not live in Keyport.

On behalf of the Board, Miguel Hernandez testified that it is the school's normal procedure to have Ms. Siegle initially check out tips stating that a student does not reside within Keyport. Ms. Siegel does not talk to him about the matter unless she believes that the student might not live in Keyport. Mr. Hernandez stated that Ms. Siegle spoke to him about her initial investigation and he asked her to further investigate the matter regarding Ms. Lee's domicile. Also, Mr. Hernandez called the local police and asked them to

check the address for their home telephone number which is listed on Ms. Lee's Keyport High School Personal Data Questionnaire, dated January 18, 2003 (R-1). Thereafter, he was advised that the telephone was at a Hazlet location. Mr. Hernandez received a letter, with photographs of the Keyport apartment, which had been sent to David Winter, the Board Secretary, from Anthony Vecchio, the Keyport Fire Marshal and Code Enforcement Officer which states that in Mr. Vecchio's opinion, no one is residing at the petitioners' Keyport apartment (R-3).

Based on all the information he received, Mr. Hernandez felt that Ms. Lee did not reside in Keyport and he discussed the matter with Gail Vovna, the Board's Director of Curriculum and the Assistant Superintendent of Education and with John Dumford, the Board's Superintendent of Education. Thereafter, he and Ms. Wovna spoke to Ms. Lee and Mr. Hernandez asked her whether she was living in Keyport. According to Mr. Hernandez, Ms. Lee stated that she didn't know and that he should speak to her father. Mr. Hernandez denied the allegation in the petitioners' petition that he told Ms. Lee to get out of school. Mr. Hernandez stated that he did give her a blank transfer form and he suggested that Mr. Lee talk to him about the matter. At the time of this conversation, Mr. Hernandez was aware that Ms. Lee was upset about her discussions with Ms. Vovna regarding some of Ms. Lee's courses.

Mr. Hernandez stated that during the 2001-2002 school year, one student left the high school after there was a question regarding residency and that this student was not of a minority race. He also stated that during the 2002-2003 school year, there were six residency investigations, and that three of these students left the high school and that none of them were of a minority race. Mr. Hernandez stated that none of these students were charged tuition. In response to an interrogatory, the Board stated that it did not change tuition since these students and their parents did not dispute the Board's investigation as to domicile and promptly transferred to another school (J-6, response to question #10).

The day after he met with Ms. Lee, Mr. Hernandez stated he and Mr. Wovna met with Mr. Lee. Mr. Hernandez stated that Mr. Lee did not say specifically that he lived in Keyport and that he mentioned that he and his wife were separated.

In response to the Board's subpoena, Diane Royle, the on-site apartment manager for the Green Grove Apartment complex, testified that she initially received an application from Mr. Lee's wife for an apartment on behalf of herself and her daughter. This application was denied for insufficient income. Mrs. Lee accused Ms. Royle of racial discrimination and was angry when her application was denied. Several days later, Mr. Lee submitted an application for himself and his daughter which was approved

Ms. Royle stated that her apartment's door is across the court from the door to the petitioners' apartment and that she never saw Mr. Lee nor Ms. Lee enter or leave their apartment. She stated that she saw Ms. Lee for the first time at this hearing. Ms. Royle stated that she did see Mrs. Lee on several occasions when she came to the apartment complex to pick up mail for the petitioners' apartment. Also, she had a discussion with Mrs. Lee about a rental late fee. Mrs. Lee was upset about the last fee and Ms. Royle told Mrs. Lee that she would have to talk to Mr. Lee about the matter since he was the renter. Ms. Royle stated that Mrs. Lee again accused her of racial discrimination when they discussed the late fee.

On or about October 1, 2003, Ms. Royle received a report from the apartment superintendent, Alvin Peterson, that he had entered the petitioners' apartment since the person living in the apartment below the petitioners' apartment had complained about a ceiling leak. Mr. Peterson told her that there was an overflowing toilet in the petitioners' apartment and that the apartment was completely empty. Also, the electric meter reader spoke to her since he thought the petitioners' apartment was empty because of the low electric meter readings.

On or about November 13, 2003, Mr. Vecchio came to her office and told Ms. Royle that he had received a report of an activated smoke detector in one of the apartments. She, Mr. Vecchio and Mr. Peterson identified the alarm as coming from the petitioners' apartment and, after receiving no response when they rang the bell, they entered the apartment. She stated that they found that the smoke detector needed a new battery and that they checked to make sure there wasn't a fire or smoke in the petitioners' apartment. Ms. Royle stated she they saw a mattress with a lamp on the floor in the bedroom, no linen or clothes in the bedroom, and no food or dishes in the kitchen except for a gallon of milk and cereal in the refrigerator.

Ms. Royle stated that no one used the assigned parking space for the petitioners' apartment, and that when Mr. Lee gave up the apartment, it was in rentable condition and it looked like it had never been lived in. It was Ms. Royle's opinion that nobody lived in the petitioners' apartment.

Mr. Vecchio testified for the Board and he stated that he got a call that a smoke detector had been activated at the Green Grove Apartment complex and he radioed the fire chief to tell him that he was going to the apartment complex. He, Ms. Royle and Mr. Paterson determined that the activated smoke detector was in the petitioners' apartment. They rang the doorbell. After there was no response, they entered the apartment and Mr. Vecchio went into all the rooms looking for any indication of a smoke-related problem. He determined that the only problem was that the smoke detector needed a new battery. Mr. Paterson replaced the battery.

Mr. Vecchio stated that he saw in the bedroom a twin bed mattress on a frame but no clothes or linens, that there were no dishes or appliances in the kitchen, and no food except for a gallon of milk and a box of cereal in the refrigerator. The kitchen also had a disconnected smoke alarm. In the living room, he saw two chairs, several paper boxes, a laundry basket and some bedding rolled in a corner. Based on what he saw, he considered the apartment to be unoccupied.

Mr. Vecchio stated that he was concerned about the fact that the apartment was empty since previously another empty apartment was determined to be a safe house for alleged terrorists. Mr. Vecchio took photographs to document what he saw in the apartment even though he did not think the petitioners' apartment was being used by terrorists. However, since he was aware that Ms. Lee was attending high school in Keyport and he was aware that the high school was concerned about residency issues, he sent a letter along with the photographs he took at the apartment to the Board (R-3). Mr. Vecchio denied that he had rearranged the furniture before taking the photographs or that he had edited the photographs.

Thereafter, Mr. Lee called him and stated that he did live in the Keyport apartment. Mr. Lee again called and asked Mr. Vecchio to come to the apartment. Mr. Vecchio did so on January 6, 2004, and found that the apartment was fully furnished and looked as if somebody lived there (P-51).

The Board hired Paul Smith, a licensed private detective, to look into the question of the petitioners' domicile. Mr. Smith subcontracted the assignment on February 9, 2004, and John Coamano, a licensed private investigator, conducted the investigation (R-11. Mr. Coamano testified that he was given three addresses to check, the one-bedroom second floor Keyport apartment, a condo in Hazlet and a large private home in Holmdel. He determined that Mr. Lee leased the Keyport apartment but that he owns the condo in Hazlet and the house in Holmdel, and that neither the condo or the house are listed for sale. Mr. Coamano stated that the Holmdel house has five bedrooms with a large backyard containing a tennis/basketball court, and he estimated that it is worth more than one million dollars. He stated that the Hazlet condo has two bedrooms and is worth $150,000.

Using the Internet, Mr. Coamano found Mr. Lee's photograph and that he works as a vice-president and portfolio manager for the Oppenheimer Funds. He also determined that Mr. Lee has two daughters, Ms. Lee who is 18 years old and a younger daughter. He saw Ms. Lee's photograph in a high school book.

Mr. Coamano determined that Mr. Lee owns three vehicles, a 2001 BMW 740, a 2001 Toyota Siena and a 1998 Mitibishi Mirage. He also found out that Mr. Lee had a driver's license in the name of Shanquan Li and the listed address is the house in Holmdel; and that he had changed his name and address several months before the investigation. Mr. Lee's current driver's license is in the name of Victor Lee and the listed address is the Keyport apartment.

On February 15, 2004, at approximately 7:00 p.m., Mr. Coamano went to the Holmdel address and saw some activity in the house. He decided to use the pretext of looking for a lost dog and to go and knock at the door to see who responded. As he was walking to the door, he saw Mr. Lee and a young girl who he believed to be Ms. Lee near the garage door, and he asked about a missing dog. After seeing Ms. Lee at the hearing, Mr. Coamano testified that he is sure the young girl he saw was Ms. Lee.

After speaking with Mr. Lee, Mr. Coamano returned to his car and saw Mr. Lee and the young girl leave in the BMW vehicle. Mr. Coamano followed, saw Mr. Lee drop off the young girl at another residency in Holmdel and return to the Holmdel house. Mr. Coamano was later stopped by the Holmdel Police who told him that they received a call about a suspicious person in the vicinity (R-12). He assumed that Mr. Lee had called the police.

On February 18, 2004, at approximately 6:00 a.m., Mr. Coamano again went to the Holmdel address and, after awhile, he saw Mr. Lee drive up and put his Mitsubishi Mirage into the garage at the Holmdel house. About 20 minutes later, Mr. Lee left driving the Toyota Siena. Mr. Coamano followed Mr. Lee who later returned to the Holmdel house.

Later on February 18, 2004, Mr. Coamano spoke to Barbara, a stay-at-home mother, who lives across the street from Mr. Lee's Holmdel home. She told Mr.

Coamano that she did not personally know the Lee family but has seen Mr. Lee, his wife and his two daughters from time to time.

Mr. Coamano spoke to both Ms. Royle and Mr. Peterson at the Green Grove Apartment complex. He also spoke to a mailman who delivers mail to the apartments on Wednesday and who stated that the petitioners' mailbox is frequently full of non-collected mail.

Also on February 18, 2004, Mr. Coamano spoke to the tenant who lives in the apartment below the petitioners' Keyport apartment who he described as a Hispanic woman. This woman told him that she did not know anyone was renting the apartment above her until she had a leak in the ceiling in her apartment. Thereafter, she stated that she saw Mr. Lee and his daughter on a couple of occasions. Mr. Coamano stated that while he was talking to the Hispanic lady, Mr. Lee and his daughter came down and would not leave. The Hispanic lady became flustered and closed her door.

Mr. Coamano went to the Hazlet condo on February 18, 2004, and spoke to a neighbor who stated that an older oriental woman comes daily to pick up the mail and that an older oriental male stays overnight at the condo about once a week. The neighbor told Mr. Coamano that she uses the Lee's parking space since it is not used.

After the investigation, Mr. Coamano concluded that the petitioners live in Holmdel and that one or both of them sometimes stay at the Keyport apartment.

As stated, the petitioners did not testify at the hearing nor did they present any witnesses. They had admitted into evidence the following exhibits to support their argument that they are domiciled in Keyport:

- Deed for a home purchased by Mr. Lee at 231 Atlantic Street in Keyport, dated February 23, 2004 (P-2), and a postal change of address (P-3)
- Bills sent to Mr. Lee at the 231 Atlantic Street address (P-5, P-7, P-8, P-9)

- Letters and bills sent to Mr. Lee at the Keyport apartment (P-4, P-6, P-10, P-11, P-18, P-23 through P-29)
- School-related letters sent to Ms. Lee at the Keyport apartment (P-30 through P-39)
- Lease and other documents relating to the rental of the Keyport apartment by Mr. Lee (P-13, P-21, P-53, P-55, P-56, P-61, P-62, P-63)
- Ms. Lee's voter registration (P-54) and bank statements (P-12, P-16, P-17) using the Keyport apartment address
- Mr. Lee's voter registration (P-14) and his driver's license (P-15) using the Keyport apartment address

ARGUMENTS OF THE PARTIES

Joan M. Damora, Esq., on behalf of the Board, argued that it is entitled to prevail as to its motion for summary decision since the petitioners have not met their burden of proof and have not shown that they are domiciled in Keyport. Ms. Damora noted that domicile is defined as "the place where [a person] has his [or her] true, fixed, permanent home and principle establishment, and to which whenever he is absent, he has an intent of returning." *T.B.W. ex rel. A.W. v. Board of Education of the Township of Belleville, Essex County,* Agency Docket No. 1159-5/96, 1998 W.L. 66 8678 (N.J. Adm. June 18, 1998); *N.J.A.C.* 6A:28-2.4(a)(l)(i).

Ms. Joan Damora argued that pursuant to *N.J.A.C.* 6A:28-2.5(c), the decision as to domicile is to be based on the totality of the information and proofs presented and that, in this matter, the Board has presented credible testimony and documents which question the petitioners' representation that they are domiciled in Keyport. Also, the Board introduced evidence as to Mr. Lee's employment, the residences he owns in Hazlet and Holmdel and the three cars he owns in order to raise a question as to the likelihood that the petitioners would permanently live in a small apartment in Keyport which for a time had little or no furniture, appliances, clothes or food.

Ms. Damora argued that the petitioners have shown only that they rented the Keyport apartment and thereafter purchased a residency in Keyport but that they did not show that they are living in Keyport. Ms. Damora noted that a person can own a number of residences but can have only one domicile; a permanent address where the person resides. *Collins v. Yancy,* 55 *N.J. Super.* 514, 520-21 (Law Div. 1959); *N.J.A.C.* 6A:28-2.4(a)(1)(i).

Ms. Lee argued that the Board has not shown that she and her father are not living in Keyport. She noted that the Board had not called as witnesses Mr. Paterson or any of the neighbors who spoke to Ms. Siegle or Mr. Coamano. She argued that of the six witnesses presented by the Board; three of them are biased against the petitioners – two because of prior disagreements with one of the petitioners and Mr. Coamano because he was paid by the Board and, therefore, inclined to support the Board's position. She noted that Mr. Coamano's report made an incorrect statement as to one of Mr. Lee's cars and referred to an exhibit which the Board had pre-marked but which was not admitted into evidence. She stated that on the Certificate of Occupancy prepared by Mr. Vecchio for the Keyport apartment, he lists the wrong address (P-13). Comparing the address on the Certificate of Occupancy (R-13) to the address on the lease (P-62); I cannot see any errors. Also, Ms. Lee argued that the references to the petitioners' income and living style are inappropriate.

Ms. Lee argued that she is legally entitled to attend the Keyport High School pursuant to:

(1) *N.J.S.A.* 18A:38-1D which provides:

> 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 to be domiciled within the district for the purposes of this section;

(2) *N.J.A.C.* 6A:28-2.4(a)1v which provides that:

> A student is domiciled in the district when his or her parent or legal guardian resides within the district on an all-year-round basis for one year or one year or more, notwithstanding, the existence of a domicile elsewhere; and

(3) *N.J.A.C.* 6A:28-2.4(a)1ii which provides that:

> Where a student's parents are domiciled within different districts, and where there is no court order or written agreement between the parties designating the district for school attendance, the student's domicile is in the district of the parent with whom the student lives for a majority of the school year, regardless of which parent has legal custody.

In addition, Ms. Lee stated that *N.J.A.C.* 6A:28-2.5(a) lists the types of documents that must be presented to show eligibility for school enrollment and argued that the petitioners have complied with this section and have presented sufficient documents to show that she and her father are domiciled within Keyport. Ms. Lee argued that the petitioners should not be required to present anything else.

CONCLUSIONS OF LAW

Having reviewed the testimony and exhibits introduced into evidence, I agree with Ms. Damora's argument that the Board has presented sufficient evidence to support the Board's conclusion that the petitioners were not domiciled in Keyport since they did not reside in Keyport. Through the exchange of interrogatories, the petitioners were

aware of the witnesses and documents the Board relied on in this matter to support its conclusion that the petitioners did not live in Keyport. On several occasions, I informed the petitioners that the burden of proof was on them to show that they were living in Keyport and that they probably could not prove their case solely on the introduction of documents. Prior to the hearing, I also advised the petitioners that they could not place into evidence documents which list the names of persons who would state that the petitioners live in Keyport or written statements of persons who state that the petitioners live in Keyport. I informed them that they would have to call these people as witnesses and give the Board the opportunity to cross-examine the witnesses.

I recognize that the petitioners used the suggested list of documents listed in *N.J.A.C.* 28-2.5(a), and have presented documents showing that Mr. Lee rented the Keyport apartment and thereafter purchased a residency in Keyport, and that the petitioners used the Keyport addresses for certain purposes. These documents alone are not sufficient and there was no convincing proof presented by the petitioners that they actually reside in Keyport. The facts in this matter are similar to those in *L.P. v. Leonia Borough Board of Education,* 93 *N.J.A.R.* 2nd (Edu.) 129. In that case, the administrative law judge and the Commissioner concluded that the petitioner rented an apartment for school purposes but did not live there. The facts in this matter show that Mr. Lee rented the Keyport apartment solely to show proof of residency. Although, normally I do not allow evidence in cases of this nature regarding the family's income, I did so in this matter and I agree with Ms. Damora's argument that it is highly unlikely that Mr. Lee and his daughter would live in an almost empty small Keyport apartment when they have other residencies available to them. In addition, the investigations of both Ms. Siegle and Mr. Coamano presented credible testimony that neither Mr. Lee nor Ms. Lee lived in Keyport.

I **CONCLUDE** that the petitioners have not proved that they are domiciled in Keyport. The statute and regulations cited by the petitioners clearly state that they must prove they live in Keyport. Therefore, I **ORDER** that the decision of the Board to terminate Ms. Lee's education at the Keyport High School be **AFFIRMED.**

As to the Board's request for tuition, Mr. Hernandez testified that the Board had not charged tuition when other Keyport High School students were found not to be domiciled in Keyport. Therefore, I **CONCLUDE** and **ORDER** that the Board is not entitled to charge tuition in this matter.

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 (45) 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 (13) 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, 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 7, 2004
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ, t/a

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

4-8-04
DATE

Mailed to Parties:
Laura Anders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 14 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

/jck

APPENDIX

WITNESSES

For the Petitioner:

None

For the Respondent:

Sandi Siegle

Diana Royle

Miguel Hernandez

Anthony Vecchio

Colleen Rafter

John Coamano

EXHIBITS ADMITTED INTO EVIDENCE

Jointly submitted:

J-3 Interrogatories sent to the petitioners by the Board

J-4 Interrogatories sent to the Board by the petitioners

J-5 Petitioners' answers to the Board's interrogatories

J-6 Board's answers to the petitioners' interrogatories

For the Petitioner:

P-1 A summary of certain statutes and regulations dealing with domicile and the petitioners' arguments

P-2 Deed for a dwelling at 231 Atlantic Street, Unit 6A, in Keyport, listing Victor S. Lee as the grantee, dated February 23, 2004

P-3 United States Postal Service change of address confirmation for Sophia Lee from the Keyport apartment address to 231 Atlantic Street, #A6, in Keyport, starting date of March 3, 2004

P-4 Letter to Victor Lee from the Governor sent to the Keyport apartment address, dated January 16, 2004

P-5 New Jersey Natural Gas statement addressed to Shanquan Lee at the 231 Atlantic Street address in Keyport, due date March 30, 2004

P-6 Verizon bill sent to S. Li at the Keyport apartment, due date February 10, 2004

P-7 Cablevision bill sent to Victor Lee at 231 Atlantic Street, Apartment #6 in Keyport, due date of April 5, 2004

P-8 Jersey Central Power and Light bill sent to Shanquan Li at 231 Atlantic Street, Unit #6, dated March 19, 2004

P-9 Letter from Verizon, dated March 2, 2004, addressed to S. Li at 231 Atlantic Street, Unit #6A

P-10 American Express statement sent to Shanquan Li at the Keyport apartment

P-11 American Express statement sent to Shanquan Li at the Keyport apartment, due date of January 3, 2004

P-12 Sovereign Bank statement sent to Sophia Lee at the Keyport apartment, for period in December, 2003

P-13 Borough of Keyport Change of Occupancy certificate dated January 9, 2003, for petitioners' occupancy at the Keyport apartment

P-14 Voter registration card issued to Victor Lee at the Keyport apartment

P-15 New Jersey driver's license issued to Victor Lee at the Keyport apartment

P-16 Letter to Sophia Lee at the Keyport apartment sent by Sovereign Bank

P-17 Sovereign Bank statement listing Sophia Lee's address as the Keyport apartment, dated December 12,2003

P-18 Jersey Central Power and Light bill sent to Shanquan Li at the Keyport apartment, dated December 18, 2003

P-19 Contribution made to the Keyport First Aid on July 10, 2003, by Shanquan Li

P-20 Contribution made to the Keyport Policemen's Benevolent Association made by Shanquan Li, on December 15, 2003

P-21 Statement to residents regarding their parking space issued by the Green Grove Apartments

P-22 Marked by identification only

P-23 Copy of a Fed Ex envelope from Joan M. Damora, Esq. addressed to Mr. and Mrs. Lee at the Keyport apartment, January 26, 2003

P-24 Copy of a Fed Ex envelope from Joan M. Damora, Esq. addressed to Mr. and Mrs. Lee at the Keyport apartment, December 5, 2003

P-25 Copy of a Fed Ex envelope from the Keyport Board of Education , dated November 20, 2003, addressed to Mr. and Mrs. Lee at the Keyport apartment

P-26 Envelope from the Keyport High School to the parents of Sophia Lee, addressed to the Keyport apartment, stamped on September 25, 2003

P-27 Envelope from the Schwartz, Simon, Edelstein, Celso & Kessler Law Firm sent to Mr. and Mrs. Lee addressed to the Keyport apartment, stamped on December 5, 2003

P-28 Envelope from the Keyport High School to the parents of Sophia Lee, addressed to the Keyport apartment, stamped September 25, 2003, with attachment

P-29 Letter from Keyport High School to the parents of Sophia Lee, addressed to the Keyport apartment, stamped August 21, 2003, with attachment

P-30 College Board SAT I Admission ticket issued to Sophia Lee listing the Keyport apartment address, test on January 29, 2003

P-31 College Board SAT student score report sent to Sophia Lee addressed to the Keyport apartment, test date of November, 2003

P-32 College Board SAT student score report sent to Sophia Lee addressed to the Keyport apartment, test date of October, 2003

P-33 Letter from Brookdale Community College to Sophia Lee addressed to the Keyport apartment regarding November 29, 2003 registration

P-34 Letter from Brookdale Community College to Sophia Lee addressed to the Keyport apartment

P-35 Envelope from the New Jersey Army National Guard sent to Sophia Lee at the Keyport apartment, with attachment, dated October 28, 2003

P-36 Letter of commendation addressed to Sophia Lee at the Keyport apartment, dated October 10, 2003

P-37 Envelope from the National Society of High School Scholars addressed to Sophia Lee at the Keyport apartment, with attachment, dated July 7, 2003

P-38 Envelope from the Institute of Children's Literature addressed to Sophia Lee at the Keyport apartment, stamped May 30, 2003, with attachment

P-39 Letter from Vector addressed to Sophia Lee at the Keyport apartment

P-40 Marked for identification only

P-41 Keyport High School Guidance Department transfer form

P-42 Marked for identification only

P-43 Marked for identification only

P-44 Marked for identification only

P-45 Marked for identification only

P-46 Keyport High School Guidance Department enrollment form for Sophia Lee

P-47 Marked for identification only

P-48 Marked for identification only

P-49 Marked for identification only

P-50 Marked for identification only

P-51 Letter from Anthony Vecchio to David Winters, dated January 6, 2004, with attachment

P-52 Marked for identification only

P-53 Letter from Shanquan Li addressed to Diana [Royle], dated January 12, 2004

P-54 County of Monmouth Voter Registration card issued to Sophia Lee at the Keyport apartment, dated February 24, 2004

P-55 Modification and renewal of lease for the Keyport apartment, dated November 7, 2003

P-56 Bills for rent of the Keyport apartment addressed to Shanquan Li for the period from February 1, 2003 through December 1, 2003

P-57 Marked for identification only

P-58 Marked for identification only

P-59 Marked for identification only

P-60 Marked for identification only

P-61 Lease term worksheet for the Keyport apartment for the period from February 1, 2003 through January 31, 2004

P-62 Lease for the Keyport apartment, listing Shanquan Li as the tenant, dated January 8, 2003

P-63 New tenant information sheet given to Shanquan Li, dated January 7, 2003

P-64 Marked for identification only

For the Respondent:

R-1 Keyport High School Personal Data Questionnaire filled out for Sophia Lee, dated January 8, 2003

R-2 Lease for the Keyport apartment, listing Shanquan Li as the tenant, dated January 8, 2003

R-3 Letter from Anthony Vecchio to David Winters, dated November 13, 2003, with attachments

R-4 Marked for identification only

R-5 Marked for identification only

R-6 Marked for identification only

R-7 Deed for a condo located at 36 Village Green Way, Hazlet, New Jersey, listing Shanquan Li and Yiqun Fan as the grantees, dated August 28, 2001

R-8 Number not used

R-9 Number not used

R-10 Raritan High School withdrawal forms for Sophia Lee, dated January 10, 2003

R-11 Investigation report prepared by John Coamano, dated March 16, 2004

R-12 Holmdel Police Report, dated February 15, 2004

OAL DKT. NO. EDU 318-04
AGENCY DKT. NO. 1/1-04

V.L. and S.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KEYPORT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed by the Assistant Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34. Timely exceptions were filed both by the Keyport Board of Education (Board) and by petitioners,[1] with petitioners' April 27, 2004 submission also incorporating replies to the Board's April 26, 2004 exceptions. The Board additionally filed, on May 3, 2004, a timely reply to petitioners' exceptions, to which petitioners attempted to reply in turn through a May 5, 2004 submission not considered herein because applicable procedural rules make no provision for response to reply exceptions. *N.J.A.C.* 1:1-18.4.

In their exceptions, petitioners urge the Commissioner to adopt that portion of the Initial Decision finding that they should not be assessed tuition, but to reject the portion finding that S.L. is not entitled to attend school in the Keyport school district (Keyport). Petitioners reiterate the statutory and regulatory citations on which they rely, *N.J.S.A.* 18A:38-

[1] Although this matter was filed and initially proceeded as though S.L. were a minor (Initial Decision at 1), documents on record show that, in fact, she had reached the age of majority prior to the beginning of the 2003-04 school year.

1(d), *N.J.A.C.* 6A:28-2.4(a)1ii and (a)1v, and *N.J.A.C.* 6A:28-2.5(a), again contending that they have been living in Keyport for over a year and are thus entitled to be found domiciled there, as proven by "over fifty (50) concrete evidences" they have provided from among the acceptable forms of documentation listed in rule. (Petitioners' Exceptions at 1-3) Petitioners also contend that they were unable to call key witnesses who are employees or students in the district, since these witnesses had been threatened with reprisal and consequently declined to appear (*Id.* at 3); that the attempt to remove S.L. from school is really about S.L.'s number-one student ranking and the district's desire to further the status of a competing non-minority student (documents on record, e.g., Exhibit P-4, indicate that petitioners are Chinese-American) with ties to district officials (*Id.* at 4, 9); that petitioners are not "free riders," since they own a home and pay taxes in the district (*Id.* at 4); that the district acts in a biased manner, treating students differently based on their racial, ethnic and economic status (*Id.* at 5,7-8, 9); that the district bases its residency investigations on "gossips and rumors" (*Id.* at 5); that the district has no procedures for dealing with residency disputes and wastes taxpayer money by hiring attorneys who cause delays and persist in fighting meritorious claims (*Id.* at 5-6, 8-9); that the Board attorney led witnesses and twisted facts (*Id.* At 7, 8); and that school officials did not handle petitioners' case in a confidential manner, so that numerous students have acted "to intimidate and violate S.L.'s privacy and safety in school," with the second-ranked student devising "several plans with some students to poison and stab S.L. and other severe misconducts" and other students "even [writing] curse words on S.L.'s name on the Senior Wall." (*Id.* at 9)

In reply, the Board counters that, while petitioners have made any number of vague, outrageous and even slanderous allegations, all in an unsupported attempt to deflect

attention from the central issue in this matter, they have utterly failed to meet their burden of establishing that they are domiciled in Keyport so as to entitle S.L. to attend school there. (Board's Reply at 4) Rather, the Board posits, the record amply supports its contention that, while petitioners may have rented and eventually purchased a residence in Keyport, they did not actually live there (*Id.* at 1-2), and there is no basis whatsoever for the suggestion that the Board's witnesses, all of whom were found to be consistent and credible by the Administrative Law Judge (ALJ), were dishonest, biased or tainted by improper motives. (*Id.* at 3) The Board further points to petitioners' failure to understand that merely producing documents from the regulatory list of acceptable residency proofs does not entitle them to a finding of domicile without regard to the relevancy, credibility or reliability of the documents themselves and the existence of contrary evidence. (*Id.* at 2-3) Finally, the Board contends that petitioners' refusal to testify despite several admonitions by the ALJ entitles the Board to an adverse inference, since petitioners nowhere offer an explanation as to why they are (purportedly) living in Keyport rather than in one of the other residences owned by them, most notably the large family home in Holmdel where S.L.'s mother and siblings undisputedly reside. (*Id.* at 4)

In its own exceptions, the Board urges adoption of that portion of the Initial Decision finding that petitioners are not entitled to attend school in Keyport, but rejection of that portion declining to assess tuition for the period of S.L.'s ineligible attendance because the Board has not previously sought tuition when removing ineligible students from its schools. The Board initially urges the Commissioner to distinguish the instant matter from the past matters referenced by the ALJ, since, in those instances, the students in question left Keyport schools immediately upon being confronted with the district's evidence of their

ineligibility; while petitioners, in contrast, persisted in fighting the district despite compelling evidence against them, seeking to delay resolution of the dispute in the interest of keeping S.L. enrolled in the district as long as possible and eventually compelling the Board to conduct a full hearing, contract for an outside investigator, litigate an administrative proceeding before the Commissioner, and continue to educate S.L. during the pendency of this appeal by operation of *N.J.S.A.* 18A:38-1.

The Board further contends that assessment of tuition is mandatory under the language of the statute, but that, even if it were not, failure to assess tuition in the present instance would be particularly unjust, not only because petitioners have availed themselves of the benefit of *N.J.S.A.* 18A:38-1 and now seek to avoid its concomitant obligation, but also because the record clearly shows petitioners to have "engaged in a course of conduct intended to deceive school authorities***since [S.L.'s initial enrollment] on January 8, 2003" through "an elaborate scam to disguise their true domicile." (Board's Exceptions at 2-6, quotations at 2 and 6) To permit petitioners to escape without consequence, the Board argues, is counter to public policy in that it "would send the wrong message to parents who may be considering enrolling their children in schools which they are not legally entitled to attend" and encourage "frivolous and meritless challenges [to Board residency determinations] without any potential risk." (*Id.* at 6)

In reply, petitioners counter that the Board's exceptions represent "the district's reluctance to resolve the issue and their malicious tendency to prolong and worsen the conflict." (Petitioners' Exceptions at 10) Petitioners urge that they should not be penalized for exercising their Constitutional right to contest an erroneous decision, and that doing so would additionally constitute racial discrimination since the other students who have

been disenrolled because of residency/domicile ineligibility were all non-minority students and they were not assessed tuition; therefore, to assess petitioners discriminates against them as members of a minority race. (*Id.* at 5) Petitioners further contend that the Board and its attorney are responsible for prolonging the case by refusing to settle with them, taking excess time to prepare and respond to interrogatories, causing delays in the hearing itself, and ignoring their warnings that the Board would "incur a large amount of expenses" by continuing to fight their claims. (*Id.* at 6, 8-9) In fact, petitioners reiterate, the Board owes *them* money for classes that were wrongfully withheld from S.L. and because the Board refused to pay for out-of-district advanced education for S.L. as it did for other students; petitioners state that if they are assessed tuition, they will "assess the district for all of the extra expenses incurred by S.L.'s education and the taxes [they] paid to Keyport." (*Id.* at 7)

Upon careful and independent review of the record of this matter, the Assistant Commissioner determines to adopt in part and reject in part the decision of the ALJ.

Initially, the Assistant Commissioner fully concurs with the ALJ that petitioners have not met their burden of demonstrating that S.L. is entitled to attend school in Keyport pursuant to *N.J.S.A.* 18A:38-1. Preliminarily, it is noted that petitioners do not even attempt to claim that they are domiciled in the district under the provisions of *N.J.S.A.* 18A:38-1(a); clearly, the family's domicile under that provision has been, and continues to be, in Holmdel. However, notwithstanding petitioners' protestations to the contrary, the record is equally clear that petitioners are not domiciled in Keyport under the provisions of *N.J.S.A.* 18A:38-1(d) and its implementing rules. Indeed, what the record of this matter instead demonstrates is that petitioners were not living in Keyport at all until their residency was questioned by the district, whereupon they took up varying degrees of occupancy (or the

semblance thereof) in properties owned or rented by them, to whatever extent they deemed necessary to counter the district's evolving inquiry.

Documentation on record, and testimony and evidence found credible by the ALJ, establish the following: Petitioners have, since 1999, owned a large family home in Holmdel, where V.L.'s wife and another daughter undisputedly reside. (Exhibit R-11 at 6) On September 4, 2001, S.L. was enrolled as a sophomore at Raritan High School in Hazlet Township, where V.L. subsequently represented to school officials that the family had been living in Holmdel, but was now buying a more affordable home in Hazlet as a result of "downsizing" following the tragic events of September 11, 2001 (Initial Decision at 3); however, the deed for the home in question shows it to have been purchased on *August 28*, 2001. (Exhibit R-7) Around December 2002-January 2003, an allegation was made to Hazlet school officials that S.L. was not living in the district, but rather in Holmdel, and the district determined to undertake an investigation. (Initial Decision at 3) During this same period, S.L. was suspended for three days and denied membership in the National Honor Society for stealing a fellow student's notebook (Board's Answer, Preliminary Notice of Ineligibility, Appendix G-1: Letter from Principal of Raritan High School, and Appendix G-2: Raritan High School Student Discipline Log); due to the intervening holiday, the final day of her suspension was January 3, 2003.

On or about January 6, 2003, V.L.'s wife tried to rent an apartment in Keyport for herself and S.L., but was denied because of insufficient credit information; she accused the site manager of racial discrimination. (Initial Decision at 6; Exhibits R-2 and R-11 at 8) Thereafter, V.L. returned to rent the apartment for himself and his daughter, apparently also inquiring about S.L. residing there alone, receiving a negative response because of S.L.'s age

(17) at the time. (*Ibid.*) V.L. obtained a lease dated January 8, 2003 (Exhibits R-2, P-62), and on the same date, S.L. was enrolled in the Keyport School District (Exhibit R-1). On January 10, 2003, S.L. was withdrawn from Raritan High School because the family was "moving." (Exhibit R-10) S.L. completed the 2002-03 school year (her junior year) in Keyport, returning for her senior year in 2003-04.

Toward the end of September 2003, allegations were made to Keyport school officials that S.L. did not reside in the district, but in Holmdel, and preliminary investigations conducted in late September through mid-October (Board's Answer, Preliminary Notice of Ineligibility, Appendix D: Curriculum Office Memo) raised sufficiently serious concern for district officials to continue and intensify their investigation. (Initial Decision at 4-5) On October 3, 2003, petitioners' Keyport apartment was entered by the apartment superintendent because of an overflowing toilet (the downstairs tenant had reported water coming through her ceiling, Exhibit R-11 at 9-10) and was found empty and with a meter reading indicating virtually no electricity usage (Initial Decision at 6). After the water leak incident, the site manager received "very angry visits and phone calls" from V.L., who accused her of racism and angrily rebuffed her inquiries as to why the apartment was empty; even after the water emergency was explained to him, V.L. contended that apartment officials had no right to enter his apartment and adamantly insisted that he be called at his office, at home and on his cell phone before anyone was allowed to enter his apartment under any circumstances. (Exhibit R-11 at 10) Mail at the apartment was picked up by V.L.'s wife, who engaged on one occasion in a dispute with the site manager and again accused her of racial discrimination. (Initial Decision at 6) The tenant living below petitioners' apartment never saw petitioners before the water leak incident, and only a few times after that, usually very late at night.

(Exhibit R-11 at 10-11; Initial Decision at 10) Petitioners' mail remained uncollected for long periods of time, and their parking space was always empty. (Exhibit R-11 at 9; Initial Decision at 10)

On October 28, 2003, S.L. was verbally notified that the school administrative staff had concluded she did not reside in the district (Petition of Appeal at 7); when petitioners persisted in their claim of entitlement, a formal written notice of preliminary ineligibility was issued on November 17, 2003 (Preliminary Notice of Ineligibility, submitted as an attachment to the Board's Answer), setting a Board hearing date of December 3, 2003 and indicating that while V.L.'s request to defer hearing for an entire month could not be granted, the Board would consider a brief delay for good cause.

On November 13, 2003, the local fire marshal entered the apartment because a smoke detector had been activated and no one answered the door; upon inspection, the alarm was found to have been set off by a dead battery, and the resulting inspection of the premises led him to conclude that the apartment was unoccupied, and had been since the time of its rental 10 months earlier. (Initial Decision at 7-8; Exhibit R-3) The marshal notified the school district of his findings (Exhibit R-3), whereupon he was called by V.L. who insisted that he did, in fact, live there.

At around this time, V.L. had the address on his driver's license changed from Holmdel to Keyport (Exhibit R-11 at 3; P-15); he also called the fire marshal again to invite him to return and re-inspect the apartment. (Initial Decision at 8) The marshal did so on January 6, 2004, this time finding the premises fully furnished and stocked with food and clothing consistent with occupation. (Exhibit P-51)

On December 17, 2003, petitioners' residency hearing was conducted before the Board, which voted unanimously to authorize S.L.'s disenrollment because her parents had not met their burden of proving domicile or residency in the district; the results of this hearing were memorialized in a formal written notice dated December 19, 2003. (Board's Answer, Notice of Disenrollment) The notice provided information about petitioners' rights of appeal to the Commissioner and continued attendance for S.L. during the pendency of such appeal, as well as advising that Board policy did not provide for attendance at school by non-residents and that tuition at the rate of $45.00 per day for S.L.'s period of ineligible attendance would be sought by the Board and could be assessed by the Commissioner through an order enforceable in court in accordance with referenced statutes and rules.

Petitioners elected to pursue the instant appeal, which was filed on January 5, 2004, served on the Board on January 12, 2004, and perfected with proof of service on January 15, 2004. In their pleadings and subsequent communications to both the Commissioner and the OAL, petitioners continued to claim they were residing in Keyport, attributing the Board's actions to racial prejudice, attempts to balance the school budget by extorting money from targeted families through improper investigations, bad faith on the part of ambitious, prejudiced administrators with animus toward petitioners, a discriminatory desire to see a Caucasian student named Valedictorian instead of S.L., and other similar motivations. The Board filed its Answer, Affirmative Defenses and Counterclaim for Tuition on January 16, 2004, and the matter was transmitted to OAL on January 20, 2004, where it was docketed on January 26, 2004 and assigned as set forth in the Initial Decision at 2. Disputes regarding interrogatories, which are reflected both in the interrogatories themselves (Exhibits J-3 through J-6) and various underlying communications, as well as a request for

adjournment by petitioners (the validity of which was challenged by the Board), delayed the scheduled hearing; ultimately, the matter was heard on March 25 and March 26, when the record also closed.

Prior to the hearing, in February 2004, V.L. terminated the lease on his Keyport apartment, which he had recently requested to be converted to a month-by-month basis (Exhibits P-53, P-55); upon inspection following petitioners' vacation of the premises, the site manager found the apartment to be in rentable condition, looking as if it had never been lived in. (Initial Decision at 7) On February 23, 2004, V.L. purchased a house in the district (Exhibit P-2), where he and S.L. now claim to reside. Petitioners' Holmdel house was never put up for sale (Exhibit R-11 at 6); V.L.'s wife and another daughter undisputedly continued to reside there; and petitioners and their vehicles were regularly seen at the locale by a neighbor and during investigative observations. (Exhibit R-11 at 6-7, 13; Initial Decision at 9-10)

In conjunction with the instant appeal, in February 2004, the Board arranged for a licensed private investigator to look into petitioners' domicile. His final report dated March 16, 2004, concludes as follows:

> As of 3-16-04 the findings in this matter indicate that the permanent residence of [V.L. and S.L.] is [address redacted] Holmdel, NJ but that they have attempted to maintain an appearance of residency at both [address redacted] Hazlet and [address redacted] Green Grove Apartments, Keyport. More recently (since December) they have been staying in the Keyport apartment on an irregular basis.
>
> It appears [V.L. and his wife] have a pattern of bullying people and using threats of racial discrimination against people in order to pressure and persuade people to do what they want them to do as indicated by Mrs. Royle, the building manager of Green Grove and also the reaction of the Hispanic female after [V.L. and S.L.] interrupted our conversation on 3-18-04 at approximately 10:30pm. [See Initial Decision at 10 and Exhibit R-11 at 10-11.]

> It appears other than the months of December and January, [V.L. and S.L.] did not stay at the Keyport address. Shortly after the water leak incident in October of 2003, when it was discovered they were not staying in the apartment, [they] initially moved some limited pieces of furniture.
>
> The only witness I could find that stated they have seen and know of [V.L. and S.L.] residing at any of the "3" residences consistently during the past year is a neighbor, Barbara, who lives across the street from [V.L.'s] [address redacted] Holmdel address. Barbara stated she sees [V.L. and his wife] and the two daughters at the [address redacted] Holmdel residence on a steady basis but can not be more specific than that because she never bothered to take notice.
>
> It appears that no other neighbors, mailman, worker or maintenance personnel of the Hazlet or Keyport locations knows [V.L. or S.L.] or have seen them on a regular basis or even have seen or know of them at all.
>
> The only exception to this is the Hispanic female at [address redacted] Keyport who has only seen them irregularly and heard movement late at night in the apartment above her in the last 3-4 months since the water leak incident in October 2003.
>
> I have spoken to Mr. Royle on 2-25-03 (*sic*), who stated that [V.L.] has come to her office since my investigation and been very angry and threatening in his manner trying to find out what I was doing at Green Grove and what she stated to me. She also stated [V.L.] has questioned Mr. Petersen, the superintendent, and she also believes he has been trying to talk to the Hispanic female tenant about [my] investigation. Mrs. Royle states [V.L.] has made her very uncomfortable and concerned for her safety.
>
> (Exhibit R-11 at 13)

Against all of the above testimony, documentation and evidence, petitioners, who bear the burden of proof in this matter, offer nothing more in support of their claim than an array of documents which, while certainly of the *type* contemplated by *N.J.A.C.* 6A:28-2.5(a), have virtually no bearing on petitioners' residency status prior to mid-December 2003 at the earliest. Specifically, Exhibits P-2 (deed), P-3 (change of address card), and P-5 through P-9 (bills) all pertain to the home purchased by petitioners on February 24, 2004. Exhibits P-6 (phone bill), P-11 (credit card statement) and P-12 (bank statement) all date from January-February and apply to activity dating from December 2003 at the earliest; P-17 is a

bank inquiry printout dating from December 12, 2003, but also indicating that as of that date the account reflected no prior activity, deposits or interest accrued. Exhibits P-10 and P-16 (letters) are undated. Exhibits P-13, P-21, P-53, P-55, P-56, P-61, P-62, and P-63 all pertain to *rental* of petitioners' Keyport apartment, not to whether they are actually living there. Exhibit P-18 is an electric bill for the Keyport apartment dated 12/18/03, showing the prior month's bill to have been $6.67, while the cost of usage from 11/18/03 to 12/17/03 totaled $11.96. Exhibits P-23 through P-46 are school-generated or school-related communications, on which use of V.L.'s Keyport address has no import given that this was the address provided to the school for contact with S.L. or her parent/guardian. Exhibit P-54's first part (S.L.'s voter registration) is dated 2/24/04, and its second part (V.L.'s voter registration) is dated 1/04/02, which even petitioners concede is an error since S.L. has never claimed residency in Keyport prior to January 8, 2003. (Exhibit J-5, Response to Interrogatory No. 8) The only other documents provided by petitioners are cancelled checks for a donation to the Keyport first aid squad dated 7/10/03 (Exhibit P-19) and a donation to the police benevolent fund dated 12/15/03 (Exhibit P-20); standing alone, however, these are of no probative value whatsoever.

While petitioners repeatedly argue that they have fully complied with the law, what the record actually demonstrates is a sustained, carefully contrived attempt to create the *appearance* of compliance; as found by the ALJ, "[t]he facts in this matter show that [V.L.] rented the Keyport apartment solely to show proof of residency," (Initial Decision at 14) and that any living in Keyport by petitioners prior to February 2004 was both sporadic and specifically in response to the Board's challenge to their claim of S.L.'s entitlement to attend school in the district.

Moreover, although there is some evidence that could be used to support a contention that petitioners have taken up occupancy of the Keyport home purchased on February 23, 2004, petitioners still cannot prevail in their claim. Even assuming, *arguendo*, that petitioners were staying with increased regularity at the Keyport apartment during and after December 2003-January 2004, and are now residing at the Keyport home, so as to raise the *possibility* of school attendance as a temporary resident under *N.J.S.A.* 18A:38-1(d), it is by now well established that this provision may **not** be used to establish residency or domicile for the purpose of creating an entitlement to attend the schools of a district. *Whasun Lee v. Board of Education of the Township of Holmdel,* App. Div. A-653-95T5, decided October 9, 1996, slip opinion at 10-15. As set forth above, the record of this matter, together with the absence of any counterbalancing evidence due to petitioners' refusal to offer testimony on their own behalf despite repeated admonitions by the ALJ as to their burden of proof and the potentially deleterious impact of such refusal (Initial Decision at 14), leaves little room for doubt that this is precisely what petitioners herein have attempted to do.

Noting petitioners' arguments on exception, the Assistant Commissioner finds no basis whatsoever to reject the ALJ's credibility determinations, which must therefore be accepted pursuant to *N.J.S.A.* 52:14B-10(c). Further, the Assistant Commissioner is likewise satisfied that the ALJ appropriately weighed the testimony and evidence presented in light of the applicable burden of proof, which has clearly been misunderstood by petitioners who repeatedly attempt to shift it to the Board. (Initial Decision at 12) Additionally, the Assistant Commissioner finds that it was not inappropriate for the ALJ to have allowed testimony and evidence regarding petitioners' income and lifestyle under the circumstances (Initial Decision at 14); however, the Assistant Commissioner does not rely on such information in reaching

his determination herein, in light of the overwhelming weight of other evidence demonstrating that petitioners are not entitled to have S.L. attend school in Keyport.

Moreover, in reviewing the Board's actions, the Assistant Commissioner finds nothing in the record to suggest that petitioners were treated unfairly or inappropriately; while it is clear that there is no love lost between certain school officials and petitioners, it is also clear that the Board did not single out petitioners for investigation (Initial Decision at 4-5) and that, once an administrative determination of ineligibility was made, the Board provided full due process at the local level and properly effectuated the provisions of *N.J.A.C.* 6A:28-2 *et seq.* Certainly, there is nothing that would even remotely suggest that the Board or its agents acted in a racially discriminatory manner, and the Board's concern about student ranking cannot be viewed as anything more than an entirely understandable desire to see that honors are awarded correctly and that the rights of lawfully entitled students are not compromised by persons conniving to attend school in the district on an illegal basis. (Exhibit J-6, Response to Interrogatory No. 10) With respect to petitioners' claims that the Board's "last minute actions" in S.L.'s senior year were "irresponsible, unreasonable, and unjust" (Petition of Appeal at 10), the Assistant Commissioner notes that the Board acted promptly to investigate and attempt to resolve this matter, and that such delay as may have occurred is primarily attributable to petitioners themselves, who understood the situation at least as early as October 28, 2003 (Petition of Appeal at 7), but persisted in the deliberately calculated and resistive course of conduct set forth above.

With respect to assessment of tuition, however, the Assistant Commissioner cannot concur with the ALJ that the Board is entitled to no payment at all because it has not previously sought back tuition from disenrolled students. Rather, the Assistant Commissioner

concurs with the Board that petitioners' situation is distinguishable from that of students who withdraw immediately upon the school administration's notice of ineligibility, and in particular that it would be contrary to both public policy and legislative intent to permit a petitioner to invoke the protections of *N.J.S.A.* 18A:38-1 without being held responsible for its concomitant fiscal obligation if the petitioner does not prevail on appeal. Although the Board errs in arguing that the statutory language requiring assessment of tuition is mandatory in nature, so that the Commissioner has no discretion in this regard—an argument previously rejected by the State Board and the courts, as set forth in *M.R.N. and K.H., on behalf of minor children, D.J.N. and J.M.N., v. Board of Education of the Flemington-Raritan Regional School District, Hunterdon County,* decided by the Commissioner February 24, 2003, Slip Opinion at 13-14, as well as in *N.J.A.C.* 6A:28-2.10(d)—the Board is correct in concluding that no equitable basis exists herein for forgiveness of all tuition that would otherwise be due.

In this instance, it appears that the Board has both a history of past practice and an absence of written policy with respect to disenrollment issues resolved at the local level; therefore, notwithstanding petitioners' demonstrated contrivance in effectuating and maintaining S.L.'s illegal enrollment in Keyport, this fact militates against assessing tuition for the entire period of S.L.'s ineligible attendance in the district. However, tuition in this instance *is* appropriately assessed, for the reasons set forth above, at the stated rate of $45.00 a day ($8,100 ÷ 180 days in session) for the period beginning with the filing date of petitioners' appeal to the Commissioner (January 5, 2004) through the filing date of this decision.[2]

[2] The Assistant Commissioner finds no basis for consideration of petitioners' claims that they are entitled to tuition adjustment to compensate them for taxes, rental expenses, donations to local charities and the cost of community college classes allegedly necessitated by the district's purported inferior quality and inability or unwillingness to meet S.L.'s needs as a gifted student.

Finally, the Assistant Commissioner observes that while S.L. is clearly ineligible to attend school in Keyport pursuant to *N.J.S.A.* 18A:38-1 and petitioners must be held responsible for back tuition to the extent set forth above, ultimate resolution of this matter does pose something of a dilemma. S.L. is not now, and never has been, lawfully entitled to attend school in the district; but through a combination of circumstance, petitioners' machinations and the operation of statute, she has, as of the date of this decision, in fact attended school there for most of her senior year with the result that an unfortunate situation has arisen with respect to class rank and graduation ceremonies. Ordinarily, issuance of a Commissioner determination on student residency at this late point in the school year might result in a directive that a student be permitted to remain in the district on a tuition basis for the balance of the year, notwithstanding that the student is ineligible for attendance in the current district and immediately entitled to a free public education in his or her actual district of domicile. However, the particular circumstances of this matter are such that the Assistant Commissioner cannot in good conscience *direct* the Board to permit S.L. to remain in Keyport High School, thereby rewarding petitioners for their calculated deception and thwarting the Board's efforts to ensure fairness to its lawfully enrolled students. Instead, the Assistant Commissioner authorizes the Board, *in its sole discretion*, to make an exception to its established policy of not admitting non-resident students by permitting S.L. to remain in Keyport High School if she so chooses, *subject* to payment of tuition and such additional terms and conditions as may be set by the Board. In this regard, the Assistant Commissioner stresses that, by allowing the Board to permit S.L.'s continued attendance, he does not intend to create, and his decision herein should not be construed as compelling the Board to

recognize, a concomitant entitlement on S.L.'s part to any rank, honor or privilege accorded to students *lawfully* attending school in the district.[3]

Accordingly, for the reasons set forth above, the Initial Decision of the OAL is adopted with respect to its determination that S.L. is not entitled to attend school in the respondent Board's district, but rejected with respect to its determination that no tuition may be assessed for any of the period of S.L.'s ineligible attendance. The Petition of Appeal is dismissed and petitioners are directed to remit tuition to the Board at the rate of $45.00 per day for the period extending from January 5, 2004 through the filing date of this decision.[4]

IT IS SO ORDERED.[5]

Isaac R. Bryant
ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: May 24, 2004
Date of Mailing: May 24, 2004

[3] The record of this matter is silent on the question of S.L.'s school attendance prior to entering Raritan High School in September 2001, and thus does not indicate if S.L. has ever attended school in her actual district of domicile (Holmdel). However, any difficulty for petitioners occasioned by that situation has been entirely created by their own determined efforts to fraudulently secure S.L.'s enrollment elsewhere, first in Hazlet Township and then in Keyport. Although certain aspects of this matter invite speculation as to the reasons for petitioners' subterfuge, findings in this regard are neither possible on the present record nor appropriate within the present context.

[4] Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

222-04R

222-04

M.F., on behalf of minor children, K.F. AND K.F.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF ATLANTIC HIGHLANDS, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

May 24, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8420-03

AGENCY DKT. NO. 99-3/03

(On Remand of OAL DKT. NO. EDU 2566-03)

M.F., ON BEHALF OF MINOR CHILDREN, K.F. AND K.F.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ATLANTIC HIGHLANDS, MONMOUTH COUNTY,

Respondent.

M.F., petitioner, *pro se*

R. Armen McOmber, Esq., for respondent (McOmber & McOmber, attorneys)

Record Closed: February 23, 2004 Decided: April 8, 2004

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner challenges respondent Board of Education's determination as to residency. The original matter having OAL Dkt. No. EDU 2566-03 was transmitted to the Office of Administrative Law (OAL) on May 5, 2003, for hearing as a contested case. The hearing took place on July 1, 2003, and by an Initial Decision issued on August 7, 2003, I concluded that respondent's determination that petitioner and her children are residents and domiciliaries of Sea Bright, New Jersey, and not of Atlantic Highlands, New Jersey, was affirmed and petitioner's appeal was dismissed.

By Decision dated September 22, 2003, the Commissioner of Education adopted the Initial Decision with modification. The Commissioner rejected the conclusion that in the absence of the filing of a counterclaim for tuition the school district was not entitled to collect such compensation for the period of the children's ineligible attendance in its schools. Thus, the Commissioner remanded the matter solely to determine the amount of tuition due the school district for the period of ineligible attendance.

The matter on remand was then transmitted to the OAL on November 13, 2004, and a hearing was scheduled for January 7, 2004.

On December 15, 2003, prior to the scheduled hearing, attorney for respondent school district filed a motion for summary decision, a copy of which was sent to James J. McGuire, Jr., Esq., as the attorney for M.F. On January 6, 2004, James J. McGuire, Jr., Esq., entered an appearance in this matter and requested an adjournment of the hearing to permit preparation for the hearing and settlement discussions. The adjournment request was granted on the condition that petitioner respond to the summary decision motion within 30 days. When no response to the summary decision motion was received by February 23, 2004, I closed the record. By letter dated February 27, 2004, Mr. McGuire stated that he was no longer representing M.F. in this matter.

FACTUAL DISCUSSION

In my Initial Decision in this matter dated August 7, 2003, I affirmed the determination of the respondent Board of Education that petitioner and her children are residents and domiciliaries of Sea Bright, New Jersey, and not of Atlantic Highlands, New Jersey, from and after January 12, 2003. That portion of the Initial Decision was affirmed by the Commissioner of Education by Decision dated September 22, 2003.

In support of its motion for summary decision in this matter, respondent relies on the Certification of Denise C. Friedman, Board Secretary/School Business Administrator employed by the Board of Education of the Borough of Atlantic Highlands. In her Certification, Ms. Friedman states:

> 3. Specifically, I have been requested to provide the total annual per pupil cost to the Board of Education for both students for a period commencing January 12, 2003 and ending June 24, 2003, a period which included 105 school days.
>
> 4. The first student, K.F., attended Atlantic Highlands Elementary School in a learning disabled class. The estimated calculation rate contained in the State budget for said class is $11,232.00 per year; $62.40 per diem. This rate will be certified by the State later this year. Therefore, the amount of tuition owed to the Board of Education for this student is $6,552.00, which represents 105 days multiplied by the per diem rate.
>
> 5. The second student, also with the initials of K.F., attended the Atlantic Highlands Elementary School in a regular education class. The estimated calculation rate contained in the State budget for said class is $9,491.00 per year; $52.73 per diem. This rate will also be certified by the State later this year. Therefore, the amount of tuition owed to the Board of Education for this student is $5,536.65, which represents 105 school days multiplied by the per diem rate.
>
> 6. Accordingly, the total tuition amount owed by M.F. to the Board of Education is $12,088.65.

LEGAL DISCUSSION AND ANALYSIS

A motion for summary decision is governed by *N.J.A.C.* 1:1-12.5(b) which provides as follows:

> (b) . . . The 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. 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.

This standard is substantially similar to the standard governing a motion for summary judgment in civil litigation under Rule 4:46-2. See, *Brill v. Guardian Life Ins. Co.,* 142 *N.J.* 520, (1995); *Contini v. Bd. of Educ. of Newark,* 286 *N.J. Super.* 106, 121 (App. Div. 1995). Applying this standard, the ALJ must determine whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. *Contini* at 122 (citing *Brill, supra,* 142 *N.J.* at 523).

As can be seen from the language of *N.J.A.C.* 1:1-12.5(b), the petitioner, as the adverse party, is obligated to submit a responding affidavit to set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding when a motion for summary decision is made and supported. Even though petitioner was given an extended period of time to do so, no such responding affidavit was ever submitted. Therefore, if the respondent's motion is properly supported by the undisputed facts and is consistent with the law, it should be granted.

The authority for the imposition of the obligation to pay tuition is found in *N.J.S.A.* 18A:38-1a(2) which provides in relevant part:

> If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the 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 implementing regulation of the Department of Education dealing with the assessment and calculation of tuition when an appeal is filed is found at *N.J.A.C.* 6A:28-2.10(b) and (c), and provides as follows:

> (b) If an appeal to the Commissioner is filed, where the appellant does not sustain the burden of demonstrating entitlement to attend the schools of the district, or abandons the appeal through withdrawal, failure to prosecute or any means other than settlement agreeing to waive or reduce tuition, the Commissioner may assess tuition for any period of a student's ineligible attendance in a district, including the 21-day period for filing of an appeal and the period during which the hearing and decision on appeal were pending.
>
> (c) Tuition assessed pursuant to the provisions of this section shall be calculated on a per student basis for the period of a student's ineligible enrollment, by applicable grade/program category and consistent with the provisions of *N.J.A.C.* 6:20-3.1(e). The individual student's record of daily attendance shall not impact on such calculation.

It is undisputed that M.F.'s two children, K.F. attended school at respondent's school district for a period commencing January 12, 2003 and ending June 24, 2003, a period which included 105 school days. It is also undisputed that the first student, K.F., attended Atlantic Highlands Elementary School in a learning disabled class, and that the estimated calculation rate contained in the State budget for said class is $11,232.00 per year; $62.40 per diem. This rate is to be certified by the State later in the year. Therefore, I **FIND** that the amount of tuition owed to the Board of Education for this student is $6,552.00, which represents 105 days multiplied by the per diem rate.

It is undisputed that the second student, also with the initials of K.F., attended the Atlantic Highlands Elementary School in a regular education class. It is also undisputed that the estimated calculation rate contained in the State budget for said class is $9,491.00 per year; $52.73 per diem. This rate will also be certified by the State later this year. Therefore, I **FIND** that the amount of tuition owed to the Board of Education for this student is $5,536.65, which represents 105 school days multiplied by the per diem rate.

Based upon the foregoing, I **CONCLUDE** that the total tuition amount owed by M.F. to the respondent Board of Education pursuant to *N.J.S.A.* 18A:38-1a(2) and *N.J.A.C.* 6A:28-2.10(b) and (c), is $12,088.65.

DECISION AND ORDER

Based on the determination that petitioner and her two children were residents and domiciliaries of Sea Bright, New Jersey, and not of Atlantic Highlands, New Jersey, during the children's attendance at Atlantic Highlands Elementary School, it is **ORDERED** that M.F. is obligated to pay tuition to respondent Board of Education in the amount of $12,088.65.

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 (45) 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 (13) 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, 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 8, 2004
DATE

JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

4/8/04 mph
DATE

Mailed to Parties:

APR 16 2004
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX

LIST OF WITNESSES:

For petitioner:

None

For respondent:

None

LIST OF EXHIBITS:

For petitioner:

None

For respondent:

Notice of Motion for Summary Decision with supporting Certification of Denise C. Friedman, Board Secretary/School Business Administrator

OAL DKT. NOS. EDU 8420-03 AND EDU 2566-03 (ON REMAND)
AGENCY DKT. NO. 99-3/03

M.F., on behalf of minor children, K.F. AND K.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ATLANTIC HIGHLANDS, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the Initial Decision on Remand of the Office of Administrative Law (OAL) have been reviewed by the Assistant Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34. No exceptions were filed by the parties.

Upon careful and independent review, the Assistant Commissioner concurs with the OAL that petitioner is obligated to pay tuition to the Board in the amount of $12,088.65 for the period of ineligible attendance by petitioner's children in the District's schools.

Accordingly, the Initial Decision is adopted for the reasons stated therein.

IT IS SO ORDERED.*

Isaac R. Bryant
ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: May 24, 2004
Date of Mailing: May 24, 2004

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

225-04

#225-04

R.S. AND J.S., on behalf of minor child, M.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

May 26, 2004

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

May 26, 2004

Ms. Jayne Spengler, Pro Se
207 Third Street
Green Brook, NJ 08812

Anthony P. Sciarrillo, Esq.
Lindabury, McCormick & Eastabrook
53 Cardinal Drive, P. O. Box 2369
Westfield, NJ 07091

R.S. AND J.S., ON BEHALF OF MINOR CHILD, M.S. V. BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY, AGENCY DKT. NO. 140-5/03, OAL DKT. NO. EDU 2895-03

Dear Parties:

We are enclosing a copy of the decision of the Commissioner of Education dated, May 26, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/dec ltr/RSNoPlainfield
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library
OAL Clerk

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2895-03
AGENCY DKT. NO. 140-5/03

R.S. AND J.S. o/b/o M.S.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,
Respondent.

R.S. and **J.S.**, petitioners, *pro se*

Anthony P. Sciarrillo, Esq., for respondent (Lindabury, McCormick & Estabrook, attorneys)

Record Closed: April 12, 2004 Decided: April 13, 2004

BEFORE **STEVEN C. REBACK**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 21, 2003, 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.

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 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 (45) 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 13, 2004
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

4-19-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 20 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

mph

LINDABURY, McCORMICK & ESTABROOK
A Professional Corporation
53 Cardinal Drive
P.O. Box 2369
Westfield, New Jersey 07091
(908) 233-6800
Attorneys for Respondent
North Plainfield Board of Education

RECEIVED

2004 APR 12 A 10:47

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

R.S. and J.S. o/b/o Minor Child, M.S.,	:	BEFORE THE COMMISSIONER
	:	OF EDUCATION OF NEW JERSEY
Petitioner,	:	Agency Docket No. 140-5/03
	:	OAL Docket No. EDUOS02895-2003S
v.	:	
	:	**Settlement Agreement**
NORTH PLAINFIELD BOARD OF EDUCATION,	:	**And Release**
	:	
Respondent.	:	

This Settlement Agreement is made this 31st day of March, 2004, between the North Plainfield Board of Education ("the Board") and Robert D. Spengler and Jayne Spengler (hereinafter referred to as "Petitioner").

Whereas, there are currently legal proceedings pending before the Commissioner of Education, State of New Jersey; and

Whereas, the parties have reached a settlement of all disagreements and disputes between them and now wish to record the terms of their settlement,

Now, therefore, in consideration of the terms contained herein, the parties agree as follows:

1. Petitioner shall pay the Board the sum of $4,000.00 in full settlement of the Board's claim for tuition;

2. All legal actions currently pending before the Commissioner of Education of New Jersey and the New Jersey Office of Administrative Law, and specifically, Agency Docket No. 140-5/03 and OAL Docket No. EDUOS 02895-2003S, shall be immediately withdrawn and dismissed with prejudice upon the parties signing of this Agreement and the Board's receipt and deposit of the settlement payment referred to in paragraph 1 above;

3. Petitioner releases any and all claims that they have against the Board, whether known or unknown, that were or that could have been asserted in this action encaptioned R.S. & J.S. o/b/o minor child, M.S. v. North Plainfield Board of Education, Agency Dkt. No. 140-5/03 and OAL Dkt. No. 02895-2003S;

4. The Board releases any and all claims that it has against Petitioner, whether known or unknown, that were or that could have been asserted in this action encaptioned R.S. & J.S. o/b/o minor child, M.S. v. North Plainfield Board of Education, Agency Dkt. No. 140-5/03 and OAL Dkt. No. 02895-2003S;

5. The parties recognize that each has signed this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein;

6. This Agreement shall be subject to ratification by the North Plainfield Board of Education;

7. This Agreement shall be subject to the laws of the State of New Jersey; and

8. All terms of this Agreement are deemed material. This document may not be altered, amended or modified or revoked accept by an instrument executed in writing by the parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

North Plainfield Board of Education

By: Mary Elizabeth O' Connor
Board President

Petitioner

By: _____ 3/11/04
Robert D. Spengler

By: Jayne Spengler 3/11/04
Jayne Spengler

OAL DKT. NO. EDU 2895-03
AGENCY DKT. NO. 140-5/03

R.S. AND J.S., on behalf of minor child, M.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the President of the North Plainfield Board of Education signed the Settlement Agreement and Release on behalf of the Board. The Commissioner further observes that Item No. 6 of the settlement specifically states that:

> This Agreement shall be subject to ratification by the North Plainfield Board of Education. (Settlement Agreement and Release, No. 6, at 2)

In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for modification of the Settlement Agreement and Release to include the Board's Resolution approving the settlement and authorizing the Board President to sign the agreement on its behalf. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/26/04

Date of Mailing: 5/27/04

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

227-04

#227-04

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES TRELEASE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF UNION CITY,	:	DECISION
HUDSON COUNTY.	:	
	:	

June 2, 2004

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

June 3, 2004

Alfred F. Maurice, Esq.
Springstead & Maurice
Court House Towers
39 Hudson Street
Hackensack, NJ 07601

Thomas R. Kobin, Esq.
Chasan, Leyner, Bariso & Lamparello
300 Harmon Meadow Boulevard
Secaucus, NJ 07094

IN THE MATTER OF THE TENURE HEARING OF CHARLES TRELEASE, SCHOOL DISTRICT OF UNION CITY, HUDSON COUNTY, AGENCY DKT. NO. 396-11/03, OAL DKT. NO. EDU 11337-03

Dear Parties:

We are enclosing a copy of the decision of the Commissioner of Education dated, June 2, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/dec ltr/Treleasetenure
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11337-03
AGENCY DKT. NO. 396-11/03

UNION CITY BOARD OF EDUCATION,

Petitioner,

v.

CHARLES TRELEASE,

Respondent.

Michael A. D'Anton, Esq., for petitioner
(Chasan, Leyner, Bariso & Lamparello, attorneys

Alfred S. Maurice, Esq., for respondent
(Springstead & Maurice, attorneys)

Record Closed: April 1, 2004 Decided: April 14, 2004

BEFORE **DIANA C. SUKOVICH,** ALJ:

Petitioner certified tenure charges against respondent, a custodian, on October 30, 2003. Respondent filed an answer to the charges on November 17, 2003 and requested a hearing. The State Department of Education transmitted the matter to the Office of Administrative Law on November 24, 2003 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

Telephone conferences were conducted throughout the proceedings, and the hearings commenced on March 23, 2004. The parties also conferred on the latter date, reached a resolution of the matter, and executed such, subject to approval by petitioner at a Board meeting. Additionally, respondent testified that he understood the terms of

OAL DKT. NO. EDU 11337-03
AGENCY DKT. NO. 396-11/03

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES TRELEASE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF UNION CITY,	:	DECISION
HUDSON COUNTY.	:	
	:	

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

Upon review, the Commissioner approves the settlement terms, since they comport with the *Cardonick* standards for review of settlements in tenure matters, and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/2/04

Date of Mailing: 6/3/04

* The parties are reminded that the Commissioner's decision in this matter is a public record and, therefore, although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, they cannot seek to bind the Commissioner to provision 15, which requires that the agreement will be confidential.

the settlement and voluntarily agreed to it. An executed copy of a conforming Settlement Agreement and a Resolution of petitioner approving the settlement were filed on April 1, 2004, on which date the record was closed. Attached herewith are copies of those documents.

Having reviewed the terms of the Settlement Agreement, I **FIND** the parties voluntarily have agreed to the terms and conditions of the settlement as evidenced by the signatures contained thereon and that the settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **ORDER** that the parties comply with the terms of the settlement and that these proceedings be and are hereby **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 (45) 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 14, 2004
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

4/22/04
DATE

Kathleen Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 22 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

\mvh

CONFIDENTIAL
SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release (hereinafter "Agreement"), dated March 23, 2004, is by and between the Union City Board of Education, which is located at 3912 Bergen Turnpike, Union City, New Jersey 07087, ("Board" or "Petitioner"), and Charles Trelease, whose address is 1514 Bergenline Avenue, Union City, New Jersey 07087 ("Trelease" or "Respondent").

1. **Background and Purposes of Agreement.**

1.1 Trelease is a carpenter employed by the Board.

1.2 Issues arose regarding Trelease's employment that gave rise to an action before the Commissioner of Education, which was transferred to the Office of Administrative Law as a contested case. The case is assigned to the Honorable Diana C. Sukovich, A.L.J., and it is captioned Trelease, Charles, Union City School District, Hudson County, OAL Docket No. EDU 11337-03, Agency Docket No. 398-11/03 (hereinafter the "Action").

1.3 Both the Board and Trelease have determined that it is in their mutual best interest to enter into this Agreement and thereby a) amicably resolve all issues in dispute asserted in the Action, or which could have been asserted in the Action, either by way of claim or defense, without any admission of liability or wrongdoing, and b) dismiss the Action with prejudice and without costs.

1.4 The justifications for settlement of this matter include:

1.4.1 The uncertainty of litigation.

1.4.2 The unavailability of witnesses the Board will require to prove its case against Trelease.

1.4.3 Trelease has asserted various medical conditions as a defense to certain of the charges at issue.

1.4.4 The settlement of this Action is in the public interest for all of the above reasons, and settlement will avoid costly, protracted litigation, the outcome of which is uncertain, during which time the Board will be required to pay salary and provide benefits to Trelease. The expeditious settlement of this matter will eliminate or reduce a significant expense to the taxpayers.

2. **Settlement.**

The Action is settled in its entirety, subject to the following terms:

2.1 Respondent hereby irrevocably resigns as a Board employee effective June 30, 2004. Trelease shall provide the Board with a resignation letter consistent with this paragraph upon his execution of this agreement.

2.2 Respondent will be paid his salary due for March 2004.

2.3 Respondent will be paid $10,000 in three equal installment payments for April, May, and June 2004.

2.4 Respondent will be paid health insurance through June 30, 2004 at midnight.

2.5 Respondent will be paid for any remaining unpaid time for October 2003.

2.6 Respondent is free to work at any employment although he is on terminal leave.

2.7 The Board shall maintain Trelease's medical benefits through June 30, 2004.

2.8 If the Board receives any inquires regarding Trelease's employment with the Board, it will provide only such information which is consistent with the Board's standard policy, which is date of hire, and date of resignation.

2.9 Upon approval of this Agreement by the Commissioner of Education, the Board will remove all disciplinary materials from Trelease's personnel file. This settlement agreement will be maintained in Trelease's personnel file.

2.10 Trelease will not re-apply for employment by the Board.

2.11 The Board shall dismiss the Action with prejudice.

3. No Representations as To Tax Consequences.

3.1 The settlement payment referenced above will be reflected on Internal Revenue forms to be issued to Trelease, and filed with the IRS indicating that the sum set forth above has been paid to Trelease as other income. The Board makes no representation as to the tax consequences of any payment hereunder.

3.2 Trelease acknowledges and agrees that he will be responsible for the payment of all applicable state, federal and local taxes with respect to payments under this Agreement, and that he assumes full responsibility and liability with respect to same. Trelease further agrees that if the IRS, or other taxing authority, deems any tax, interest, penalties, or other amounts to be due from the Board with respect to the above referenced settlement payments, Trelease will fully indemnify and hold the Board harmless for any sums the Board may be required to pay.

4. Complete Release.

4.1 Trelease releases and gives up any and all claims and rights that he has or may have against the Board, or any of its officials, officers, representatives or employees, including, but not limited to, any claim of liability, damages or attorneys' fees. This release includes all claims, including those of which Trelease is not aware

and those not mentioned in this Release. This Release applies to all claims resulting from anything that has happened up to now.

4.2 In addition to releasing any and all claims and rights pursuant to Paragraph 4.1 above, Trelease also specifically releases the following claims:

4.2.1 Any and all claims which were brought or could have been brought or arising:

i) under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq. ("LAD"), which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States;

ii) under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq., which, among other things, prohibits retaliatory action against an employee under certain specified conditions;

iii) under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq.;

iv) under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., or the Civil Rights Act of 1991, as amended, which, among other things, prohibits discrimination in employment on account of a person's race, color, religion, sex or national origin;

v) under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, et seq., ("ADEA"), which, among other things, prohibits discrimination in employment on account of a person's age;

vi) under the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101, et seq., ("ADA"), which, among other things, prohibits discrimination in employment on account of a person's disability or handicap;

vii) under the Family and Medical Leave Act of 1993, as amended, 29 U.S.C. § 2601, et seq., ("FMLA"), which among other things, entitles certain employees to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition;

viii) under the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701 et seq., which among other things, prohibits discrimination in employment by federal contractors against individuals with disabilities;

ix) under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, et seq., ("ERISA"), which, among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute;

x) under the Older Workers Benefit Protection Act, 29 U.S.C. § 621, et seq., ("OWBPA"), which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age; and

xi) under any federal or state statute, rule or regulation or common law.

4.3 The Board releases and gives up any and all claims and rights that it may have against Trelease, including, but not limited to, any claim of liability, damages or attorneys' fees arising out of the Action. This release includes all claims, including those of which the Board is not aware and those not mentioned in this Release. This Release applies to all claims resulting from anything that has happened up to now.

5. Who is Bound.

Trelease is bound by this Release. Anyone who succeeds to Trelease's rights and responsibilities, such as heirs or the executors of Trelease's respective individual estates, are also bound. This Release is made for the benefit of the Board and all who succeed to its rights and responsibilities.

6. No Disparaging Statements.

Trelease agrees that he will not make any statement(s) that has, have, or can be expected to have the effect of disparaging the Board and/or its employees or agents. The Board, as an entity, will not make or adopt any statement(s) that has, have, or can be expected to have the effect of disparaging Trelease.

7. Fair Representation.

Trelease represents and warrants that Alfred F. Maurice, Esq. has represented him fully, fairly, and without bias in connection with the Action.

8. Consultation with an Attorney.

Trelease has consulted with his attorney with respect to this Agreement, and reviewed with his attorney all the terms and conditions of this Agreement before signing this Agreement.

9. Complete Agreement.

This Agreement contains the entire agreement between the Board and Trelease 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 or Trelease to do anything other than as is expressly stated in this Agreement.

10. Choice of Law.

This Agreement shall in all respects be interpreted, enforced and governed by the laws of the State of New Jersey.

11. Modification.

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

12. Approval by Commissioner of Education and OAL.

The enforceability of this Agreement, except as set forth in the remainder of this paragraph, is conditioned upon approval by the Administrative Law Judge assigned to the Action, and, if required by law, including N.J.A.C. 6A:3-5.6, the Commissioner of Education. If the Commissioner of Education does not approve this Agreement, Trelease shall return the payment made under paragraph 2.2 to the Board. If Trelease fails to do so, Trelease hereby agrees that the Board may deduct the payment made

pursuant to paragraph 2.2 from any compensation the Board is obligated to pay Trelease upon the expiration of the 120 day period set forth in N.J.S.A. 18A:6-14.

13. **Attestation of Trelease.**

Trelease represents and warrants that he has carefully read each and every provision of this Agreement, and that he fully understands all of the terms and conditions contained in each provision of this Agreement. Trelease represents and warrants that he enters into this Agreement voluntarily, of his own free will, without any pressure or coercion from any person or entity whatsoever.

14. **Negotiated Agreement; No Construction Against Any Party.**

This Agreement was not drafted by any of the parties, but rather is the result of negotiations among the parties with the benefit of their attorneys. Each party to this Agreement read this Agreement and has freely and voluntarily executed it. No ambiguity that may arise in this Agreement shall be resolved by construing the Agreement against either of the parties as drafter of same.

15. **Confidentiality and Non-Disclosure.**

Unless consent is granted by the other party to this Agreement, neither Trelease nor the Board, nor their attorneys shall disclose this Agreement or discuss the terms hereof with any third party. However, the information in this Agreement may be communicated to the parties' attorneys, tax advisors, and financial advisers. If either party or their attorney receives an inquiry from any third party about the Action or this Agreement, he shall respond by saying only that "the matter has been settled." The parties agree and understand the confidentiality requirements of this paragraph are a

material inducement to their consent to this Agreement, and that a violation of these confidentiality requirements will be deemed a material breach of this Agreement.

16. **Formal Approval.**

The Board shall not be bound by this Agreement until it has been formally approved by Resolution of the Board, and duly executed by all parties.

17. **Execution in Counterparts.** This Agreement may be signed in separate counterparts, each of which shall be deemed a duplicate original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed

WITNESS:

Dated: 3/31/04

CHARLES TRELEASE

BY:

WITNESS:

CHRISTOPHER F. IRIZARRY
BOARD SECRETARY

Dated: 4-1-04

UNION CITY BOARD OF EDUCATION

FELINA DEL NODAL
BOARD PRESIDENT

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Resolution No. 114

RESOLUTION PRESENTED AT A PUBLIC MEETING AT THE UNION CITY BOARD OF EDUCATION HELD ON THURSDAY, MARCH 25, 2004

RESOLUTION AUTHORIZING AND APPROVING THE SETTLEMENT OF TENURE CHARGES IN ACCORDANCE WITH THE TERMS OF A SETTLEMENT AGREEMENT, DATED MARCH 23, 2004

WHEREAS, on October 30, 2004, the Union City Board of Education ("Board") certified tenure charges against a certain employee; and

WHEREAS, upon the recommendation of the Superintendent, Assistant Superintendent of Personnel, and Board Counsel, the Board has determined that it is in the best interests of the Board to the settle the tenure charges; and

WHEREAS, by settling the tenure charges the Board will save attorneys fees.

NOW, THEREFORE, BE IT RESOLVED by the Board that:

1. The aforesaid recitals are incorporated herein as though fully set forth at length.
2. The settlement agreement, dated March 23, 2004, a copy of which is on file in the Human Resources office is hereby authorized and approved, with such changes as the Superintendent, in his sole discretion, after consultation with Board Counsel, determines to be necessary convenient and desirable to effect the settlement of the tenure charges at issue.
3. The Board President and Board Secretary, and any other official or employee of the Board be and they are hereby authorized to execute any and all documents and to take any and all actions necessary to complete and realize the intent and purpose of this Resolution.
4. This Resolution shall be effective immediately.

Certified to be a true and correct copy of a resolution adopted by the Board of Education at its meeting held on March 25, 2004.

Christopher F. Irizarry
Board Secretary

SEAL

224-04

#224-04

ANTHONY B. CANCILLERI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

May 26, 2004

compensation pursuant to *N.J.S.A.* 18A:30-2.1. The petition consisted of two separate counts, one pertaining to the above referenced statute and the second respecting a suspension imposed upon petitioner.

In November 2002 Assignment Judge Thomas E. Clancy, to whom the matter originally was assigned, placed the case on the inactive list in light of a pending worker's compensation action between the parties. However, since the second count did not concern that element it was assigned to me for plenary hearing. Thereafter, various hearing dates were adjourned as the parties seriously were exploring the possibility of settlement. New hearing dates of September 20, 2004 and September 21, 2004 ultimately were established.

However, counsel now have submitted a Settlement Agreement in which they have agreed that the petitioner would withdraw, with prejudice, his petition to the Commissioner contingent upon compliance by the Board with certain conditions set forth in the agreement respecting payment of salary between June and October 2002, together with accumulated sick leave and vacation pay, if any. The Settlement Agreement also makes reference to a case pending before the Public Employment Relations Commission (Dkt. No. TI-H-2002-05).

I have reviewed the Settlement Agreement and the terms thereof and **FIND** as follows.

1. The parties voluntarily have agreed to the settlement as evidenced by the signatures contained thereon.

2. The settlement fully disposes of all issues in controversy between the parties and is consistent with 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 (45) 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 8, 2004
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

4/14/04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 22 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

\mvh

OXFELD COHEN, PC
60 Park Place, 6th Floor
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

RECEIVED
STATE OF NEW JERSEY
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BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION
DOCKET NO. TI-H-2002-05

IN THE MATTER OF PASSAIC BOARD OF EDUCATION,

Respondent,

-and-

ANTHONY B. CANCILLERI,

Petitioner,

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
OAL DKT. NO. EDUOA 09143-02
Agency Ref. No. 255-8/02

ANTHONY B. CANCILLERI,

Petitioner,

-vs-

PASSAIC BOARD OF EDUCATION,

Respondent.

SETTLEMENT AGREEMENT

Anthony B. Cancilleri, Petitioner in the above matters, and the Passaic Board of Education, Respondent in the above matters, hereby agree to resolve in their entirety the matters of Anthony B. Cancilleri v. Passaic Board of Education before the Public

Employment Relations Commission, Docket No. TI-H-2002-05 and before the Commissioner of Education, OAL DKT. NO. EDUOA 09143-02, Agency Ref. No. 255-8/02 upon the following terms:

1. The Respondent agrees to pay to the Petitioner all salary from the date of June 5, 2002 through the date of October 2, 2002, together with accumulated sick leave and vacation pay, if any, owed to Petitioner.

2. Respondent will promptly and accurately fill out all forms necessary to process Petitioner's pension application pending before the PERS.

3. Petitioner hereby agrees to withdraw his claim before the Public Employment Relations Commission in Anthony B. Cancilleri v. Passaic Board of Education, Docket No. TI-2002-05 with prejudice. This withdrawal is contingent upon compliance by the Respondent with the conditions set forth in Paragraphs 1 and 2 of this agreement.

4. Anthony Cancilleri agrees to withdraw with prejudice his petition before the Commissioner of Education, Anthony B. Cancilleri v. Passaic Board of Education, OAL DKT. NO. EDUOA 09143-02, Agency Ref. No. 255-8/02. This withdrawal is contingent upon compliance by the Respondent with the conditions set forth in Paragraphs 1 and 2 of this agreement.

5. This agreement constitutes the entire agreement between the parties with regard to the matters at issue herein. This agreement may not be utilized by either party in any other proceeding as support or proof of any contention raised by that party

OAL DKT. NO. EDU 9143-02
AGENCY DKT. NO. 255-8/02

ANTHONY B. CANCILLERI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/26/04

Date of Mailing: 5/27/04

234-04

234-04

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTONIO LEWIS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF ASBURY PARK,	:	DECISION
MONMOUTH COUNTY.	:	

SYNOPSIS

The Board brought "Disciplinary Charges" of unbecoming conduct, incapacity and conduct detrimental to a thorough and efficient education against respondent superintendent.

The ALJ determined that the Board's Count One was a charge of "inefficiency" as the Legislature uses the word in *N.J.S.A.* 18A:17-20.2. The ALJ found, however, that there was no record that the Board complied with legislatively required procedures requiring notice and an opportunity for improvement before a board may prosecute a charge of inefficiency. The ALJ dismissed Count One.

The Commissioner concurred with the ALJ that the charges comprising Count One were properly categorized as ones of inefficiency and had to be dismissed for the Board's failure to comply with the requirements of *N.J.S.A.* 18A:6-11. With respect to Count Two, the Commissioner determined that the charge, even if true, standing alone was insufficient to warrant respondent's dismissal or reduction in salary. The Commissioner, therefore, dismissed Count Two. The Commissioner directed that the Board immediately reinstate respondent to his position of superintendent with full pay from the first day of his 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.

June 7, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 921-04

AGENCY DKT. NO. 42-2/04

IN THE MATTER OF TENURE CHARGES BROUGHT AGAINST ANTONIO LEWIS, SUPERINTENDENT OF THE ASBURY PARK SCHOOL DISTRICT

Raymond L. Hamlin, Esq., for petitioner Asbury Park Board of Education (Hunt, Hamlin & Ridley, attorneys)

Salvatore Perillo, Esq., for respondent Antonio Lewis, Ed.D. (Perskie, Nehmad & Perillo, attorneys)

Record closed: April 1, 2004 Decided: April 6, 2004

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

The Asbury Park Board of Education (BOE) brings "Disciplinary Charges" against respondent Antonio Lewis, Ed.D., its superintendent of schools, whom it has suspended without pay. In "Count One," the BOE alleges that the respondent failed to properly and effectively lead, supervise, and manage the Asbury Park school system. On this basis, the BOE claims that he should be dismissed from its employment. In "Count Two," the BOE alleges that the respondent participated "in a decision to circumvent N.J.S.A. 18A:17-20.1" (which governs contracts with

and appointments of superintendents), resulting in an "invalid" contract that increased his salary and extended his term of employment, and the BOE alleges that he failed to "inform" the BOE that it should "rescind" that contract. P-1; P-4; see also N.J.S.A. 18A:17-20, -20.2; N.J.A.C. 6A:3-5.1. The BOE characterizes its charges as "conduct unbecoming an employee, incapacity and conduct which has been detrimental to a thorough and efficient education of the students of the Asbury Park school district." P-1. The BOE does not characterize its charges as "inefficiency," for which education laws require extensive procedures and timelines, to allow the employee an opportunity to improve and eliminate deficiency, before prosecution. N.J.S.A. 18A:17-20.2; see N.J.S.A. 18A:6-11; N.J.A.C. 6A:3-5.1(c).

Respondent denies that he is guilty of the charges. He also alleges that the BOE wrongfully usurped his statutory power as superintendent; interfered with and prevented his proper and effective management of the school system; held him accountable for conditions beyond his control; and, by bringing the above-described charges, damaged his reputation. He also contends that the BOE, in its evaluation of his performance and in charging and suspending him, violated education laws and the Open Public Meetings Act, by failing to give him notice of the meeting when it acted on the charges. See N.J.S.A. 10:4-9; N.J.S.A. 18A:6-11, -13; N.J.S.A. 18A:17-20, -20.3; N.J.A.C. 6A:3-5.1(c). In a petition for emergent relief, (A) citing N.J.A.C. 6A:3-1.6, respondent moved for an order staying the BOE's order of suspension; (B) citing N.J.S.A. 18A:6-16, he demanded a decision dismissing the charges as not sufficient to warrant his dismissal; and (C) citing N.J.S.A. 18A:6-14, he demanded an order requiring the BOE to pay his salary from the time it suspended him. R-1.

The Commissioner of the Department of Education (Department) decided that respondent failed to satisfy standards for emergent relief. N.J.S.A. 18A:6-9. However, the Commissioner also determined that, notwithstanding the BOE's characterization of its charges, the charges may constitute charges of inefficiency. Further, the Commissioner determined that respondent's petition should be treated as a motion for an order dismissing the charges because of the BOE's alleged failure to comply with requirements of N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1(c) for prosecution of charges of inefficiency. The Commissioner directed the BOE to respond to that motion, and the Commissioner transmitted the case here for a decision on (1) whether the BOE's charges constitute charges of inefficiency, and (2) whether the charges should be dismissed

because of failure to comply with the statutory and regulatory requirements. R-2. The BOE opposes the motion.

THE RECORD
AND
PROCEDURAL HISTORY

The record and procedural history are intertwined and are set forth together.

(1) Pursuant to a contract dated April 10, 2000, the BOE, which operates an "Abbott district," began to employ respondent as the superintendent of its district for a term of three years at an annual salary of $125,000, plus increases on the base salary, a merit bonus for meeting goals established by the BOE, or a greater merit bonus for exceeding goals established by the BOE. P-2C; N.J.S.A. 18A:7F-3, "Abbott district"; see also N.J.S.A. 18A:17-20.

(2) The BOE alleges that, although adequate Open Public Meetings Act notice had not been provided, the preceding BOE held a Special Meeting during which it purported to approve a contract with the respondent, increasing his salary and extending his term, but without rescinding their existing contract. See N.J.S.A. 10:4-8(d), -9, -10, -12(b)(8), -14; see also N.J.S.A. 18A:17-16. (The BOE has not specified the date of the alleged meeting and has not submitted any record, e.g., minutes, from which the date of the alleged meeting can be identified. The BOE also has not filed a Superior Court complaint in lieu of prerogative writ to void the action taken during such a meeting, and it has not represented whether and when the preceding BOE took corrective or remedial action by acting *de novo* at a public meeting held in conformity with the Act and other applicable law regarding the purported approval of another contract with respondent. See N.J.S.A. 10:4-15.)

(3) In a memorandum to respondent dated November 23, 2001, Nicholas Celso III, the BOE's previous attorney, wrote the following:

> Tony, after we spoke, it occurred to me that the [BOE] cannot take action at a Special Meeting unless the specific item to be acted on

> was advertised with the meeting notice. Therefore, if your contract was not advertised as an item to be considered and acted upon, any action by the [BOE] would be null and void. This should be done at a Regular Meeting.
>
> > Resolved, that the Employment Contract dated April 10, 2000, between [respondent] and the [BOE] is rescinded and the [BOE] hereby approves a new Employment Contract with [respondent] for the period, July 1, 2001 through June 30, 2006, at the annual base salary of $135,000, subject to the remaining terms and conditions set forth therein. Be it further resolved, that the [BOE] President and Secretary are hereby authorized to execute said Contract on behalf of the [BOE].
>
> [P-2D, emphasis added.]

The BOE has not filed a complaint in Superior Court to void any act as violative of the Open Public Meetings Act.

(4) The minutes for the BOE's December 20, 2001, meeting show the following: Adequate Open Public Meetings Act notice had been given. The BOE adjourned to Closed Session to discuss matters exempted from public discussion by the Act and as announced prior to entering Closed Session. On a motion to approve based on the recommendations of the Personnel Committee, the BOE approved, "Aye: 8, Nay: 0, Abstain: 0," "a new contract for the Superintendent effective July 1, 2001 through June 30, 2006," and on a motion to approve based on the recommendations of the Personnel Committee, it approved, "Aye: 7, Nay: 0, Abstain: 1," "the new terms and conditions of the Superintendent's contract as outlined by [the BOE's] counsel." P-2E.

(5) On March 26, 2002, Adrienne Sanders, then the BOE's president, and respondent executed the "Superintendent's Contract," which stated the following: The contract was "entered into on the 20th of December, 2001." P-2F. The term of employment of the superintendent would be July 1, 2001, to June 30, 2006. The superintendent's salary would be $150,000, plus salary increases of 5% for each year of the contract, plus merit pay bonuses, plus other benefits. The BOE would evaluate the superintendent's performance at least once a year as required by

N.J.S.A. 18A:17-20.3(a). The evaluation would be based on the district's goals and objectives, the superintendent's responsibilities as set forth in the superintendent's job description, and criteria established by State regulations. The evaluation would be written and include areas of commendation and recommendations and direction as to any area in which improvement is expected. A copy of the evaluation would be provided to the superintendent and the BOE would meet to discuss findings before the BOE takes final action. In the event the BOE determined that the superintendent's performance was unsatisfactory, it would describe specific instances of unsatisfactory performance in writing and in detail and provide recommendations for improvement. The superintendent shall have the right to respond in writing to evaluations. The contract could be terminated (a) by the parties' mutual agreement, (b) by the superintendent's 90 days' written notification to the BOE, (c) by "Notification in writing by the [BOE] to the Superintendent at least one year prior to the expiration of this Contract of the [BOE's] intent not to renew this employment Contract, as required by law," and (d) during the term of the agreement, the BOE may terminate the superintendent's employment only for good cause as defined by N.J.S.A. 18A:17-20.2 in accordance with the procedures of the tenure hearing laws, N.J.S.A. 17A:6-9. P-2F.

(6) On April 14, 2003, Donald Warner, Ed.D., prepared an Evaluation Summary Report relative to respondent's performance for the BOE. See N.J.S.A. 18A:17-20.3.

(7) Respondent's responses to the Evaluation Summary Report included the following: Contrary to law, including N.J.S.A. 10:4-12(b), he was not given notice that the BOE would consider his employment and evaluation of his performance and he was not afforded notice, information and a reasonable opportunity to choose whether the BOE's discussion of his employment should be public. Consequently, the BOE's evaluation was invalid. BOE policy 1240 states that the annual summary conference between the BOE and the superintendent shall be held in private unless the superintendent requests that it be public, and he did not consent to Dr. Warner's viewing his evaluation or Dr. Warner's presence during the BOE's evaluation. Only five of the nine BOE members participated in the evaluation process and, although a majority, that showed a "serious split" in the BOE. Relative to "Progress Toward District Goals and Objectives," he responded extensively. R-1B. He wrote, for example, that since the BOE had failed to set "goals and objectives," he shared his goals with the BOE, but the BOE failed to

engage in meaningful discussion with him at the end of the 2001-02 school year or the beginning of the 2002-03 school year. See N.J.S.A. 18A:17-20.3(a). He wrote also, for example, that to address low test scores he instituted research-based Whole School Reform models (Pre-K through 12), readily accepted by experts, and ensured that instructors had all that was needed to implement curriculum. R-1B. To address the comment that there was no professional development plan in the district, he attached the current plan. He wrote that the process used in hiring staff had been explained to the BOE members at length and on several occasions and highlighted certain aspects of it. With his response he submitted the following documents: "1. Goals and Objectives, 2. Grants, 3. Technology, 4. Instructional Leadership, 5. News Releases, 6. Curriculum, 7. Conditional Certification, 8. Parental Involvement, 9. Teaching Supplies, 10. Community, 11. Professional Development 2002-02," and noted that it was "partial documentation." R-1B.

(8) In a letter to the BOE and others dated April 23, 2003, Dwight R. Pfennig, Ed.D., Deputy Commissioner of the Department, wrote that there may have been "procedural and/or legal irregularities in preparing and distributing the evaluation" (of the respondent's performance) at the BOE's April 14, 2003, meeting, and of particular concern were:

> 1. The proper (Rice) notice being provided for the Superintendent, indicating the Board's desire to discuss his evaluation in executive session and his option to have that discussion conducted in public.
>
> 2. The Board of Education's instructions directing Dr. Lewis to forward his response/rebuttal to the homes of Board of Education members.
>
> 3. The rejection of New Jersey School Board Association assistance in the evaluative process, and the securing of an independent consultant, Dr. Donald Warner, to assist the Board in the evaluative process.
>
> 4. The absence of the evaluative opinions of four Board of Education members in the construction of the evaluation that clearly "cuts across" support and non-support lines of the Superintendent.
>
> 5. The unprofessional presentation of the written evaluation.

> 6. The potential for litigation concerning the Superintendent's evaluation that may have a serious negative impact on the budget of the Asbury Park School District.
>
> [R-1A.]

Deputy Commissioner Pfennig also wrote that on December 23, 2002, he had provided summary notes from the December 16, 2002, executive session of the BOE, in which he stated: "The conduct of [BOE] members in approving the administrative recommendations of the Superintendent and the appropriate conduct of [BOE] members in public and non-public meetings indicate the need for training in boardsmanship." Nonetheless, recent events relating to the BOE's evaluation of the respondent showed that the BOE had not heeded the Department's concerns and suggestions. He and other Department officials expected to meet with the BOE on May 15, 2003, to solve the BOE's "serious governance issues." R-1A.

(9) The respondent alleges the following: In 2003 the Department completed an evaluation of the Asbury Park school district to determine if it was meeting standards required by education laws, and in June 2003 the Department conducted a reevaluation of the school district's conditional certification, which the Department reported in a "Status Review of the Conditional Certification of the Asbury Park School District." In the Status Review the Department criticized the BOE's "improper and illegal interference in personnel decisions and [criticized] other actions by [BOE] members which were ill advised and in violation of [BOE] Policy." In the Status Review the Department recommended that the Asbury Park school district be directed to enter the "Level II" evaluation process, which is based on a district's failure to show sufficient progress toward achieving the thoroughness and efficiency standards established pursuant to N.J.S.A. 18A:7F-4. R-1; see also N.J.S.A. 18A:7A-14; N.J.S.A. 18A:7F-4; N.J.A.C. 6A:30-1.1 to -3.5.

(10) In response to the Status Review, the respondent proposed and the BOE adopted a "Corrective Action Plan." R-1.

(11) On December 10, 2003, the BOE held a Special Meeting during which it decided to bring

the "Disciplinary Charges": "conduct unbecoming an employee, incapacity and conduct which has been detrimental to a thorough and efficient education for the students of the Asbury Park School District." P-1; see N.J.A.C. 6A:3-5.1. The respondent contends that, because the BOE had not given prior notice of what action it could take, it violated the Open Public Meetings Act. N.J.S.A. 10:4-15.

(12) On December 15, 2003, Raymond Palmer, the BOE's current president, signed a "Statement of Evidence in Support of Charges" (with exhibits attached) relative to the following (numbered) "Disciplinary Charges" and allegations charges against petitioner. P-1; P-2. 1. The BOE alleges that respondent failed to ensure that the district maintained certification. 2. The BOE alleges that respondent failed to ensure that the district developed and implemented curriculum consistent with the Department's requirements. 3. The BOE alleges that the respondent failed to ensure that the curriculum was provided to its staff. 4. The BOE alleges that the respondent failed to ensure that the curriculum was fully implemented in all areas. 5. The BOE alleges that the respondent failed to ensure that the curriculum was fully articulated across all grades consistent with the Department's standards. 6. The BOE alleges that the respondent failed to ensure that ESPA standards in Language Arts Literacy and Math have been met consistent with the Department's standards. 7. The BOE alleges that the respondent failed to ensure that GEPA standards in Language Arts Literacy, Math and Science have been met consistent with the Department's standards. 8. The BOE alleges that the respondent failed to ensure that HSPA standards in Language Arts Literacy and Math have been met consistent with the Department's standards. 9. The BOE alleges that the respondent failed to ensure that all teaching staff members employed or recommended for employment within the BOE were appropriately certified consistent with the Department's standards. 10. The BOE alleges that the respondent failed to ensure that all monthly fiscal reports created, drafted, approved and/or provided for review were certified as accurate consistent with the Department's standards. 11. The BOE alleges that the respondent failed to communicate with BOE members about the Commissioner's recommendation that the conditional certification granted to the school district be rescinded and that Level II Monitoring be implemented. 12. The BOE alleges that respondent participated in the decision to circumvent N.J.S.A. 18A:17-20.1 (which governs reappointment of superintendents). 13. The BOE alleges that the respondent failed to set or achieve goals as the chief school administrator. 14. The BOE alleges that the respondent failed to lead the district in

a manner reasonably expected. 15. The BOE alleges that the respondent failed to correct deficiencies identified in the May 13, 2002, Level II evaluation. 16. The BOE alleges that the respondent failed to ensure that the district's students have a safe learning environment. 17. The BOE alleges that the respondent's action and inaction violated its policy, expectations and standards, and alleges that the respondent's action and inaction caused the district's performance in standardized tests to be the worst in the state of New Jersey. 18. The BOE alleges that respondent's "failure to effectively direct, discipline and manage the Asbury Park School District" caused the district's above-described poor performance. P-1; P-4. That is, numbers 1 to 11 and 13 to 18 relate to the above-described "Count One," and number 12 relates to "Count Two," in the charges filed with the Commissioner on February 4, 2004. P-4.

(13) On December 17, 2003, the BOE served the disciplinary charges, etc., upon respondent and notified him that, within fifteen days of receipt, he could submit to the BOE written responses to the charges which the BOE would consider in determining whether there was probable cause to credit the evidence in support of the charges and whether the charges, if credited, warranted his dismissal. P-3.

(14) In a letter to the BOE's attorneys dated December 19, 2003, Deputy Commissioner Pfennig wrote that the BOE's meetings in the previous two weeks, public comment, and the BOE president's and BOE attorney's directives to the school district's administrative staff had caused the Department concern about possible violation of the Open Public Meetings Act, State education statutes, and State education regulations relative to the following matters:

> 1. The Asbury Park Board of Education Meeting Notice for Wednesday, December 10, 2003, did not indicate any action to be taken by the Board of Education and action was taken.
>
> 2. Following the approval (by public vote of the Board) of personnel items at the December 17, 2003, meeting (including a Disaffected Youth Counselor), the Board President informed the person approved that "she did not have the job."
>
> 3. Personnel Committee actions forwarding personnel recommendations to the Board are in violation of Title 18A:27-4.1(a) which clearly states, "A board of education shall appoint, transfer or remove a certificated or non-certificated officer or

> employee only upon the recommendation of the chief school administrator and by recorded roll call majority vote of the full membership of the board. The board shall not withhold its vote for arbitrary and capricious reasons."
>
> 4. The letter from Board counsel to Acting Superintendent, Kathy McDavid asserting "nullity" on the personnel action, taken at the December 17, 2003 meeting may also be in violation of the Open Public Meetings Act and Title 18A:27-4.1(a).
>
> [R-1C.]

Deputy Commissioner Pfennig also wrote that, given the above-described circumstances, the Department would investigate and engage in "corrective work with the district." R-1C.

(15) On February 3, 2004, the BOE held a Special Meeting, during which, in closed session, it adopted a resolution certifying the charges to the Commissioner and suspended respondent without pay, effective February 4, 2004. The respondent alleges that the BOE failed to provide adequate Open Public Meetings notice of that action and charges that it, thereby, violated the Act.

(16) On February 4, 2004, the BOE's "Disciplinary Charges" and the BOE interim business administrator/board secretary's "Certification of Determination" were filed with the Department. P-4; see N.J.S.A. 18A:6-9. The "Disciplinary Charges" are set as "Count One" and "Count Two," described above. The BOE attached to its charges exhibits, including the above-quoted November 28, 2001, memorandum from its former attorney. P-2D. The BOE's "Count Two" charges violation of N.J.S.A. 18A:17-20.1, an education statute. The exhibit raises the question of the adequacy of notice under the Open Public Meetings Act, but in "Count Two" or elsewhere, the BOE does not charge violation of the Open Public Meetings Act. N.J.S.A. 10:4-6 to -21.

(17) On February 5, 2004, the BOE served on the respondent the charges and a letter dated February 4, 2004, notifying him that the BOE had voted to suspend him without pay, effective February 2, 2004. P-5.

(18) The respondent filed a Superior Court complaint in lieu of prerogative writ, alleging that

the BOE's actions taken during its December 2003 and February 2004 meetings violated the Open Public Meetings Act and demanding that they be declared void. See N.J.S.A. 10:4-15.

(19) On February 11, 2004, respondent filed his petition for emergent relief with exhibits and brief. R-1; R-1A; R-1B; R-1C; N.J.A.C. 6A:3-5.3.

(20) In a letter dated February 17, 2004, the Commissioner, citing N.J.A.C. 6A:3-1.6 and Crowe v. De Gioia, 90 N.J. 126 (1982), wrote that respondent failed to satisfy standards for emergent relief and he denied respondent's petition for that relief. However, the Commissioner wrote that, notwithstanding the BOE's characterizing its charges as charges of "conduct unbecoming," they may constitute charges of inefficiency. Therefore, the Commissioner wrote, the petition should be treated as a motion for an order dismissing the charges for failure to comply with the procedural requirements of N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1(c) and he directed the BOE to respond, explaining why the charges should not be so dismissed. R-2.

(21) On February 18, 2004, respondent's answers and defenses were filed with the Department. The respondent denied any wrongdoing, and his allegations and contentions include the following: In the decades before his employment as superintendent, the Asbury Park district failed to receive any certification from the Department. As a result of the programs he implemented, in the spring of 2002 the Department issued a conditional certification to the district. BOE governance issues were the primary cause of the Department's returning the district to Level II status. See N.J.S.A. 18A:7A-14; N.J.S.A. 18A:7F-4; N.J.A.C. 6A:30-1.1 to -3.5. The BOE interfered with his performance of his duties and improperly interfered with personnel issues, including the hiring, firing and transfer of employees. The district had a curriculum in place that, as a result of changes in DOE standards, needed to be revised. Numerous meetings at all staff levels were conducted and he (respondent), through the district staff, despite interference by the BOE, was implementing a curriculum that would have complied with all applicable standards. The curriculum was provided to all staff. All required steps were taken to prepare the student body and teachers relative to GEPA and HSPA standards. The BOE failed to set goals and objectives required by N.J.S.A. 18A:17-20.3 and BOE policy, but he set his own goals. He was in the process of revising a corrective action plan the BOE had approved when he was improperly suspended. The BOE's Special Meetings of December 10, 2003, and

February 3, 2004, violated the Open Public Meetings Act and were void. The BOE failed to state its charges with specificity as required by N.J.A.C. 6A:3-5.1(b)(1) and it failed to submit a supporting statement of evidence as required by N.J.A.C. 6A:3-5.1(b)(1). The BOE failed to make a determination within 45 days of the respondent's receipt of the charges as required by N.J.S.A. 18A:6-13. The charges do not state a claim of conduct unbecoming as required by N.J.S.A. 18A:6-10 and the BOE cannot establish "just cause" for his dismissal.

(22) By letter dated February 28, 2004, the BOE's attorney filed a letter brief in response to the Commissioner's letter of February 17, 2004, and in opposition to the motion for an order dismissing the charges. The respondent submitted a letter dated March 2, 2004.

(23) The Department transmitted the contested case to the OAL, where it was filed on March 8, 2004. N.J.S.A. 52:14B-2(b).

(24) On March 16, 2004, the parties' attorneys and I conferred and on March 24, 2004, the BOE filed its letter brief in opposition to the respondent's motion.

(25) On April 1, 2004 (by telephone), I requested that the attorneys address whether "Count One" constitutes a charge of "inefficiency," as the Legislature uses that word in N.J.S.A. 18A:17-20.2; whether "Count One" should be dismissed; and whether "Count Two" states a claim upon which relief can be granted, and the attorneys argued for and against the motion for an order dismissing the charges.

CONCLUSIONS OF LAW

The Legislature has provided standards for qualifications, appointment, salaries, duties, powers, evaluations, terms, and dismissal or reduction in compensation of school districts' superintendents. See N.J.S.A. 18A:17-15 to -20.4.

N.J.S.A. 18A:17-20 provides for superintendents' general powers and duties:

> a. Any superintendent of schools, who has acquired tenure in the position of superintendent as of the effective date of [N.J.S.A. 18A:17-20.1 et seq.] shall have general supervision over the schools of the district or districts under rules and regulations prescribed by the State board and shall keep himself informed as to their condition and progress and shall report thereon, from time to time, to, and as directed by, the board and he shall have such other powers and perform such other duties as may be prescribed by the board or boards employing him.
>
> He shall have a seat on the board or boards of education employing him and the right to speak on all educational matters at meetings of the board or boards but shall have no vote.
>
> b. Any superintendent of schools who has not acquired tenure in the position of superintendent as of the effective date of [N.J.S.A. 18A:17-20.1 et seq.] but who holds tenure during the term of his employment contract pursuant to [N.J.S.A. 18A:17-20.2], shall be the chief executive and administrative officer of the board or boards of education employing him and shall have general supervision over all aspects, including the fiscal operations and instructional programs, of the schools of the district or districts under rules and regulations prescribed by the State board and shall keep himself informed as to their condition and progress and shall report thereon, from time to time, to, and as directed by, the board and he shall have such other powers and perform such other duties as may be prescribed by the board or boards employing him.
>
> He shall have a seat on the board or boards of education employing him and the right to speak on all matters at meetings of the board or boards but shall have no vote.

N.J.S.A. 18A:17-20.1 provides for reappointment of superintendents and provides for

boards' declining to reappoint superintendents:

> At the conclusion of the term of the initial contract or of any subsequent contract as hereinafter provided, the superintendent shall be deemed reappointed for another contracted term of the same duration as the previous contract unless either: a. the board by contract reappoints him for a different term which term shall be not less than three nor more than five years, in which event reappointments thereafter shall be deemed for the new term unless a different term is again specified; or b. at least one year prior to the expiration of the first or any subsequent contract the board shall notify the superintendent in writing that he will not be reappointed at the end of the current term, in which event his employment shall cease at the expiration of that term.

N.J.S.A. 18A:17-20.3 provides for the process for evaluation of superintendents:

> a. Every local board of education having a superintendent shall evaluate the performance of the superintendent at least once a year. Each evaluation shall be in writing, a copy shall be provided to the superintendent and the superintendent and the board shall meet to discuss the findings. The evaluations shall be based upon the goals and objectives of the district, the responsibilities of the superintendent and such other criteria as the State Board of Education shall by regulation prescribe. Any contract entered into pursuant to N.J.S. 18A:17-15 shall provide for an evaluation pursuant to this section and may provide for additional evaluation criteria or procedures which shall not be inconsistent with the regulations of the State board.
>
> b. The New Jersey School Boards Association shall establish a training program for local school board members on the evaluation of superintendents pursuant to subsection a. of this section. Every newly appointed or elected school board member shall complete the training program within 6 months of commencement of his term of office.

Instead of "career tenure" for superintendents, present statutes provide "tenure for the duration of the contract between the local board of education and the superintendent," i.e., "a superintendent shall hold tenure during the term of the contract with the board and during the contract period shall not be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause." Assembly Education Statement,

Assembly, No. 1131 – L.1991, c. 267. Consistent with this statement, N.J.S.A. 18A:17-20.2 states:

> During the term of any employment contract with the board, a superintendent shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming a superintendent or other just cause and then only in the manner prescribed [N.J.S.A. 18A:6-9 et seq.].

That is, the Legislature, distinguished "inefficiency" as a basis for removal from "conduct unbecoming" and "other just cause" as bases for dismissal, and, as shown below, the Legislature requires a board of education to comply with distinct procedures before the board may prosecute a charge of inefficiency. N.J.S.A. 18A:17-20.2. These procedures include those provided in N.J.S.A. 18A:6-11:

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination. Provided, however, that if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency.

> The consideration and actions of the board as to any charge shall not take place at a public meeting.
>
> [Emphasis added.]

Count One

Consistent with the Legislature's requirements, if "Count One" constitutes a charge of inefficiency, prosecution of the charge is conditioned on the BOE's compliance with the above-cited procedure allowing for correction of the alleged inefficiency.

In construing New Jersey's laws and statutes, words and phrases shall be given their generally accepted meanings. N.J.S.A. 1:1-1. The "plain language" of a statute is the starting point for its construction. Stevenson v. Keene Corp., 254 N.J. Super. 310, 317 (App. Div. 1992), aff'd o.b., 131 N.J. 393 (1993). And, in Laba v. Newark Board of Education, 23 N.J. 364, 384 (1957), the Court wrote that the statutory standard addressing "inefficiency, incapacity, conduct unbecoming . . . or other just cause" is "general in terms but measured by common understanding it fairly and adequately conveys its meaning to all concerned."

The plain meaning of "inefficiency" is "the quality or condition of being inefficient; lack of efficiency," and "inefficient" means "not efficient; unable to effect or achieve the desired result with reasonable economy." The Random House College Dictionary 680 (Revised Edition 1982). Therefore, the essence of inefficiency as a charge against an employee is that he or she has failed to reasonably effectively perform duties required of his or her title.

The plain meaning of "unbecoming" is "unsuitable . . . detracting from one's appearance, character, or reputation; creating an unfavorable impression." Id. at 1427. "Conduct unbecoming" is an "elastic" term broadly defined to include any conduct that has 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 (App. Div. 1960), quoted in Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998). Therefore, the elements of conduct unbecoming a public employee include that the employee's position is in the public eye, that the position is subject to a promulgated or implicit standard of good behavior, that the position requires the employee to

uphold that which is morally and legally correct, and that the subject conduct, while on duty or off duty, demonstrates that the employee is unsuitable for his or her duties as a public servant. Karins, supra, 152 N.J. at 554-55 (1998), citing State v. Bullock, 136 N.J. 149, 153-55 (1994); State v. Johnson, 127 N.J. 458, 462-63 (1992); Ward v. Keenan, 3 N.J. 298, 309-11 (1949); Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992), citing Asbury Park v. Department of Civil Serv., 17 N.J. 419, 429 (1955).

The BOE has cited no decision wherein a school's failure to meet standards constituted conduct unbecoming on the part of the school's administrator, or students' failure to learn basic skills constituted conduct unbecoming on the part of their teacher. Karins, supra, 152 N.J. at 555-56, involved an off-duty firefighter who directed a racial epithet against a private citizen and a police officer in the course of the officer's duties and the Court cited the following as cases of conduct unbecoming public employees: Tress v. Burlington Dep't of Health, 93 N.J.A.R.2d 698 (CSV), involved a Burlington County Department of Health employee who directed a religious slur at a fellow employee; City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967), involved a police officer who exhibited a disrespectful and contemptuous attitude to a superior officer; Hartmann, supra, 258 N.J. Super. 32, involved off-duty police officers who became inebriated and engaged in a fight; Rinnier v. Department of Transp. 94 N.J.A.R.2d 440 (CSV), involved Department of Transportation employees who howled at a woman being transported in a police vehicle and who refused the police officer's request for their identification.

The respondent has cited Smith v. Carty, 120 N.J.L. 335 (E. & A. 1938), wherein it was found that a teacher's obtaining a loan through fraud and misrepresentation constituted personal misconduct so unbecoming that she was unfit to continue as a school employee.

Consistent with the above, the BOE's "Count One," alleging that the respondent failed to properly and effectively lead, supervise and/or manage the Asbury Park school system, constitutes a charge of "inefficiency" as the Legislature uses that word in N.J.S.A. 18A:17-20.2.

The BOE argues that its allegation in "Count One" that the respondent failed to communicate with it about the Commissioner's recommendation that the conditional certification granted to its school district be rescinded and that Level II Monitoring be implemented

constitutes a charge of conduct unbecoming (or other good cause for dismissal) and not inefficiency. However, the subject matter of the certification and monitoring relates to the efficient operation of the school system and, therefore, the allegation relates to the charge of "inefficiency" as the Legislature uses that word in N.J.S.A. 18A:17-20.2.

Department regulations further specify the process for charges brought against a tenured board of education employee. N.J.A.C. 6A:3-5.1 to -5.6.

"In all instances of the filing and certification of tenure charges, other than for reasons of inefficiency," N.J.A.C. 6A:3-5.1(b) governs the process. N.J.A.C. 6A:3-5.1(b), emphasis added.

"In the event that the tenure charges are charges of inefficiency, except in the case of building principals in State-operated school districts, where procedures are governed by the provisions of N.J.A.C. 6:7," N.J.A.C. 6A:3-5.1(c) governs the process. N.J.A.C. 6A:3-5.1(c), emphasis added.

N.J.A.C. 6A:3-5.1(c) provides extensive procedures and timelines for tenure charges of inefficiency. 1. Initial charges of inefficiency and written statement of evidence shall be stated with specificity and filed with the district board of education or the State district superintendent. 2. The district board of education or the State district superintendent shall serve the charge and statement of evidence on the employee and his or her representative, if known. 3. The district board of education or the State district superintendent shall notify the employee that, unless the inefficiency is corrected within minimally 90 days, the board or the State district superintendent intends to certify the charge of inefficiency to the Commissioner pursuant to N.J.S.A. 18A:6-11. 4. The district board of education or the State district superintendent shall direct that there be a modification of the "individual professional improvement plan mandated by N.J.A.C. 6:3-4.3(f) to assure that such plan addresses the specific charges of inefficiency and comports with the timelines established for correction." N.J.A.C. 6A:3-5.1(c)(4). 5. "Upon completion of the minimal 90-day period for improvement, . . . the administrator or administrators responsible for bringing such charges to the attention of the board or the State district superintendent shall notify the board or the State district superintendent in writing of what charges, if any, have not been corrected." N.J.A.C. 6A:3-5.1(c)(5). 6. Upon receipt of the written notification, the district

board of education or the State district superintendent shall notify the employee in writing of what deficiency has or has not been corrected. The time from the expiration of the minimal 90-day period to the time that the board or the State district superintendent notifies the employee shall not exceed 30 days. 7. In the event it is alleged that the board or the State district superintendent notifies the employee that the inefficiency charged has not been corrected, the employee shall have 15 days from the date of notice to respond by filing a statement of evidence under oath in opposition to the charges. 8. Upon receipt of the employee's statement of evidence, the district board of education shall determine by a majority vote of its full membership, or the State superintendent shall determine, within 45 days, whether there is probable cause to credit the evidence in support of the charges and that such charges, if credited, are sufficient to warrant a dismissal or reduction in salary. 9. In the event the district board of education or the State district superintendent finds that probable cause exists and that the charges, if credited, are sufficient to warrant a dismissal or reduction in salary, the board or the State superintendent shall, within 15 days, file written charges, stating with specificity the nature of the inefficiency alleged, together with the certificate of determination, with the Commissioner, together with a proof of service upon the employee and the employee's representative, if known. See Rowley v. Board of Educ. of Manalapan-Englishtown Reg'l Sch. Dist., 205 N.J. Super. 65 (App. Div. 1985), for an example of the extensive process involved in bringing inefficiency charges.

The BOE argues that, since as a superintendent the respondent does not have an "individual professional improvement plan," N.J.A.C. 6A:3-5.1(c)(4)'s procedure required for an inefficiency charge is inapplicable to the respondent (or to any superintendent). However, a regulation does not trump a statute and, even if the BOE cannot comply with part of N.J.A.C. 6A:3-5.1(c)'s procedure, the BOE is not excused from compliance with the Legislature's requirement that it provide written notice of the alleged inefficiency and "allow [respondent] at least 90 days in which to correct and overcome the inefficiency." N.J.S.A. 18A:6-11.

The BOE also argues that, since no administrator is "responsible for bringing [the subject] charges," N.J.A.C. 6A:3-5.1(c)(5)'s procedure required for an inefficiency charge is inapplicable to the respondent (or to any superintendent). Again, a regulation does not trump a statute and, even if the BOE cannot comply with part of N.J.A.C. 6A:3-5.1(c)'s procedure, the

BOE is not excused from compliance with the Legislature's requirement that a board provide written notice to the superintendent of the alleged inefficiency and "allow [respondent] at least 90 days in which to correct and overcome the inefficiency." N.J.S.A. 18A:6-11. The board should be capable of determining whether a superintendent has corrected the conditions and eliminated the inefficiencies charged.

To summarize, consistent with the above-cited laws, the BOE's "Count One" is a charge of "inefficiency" as the Legislature uses that word in N.J.S.A. 18A:17-20.2. However, there is no record that the BOE complied with legislatively required procedures requiring notice and an opportunity for improvement before a board may prosecute a charge of inefficiency.

Count Two

In "Count Two," the BOE alleges that respondent participated in a "decision to circumvent N.J.S.A. 18A:17-20.1." This allegation relates to the above-described contract that increased the respondent's salary and his period of employment. The BOE also alleges that the respondent failed to "inform" the BOE that it should "rescind" the contract. P-4.

A public official's circumvention of a statutory requirement of his or her office may well constitute conduct unbecoming (and would not appear to be inefficiency subject to the above-described procedures).

However, the BOE's "Count Two" does not appear to state a claim on which relief may be granted. N.J.S.A. 18A:17-20.1 establishes timelines for deeming that superintendents are reappointed under the same terms as their previous contracts unless the board reappoints the superintendent pursuant to a contract with different terms than the previous contract. N.J.S.A. 18A:17-20.1 also provides that a board may timely notify the superintendent that it will not reappoint. However, I do not see that N.J.S.A. 18A:17-20.1 prohibits a board from contracting with and reappointing a superintendent before the conclusion of his earlier term for a term that overlaps and/or supersedes the earlier term. (Note, however, that in Gonzalez v. Board of Education of Elizabeth School District, 325 N.J. Super. 244 (App. Div. 1999), certif. denied, 163 N.J. 77 (2000), the court concluded that N.J.S.A. 18A:17-20.1 does not authorize a board to

appoint a superintendent to a term to begin during the term of the succeeding board.)

Among the exhibits that the BOE attached to its charges is the above-quoted November 23, 2001, memorandum from its former attorney, raising the question of the adequacy of notice under the Open Public Meetings Act. P-2D. However, the BOE's "Count Two" charges violation of N.J.S.A. 18A:17-20.1 (an education statute) and does not charge violation of the Open Public Meetings Act. N.J.S.A. 10:4-6 to -21.

Consistent with the above and N.J.A.C. 6A:3-5.1(b)(1), N.J.A.C. 1:1-1.3(a), and R. 4:6-2(e), "Count Two" appears to fail to state a claim upon which relief may be granted and may be dismissible on that basis.

Conclusion

Despite the BOE's characterization of its "Count One," it charges inefficiency and, since the BOE failed to comply with the above-described procedures required for prosecution of such a charge, "Count One" must be dismissed.

The BOE's "Count Two" does not appear to state a claim upon which relief may be granted, so "Count Two" may be dismissed. However, since the Commissioner has not requested a decision on whether the charge should be dismissed on that basis, these comments are informational only.

Asbury Park, an Abbott district, suffers from profound economic, social and other disadvantages that challenge its people and school system and, despite substantial State funding, its students have not performed well in tests measuring academic achievement. N.J.S.A. 18A:7F-3, "Abbott district." I have encouraged the parties to settle their differences so that, instead of burning up the district's resources in litigating this matter, those resources can be appropriately used to educate Asbury Park's children.

ORDER

Consistent with the above, I **ORDER** "Count One" **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 (45) 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 (13) 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, 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, 2004
DATE

JOHN R. TASSINI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

4/6/04 mgh
DATE

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Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For Petitioner:

P-1 Disciplinary Charges, undated (filed with BOE & served with BOE's letter, dated December 15, 2003)

P-2 Statement of Evidence in Support of Charges, December 15, 2003

P-2A Exhibit A (to Statement of Evidence in Support of Charges): Attachment #1, District Recommended for Level II, Failed Indicators

P-2B Exhibit B (to Statement of Evidence in Support of Charges): Letter from Department Commissioner, August 21, 2003

P-2C Exhibit C (to Statement of Evidence in Support of Charges): Asbury Park BOE Superintendent's Contract, April 10, 2000

P-2D Exhibit D (to Statement of Evidence in Support of Charges): Memorandum from Celso to Lewis, November 28, 2001

P-2E Exhibit E (to Statement of Evidence in Support of Charges): Asbury Park BOE portion of minutes, December 20, 2001

P-2F Exhibit F (to Statement of Evidence in Support of Charges): Asbury Park BOE Superintendent's Contract, December 20, 2001, March 26, 2002

P-3 Letter from BOE President, December 15, 2003

P-4 Disciplinary Charges and Certification of Determination by Interim Business Administrator/BOE Secretary, February 4, 2004, filed with Department February 10, 2004

P-5 Letter from BOE President, February 4, 2004.

P-6 Letter from BOE attorney, February 24, 2004

P-7 Letter from BOE attorney, February 28, 2004

P-8 Letter from BOE attorney, March 3, 2004

For Respondent:

R-1 Petition for Emergency Relief with Certification by petitioner, February 10, 2004

R-1A Exhibit A (to Petition for Emergency Relief): Letter from Department Deputy Commissioner to BOE President, April 23, 2003

R-1B Exhibit B (to Petition for Emergency Relief): Response to Evaluation – Dr. A. Lewis

R-1C Exhibit C (to Petition for Emergency Relief): Letter from Department Deputy Commissioner, December 19, 2003

R-2 Letter from Department Commissioner, February 17, 2004

OAL DKT. NO. EDU 921-04
AGENCY DKT. NO. 42-2/04

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTONIO LEWIS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF ASBURY PARK,	:	DECISION
MONMOUTH COUNTY.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board were submitted in accordance with *N.J.A.C.* 1:1-18.4 and fully considered by the Commissioner in his determination herein.

The Board's exceptions charge that the Administrative Law Judge (ALJ) erroneously concluded that the charges against respondent contained in Count One were ones of inefficiency within the intendment of *N.J.S.A.* 18A:17-20.2. In so finding, it avers, he relied solely on the dictionary definitions of the terms "inefficiency" and "unbecoming," wholly failing to take into consideration any other factors in interpreting the meaning of these terms. The Board professes that a statute should be accorded such "plain meaning" only when it is clear and unambiguous which, it contends, is not the case here. In situations such as this, where terms can be subject to more than one interpretation, recourse must be made to the statute's "purpose, legislative intent, and prior precedent" to resolve interpretation differences. (Board's Exceptions at 1-2) In this regard, the Board proposes that the overall purpose of *N.J.S.A.* 18A:17-20.2, which the ALJ failed to recognize or take into account,

> is to prevent the arbitrary dismissal of superintendents without cause. ***[T]here is no dispute that the Board filed the present charges against the respondent for cause and has therefore *not*

> *violated the legislative intent and purpose of the statute.* (emphasis in text) (*Id.* at 3)

The Board next contends that by confining the parameters of unbecoming conduct to its dictionary definition the ALJ failed to consider prior case law. Referencing *In re Howard*, decided by the Commissioner April 1, 2002, *aff'd with modification* by the State Board March 3, 2004, it claims that unbecoming conduct has been defined as "a lack of fitness to discharge the duties and functions of one's office or position," which, it contends, exemplifies the behavior at issue here. (*Id.* at 4) *Citing In re Vitacco*, 347 *N.J.Super.* 337 (App. Div. 2002); *In re Howard*; and *In re Romanoli*, decided by the Commissioner 93 *N.J.A.R.* 2d. (EDU) 82, *aff'd* State Board 87, *aff'd* Appellate Division April 13, 1994, No. A-2346-92T3, the Board professes that the ALJ additionally "failed to take into account past practices which demonstrates (sic) that tenure charges filed against superintendents are *commonly* based on 'unbecoming conduct' while tenure charges for 'inefficiency' are reserved for cases involving teaching staff members." (emphasis in text) (*Ibid.)* More particularly, it charges, "[i]n the present case, the Board has provided a long line of cases upholding tenure charges against superintendents based on unbecoming conduct while [the ALJ] and the respondent have both failed to cite to *any case* in which tenure charges were filed against a superintendent based on inefficiency." (emphasis in text) (*Ibid.*)

Next, the Board continues to argue, as it did below, that *N.J.S.A* 18A:17-20.2 does not contain a procedural process for bringing charges of inefficiency against a superintendent and compliance with all sections of the regulatory provisions which provide such a process is technically impossible when the charged individual is a superintendent. Therefore, it postulates:

> [d]ue to the fact that there is *no statute or regulation which sets forth the procedure* for a board of education to follow to file tenure charges based upon inefficiency against a superintendent and since *there is* (sic) *has not been a single case in New Jersey in which tenure charges have been initiated or sustained against a*

> *superintendent based upon inefficiency*, it is more than evident that the present tenure charges against Dr. Lewis were properly based on unbecoming conduct. The petitioner should not be burdened with defending an issue of first impression, especially since the respondent himself did not raise the issue. The result of having to respond to something that heretofore has been omitted from consideration by our courts is unfair and contrary to the legislative intent of the statute. (emphasis in text) (Board's Exceptions at 6)

Finally, the Board objects to the ALJ's "informational" analysis of Count Two of its tenure charges against respondent, as the Commissioner's transmittal of this matter to the OAL requested nothing more than a determination of whether the Board's charges were, in fact, ones of inefficiency. As such, it contends that the ALJ's analysis was "offered as a means to assist the Commissioner of Education in rendering a decision which would completely dismiss the charges against this petitioner without any discovery or an opportunity for the petitioner to be heard." (*Id.* at 3)

Upon his independent and comprehensive review of the record, the Commissioner concurs with the ALJ, that the charges comprising Count One are properly categorized as ones of inefficiency and must, therefore, be dismissed for the Board's failure to comply with the requirements of *N.J.S.A.* 18A:6-11. In so determining, the Commissioner finds the Board's exception arguments, both with respect to the nature of its charges and the propriety of bringing inefficiency charges against a superintendent, antithetic to both the governing statutes, *N.J.S.A.* 18A:17-20.2, *N.J.S.A.* 18A:6-11, and applicable case law. *See In the Matter of the Tenure Hearing of Richard P. Adams, School District of the Borough of Ocean Gate, Ocean County*, decided by the Commissioner September 19, 1997, a case virtually identical to the instant matter.[1] (*See also In the Matter of the Tenure Hearing of Dr. Frank J. Napoli, School District of*

[1] Charges against District superintendent were found to be ones of inefficiency as they related to the Board's dissatisfaction with the performance of its superintendent. Because the Board had not accorded the respondent the requisite 90-day period to improve his performance as mandated by *N.J.S.A.* 18A:6-11, the charges were dismissed.

the City of Salem, Salem County, 1988 *S.L.D.* 261, *aff'd with modification* by the State Board, 1988 *S.L.D.* 284.) Notwithstanding the categorization the Board attempts to ascribe to its charges, the Commissioner is in full agreement with the ALJ that charges of inefficiency are qualitatively different from charges of unbecoming conduct. (Initial Decision at 16-17) More particularly, as was found in *Adams, supra*:

> Inefficiency amounts to the teaching staff member failing to effectively perform his or her duties. *Rowley v. Manalapan-Englishtown Board of Education*, 205 *N.J. Super.* 65, 70 (App. Div. 1985). In sustaining charges of inefficiency, the Commissioner noted conduct must amount to "inefficiencies and inadequacies" in a respondent's performance of his duties. *In the Matter of the Tenure Hearing of Slovney*, 84 *S.L.D.* 1764, 1794. The charges which allege failure to perform duties are, by definition, another phrase for the term of "inefficiency." (*Adams* Slip Opinion at 7)

Here, the Commissioner is in full accord with the ALJ that "the BOE's 'Count One,' alleging that the respondent failed to properly and effectively lead, supervise and/or manage the Asbury Park school system constitutes a charge of 'inefficiency'"***. (Initial Decision at 17) Consequently, inasmuch as the Board did not fulfill its obligation, pursuant to *N.J.S.A.* 18A:6-11, of providing respondent written notice of the inefficiency and according him 90 days to improve his performance, Count One of the Board's charges must be dismissed.

With respect to Count Two of the Board's charges, charging respondent with unbecoming conduct for knowingly entering into an invalid contract, the Commissioner, in fulfillment of his responsibility pursuant to *N.J.S.A.* 18A:6-16 and *N.J.A.C.* 6A:3-5.5, has reviewed this charge and upon such review, has determined that the charge, even if true, is,

standing alone, deemed insufficient to warrant respondent's dismissal or reduction in salary and, therefore, Charge Two must be dismissed.[2]

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons stated therein. Therefore, tenure charges against respondent are dismissed and, pursuant to *N.J.S.A.* 18A:6-14, the Commissioner directs that the Asbury Park Board of Education immediately reinstate Antonio Lewis to his position of superintendent with full pay from the first day of his suspension. In so holding, the Commissioner notes that the above result is compelled by law and that nothing herein precludes the Board, in its discretion, from filing new tenure charges in compliance with the Tenure Employees Hearing Law.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 6/7/04

Date of Mailing: 6/7/04

[2] Because the Commissioner's transmittal of this matter to the OAL requested that, subsequent to a determination on respondent's Motion to Dismiss for failure to comply with the procedural requirements of *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6A:3-5.1(c), alleging charges were ones of inefficiency rather than unbecoming conduct, the matter be returned to the Commissioner for a sufficiency determination pursuant to *N.J.S.A.* 18A:6-16, the Commissioner does not reach to the ALJ's informational comments with regard to Charge Two.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

239-04

C.A. AND B.A., on behalf of G.A., :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLE TOWNSHIP, CAPE MAY COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents challenged the Board's charges against high school senior, G.A., and contested the severity of the suspension penalty imposed.

In light of testimony of witnesses and the record, the ALJ found that the Board had good cause to discipline G.A. since he brought two knives to school and he threatened student M.P. The ALJ determined, however, that G.A. did not commit an assault on M.P. on school property. *N.J.S.A.* 18A:37-2.2 did not apply since G.A. violated a lesser statute, *N.J.S.A.* 18A:37-2c. The ALJ agreed that the Board's penalty of suspension from school and G.A.'s placement on the restricted activities list was not arbitrary and capricious because it would be difficult to supervise G.A. at activities involving crowds. The ALJ found, however, that commencement is a tightly controlled event so barring G.A. from that event was arbitrary, capricious and without rational basis. The ALJ ordered G.A. be permitted to participate in commencement, that remaining sanctions be affirmed and home instruction continue.

The Commissioner modified the Initial Decision. The Commissioner determined that, as a result of G.A.'s serious transgressions, the Board did not abuse its discretion in restricting G.A.'s participation in, or attendance at, any school-sponsored extracurricular activities and, contrary to the ALJ, determined that such extracurricular restriction may reasonably extend to commencement exercises.

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.

June 11, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2384-04

AGENCY DKT. NO. 111-3/04

C.A. AND B.A. O/B/O G.A.,

Petitioners,

v.

MIDDLE TOWNSHIP BOARD

OF EDUCATION,

Respondent.

Michael Stanton, Esq., for petitioners (Taht, Stanton & McCrosson, attorneys)

James B. Arsenault, Jr., Esq., for respondent (Cooper, Levenson, April, Niedelman & Wagenheim, attorneys)

Record Closed: April 26, 2004 Decided: May 6, 2003

BEFORE **BRUCE M. GORMAN,** ALJ:

STATEMENT OF THE CASE

Petitioner G.A. is a student at Middle Township High School. On February 19, 2004, David J. Salvo, High School Principal, suspended G.A. from school for possession of a weapon on school property and terroristic threats (R-3). The charges were amended on March 1, 2004 by Superintendent Michael J. Kopakowski to the following:

1. That on February 19, 2004, G. did have in his possession two knives, specifically a green handled folding knife with an approximate 3.25 inch blade and a black handled folding knife with an approximate 4 inch blade

with the purpose to use them unlawfully again student M.P., and for the purpose of causing M.P. fear of bodily harm.

2. That on February 9, 2004, G. did assault student M.P. by brandishing one or both of the said knives at student M.P. and after having made threats to M.P. the previous evening (February 18, 2004) via Internet chat that he would cut off M.P.'s penis and slice his face.

On March 9, 2004, respondent Board of Education passed a resolution, R-4, wherein respondent imposed the following penalties on petitioner:

1. That the Student be suspended from school from Thursday, March 4, 2004 through the conclusion of the school year on June 15, 2004; ad
2. That the Student be provided with adequate home instruction of no less than 10 hours per week for this period of suspension;
3. That the Student be placed on the restricted activities list until the completion of the 2003-2004 school yea, and shall not be entitled to participate in or attend any extracurricular or school-sponsored activities including but no limited to Commencement Exercise; and
4. That the Student be enjoined from any contract with Student M.P., or from causing any other person to threaten, harass or intimidate Student M.P. on his behalf.

Petitioner G.A. denies the charges as preferred and contests the severity of the penalty.

PROCEDURAL HISTORY

Petitioner filed a Petition and Request for Emergent Relief dated March 29, 2004 with the Department of Education, Bureau of Controversies and Disputes on March 31, 2004. The matter was transmitted to the Office of Administrative Law (OAL) on April 5, 2004. Respondent filed its Answer with OAL on April 8, 2004. On April 7, 2004, petitioner's application for emergent relief was argued telephonically before the Honorable Ana Viscomi, ALJ. On April 8, 2004, Judge Viscomi issued a decision denying petitioner's application and directing that the matter be set down for plenary hearing. I conducted the hearing on April 13, 2004 at the Office of Administrative Law, 1601 Atlantic Avenue, Atlantic City, New Jersey. Petitioner introduced Exhibits P-1, P-2 and P-3. Respondent introduced Exhibits R-1, R-2, R-3, and R-4. Testimony was recorded on tape. In addition, the parties jointly offered a transcript of the hearing below of March 9, 2004, J-1. Petitioner G.A. testified himself and presented John McInerney, Ph.D., as an

expert witness. Respondent relied upon the testimony contained in J-1. The hearing concluded on April 13, 2004, but the record remained open for the submission of briefs. Briefs were submitted by April 23, 2004, and the record was closed on that date.

FINDINGS OF FACT

Petitioner G.A. ("Petitioner") is age 17 and a high school senior in respondent's school system. He is scheduled to graduate in June of 2004. Petitioner is 6'1" tall and weighs approximately 170 pounds. He is not classified.

During the school day on February 18, 2004 petitioner became involved in a shoving match with a senior male named M.P. M.P. is 5'9" tall and weighs 140 pounds, according to petitioner's best approximation. M.P. is classified as a result of a severe hearing impairment.

A teacher interceded between petitioner and M.P. Petitioner was sent to the principal's office, while M.P. was sent back to class.

That evening, petitioner and M.P. continued the dispute through use of an Internet chat line. Respondent introduced into evidence a transcript of the exchange, R-1. The transcript reveals what on one level could be considered a typical example of teen-age male bravado, with petitioner threatening M.P. and M.P. responding with the proverbial "Oh yeah? You and who else?" type of response.

What renders the exchange atypical are petitioner's repeated references to his possession of a knife and his intent to utilize the knife to sever various portions of M.P.'s anatomy from his body. Notable are petitioner's statements that he was going to "chop off his pee pee", "chop off ur dick and feed it to u", and "slice ur face off". Petitioner concluded with the warning, "u keep sayin stupid shit and I will kill u."

It should be noted that, simultaneous with this exchange, both petitioner and M.P. were engaged in separate Internet conversations with a female student at respondent's high school named V.M. In some fashion, V.M. was either monitoring the conversation between petitioner

and MP or was being informed by each of them of what was being said. Petitioner indicated in his testimony that, at least in part, he was trying to impress V.M.

M.P.'s reaction to the conversation is less certain, colored no doubt by the usual reluctance of the teen-age male to admit fear. He testified (J-1, 35:22-36:4):

> Q. Do you believe that the conversation you had on AOL was a threat?
>
> A. No. Well, G. didn't say that he was joking, so I kind of thought that it was serious, and I started to feel nervous, like maybe I was going to get hurt the next day. So that's why I printed it out and brought it to school because I wanted to keep myself from getting hurt.

Taken by itself, this example of excessive teen-age testosterone would not involve this Court or the Department of Education. But what happened the following day brings the matter before me.

The following morning petitioner went to school. He wore a jacket which he customarily wears when working with his father clearing land. Inside the jacket pocket was a folding knife with a 3" blade. In addition, the previous evening petitioner had found in his room another knife, a folding knife with a 4" blade, belonging to a friend. He likewise brought that knife to school in his jacket. According to petitioner, he intended to give the second knife back to his friend.

According to petitioner, he arrived at school on February 19, he found M.P. waiting for him at the front door with a transcript of the chat line conversation (R-1). Also present was V.M. Petitioner asked for the copy, and M.P. gave it to him. Petitioner and V.M. proceeded into the school. V.M. asked if he had really brought a knife. Petitioner stated that he had. V.M. asked to see the knife. Petitioner took V.M. to his locker where he had placed the jacket containing the knives. (How the jacket got into the locker was not explained by petitioner, who averred that he met V.M. as he entered school.) Petitioner opened his locker, took out one of the knives, showed it to V.M., placed the knife back into the jacket, and locked the jacket in his locker. Petitioner stated that at some point while he was at the locker he was conscious of M.P. walking by, but he contended that he did not know M.P. was present when he brought out the knife. Petitioner then proceeded to homeroom.

M.P.'s recollection of the event at the locker is similar, but with noteworthy differences. He testified (J-1, 31:20-33:9):

A. That particular day V. asked me if I would come to G.'s locker. I was like alright, I'll go. And so we went to G.'s locker, and I was standing there, and I kind of knew what was going to happen, I kind of knew what he was going to do, and I tried to walk away because I had a feeling that he had a gun, I mean a knife – sorry – my interpretation – and then V., she pulled me by my shirt and she pulled me back to the locker even though I was trying to walk away, and when I stood there he showed me the knife that was in the coat, and it was in his locker but I did see it, I did see the knife.
Q. Who was V.?
A. Well, her name is V.A. She's a junior.
Q. And you know her from school?
A. Yeah. She's in my school. I – (unclear – too low-voiced).
Q. And on the morning of the 19th she brought you by Mr. A.'s locker, is that correct?
A. Yeah. But I'm not sure exactly what she said. I just followed – I just came with her when she said come with me.
Q. V. doesn't sign, does she?
A. Could you clarify?
Q. She doesn't speak sign language?
A. Oh, no.
Q. So you are not really sure why she was asking you to come with you, you just knew that she was asking you to follow?
A. I didn't know what she was going to do but I knew that she wanted to come to G.'s locker. She said, "Let's go with me to G.'s locker."
Q. You said you had a feeling or you kind of knew what was going to happen when you went to G.'s locker, that you suspected he had a weapon?
A. Well, I didn't know that but I – I thought, maybe they were like playing around or something happened, but then when I got to the locker, then I knew what was happening, and that's when I decided that I had to turn in the paper that had our AOL conversation on it.

M.P. then testified as to exactly what he saw (J-1, 33:10-16)

Q. First about what you saw at the locker, you're sure you saw a knife?
A. Yes.
Q. Was the blade extended?
A. No. It happened really fast. I really don't know when – I know I saw a knife. I know it was a knife – (unclear – voice trails).

We have a difference in perception. According to G.A., he was showing the knife to V.M. According to M.P., he thought G.A. was showing him the knife. The witnesses do agree on the following: 1) V.M. instigated the incident; 2) G.A. did not extend the blade or otherwise "brandish" the knife at M.P. (P-3); 3) G.A. exhibited one knife and not two (P-3).

An uninvolved third party, A.M., also testified. A.M. testified that she was not personally familiar with either G.A. or M.P. (J-1, 42:14-22). She stated that M.P. had followed G.A. and V.M. to G.A.'s locker without apparent invitation (J-1, 43:25-44:2), and that M.P. was the "instigator" of any contact between M.P. and G.A. at G.A.'s locker (J-1, 44:18-21).

M.P. reported the knife to the vice principal, and she caused petitioner to be sent to her office. A police officer assigned to Middle Township High School, Sergeant Jeffrey Saduk, frisked petitioner and found no weapon. Petitioner's locker was then searched, and the knives were discovered. Petitioner was placed under arrest and charged with Terroristic Threats (*N.J.S.A.* 2C:12-3a), Possession of a Weapon in School (*N.J.S.A.* 2C:39-5e), and Possession of a Weapon for Unlawful Purpose (*N.J.S.A.* 2C:39-4d). Those charges remain pending in the Superior Court. In addition, petitioner was suspended from school.

On March 9, 2004, respondent conducted a hearing to determine the penalty to be imposed upon petitioner. On that date, respondent passed a resolution, R-4, suspending petitioner from school commencing Thursday, March 4, 2004 "through the conclusion of the school year on June 15, 2004..." Respondent ordered not less than ten hours of home instruction per week, enjoined petitioner from any further contact with M.P., and ruled that petitioner "shall not be entitled to participate in or attend any extracurricular or school-sponsored activities *including but not limited to Commencement Exercises*..." (Emphasis added).

Respondent concurs that prior to February of 2004, petitioner's disciplinary record was limited to what would be characterized as minor infractions, offenses common to many students. In February of 2004, a drug screen found petitioner to be under the influence of marijuana. On February 19, respondent was about to suspend petitioner for ten days for this infraction.

Petitioner testified that he was not aware of M.P.'s presence when he showed his knife to V.M. He stated he had no intention of harming M.P. He stated that he always carried a knife in his work jacket, and that the presence of the knives on February 19 was coincidental and had nothing to do with his dispute with M.P.

Petitioner testified that since the incident his parents have closely monitored his activities. He has undergone drug testing on a weekly basis and has been found to be drug free. In addition, he has volunteered his time at a charitable organization known as Cape Assist.

Petitioner presented as frightened and remorseful. He did not attempt to avoid responsibility for his actions. Whatever his intentions on February 19, I am satisfied that he now regrets the incident, and I so **FIND**.

By contrast, M.P. expressed ambivalence over the incident. He state (J-1, 36:15-22):

Q. Based upon that incident, are you fearful for your safety?
A. Not really. Maybe a little. But the first day that it happened, I was really stressed out and worried.
Q. Are you concerned that anything may happen in the future if Mr. A. Returns to the high school?
A. Yeah. Yeah. I am worried. Mm-mmm.

And again on cross-examination, M.P. stated (J-1, 38:16-17):

Q. Well, how do you feel now about your safety?
A. I don't know.

I note that respondent has chosen not to produce M.P. to offer direct testimony in my presence. As a result, I have had no opportunity to gauge his demeanor. I am forced to reach a conclusion as to the true level of fear which this incident induced in him solely on the basis of his transcript testimony (J-1).

Petitioner called Dr. John McInerney to testify. Dr. McInerney was stipulated by both parties to be an expert in child psychology.

Dr. McInerney testified that he conducted a Comprehensive Psychological Evaluation of petitioner on February 23 and March 1, 2004. Since that time petitioner has been under the care of another therapist in Dr. McInerney's office who specializes in drug and alcohol counseling.

Dr. McInerney testified that petitioner had above average cognitive ability, and was free of all significant signs of major psychiatric illness. He suffers from no mood, behavior, or thought disorder. The doctor opined that many teen-agers fail to understand the consequences of his conduct. Dr. McInerney stated petitioner had made progress in reaching that understanding. It was the doctor's opinion that petitioner could be returned to school without constituting a danger to other students.

Dr. McInerney stated he had not read the transcript of the Internet chat, R-1. I read the transcript to him and asked him to comment. The doctor opined that teenagers often make lurid threats they do not intend to act on. He characterized petitioner's statements as angry, childlike threats intended to intimidate M.P., but devoid of any intent to turn the threats into action.

David Salvo, High School Principal, testified at the March 9, 2004 hearing. It was Mr. Salvo who recommended the penalties contained in R-4 (J-1, 17:6-16). When asked the rationale behind his recommendation, Mr. Salvo testified (J-1, 18:20-23):

> Q. The recommendation to the Board is based upon your investigation of this incident?
> A. My investigation and obviously the confrontation with G. and people that handled the particular . . .

Mr. Salvo offered no other basis for the recommendation. In consequence, I do not know whether his concern was for the safety of the student population, deterrence of similar conduct, or some other unspecified purpose.

Gladys Lauriello, vice principal, and Sgt. Jeffrey Saduk of the Middle Township Police Department also offered testimony at the March 9, 2004 hearing.

LEGAL ANALYSIS

It is well settled that petitioner must establish by a preponderance of the credible evidence that respondent's imposition of a long-term suspension through the end of the school year is "improper, that is, patently arbitrary, without rational basis or induced by improper motives." *J.D. & E.D o/b/o B.D. v Toms River Regional School District Board of Education*, OAL Docket No. EDU6009-97, 1991. In general, the action of a local school board "which lies within the area of its discretional powers may not be upset unless patently arbitrary..." *Kopera v. Bd. of Ed of West Orange*, 60, *N.J. Super.* 288, 294 (App. Div., 1960).

Therefore, in order to prevail, petitioner must show that respondent acted in an arbitrary and capricious fashion in imposing the discipline set forth in R-4.

In order to determine whether respondent acted arbitrarily and capriciously, we must first examine its legal position. Respondent premises its determinations on the theory that this incident falls within the parameters of *N.J.S.A.* 18A:37-2.2 (see respondent's brief, page 3). *N.J.S.A.* 18A:37-2.2 states in pertinent part:

> Any pupil who commits an assault upon a teacher, administrator, board member, other employee of a school board or another student, with a weapon, on any school property, on a school bus, or at a school-sponsored function shall be immediately removed from the school's regular education program pending a hearing before the local board of education.
>
> For purposes of this section "assault" means those actions defined under subsection a.(1) of *N.J.S.A.* 2C:12-1.
>
> For purposes of this section "weapon" includes but is not limited to those items enumerated in subsection r. of *N.J.S.A.* 2C:39-1, except a firearm as defined by *N.J.S.A.* 2C:39-1f and 18 *U.S.C.* § 921.

Accordingly, three elements are necessary to fall within the parameters of this statute. The perpetrator must: 1) commit an assault; 2) upon, *inter alia*, a student; 3) on school property.

Respondent argues that petitioner committed an assault as defined in *N.J.S.A.* 2C:12-1(a)(3), which states:

a. Simple assault. A person is guilty of assault if he:

3) Attempts by physical menace to put another in fear of imminent serious bodily injury.

There can be no doubt that respondent could reasonably find the chat room discussion, R-1, was an attempt to put MP in fear of imminent serious bodily injury. The problems with relying on R-1 are twofold. First, the colloquy took place in cyberspace, which cannot be said to place MP in "physical menace", because he was not within physical reach of G.A. But more importantly, the chat room discussion in cyberspace did not take place "on school property". Wherever cyberspace may be, there is no evidence that it is "on school property".

Consequently, the chat room discussion itself does not bring this matter within the four corners of *N.J.S.A.* 18A:37-2.2. Respondent must rely upon the incident at the locker in support of its position.

As noted in the factual findings, certain aspects of the locker incident are undisputed. M.P. followed G.A. to his locker. G.A. took out the knife and displayed it to V.M. G.A. states he did not know M.P. was in the area. Nothing in M.P.'s testimony contradicts that assertion. G.A. did not open the knife, nor did he "brandish" it at M.P. as suggested by the charges, P-3. At most, in M.P.'s words, G.A. "showed" the knife (J-1, 32:3-5). Nothing in any of the testimony suggests that G.A.'s actions amounted to "physical menace" which placed M.P. "in fear of *imminent* serious bodily injury" (emphasis added). Had G.A. opened the knife, there might be a stronger basis for respondent's action, but it is uncontroverted that the knife remained closed.

Accordingly, I **FIND and CONCLUDE** that G.A. did not commit an assault on M.P. on school property. *N.J.S.A.* 18A:37-2.2 does not apply, and insofar as respondent acted in reliance upon that statute, such reliance was misplaced.

The inapplicability of *N.J.S.A.* 18A:37-2.2 is crucial. The Legislature has determined that assault with a weapon on school property is a particularly egregious offense, and has delineated special remedies for a board of education confronted with such a situation. See NJS

18A:37-2.1 *et seq*. For example, a student who violates *N.J.S.A.* 18A:37-2.2 *must* immediately be suspended. The school administration has no latitude. *N.J.S.A.* 18A:37-2.1. The police *must* be notified. *N.J.S.A.* 18A:37-2.3. The student cannot return to school without an express determination by the administration that he should be permitted to do so. *N.J.S.A.* 18A:37-2.5. No such requirements exist for lesser disciplinary violations.

The draconian nature of the penalties imposed upon G.A. must be viewed in light of respondent's stated position that it posited its decision on the assumption that *N.J.S.A.* 18A:37-2.2 applied. Since that statute does not apply, the question becomes, did petitioner violate a lesser statute, and if so, are the penalties applied appropriate, or do they rise to the level of arbitrary and capricious?

The general causes for suspension and expulsion of pupils are found at *N.J.S.A.* 18A:37-2. In this case it is undisputed that G.A. brought not one, but two knives to school. In my opinion, bringing a knife to school constitutes a danger to everyone and is a clear violation of *N.J.S.A.* 18A:37-2c, which states:

> Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include, but not be limited to, any of the following:
>
> * * *
>
> c. Conduct of such character as to constitute a continuing danger to the physical well-being of other pupils;

Accordingly, respondent had good cause to discipline petitioner. The remaining question is, given that petitioner violated *N.J.S.A.* 18A:37-2c and not the more egregious *N.J.S.A.* 18A:37-2.2, is the discipline imposed excessive to the point that it must be deemed arbitrary and capricious?

To reach a conclusion, we must analyze each of the sanctions imposed upon petitioner in light the respondent's purpose in imposing the discipline. R-4 gives no specific rationale for the discipline, but respondent's brief makes it clear that the safety of other students, especially M.P., lay at the heart of its actions. Respondent's brief is rife with references to the potential danger G.A. represents to the student population of its high school. Therefore, in light of that perceived

purpose, the question becomes, are any of the sanctions imposed so unreasonable as to be "patently arbitrary" or "without rational basis"? *J.D. & E.D. o/b/o B.D., supra.*

1. G.A. is suspended from school from March 4, 2004 through the conclusion of the school year on June 15, 2004.

Petitioner argues that respondent has "effectively expelled G.A. from school". I cannot honestly disagree. The June 15, 2004 date appears to have been specifically chosen because it coincides with "the conclusion of the school year". R-4. Given that petitioner violated *N.J.S.A.* 18A:37-2c rather than the more serious *N.J.S.A.* 18A:37-2.2, his de facto expulsion borders on arbitrary and capricious. Were petitioner in a lower grade, I might be inclined to curtail the suspension. Petitioner cannot be barred forever from the school without formal expulsion.

But petitioner is not in a lower grade. He is a second semester senior. He has already been accepted into college. Respondent must balance petitioner's rights against the safety of MP and the rest of the student body.

Dr. McInerney stated that GA is not a threat and can safely be returned to school. His testimony is compelling, and were the standard of proof different, I would likely return GA to school at some point sooner than the end of the school year.

But the standard here is "arbitrary and capricious". Respondent must be concerned with its limited ability to monitor petitioner if he is returned to the student population. A modern high school is a crowded place. Students move about from class to class in a continuous maelstrom of activity. Petitioner could easily access MP, VM, AM, or any other student. If petitioner is allowed to return to school, respondent will have little control over his movements or activities.

Faced with the safety issue, respondent appears to have determined removal of the problem (G.A.) for the small amount of time left to him at Middle Township High School outweighed any minimal educational value which G.A. would derive from his final months of high school. In balance, I cannot find respondent's action to be "without rational basis". *J.D. & E.D., supra.*

2. G.A. is enjoined from any contact with MP, or from causing any other person to threaten, harass or intimidate MP on his behalf.

I see nothing to be gained from affording G.A. access to M.P.. And any further threat or intimidation would constitute further violation of *N.J.S.A.* 18A:37-2. Respondent's determination on this issue is clearly not arbitrary and capricious.

3. G.A. is placed on the restricted activities list until the completion of the 2003-2004 school year and is not permitted to participate or attend any extracurricular or school-sponsored activities.

This restriction is harsh. It deprives G.A. of the pleasure of attending his prom, possibly his senior trip, and the other senior activities. But most of these activities involve crowds, crowds wherein supervision of G.A. will be difficult. Further, there is no rationale for suspending G.A. from school but permitting him to attend ancillary functions. In one sense, such a holding would appear to reward G.A. for his misconduct. Most students would revel in a scenario wherein they could avoid attending school but participate in the social activities the school generates.

Accordingly, with the exception set forth below, I cannot hold that respondent's determination on this issue is arbitrary and capricious.

4. G.A. is not permitted to participate in school-sponsored activities, *including but not limited to Commencement Exercises.*

Respondent's determination on this issue crosses the line. Respondent offers no reason for this prohibition. If respondent's concern is the safety of M.P., or of the student body as a whole, it is misplaced. Commencement differs from the prom, the class trip, and other senior activities because it is a tightly controlled event. The students march into the auditorium or stadium in a prearranged order. They sit in assigned seats at center stage, in clear view of all on-lookers. They proceed to the podium to receive their diplomas under the eyes of hundreds of

watchers. They recede in orderly lines. The notion of G.A. extracting a knife from beneath his robes, charging across the stage, and chopping off some portion of M.P.'s anatomy in front of an audience of hundreds is so far-fetched as to reach the level of "without rational basis".

Although not plead anywhere, it is possible respondent attempts here to enforce some sort of unwritten "zero tolerance" policy, serving as a deterrent to others against future misconduct. If so, respondent's action is unduly punitive. Commencement is a seminal right of passage in our society, not only for the graduate, but also for his family. The ceremony marks the end of childhood for the graduate, and the end of the child-rearing years for his parents. It is a day of celebration for siblings, grandparents, and family friends. When respondent punishes petitioner in this way, it also punishes his entire family.

Such egregious overkill cannot be justified.

Respondent cites *R.L. & K.L. o/b/o B.L. v. Kingsway Reg. Bd. Of Ed.*, 95 *NJAR* (EDU) 296 (May 5, 2995) in support of its position. In that case, the Commissioner upheld the Board's determination barring petitioner's attendance at Commencement. That case is easily distinguishable. It involved a high school senior who fondled seventh and eighth grade girls. G.A.'s offense in no way rises to such a level.

Based upon the above, I **FIND and CONCLUDE** that respondent's action barring petitioner's participation in Commencement Exercises is arbitrary, capricious, and without rational basis.

ORDER

I **ORDER** that respondent's determination barring petitioner from participation in Commencement Exercises be **REVERSED**.

I further **ORDER** that petitioner's suspension from school be lifted twenty-four hours prior to the date and time Commencement Exercises begin.

I further **ORDER** that petitioner be permitted to participate in Commencement Exercises.

I further **ORDER** that the remaining sanctions imposed upon petitioner by respondent's resolution of March 9, 2004, R-4, be **AFFIRMED.**

I further **ORDER** respondent to continue to provide petitioner with home instruction in accordance with the terms of the prior Order of April 8, 2004.

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 (45) 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 (13) 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, 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.

5-6-04

DATE

BRUCE M. GORMAN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

5/6/04

DATE

Mailed to Parties:

MAY 11 2004

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

LIST OF EXIHIBITS

For petitioner:

P-1 McInerney letter dated March 8, 20044

P-2 McInerney Affidavit, March 19, 2004

P-3 March 1, 2004 letter from Superintendent

For respondent:

R-1 Chat transcript

R-2 Drug screen results

R-3 February 19, 2004 letter regarding drug suspension

R-4 Board Resolution-Suspension

Joint Exhibits:

J-1 Transcript of March 9, 2003 Proceedings

LIST OF WITNESSES

For petitioner:

G.A.

Dr. John McInerney (telephonically)

For respondent:

None

Martino

From: postmaster@doe.state.nj.us
Sent: Thursday, May 06, 2004 1:53 PM
To: Martino
Subject: Delivery Status Notification (Success)


ATT18245.TXT


INITIAL DECISION EDU2384-04(GA...

Your message

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  To:      EDU
  Subject: INITIAL DECISION EDU2384-04(GAvMiddleBOE) ID 5-7
  Sent:    Thu, 6 May 2004 14:00:29 -0400

was delivered to the following recipient(s):

Heredia, Cris on Thu, 6 May 2004 13:52:48 -0400
    <physics.doe.state.nj.us #2.0.0>
Duncan, Kathleen on Thu, 6 May 2004 13:52:48 -0400
    <physics.doe.state.nj.us #2.0.0>
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OAL DKT. NO. EDU 2384-04
AGENCY DKT. NO. 111-3/04

C.A. AND B.A., on behalf of G.A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLE TOWNSHIP, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and the petitioners' reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4.

In its exceptions, the Board contends that the ALJ erred in concluding that G.A. had not committed an assault on M.P. as contemplated by *N.J.S.A.* 18A:37-2.2. (Board's Exceptions at 3) In this regard, the Board argues that "the ALJ improperly divorced G.A.'s conduct in bringing two knives to school on February 19, 2004 from the specific threats recorded in the Internet chat on February 18, 2004." (*Id.* at 4) The Board continues:

> The ALJ found that the Board could reasonably conclude on these facts that G.A.'s threats during the Internet chat – to bring a knife to school and to cut various parts of M.P.'s body – were intended to put M.P. in fear of imminent bodily harm. *** If that finding is reasonable, it supports the Board's decision that G.A. committed an assault as that offense is defined at *N.J.S.A.* 2C:12-1(a)(1). *** More troubling, the morning after making his very specific threats, G.A. came to school with a knife which was seen by M.P. While the factual testimony of M.P. and G.A. at the March 9, 2004 hearing before the Board was in some measure divergent, G.A. testified clearly that he had a knife on February 19, 2004 and M.P.

> testified clearly that he saw the knife in G.A.'s hand that same day. The threat from the evening of February 18, 2004 coupled with G.A.'s possession of a knife on February 19, 2004 and his decision to take the knife out of his pocket in a manner that would have allowed M.P. to see the knife rises to the level of an assault with a weapon on school grounds that warrants disciplinary action against G.A. (*Id.* at 4-5)

In reply, petitioners counter that the ALJ correctly determined that G.A. had not committed an assault on M.P. so as not to be subject to discipline pursuant to *N.J.S.A.* 18A:37-2.2. (Petitioners' Reply at 1) Petitioners review the ALJ's factual findings in this regard and argue, in pertinent part:

> Nothing in any of the testimony suggest[s] that G.A.'s actions amounted to "physical menace" which placed M.P. "[i]n fear of *imminent* serious bodily injury" (emphasis added). Had G.A. opened the knife, there might be a stronger basis for respondent's action, but it is uncontroverted that the knife remained closed. ***
>
> The fact that G.A. briefly showed the closed knife to V.A. and in no way "brandished" it at M.P., or threatened M.P. with the knife in any way, makes it abundantly clear that G.A. did not attempt physical menace to put M.P. in fear of imminent serious bodily injury, and makes it clear there was no assault. (*Id.* at 2)

The Board next contends that the ALJ's decision to vacate G.A.'s restriction from commencement exercises impermissibly intrudes upon its authority to impose reasonable discipline, and impermissibly substitutes the ALJ's judgment for that of the Board. (Board's Exceptions at 6) Underscoring that it is petitioners' burden to demonstrate that the Board's action is improper, arbitrary or capricious, the Board stresses that the ALJ found that it *did* have good cause to discipline G.A. Furthermore, the Board imposed this restriction after a full hearing. Therefore, while the Board acknowledges that "[commencement is a seminal right of passage in our society, not only for the graduate, but also for his family," (*id.* at 7, citing Initial Decision at 14) it charges that "the ALJ is not ordinarily, and on these facts cannot be, permitted

to elevate the interests of G.A.'s family above the reasonable determinations made by the Board of Education." (*Id.* at 7)

To this, petitioners reply that because the ALJ has the authority to determine whether discipline imposed upon a student is arbitrary and capricious, he may also modify or set aside such discipline. (Petitioners' Reply at 2) Although petitioners are cognizant that the school year is nearing an end, they nevertheless maintain their position that G.A. should have been returned to the regular school setting, and that the Board's failure to conduct any professional evaluations of him so as to inform its conclusion "that G.A. constituted 'a continuing danger to the physical well-being of the *** students' (P-3)" (*id.*) renders its removal decision arbitrary and capricious. In support of this contention, petitioners cite to the State Board of Education's decision in *P.H. and P.H., on behalf of minor child, M.C. v. Board of Education of the Borough of Bergenfield, Bergen County, David Hespe, Commissioner, and New Jersey State Board of Education,* State Board decision, October 3, 2001. Thus, petitioners reason, there is no rational basis to exclude G.A. from his graduation ceremony, since there is no finding that he is a danger to anyone and the Board's disciplinary decision, based on "an assault that never occurred" was arbitrary and capricious.

Upon careful and independent review of the record herein, the Commissioner determines to modify the Initial Decision, as set forth below.

As the Initial Decision indicates, subsequent to a "shoving match" which took place between G.A. and M.P. on February 18, 2004, the boys engaged in a "conversation" on the internet the same night. Although the ALJ remarks that "[t]he transcript [of the conversation] reveals what on one level could be considered a typical example of teen-age male bravado ***"

(Initial Decision at 3), the Commissioner does not so lightly characterize the exchange, as it follows below.[1]

M.P.: you know, i didnt do anything to u but i was not say fag first, u were started w/it to pushed me
M.P.: then i called u a fag then u look like u were gonna 2 beat me up
G.A.: tell him i have a knife and im gonna chop off his pee pee[2]
M.P.: but u got w/secuirty
G.A.: so what
G.A.: he didn't do anything when i pushed
G.A.: so next time I will take out my knife and slice u
M.P.: oh really
M.P.: i bet u wouldnt do ever in ur life
G.A.: wanna bet
G.A.: start shit with me tomorrow and see what happens
M.P.: oh okay
***
G.A.: yea bitch
***
G.A.: do u think i care if i go to jail
G.A.: i'm gonna chop off ur dick and feed it to u
M.P.: oh okay
***
G.A.: then shove ur nuts up ur poop shooter
***
M.P.: your so damn nasty
G.A.: ur never ever gonna get any p_____
G.A.: ur mos homosexual
G.A.: ur mos scared too
M.P.: shut up and leave me alone
M.P.: you really cant do anything to me DUH
G.A. : yea why cant i?
M.P.: cause ur kiddin me
M.P.: ur not serious said all of this to me
***
G.A.: says who
G.A.: i am goin to get u!
M.P.: oh go ahead
G.A.: alrite
G.A.: tomorrow ur dead
M.P.: oh haha NO

[1] The students' initials are used, rather than their respective internet screen names.
[2] Apparently, segments of the Internet conversation took place between G.A. and V.M., and the messages were then forwarded to M.P. (Exhibit J-1 at 52)

G.A.: i will show u my knife before i slice ur face off
G.A.: u keep sayin stupid shit and i will kill u
G.A.: ur dead u f_____ faggot
(Exhibit R-1)

Although the ALJ observes that "Taken by itself, this example of excessive teen-age testosterone would not involve this Court or the Department of Education,***" (Initial Decision at 4) the Commissioner disagrees. G.A.'s statements *alone* can well be considered expressive behavior which hints at future violence, such that school officials may be concerned. Notwithstanding that G.A.'s declarations were from his home and projected into cyberspace, to the extent school officials reasonably believed that such speech could "substantially interfere with the work of the school or impinge upon the rights of other students," it is not likely to be protected by the First Amendment, *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 510 (1969); it may fairly be considered grounds for imposing serious sanctions, *R.R. v. Bd. of Ed., Shore Reg. H.S.*, 109 *N.J. Super.* 337, 344 (Chan. Div. 1970); and it could not, from any responsible perspective, given the numerous, and even catastrophic, acts of violence that have occurred at schools in recent years, be dismissed as merely an example of "excessive teen-age testosterone." Indeed, a reasonable person may well interpret the words, which were specifically directed and delivered to M.P., as a serious expression of the intent to cause either present or future harm, so as to constitute a "true threat." *Doe v. Pulaski County Special School Dist.*, 306 F.3d 616 (8th Cir. 2002) (*en banc*).

That G.A. chose to exacerbate this behavior by bringing two knives to school the next day only serves to render his misconduct more flagrant, giving the appearance, for all those charged with evaluating and responding to the situation, that G.A. was signaling an intent to act on the threats made the night before to M.P. Given the ALJ's factual findings with respect to the events that took place at G.A.'s locker, however, which are supported by the record herein,

the Commissioner is constrained to agree that G.A.'s behavior, although sufficiently flagrant to warrant severe penalty, falls short of constituting an "assault" on M.P. on school property, on a school bus, or at a school sponsored function, in violation of *N.J.S.A.* 18A:37-2.2.[3]

Notwithstanding, as noted by the ALJ, respondent had good cause to discipline G.A. pursuant to *N.J.S.A.* 18A:37-2c. Significantly, although there is no requirement for *mandatory* removal under *N.J.S.A.* 18A:37-2c, the general statute which provides authority for the Board's disciplinary action, (Initial Decision at 11), the Commissioner finds that the Board's decision to *immediately* remove G.A. was not, under these circumstances, arbitrary, capricious and unreasonable. The nature of G.A.'s offense was quite serious. G.A. threatened to "chop" and "slice" various body parts of M.P., as well as to kill him, and it was prudent for the Board to view these threats as lending a serious and urgent context to G.A.'s subsequent decision to actually bring knives to school. Indeed, notwithstanding the phrasing of its "charges" to include an assault, the Board's letter to petitioners affirms that G.A.'s "external suspension is based on charges that [G.] possessed weapons (to wit two knives) on school property and made terroristic threats against student M.P. on February 19, 2004 (sic)." (Exhibit P-3) Therefore, the Commissioner finds that although the Board's initial removal decision was driven by an incorrect application of the law, G.A.'s removal from the regular education program, was not unwarranted.

---

[3] To the extent the Board argues that its *initial* removal of G.A. from school was pursuant to *N.J.S.A.* 18A:37-2.2, it was bound by that statute, and its implementing regulations, to place G.A. in an alternative education program meeting the requirements of *N.J.A.C.* 6A:16-8. *N.J.A.C.* 6A:16-5.6(d). If such an alternative education program was not available, G.A. was to be placed on home instruction, according to *N.J.A.C.* 6A:16-9, until an alternative education placement became available. *N.J.A.C.* 6A:16-5.6(d)1. In this connection, the Commissioner notes that there is nothing in the Board's papers which acknowledges the mandates set forth in *N.J.A.C.* 6A:16-5.6 *et seq.*, which must now be read in light of the State Board's decision in *P.H. and P.H., on behalf of minor child, M.C. v. Board of Education of the Borough of Bergenfield, Bergen County, David Hespe, Commissioner, and New Jersey State Board of Education,* State Board decision, July 2, 2002.

As for G.A.'s *continued* suspension from school, the Commissioner is not persuaded on this record that petitioners have demonstrated by a preponderance of credible evidence that placing him on a program of home instruction for the balance of the school year was an abuse of the Board's discretion, particularly where petitioners acknowledge that the Board "has a policy that permits a student to be suspended up to one year for the possession of a weapon." (Petitioners' Motion for Emergent Relief at 4)[4] Moreover, although until recently his disciplinary infractions may have been characterized as "minor," G.A.'s record is not unblemished and, in fact, the Board was about to suspend him for being under the influence of marijuana in school in violation of *N.J.S.A.* 18A:40A-12 at the time this incident took place. While choosing to focus primarily on the question of whether an assault took place in school, petitioners appear to lose sight of the compelling facts that G.A. (1) threatened M.P. in a manner sufficient to warrant criminal charges and (2) brought two knives to school the next day.

Further, it is important to consider the Board's decision to restrict G.A.'s participation in extracurricular activities separate from its decision to remove him from the regular education program, since a student's entitlement to a through and efficient education does not, as a general principle, extend to extracurricular activities. More specifically, exclusion from attendance at graduation exercises, because it is a privilege and not a right, has long been upheld in discipline cases. *See, e.g., C.B., on behalf of minor child, L.B. v. Board of Education of the Eastern Camden County Regional School District, Camden County*, Commissioner decision No. 191-01L, June 15, 2001 (Student prohibited from attending extracurricular activities, including graduation ceremony, for shoplifting in Disney World on class trip); *Nicholas Dentino v. Board of Education of the Borough of Haddonfield, Camden County*, Commissioner Decision No. 161-00E, May 19, 2000 (Student suspended for remainder of the

[4] The Commissioner notes that this policy was not brought to the record.

school year for vandalizing the school was properly excluded from graduation exercises); *C.S., on behalf of minor child, C.O. v. Board of Education of the Lower Camden County Regional High School District Number One, Camden County*, Commissioner Decision No. 299-98, July 8, 1998 (Board's suspension of senior for one year for possession of marijuana on school grounds, including denial of participation in activities such as graduation exercises, upheld as reasonable and appropriate); *D.D., on behalf of minor L.D. v. Board of Education of the City of Ocean City, Cape May County,* Commissioner decision No. 262-96EL, June 19, 1996 (Student denied participation in graduation ceremonies for violation of substance abuse policy); and *B.G., B.B. and Deborah Van Pelt v. Board of Education of the Borough of Elmwood Park*, 1974 *S.L.D.* 611 (Petitioners, all suspended five times during the school year for "cutting" classes, were properly barred from attending graduation ceremonies).

Based upon the facts on this record, the Commissioner determines that the Board did not abuse its discretion in restricting G.A.'s participation in, or attendance at, any school-sponsored extracurricular activities and, contrary to the ALJ's finding, determines that such extracurricular restriction *may reasonably extend to commencement exercises.*[5] Notwithstanding that graduation may be "a seminal right of passage" both for G.A. and his family (Initial Decision at 14), the honor of participating in his graduation ceremony is one that G.A. must justifiably forfeit as a result of his serious transgressions; his remorse, at this stage, is simply insufficient to overcome the Board's presumption of correctness.

[5] The Commissioner also concurs with the ALJ that there is nothing arbitrary, capricious and unreasonable about the Board's decision to enjoin G.A. from any contact with M.P., or from causing any person to threaten, harass or intimidate M.P. on his behalf.

Accordingly, the Initial Decision is modified as set forth herein. The sanctions imposed by the Board on March 9, 2004 are affirmed and home instruction is to continue in accordance with the order of the ALJ.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 6/11/04

Date of Mailing: 6/11/04

[6] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

K.R., on behalf of minor children, J.R., AND D.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

June 14, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 549-04
AGENCY DKT. NO. 467-12/03

K.R., ON BEHALF OF MINOR CHILDREN, J.R. AND D.B.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,
Respondent.

K.R., mother appearing for minor children J.R. and D.B.

Jeffrey F. Belz, Esq., appearing for respondent

Record Closed: April 20, 2004 Decided: April 20, 2004

BEFORE **JOHN R. FUTEY**, ALJ:

This matter was transmitted to the Office of Administrative Law (hereinafter "OAL") on February 9, 2004, 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. It was scheduled for hearing for April 16, 2004, at the OAL, Mercerville, N.J. On that date the parties met and negotiated the matter.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1)

After being placed under oath the parties stated that they understood and agreed to the terms of the settlement.

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 (45) 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 20, 2004
DATE

JOHN R. FUTEY, ALJ

Receipt Acknowledged:

4-30-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 3 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement Agreement

WITNESSES

For appellant

K.R.
E.C.

For respondent

NONE

J / memo dtd 4-16-04 GF

K.R. o/b/o Minor Children, J.R. + D.B.

v.

OAL DKT No: EDU05 549-2004
Agency Ref: 467-12/03

Twp of Ewing BOE

Petitioner agrees that she will pursue transfer of custody of the students to the students grandmother, Elaine Caldwell, with the Family Court of Mercer County within ten (10) days. So long as Petitioner obtains the transfer of custody within a reasonable time period, the Respondent

OAL DKT. NO. EDU 549-04
AGENCY DKT. NO. 467-12/03

K.R., on behalf of minor children, J.R., AND D.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record, 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.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/14/04

Date of Mailing: 6/15/04

D.P., on behalf of minor children,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

June 14, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 340-04
AGENCY REF. NO. 380-10/03

D.P., on behalf of minor children,
Petitioner,
v.
BOARD OF EDUCATION OF PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT, SALEM COUNTY,
Respondent.

D. P., petitioner, *pro se*
Johnathan J. Garbini, Esq., for respondent

Record Closed: April 26, 2004 Decided: April 26, 2004

BEFORE **DONALD J. STEIN,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 28, 2004 for determination under *N.J.S.A.* 39:5-30 *et seq.*, and 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.*

The parties have agreed to a settlement and have prepared an agreement, marked as J-1 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 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 (45) 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.

4-26-04
DATE

DONALD J. STEIN, ALJ

Receipt Acknowledged:

4-30-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 3 2004
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jck

JONATHAN J. GARBINI, ESQUIRE
394 South Broadway
Post Office Box 245
Pennsville, New Jersey 08070
Telephone: (856) 678-5353
Facsimile: (856) 678-3635
Attorney for the Respondent

DAWN PEREZ, On Behalf of Her minor children, Petitioner,	:	OFFICE OF ADMINISTRATIVE LAW
v.	:	Docket No.: EDUOS 00340-2004S
PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, Respondent.	:	CONSENT ORDER

THIS MATTER, having been brought before the Court by way of telephone conference, with Dawn Perez appearing pro-se on behalf of her minor children, and Jonathan J. Garbini, Esquire, appearing on behalf of the Penns Grove-Carneys Point Regional School District Board of Education, and the parties having previously conferenced this matter with the Superintendent of Schools, Joseph Massare,

IT IS ON THIS _____ day of _____, **2004, ORDERED AND ADJUDGED as follows:**

1. The Petition filed by Dawn Perez shall hereby be dismissed without prejudice.

HAN J. GARBINI, ESQ
ost · Box 245
ansv ..Jew Jersey
08070

2. Mrs. Perez shall be permitted to reopen this matter should she feel there are any further problems regarding her children and the school uniform policy prior to June 30, 2004.

3. As of June 30, 2004, this matter shall be deemed dismissed with prejudice.

HONORABLE DONALD J. STEIN, A.L.J.

Consented to as to form and content:

DAWN PEREZ
Petitioner

JONATHAN J. GARBINI, ESQ.
Attorney for Respondent

EXHIBITS

Jointly submitted:

J-1 Fully executed agreement signed by the parties

OAL DKT. NO. EDU 340-04
AGENCY DKT. NO. 380-10/03

D.P., on behalf of minor children,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Initial Decision and the Consent Order have been reviewed.

Noting the absence of sufficient terms of the parties' agreement so as to permit his full review of this Consent Order as a settlement, pursuant to *N.J.A.C.* 1:1-19.1, the Commissioner shall, instead, consider this matter a withdrawal pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and determines that the petition in this matter shall be dismissed in the manner set forth in the Consent Order.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/14/04

Date of Mailing: 6/15/04

242-04

#242-04

ALFRED HALL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

June 14, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 06700-03S

AGENCY DKT. NO. 328-8/03

ALFRED HALL,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,

Respondent.

Mary L. Crangle, Esq., for petitioner (Jennings Sigmond, attorneys)

Karen A. Murray, Esq., for respondent (The Murray Law Firm, attorneys)

Record Closed: April 26, 2004 Decided: April 28, 2004

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the filing of a Petition of Appeal by Alfred Hall ("petitioner"), to the Commissioner of Education challenging a determination of the Board of Education of the City of Camden, Camden County, ("respondent") to withhold his increment for the 2002-2003 school year. The case was transmitted to the Office of Administrative Law ("OAL") from the Department of Education on September 29, 2003, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to –13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their 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 (45) 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 28, 2004
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

4/29/04
DATE

Kathleen Duncan /ar
DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 30 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

Attachment
mjm

CAMDEN CITY BOARD OF EDUCATION

AND

ALFRED HALL

AGREEMENT

This Agreement, made and entered into this _____ day of March, 2004, by and between **Alfred Hall** and the **Camden Board of Education** (hereinafter referred to as the "Board") is intended to amicably resolve all pending matters related to the employment of Alfred Hall by the Board as follows:

1. Alfred Hall agrees to retire from employment with the Board effective April 1, 2004. Mr. Hall's letter of resignation from employment with the Board effective April 1, 2004 as a result of his retirement is attached hereto as Exhibit 1.

2. The parties agree that they have resolved the matter of Alfred Hall's increment withholding for the 2003-2004 school year and the Board and Alfred Hall agree to execute, through their authorized representatives, whatever documents are required by the Commissioner of Education and/or Office of Administrative Law to effectuate the withdrawal of Alfred Hall's appeal to the Commissioner of Education docketed as EDU-OA-06700-2003S.

3. The Board further agrees not to file tenure charges against Alfred Hall and to remove from his files any and all references to contemplated tenure charges.

4. Alfred Hall will continue to be paid his current salary through March 31, 2004. His records with the Board will reflect that he was on a paid leave of absence from March 1, 2004 through March 31, 2004. The Board also agrees that Alfred Hall will be entitled to receive retroactive pay for the 2003-2004 school year, until the date of his retirement, once negotiations over the salary guides are finalized.

5. As a result of his retirement from the Board, the Board agrees to pay Alfred Hall for his unused accumulated sick leave days as well as his earned but unused vacation days pursuant to the terms of the collective bargaining agreement between the Camden Board of Education and the Camden City Federation of School Administrators, Local 39.

6. The Board agrees that upon request for a reference from any prospective employer, the only information provided will be Alfred Hall's dates of employment with the Board, his titles and positions held; and salary information.

7. The parties agree that they have been duly represented by their respective attorneys and that they have voluntarily, without coercion, agreed to the resolution of the matters related to Alfred Hall's employment by the Board of Education as set forth above.

8. This Agreement contains all of the terms of the parties' Agreement and cannot be modified or changed unless all parties agree to do so in writing.

9. The parties agree that this Agreement is non-precedential; shall be kept confidential and shall not be used by any party in any other litigation or forum.

IN WITNESS WHEREOF, the parties have signed, delivered and acknowledged this Agreement.

For the Camden Board of Education

By: [signature]

Dated: 4/19/04

Witness: [signature]

Dated: 4/19/04

For Alfred Hall

[signature]

Dated: 3/30/04

Witness: [signature]

Dated: 3/30/04

119 Millstone Way
Monroeville, NJ 08343

March 18, 2004

Annette D. Knox
Superintendent of Schools
City of Camden
201 N. Front Street
Camden, NJ 08102

Dear Superintendent Knox:

This is to inform you that I am retiring from employment with the Camden Board of Education effective April 1, 2004 and as a result I am resigning my employment with the Board effective the same date.

Sincerely,

Alfred Hall

CERTIFICATION

I, **N. JOHN AMATO**, SCHOOL BUSINESS ADMINISTRATOR/BOARD SECRETARY OF THE BOARD OF EDUCATION OF THE CITY OF CAMDEN, IN THE COUNTY OF CAMDEN, STATE OF NEW JERSEY, **HEREBY CERTIFY** THAT THE FOREGOING ANNEXED EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF SAID CITY DULY CALLED AND HELD ON **MONDAY, MARCH 29, 2004** HAS BEEN COMPARED BY ME WITH THE ORIGINAL MINUTES AS OFFICIALLY RECORDED IN MY OFFICE IN THE MINUTE BOOK OF SAID BOARD OF EDUCATION AND IS A TRUE, COMPLETE AND CORRECT COPY THEREOF AND OF THE WHOLE OF SAID ORIGINAL MINUTES SO FAR AS THE SAME RELATES TO THE SUBJECT MATTERS REFERRED TO IN SAID EXTRACT.

IN WITNESS WHEREOF, *I HAVE SET MY HAND AND AFFIXED THE CORPORATE SEAL OF SAID BOARD OF EDUCATION THIS 30TH DAY OF MARCH, 2004*

SCHOOL BUSINESS ADMINISTRATOR/
BOARD SECRETARY

RESOLUTION
#281-SY '03
SETTLEMENT AGREEMENT
(Docket No. EDU-OA-06700-2003S)

WHEREAS, the Camden Board of Education (Board) and Alfred Hall (AH) have negotiated a settlement of EDU-OA-06700-2003S to save the expense and time of a hearing and associated litigation costs;

WHEREAS, AH has agreed to the terms of this agreement;

NOW, THEREFORE, BE IT RESOLVED, the Board hereby agrees to accept the terms of the confidential agreement, which shall be on file with the Board Secretary's office.

Adopted: Mach 29, 2004

OAL DKT. NO. EDU 06700-02S
AGENCY DKT. NO. 328-8/03

ALFRED HALL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement. The Commissioner notes, however, that the terms of the settlement appear to have been effectuated prior to the Commissioner's approval. The parties are reminded that they acted at their peril in so doing and the Commissioner cautions them and other litigants whose controverted matters have been duly transmitted to the OAL against effectuation of any settlement prior to its submission to, and approval by, the Commissioner pursuant to *N.J.A.C.* 1:1-19.1.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/14/04

Date of Mailing: 6/16/04

243-04

#243-04

IN THE MATTER OF THE TENURE	:	
HEARING OF ELSIE GRAHAM,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF	:	DECISION
THE CITY OF NEWARK, ESSEX COUNTY.	:	
	:	

June 15, 2004

AGENCY DKT. NO. 101-3/04

IN THE MATTER OF THE TENURE HEARING OF ELSIE GRAHAM, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For Petitioner: Arsen Zartarian, Esq., State-operated School District of the City of Newark

This matter was opened before the Commissioner of Education on March 12, 2004 through the certification of tenure charges alleging inefficiency and incompetence against a tenured teacher employed by the State-operated School District of the City of Newark (hereinafter, "District").

By notice dated March 16, 2004, the Commissioner directed respondent, via both certified and regular mail, to file an Answer to the tenure charges against her.[1] A copy of the notice was also provided to respondent's union counsel. This communication from the Bureau of Controversies and Disputes clearly provided respondent notice 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 date such charges are filed with the Commissioner to file a written response to the charges,* and that failure to answer within the prescribed period, where no extension has been applied for and granted, or where there has been a submission by the charged employee of a responsive filing indicating that she does not contest the charges, **will** result in the charges being

[1] The return receipt indicates that this notice was received on March 18, 2004.

deemed admitted by the charged employee. *N.J.A.C.* 6A:3-5(c). Because no reply has been received in response to the District's charges from respondent, or on her behalf, each count of the charges against respondent is deemed to be admitted.

The Commissioner's review of the tenure charges certified against respondent by the District and the statement of evidence in support of those charges indicate that since September 1999, respondent has demonstrated an inability to competently and responsibly execute her duties as a teacher, despite the provision of a 90-day improvement period, as required by *N.J.A.C.* 6A:3-5.1(c), from October 13, 2003 until January 27, 2004. The record shows that respondent has failed to:

- Effectively implement lesson plans and achieve educational goals;
- Satisfactorily establish learning objectives, or plan and prepare instruction consistent with appraisal of individual student needs and requirements;
- Exhibit satisfactory teaching techniques and satisfactorily use effective instructional methods and resources;
- Implement skills which include a variety of instructional strategies and meet the varied ability levels and learning styles of all students;
- Improve the effectiveness and delivery of her instruction despite significant assistance from administrative staff;
- Improve her absenteeism rates; and
- Meet acceptable standards of professional behavior. (Tenure Charges at 1-2)

The Commissioner recognizes that the enabling statute provides that tenured staff shall not be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause***." *N.J.S.A.* 18A:6-10. The Commissioner further

notes that "[w]hether the charges fall under any of the categories is a determination for [him] to make." *In the Matter of the Tenure Hearing of Walter Driscoll, School District of Woodstown-Pilesgrove Regional High School, Salem County,* decided October 25, 1983, Docket No. A-748-82T2. Deeming the above charges to be admitted, and noting that respondent does not deny the specific allegations contained therein, the Commissioner finds that the District has demonstrated that respondent's inefficiencies, as noted herein, are sufficient to warrant her dismissal.

IT IS ORDERED this 15th day of June 2004 that summary decision shall be granted to the District, and respondent shall be dismissed from her tenured position as a teacher in the District's employ as of the date of this order. This matter shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6A:9-17.6(a)1 for action against respondent's certificate as it deems appropriate.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/15/04

Date of Mailing: 6/16/04

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

248-04

#248-04

IN THE MATTER OF THE TENURE	:	
HEARING OF ELMER FERRER	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
LONG BRANCH, MONMOUTH COUNTY:		
_____:		

June 17, 2004

AGENCY DKT NO. 135-4/04

IN THE MATTER OF THE TENURE	:	
HEARING OF ELMER FERRER	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
LONG BRANCH, MONMOUTH COUNTY:		

For the Board, McOmber & McOmber, P.C.

Elmer Ferrer, *Pro Se*

This matter was opened before the Commissioner of Education on April 19, 2004, through the certification of tenure charges against a tenured custodian alleging abandonment of his position with the Long Branch School District.

By notice dated April 20, 2004, the Commissioner directed respondent, via both certified and regular mail, the certified copy having been signed for on April 26, 2004, to file an Answer to the tenure charges against him. This communication from the Bureau of Controversies and Disputes clearly provided respondent notice 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 date such charges are filed with the Commissioner* to file a written response to the charges, and that failure to answer within the prescribed period, where no extension has been applied for and granted, will result in the charges being deemed admitted by the charged employee. Because no reply has been received from respondent, or any attorney on his behalf, in response to the District's charges, each count of the charges against respondent is deemed to be admitted. *N.J.A.C.* 6A:5-3(c).

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicates that respondent has been employed with the Board since November of 1992. In 1996, respondent claimed an injury at work and was involved in subsequent workers' compensation claims and litigation. Based on information provided by the workers compensation carrier, respondent should have returned to work on or about December 2002; repeated efforts to reach him at his last known address have not led to any contact. Respondent is not receiving a salary, has not attempted to contact the Board office or any of his direct supervisors, and has not responded to any of the Board's inquiries. Because of his lack of communication and his failure to attend to his custodial duties, the Board concludes that Mr. Ferrer has abandoned his position as a tenured custodian with the Long Branch Board of Education. (Sworn Affidavit of Evidence of Archie Greenwood, Assistant Superintendent at 1-2)

Deeming the within charges to be admitted, and noting that respondent has chosen not to deny the allegations against him, the Commissioner concludes that the Board has demonstrated that respondent has abandoned his position with the District.[1]

IT IS ORDERED this 17th day of June 2004 that that summary decision shall be granted to the District, and Elmer Ferrer shall be dismissed from his tenured position as a custodian in the Board's employ as of the date of this order.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/17/04
Date of Mailing: 6/17/04

[1] Pursuant to *N.J.S.A.* 18A:17-3, public school janitors, or custodians, shall, unless appointed for a fixed term, hold office or employment under tenure of good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, ***except for neglect, misbehavior or other offense.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.*18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

247-04

#247-04

FRANCES ELLIOTT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teacher alleged the Board's action in charging her sick days for work-related injury violated *N.J.S.A.* 18A:30-2.1.

In January 2004, the Workers' Compensation Court approved a settlement with dismissal but did not determine whether petitioner was in the course of her employment when the accident occurred. Neither was the "going and coming issue" decided (petitioner had signed in and then left the school to find parking when she was hit by a vehicle). The ALJ noted that recent cases seem to stand for the proposition that employees who travel to a regular fixed location are not covered by the workers' compensation statute until they are on the premises working. The ALJ determined that petitioner was not injured in an accident arising out of her employment; petitioner had signed in but was not at work, she was looking for a place to park her vehicle and complete her journey to her place of employment. The ALJ concluded that the Board correctly charged petitioner's sick leave account for the 21 days she was absent while recovering from the accident. Petition was dismissed.

The Commissioner adopted the Initial Decision as his own.

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.

June 17, 2004

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

June 17, 2004

Ned P. Rogovoy, Esq.
630 S. Brewster Road
Suite B3
Vineland, NJ 08361

Frank P. Cavallo, Esq.
Parker, McCay & Criscuolo
Three Greentree Centre, Suite 401
Route 73 & Greentree Road
Marlton, New Jersey 08053

FRANCES ELLIOTT V. BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY, AGENCY DKT. NO. 150-5/03, OAL DKT. NO. EDU 6418-03

Dear Parties:

We are enclosing a copy of the decision of the Commissioner of Education dated, June 17, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/dec ltr/Elliott
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6418-03

AGENCY DKT. NO. 150-5/03

FRANCES ELLIOTT,

Petitioner,

v.

BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY,

Respondent.

Ned P. Rogovoy, Esq., for petitioner

Frank P. Cavallo, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: April 21, 2004 Decided: May 3, 2004

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

When an employee is injured in an accident arising out of her employment, she may receive full salary while absent for up to one year without having such absence charged to her annual sick leave. *N.J.S.A.* 18A:30-2.1. Petitioner appeals from the Board of Education's determination that the accident petitioner suffered did not occur in the course of her employment. Accordingly, the Board of Education charged petitioner's sick

leave account for the 21 working days during which she recovered from her accident. The petitioner requested a fair hearing and the matter was transmitted to the OAL on September 3, 2003, to be heard as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on stipulated facts and cross-motions for summary judgment.

A SUMMARY OF THE RELEVANT FACTS

The parties agreed as follows:

1. Petitioner, on February 24, 2003, was an employee, teacher of eighth grade Social Studies at a school named the Ohio Avenue School (hereinafter referred to as "the school") located in the Atlantic City School District.

2. Petitioner has been an employee, full-time teacher since on or about 1989 in the Atlantic City School District which district is the respondent employer.

3. The school is located on the northwest corner of Ohio and Pacific Avenues in Atlantic City, New Jersey.

4. There is no designated parking lot for teacher employees.

5. There is an adjacent parking lot which is designated for use by individuals working in the central administrative offices only. A second parking lot, that is not owned and/or operated by the school district, is utilized by the maintenance personnel of the school district only.

6. Teacher employees such as petitioner were instructed verbally and by memo from agents of the respondent not to park in the adjacent parking areas since those were reserved for other employees.

7. Each teacher employee in the school year 2002-2003 and specifically on February 24, 2003, were required to sign a "sign-in sheet" which records the teacher employees' check-in time, which "sign-in sheet" is also signed by the employee at the close of the work day.

8. On Tuesday, the 24th of February, 2003, petitioner drove her privately-owned vehicle from her home and parked it facing east on the northern curb of Ohio Avenue and turned the blinkers on. The petitioner exited the vehicle from the driver's side, entered the school, signed the "sign-in sheet," and deposited her papers, teacher's manual and tote bag at the security desk at the front entrance, and then exited the building and re-entered her car, as was often her custom.

9. Since there is no designated parking area for teacher employees, she proceeded to scout the surrounding areas for a parking space and in fact, parked her car on Ohio Avenue facing east on the north curb line between Arctic and Fairmount, approximately two and a half blocks west of the school.

10. The petitioner employee, after parking and securing her vehicle on the north curb line of Ohio Avenue, began walking east toward the school, and as she crossed the bisecting street of Arctic Avenue, when a vehicle traveling east on Ohio Avenue which had just approached Arctic Avenue, took a left-hand turn to proceed north on Arctic, the vehicle came in contact with the petitioner who was then a pedestrian crossing the roadway at the intersection of Arctic and Ohio Avenues while she was walking toward the school.

11. The accident report attached filed by the Atlantic City Police Department shows the time to be approximately 7:15 a.m.

12. The petitioner was transported to the Atlantic City Medical Center where she received 18 stitches in the rear of her head, as well as receiving other soft tissue injuries to her neck, right shoulder and right leg.

13. Petitioner's doctors did not release her to return to work until March 25, 2003, which caused her to be absent from work for 21 days.

14. Respondent does not question petitioner's inability to work for 21 days as a result of the injury.

15. Respondent employer paid the petitioner for the 21 days from February 24, 2003, through March 25, 2003, but the payment was charged against petitioner's accumulated sick leave.

16. Petitioner filed with the Commissioner of Education on the 12th of May, 2003, requesting a reinstatement of the teacher's 21 docked sick days pursuant to *N.J.S.A.* 18A:30-2.1.

17. Subsequently, on July 18, 2003, petitioner filed a Workers' Compensation Claim against the respondent in the Workers' Compensation Court and the Commissioner stayed the action until the Workers' Compensation Court disposed of the matter.

18. On January 18, 2004, the Workers' Compensation Court approved a settlement with dismissal under Section *N.J.S.A.* 34:15-20, and the Court specifically did not determine whether the petitioner was in the course of her employment, or the "going and coming issue" was not decided, and specifically, on the record it was stated that it was reserved for decision in the appropriate jurisdiction.

LEGAL DISCUSSION

The parties identify a single phrase in the statute as the issue to be determined in this matter.

> Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence

> for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in *N.J.S.* 18A:30-2 and 18A:30-3.

Legal and judicial discussion of the question of when an employee is acting within the scope of her employment has a long history in the field of workers' compensation law. Employer liability attaches only when a person is within that scope. The parties' briefs indicate that it is to this body of law we must look in order to resolve the issue.

Particular attention has been paid to the issue of travel from one's home to one's workplace and the return trip. When and under what circumstances does travel to and from the workplace to home implicate employer liability for the purpose of allocating workers' compensation benefits. This concept is known as the "going and coming rule."

A graphic illustration of the rule over time would resemble an accordion or concertina. The concept expanded until 1979 at which time it was severely curtailed by the legislature. Since then it has expanded again. 38 *N.J. Pract. (Gelman)* 8.4.

The recent cases seem to stand for the proposition that employees who travel to a regular fixed location are not covered by the workers' compensation statute until they are on the premises, doing what they are supposed to be doing. *Jumpp v. City of Ventnor*, 203 WL 21921277 N.J. 2003.

The exceptions to this rule arise when there is a palpable nexus to the employer while the travel is accomplished, such as when the employee is paid to travel; *Brown v. American Red Cross*, 272 *N.J. Super.* 173 (App. Div. 1994); or when the employee is required to park in the employer's parking lot. *Livingston v. Abraham & Straus, Inc.*, 111 *N.J.* 89.

In the instant case, petitioner relies on the *Livingston* case, *supra,* but she puts some back spin on it.

Instead of liability attaching because petitioner parked in a company (school) parking lot, she argues that liability attaches because she was forbidden to park in the company (school) parking lot.

However, the reason for the exception in *Livingston*, *supra*, is that the employer exercised control over its parking lot. That is the nexus. Here petitioner could park only where the employer exercised no control and, therefore, the nexus is simply not there.

The fact that petitioner clocked in while on her way to find a parking place does not entitle her to the benefits of the statute. This was a benefit only to her, not to her employer. This was a deviation from what the employer would expect of employees. Once a person signs in, they are assumed to be at work. Petitioner was not at work. She was looking for a place to park her vehicle and complete her journey to her place of employment.

I **FIND** that petitioner was not injured in an accident arising out of her employment.

CONCLUSION

I **CONCLUDE** that the board of Education correctly charged petitioner's sick leave account for the 21 days she was absent while recovering from the accident.

ORDER

I **AFFIRM** the action of the Atlantic City Board of Education. I **ORDER** that petitioner's complaint 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 (45) 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 (13) 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, 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.

5-3-04
DATE

Edgar R. Holmes
EDGAR R. HOLMES, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

5-3-04
DATE

Mailed to Parties:

MAY 10 2004
DATE

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sd

WITNESSES

For Petitioner:

None.

For Respondent:

None.

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Petitioner's Brief in Support of Motion for Summary Decision

For Respondent:

R-1 Respondent's Brief in Support of Motion for Summary Decision

Joint:

J-1 Stipulation of Facts

L ıks

From: postmaster@doe.state.nj.us
Sent: Monday, May 03, 2004 1:33 PM
To: Danks
Subject: Delivery Status Notification (Success)


ATT14047.TXT


EDU 6418-03 (Elliott) Initial ...

Your message

To: EDU
Subject: EDU 6418-03 (Elliott) Initial Decision - Agency # 150-5/03
Sent: Mon, 3 May 2004 13:41:01 -0400

was delivered to the following recipient(s):

Duncan, Kathleen on Mon, 3 May 2004 13:33:23 -0400
<physics.doe.state.nj.us #2.0.0>
Heredia, Cris on Mon, 3 May 2004 13:33:23 -0400
<physics.doe.state.nj.us #2.0.0>

OAL DKT. NO. EDU 6418-03
AGENCY DKT. NO. 150-5/03

FRANCES ELLIOTT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
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.

Upon careful and independent review of the record in this matter, the Commissioner concurs that the Petition of Appeal is properly dismissed. Accordingly, the Initial Decision is adopted for the reasons set forth by the Administrative Law Judge.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/17/04

Date of Mailing: 6/17/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

249-04

#249-04

BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning sending Board of Education (Bloomingdale) contended respondent receiving district Board of Education (Butler) was prohibiting its representative from voting on certain matters in violation of *N.J.S.A.* 18A:38-8.1 and applicable case law. Each Board submitted a cross-motion for summary decision.

The ALJ denied both Boards' motions and directed that the matter proceed to plenary hearing, reasoning that operative law requires subtle distinctions among agenda items that cannot be made in the absence of a fully developed factual record. The Boards contended that the ALJ's Order created an unworkable standard and jointly requested interlocutory review for purposes of establishing a "bright line test."

The Commissioner granted the requested review and rejected the ALJ's Order. Reiterating the standard set forth in prior case law (*Lincoln Park, Little Ferry* and *Green*), the Commissioner granted Butler's motion for summary decision, holding that the agenda items on which the Bloomingdale Board member had been prohibited from voting were neither procedural/organizational nor expressly enumerated in *N.J.S.A.* 18A:38-8.1, and were, therefore, beyond the scope of authority conferred upon sending district board members by applicable statute and case law.

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.

June 17, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street
Newark, New Jersey 07102
(973) 648-6036
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Stephen G. Weiss
Administrative Law Judge

04 MAY 23 PM 2:18

May 14, 2004

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RE: Bloomingdale BOE v. Butler BOE - OAL Dkt. No. EDU 9367-03

Dear Counsel:

I have completed my review and consideration of the cross-motions for summary decision in this matter and the following constitutes my letter opinion denying both motions.

This matter involves a challenge by the petitioner, Bloomingdale Board of Education (Bloomingdale), to certain restrictions which the respondent, Butler Board of Education (Butler), has determined to place on the Bloomingdale Board's single representative to the Butler Board. That representative sits as a result of a Sending-Receiving Agreement for grades 9-12 between the two school districts. In its Verified Petition of Appeal filed in July 2003, Bloomingdale, a K-8 school district, alleged in respect to its one representative that Butler has prevented him from exercising his rights as a full member in violation of law. In particular, that he was prevented from voting upon the following items: a memorandum of agreement with the District Medical Inspector for the 2002-2003 school year, use of Butler High School facilities for Butler Booster Club meetings, approval of an agreement with the Butler Custodian and Maintenance Association, approval of an employment contract with the District Supervisor of Building

and Grounds, approval of the monthly reports of the Butler Board Secretary and Treasurer, approval of the appointment or reappointment of Butler High School employees including but not limited to substitute teachers, substitute cafeteria workers, Resource Center/Library teachers' aides and maintenance and custodial personnel and the approval of the appointment of a Secretary for Special Services.

Moreover, it was alleged that at the organizational meeting of the Butler Board held in April 2003 the Bloomingdale member was prevented from voting on the appointments of the Treasurer of School Monies and Alternate Treasurer of School Monies. In addition, that the Bloomingdale appointee was prevented from voting with respect to the approval of a wide range of other professional appointments including, *inter alia*, Architect, Attorney, Broker, Auditor, Insurance Agent, Negotiations Consultant, Medical Inspector, Public Agency Compliance Officer, Asbestos Program Manager, Health and Safety Designee, Chemical Hygiene Officer, Affirmative Action Officer/Title IX Coordinator and a representative to the Pooled Insurance Program of New Jersey.

The Verified Petition also alleged that the Bloomingdale member was prohibited from voting with respect to the following business items: (a) the designation of Board of Education accounts; (b) the respective required signatures on checks; and (c) the Business Administrator/Board Secretary's authority to invest school district funds.

Accordingly, Bloomingdale sought a declaratory judgment permitting its representative to: (a) participate in debate regarding resolutions of district-wide importance; (b) directing the respondent to count the vote of the Bloomingdale Board member on all resolutions of district-wide importance, and (c) for such other relief as the Commissioner shall deem appropriate.

In its Answer to the Verified Petition, Butler essentially denied it was prohibiting the Bloomingdale's representative from voting on any matter which by law he could properly vote upon and that its actions were entirely consistent with, and conformed to, all of the requirements of *N.J.S.A.* 18A:38-8.2(a)(2).

In October 2003 the matter was transmitted to the Office of Administrative Law as a contested case and assigned to the undersigned Administrative Law Judge. Soon thereafter, counsel advised that the case appeared to them to be an appropriate one for the filing of cross-motions for summary decision and a schedule was established for the same. Subsequently, those cross-motions were filed, together with a Joint Stipulation of Facts.

JOINT STIPULATION OF FACTS

Pursuant to the agreed upon schedule, a Joint Stipulation of Facts has been submitted and it is set forth verbatim below with exhibit references omitted:

"1. At all times relevant herein, the Bloomingdale Board has been in a sending-receiving agreement pursuant to *N.J.S.A.* 18A:38-8 with the Butler Board, whereby the Bloomingdale Board sends its high school students, grades 9 through 12, to the Butler High School, in exchange for per-student remuneration.

2. *N.J.S.A.* 18A:38-1 entitles the Bloomingdale Board to have one representative sit on the Butler Board and to vote on certain enumerated matters.

3. At the Butler Board meeting held on September 23, 2002, the Bloomingdale Board member was prohibited from voting on the following matters:

a. A memorandum of agreement with the District Medical Inspector for the 2002-2003 school year; and
b. The use of the Butler High School facilities for Butler Booster Club Meetings.

4. At the Butler Board meeting held on November 21, 2002, the Bloomingdale Board member was prohibited from voting on the following matters:

a. Approval of an agreement with the Butler Custodial and Maintenance Association; and
b. Approval of an employment contract with the District Supervisor of Buildings and Grounds.

5. At the Butler Board meetings held regularly throughout the 2002-2003 school year, the Bloomingdale Board member was prohibited from voting on the following matters:

a. The approval of the monthly reports of the Butler Board Secretary and Treasurer;
b. The approval of the appointment or reappointment of Butler High School employees including, but not limited to, substitute teachers, substitute

cafeteria workers, Resource Center/Library teachers' aides, and maintenance and custodial personnel; and

c. The approval of the appointment of the secretary for Special Services.

6. At the Butler Board Organization Meeting held on April 28-29, 2003, the Bloomingdale Board member was prohibited from voting on the following matters:

a. Approval of the appointment of the Treasurer of School Monies;

b. Approval of the appointment of the Alternate Treasurer of School Monies;

c. Approval of the professional appointments of the 2003-2004 school year, pursuant to *N.J.S.A.* 18A:18A-2 *et seq.*, as follows:

   a. Architect of Record;

   b. Attorney;

   c. Broker of Record, Employee Benefit Programs;

   d. Auditor;

   e. Insurance Agent;

   f. Negotiations Consultant; and

   g. Medical Inspector.

d. Approval of the designation of Board of Education Accounts and the respective required signatures;

e. Approval of the following appointments for the 2003-2004 school year:

   a. Public Agency Compliance Officer;

   b. Asbestos Program Manager;

   c. Health and Safety Designee;

   d. Chemical Hygiene Officer;

   e. Affirmative Action Officer/Title IX Coordinator; and

   f. Representative to the Pooled Insurance Program of New Jersey.

f. Approval to authorize the Butler Business Administrator/Board Secretary to invest Butler funds in such instruments as she is legally empowered.

7. While voting rights of the Bloomingdale Board member were curtailed at all relevant times herein, the Butler Board did not limit the Bloomingdale Board member's right to participate in discussions.

8. During this time period, by way of a letter from counsel, the Bloomingdale Board expressed its concerns that its representative to the Butler Board was having his voting rights unlawfully curtailed. While the parties' respective counsel continued to correspond, and narrow some differences, ultimately the parties have determined that they were unable to agree upon the voting rights of the Bloomingdale Board member sitting on the Butler Board under *N.J.S.A.* 18A:38-8.1.

9. On or about July 23, 2003, the Bloomingdale Board filed a Verified Petition of Appeal in this matter setting forth instances wherein the Bloomingdale Board member sitting on the Butler Board was prohibited from voting on issues before the Butler Board."

DISCUSSION

Bloomingdale maintains that all of the items which its representative was prohibited from voting upon were "procedural matters" and therefore in contravention of the decision in *Little Ferry BOE v. Ridgefield Park BOE*, Final Decision (July 24, 1997), hdtp://www.nj.gov/njded/legal, which held that a sending district's representative could vote not only on the election of Board officers, but also upon "other procedural matters" attendant to the orderly conduct of Board operations. Butler, in reply, maintains that none of the matters in respect to which the Bloomingdale representative was prohibited from voting upon fell within the scope of either the statute or any Commissioner's decision since they affected only the conduct, operations and activities of the Butler Board.

Since this case involves cross-motions for summary decision, a brief reference to the decisional authority in that area is appropriate. Under *N.J.A.C.* 1:-12.5(a), any party may move for summary decision (the OAL equivalent of *R.*4:46-2(c)) upon all or any of the substantive issues in a case. In considering the motion an ALJ may rule in favor of the movant where the papers filed, together with any supporting affidavits or certifications, establish that no genuine issue of material fact exists and that the moving party is entitled to summary decision as a matter of law. Thus, as the New Jersey Supreme Court observed in *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520 (1995), in determining whether summary disposition is appropriate the judge must analyze, " . . . 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 536. (citations omitted). Thus, the motion should be denied where the party opposing it has come forward with evidence

that minimally creates a genuine issue of material fact challenged. *See also, In the Matter of Robros Recycling Corp.* 226 *N.J. Super.* 343 (App. Div. 1988), *certif. denied.* 113 *N.J.* 368 (1988).

The statute applicable to the instant matter is *N.J.S.A.* 18A:38-8.1 which, as amended in 1996, provides as follows:

> "In addition to the members of the board of education of a Type I and Type II school district provided by law, in a school district which is receiving pupils from another district or districts pursuant to *N.J.S.* 18A:38-8, there shall be an additional member as provided pursuant to Section 2 of this Act to represent the board of education of each sending district. Any additional member shall be a member of the board of education of a sending district designated annually by the board of that district and shall be eligible to vote on the following matters before the receiving district board of education:
>
> a. Tuition to be charged the sending district by the receiving district and the bill lists or contracts for purchase, operation or maintenance of facilities, equipment and instructional materials to be used in the education of the pupils of the sending district;
>
> b. New capital construction to be utilized by sending district pupils;
>
> c. Appointment, transfer or removal of teaching staff members providing services to pupils of the sending district, including any teaching staff member who is a member of the receiving district's central administrative staff; and
>
> d. Addition or deletion of curricular and extracurricular programs involving pupils of the sending district." (emphasis added).

In *Lincoln Park BOE v. Boonton BOE*, 97 *N.J.R.* 2d (EDU) 592, the first case decided under the statute, its legislative history was discussed. As originally proposed, it expansively authorized the sending district's representative to, "vote on all matters before the receiving district board of education, except those matters pertaining exclusively to the grades of the receiving district in which no students from the sending district are enrolled

including, but not limited to matters of facilities, personnel and programs". *Id.* at 596. The bill was vetoed by former Governor Whitman. Nevertheless, in her veto message, the Governor pointed out that the goal of the bill was a laudable one since it was designed to foster an atmosphere of trust and cooperation between the respective boards.

Governor Whitman expressed two major concerns; (a) that the bill could provide disproportionate representation to the sending district; and (b) that it authorized the sending district representative to vote on all matters even those which might not affect the sending district. *See, Governor Whitman's Veto Message with Recommendations for Reconsideration*, S.151 (October 20, 1994). Thus, changes she then recommended had to do with the formula for determining the percentage of representation by the sending district and limiting the voting rights of the sending district representative to certain areas.

By virtue of the Governor's veto message, the statute was conformed and became effective in January 1995. Thereafter, in August 1996, it was amended in order to clarify further the voting rights of the sending district's appointee. The Senate Education Committee statement to the amendment (S.1031), Laws 1996, Chapter 103, observed that language had been added to permit the sending district's representative to vote on the appointment, transfer or removal of professional staff who provide services to pupils of the sending district.

Since *N.J.S.A.* 18A:38-8.1 addresses only two subjects, the sending district's entitlement to membership on a receiving district's board of education and the designation of those matters he or she is eligible to vote upon, interpretation of the statute must begin with a consideration of its plain language. According to *Lincoln Park, supra,* there was no language expressing an intention to limit either the sending district appointee's access to documents/information or his or her level of participation outside of voting eligibility. Thus, the position taken by Boonton, the respondent in that case, was described as a "leap" which would severely circumscribe the Lincoln Park member's rights and had no basis, express or implied, in the statute or the legislative history. *Id.* at 596. Also, Boonton regrettably had been found to have alienated and hindered the collaboration anticipated by the sending-receiving relationship. *Id.* at 597. Indeed, even though the Governor, in her veto message had recommended more limited voting

eligibility, which the Legislature then adopted, she accurately pointed out, as noted, that the underlying intent of the legislation was to promote cooperation between the two school districts in order to foster an atmosphere of trust and interpretations of disputes arising under the statute have to bear that fundamental principle in mind. *See, e.g., Callowhill v. Atlantic City BOE*, 96 *N.J.R.* 2d (EDU) 693 where the Commissioner noted that since the sending district's appointee could vote on the contracts of the Superintendent of Schools and the School Business Administrator, it made no sense to preclude the member from participating, as well, in discussion of the evaluative comments regarding those positions. However, with respect to the Board Solicitor position involved in *Callowhill*, since there was no demonstration of an entitlement to vote on that individual's contract, there was no basis to compel participation in evaluative discussions.

Thereafter, in the *Little Ferry* case, *supra*, decided a few months after *Lincoln Park*, the specific question was whether a sending district representative could vote on matters that were considered procedural or organizational. The sending district (Little Ferry) argued that excluding its member from such determinations clearly contravened its statutory rights and that although *N.J.S.A.* 18A:38-8.1 limited specific voting rights with respect to "issues confronting the Board", neither the language of the statute nor the position taken by the Commissioner in *Lincoln Park* dictated that the representative was not entitled to essential attributes of "full board membership" including, in particular, meaningful involvement in the procedural and organizational matters of the Board such as election of officers.

The respondent in that case, Ridgefield Park, had maintained that the statute clearly limited the scope of voting rights conferred upon the sending district representative and since voting for the election of officers was not delineated specifically in the statute, which otherwise was narrowly prescribed, the Commissioner should not extend the voting rights.

In his decision, as noted, the Commissioner determined, based upon his reading of the statute and the earlier *Lincoln Park* decision, that the sending district's representative was entitled not only to vote on the election of board officers, but also on "other

procedural matters" attendant to the orderly conduct of board operations. As he recognized in *Lincoln Park*, the statute had a dual purpose: (1) granting the sending district's representative entitlement to membership; and (2) designating those matters before the board upon which the representative was entitled to vote. Consistent with that duality the Commissioner observed that notwithstanding the limitation on voting rights respecting substantive matters arising before the board, in all other respects the sending district's representative, by virtue of the statutory entitlement to a seat on the receiving district board, is empowered to function as a full member of the board. Accordingly, the Commissioner determined that eligibility for full participation, including voting rights, in those procedural and organizational matters necessary to insure the effective operation of the board, did inure to the sending district representative by virtue of his or her board membership. Moreover, he explained that statutory restrictions governing voting rights on substantive matters cannot be superimposed on a separately granted membership right, thereby depriving the sending district's representation of full and effective participation as a board member. Thus, the Commissioner rejected Ridgefield Park's position that voting rights were limited to those specifically articulated in *N.J.S.A.* 18A:38-8.1 since such a reading would be unduly restrictive, inapposite to the legislative history and contrary to the underlying intent of the statute itself.

Based upon my review and consideration of the Joint Stipulation of Facts, the statute and the case law in this area, it appears to me the items in dispute simply are not capable of resolution in a summary fashion. Whether or not an item is "procedural" as opposed to "substantive", whether or not a matter is "of district-wide importance" and whether or not in any particular case the receiving district Board's position is "unduly restrictive" within the context of the case law are not matters which are easily resolved. In order properly to determine whether a sending district's representative is eligible for full participation, including voting rights, in those procedural and organizational matters necessary to insure the effective operation of the Board itself, primarily fact sensitive issues, a fully developed record is required.

For example, among the items at issue in this case is the question of the appointment of an architect. Is that procedural or substantive? Do the duties and responsibilities of the architect touch in any meaningful way on the interests of the

students from Bloomingdale who attend Butler High School? Without exploring in greater detail the duties and responsibilities of that position, as well as several others in issue, one can only offer conclusionary statements that may or may not have a solid grounding in the actual facts. This case is deserving of a more deliberative approach.

Other than the two decisions in *Lincoln Park, supra,* and *Little Ferry, supra*, there is little real guidance in terms of the application of the statute. A full and complete record which comprehensibly explores what many of these people do, and how, if at all, the activities impact in the pertinent areas identified by the Commissioner must be fleshed out and explored. The decision in *Little Ferry* (voting on Board organization) was a rather straightforward one in terms of procedural versus substantive. This is not the case with many of the issues before me.

Accordingly, given the rather sparse record in this case and the absence of detailed descriptions of what the people whose appointments are in issue actually do in terms of the activities of the Board and how it impacts on the Bloomingdale students I would be remiss if I moved forward in a summary fashion. For example, while the district medical inspector is not a teaching staff member; nevertheless, that person very well may be involved in the physical health and welfare of Bloomingdale's students who attend Butler High School. Does the statute preclude Bloomingdale's representative from having a voice in his or her selection? These and other such questions as to the appointments issue and the business issues abound in this case and for the reasons expressed, not to mention the language of the OAL rule, summary disposition is not appropriate. Thus, the cross-motions therefore are denied.

Counsel kindly will prepare an appropriate form of order which embodies this determination concerning the cross-motions and to which the instant letter opinion should be attached and incorporated by reference.

Either or both counsel may, of course, wish to pursue an interlocutory appeal which is their prerogative. In the meantime, this will serve as a reminder that the case remains scheduled for plenary hearing on September 24, 2004.

Very truly yours,

Stephen G. Weiss
Administrative Law Judge

\mvh

OAL DKT. NO. EDU 9367-03
AGENCY DKT. NO. 251-7/03

BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,	:	
RESPONDENT.	:	

This matter comes before the Commissioner by way of a joint request for interlocutory review of the Letter Order of the Office of Administrative Law (OAL) denying the parties' cross-motions for summary decision. The request was submitted, granted and briefed in accordance with the provisions of *N.J.A.C.* 1:1-14.10.

In the Order under review, the Administrative Law Judge (ALJ) concluded that the agenda items in dispute were not amenable to analysis in the absence of a fully developed record, since the operative statutes and case law require fact-sensitive distinctions between "procedural" and "substantive" items, as well as a determination of the extent to which any particular item is "of district-wide importance" or any particular sending-district-member voting prohibition is "unduly restrictive." (Letter Order at 9) The parties contend that this standard is unworkable, effectively contemplating factual analysis of every vote taken by the Butler Board of Education; they therefore ask that the Commissioner reject the ALJ's recommendation, decide the case as a matter of law and

create a "bright line test" to be relied upon by the parties without the need to debate each time a matter comes up for vote before the Butler Board. (Request for Interlocutory Review at 5-6)

The Bloomingdale Board claims that *N.J.S.A.* 18A:38-8.1 provides "inherent rights to [its] representative by virtue of his membership on the receiving district's board," and that the Commissioner's decisions in *Little Ferry, supra,* and *Lincoln Park, supra*, confer upon sending district board members the full spectrum of rights attendant to membership on receiving boards. According to Bloomingdale, such rights "undoubtedly include voting on procedural and organizational matters" which "clearly are of district-wide importance and affect the Butler High School"; these include but are not limited to: "the professional appointments of non-teaching staff employees at the high school level; teaching staff members; the designation of Board of Education accounts and required signatures; the approval of financial depositories; and the approval of outside organizations' use of school facilities." Therefore, Bloomingdale contends, as a matter of law, its representative on the Butler Board is entitled to vote, in addition to those matters specified in *N.J.S.A.* 18A:38-8.1, on all "procedural matters, high school issues, and matters of district-wide importance." (Bloomingdale's Brief at 3-8). In response to Butler's arguments in opposition, Bloomingdale denies that it is attempting to expand the *substantive* voting rights of its representative and counters that it is merely attempting to compel Butler to honor the *procedural and organizational* voting rights conferred by law, particularly the Commissioner's decision in *Little Ferry, supra.* (Bloomingdale's Reply Brief at 1-5)

Upon review of the ALJ's Order, the briefs of the parties and the Stipulation of Facts which together constitute the substantive record of this matter, the Commissioner determines to reject the recommended Order and grant summary decision to the Butler Board of Education.

The Commissioner is unpersuaded by Bloomingdale's attempt to characterize the matters on which it contends its representative is entitled to vote as "procedural and organizational" within the meaning of the Commissioner's decision in *Little Ferry, supra.* Indeed, the Commissioner finds that Bloomingdale's claims are premised on an erroneous reading of *Little Ferry*, and that, to a great extent, the ALJ has accepted that reading in reaching his conclusion on the appropriateness of summary decision. Both Bloomingdale, in its briefs, and the ALJ, in his recommended Order at 8-10, have properly recognized—as has the Butler Board—that statute and case law accord membership to a sending district member on the receiving board, and that such membership entails rights over and above the substantive voting rights expressly specified in statute. All have understood that these rights are not unlimited, however, and that the parameters for them have been established by prior decisional law.

Where Bloomingdale and the ALJ have erred is in fixing upon individual phrases within the text of *Little Ferry*—such as "organizational and procedural matters *of district-wide import,*" "procedural matters *attendant to the orderly conduct of Board operations*," "*full and effective participation* as a board member," and cautions against "*unduly restrictive*" interpretation of *N.J.S.A.* 18A:38-8.1—to conclude, contrary to the clear general thrust of the decision itself, prior related case law and the statute and its legislative history, that the voting rights conferred on a sending district board member by

virtue of his or her membership on the receiving board are, or may potentially be, depending upon factual circumstances, sufficiently expansive in scope to encompass the wide range of issues set forth in Bloomingdale's complaint. (Bloomingdale Brief at 4-8; Bloomingdale Reply at 2-6; Initial Decision at 8-10)[1]

Instead, the Commissioner finds *Little Ferry* to stand for the clear proposition that, as the Butler Board has correctly set forth in its briefs and correspondence with the Bloomingdale Board (Stipulation of Facts, Exhibits E and G), the rights afforded to sending district members on receiving boards of education in effectuation of their status as board members, over and above the substantive voting rights expressly enumerated in statute, extend *only* to participation in deliberation, discussion and access to materials and information, and to voting on organization of the board pursuant to *N.J.S.A.* 18A:10-3 and 18A:15-1 and other "procedural and organizational matters necessary to ensure the effective operation *of the board itself.*" (*Little Ferry, supra,* Slip Opinion at 7-8 (emphasis supplied); see also, *Board of Education of the Township of Green, Sussex County, v. Board of Education of the Township of Newton, Sussex County,* decided by the Commissioner August 5, 1997.)

In other words, under controlling statute and case law, the sending district board member's right to vote on non-enumerated matters encompasses *internal procedural and organizational items only*, such as election of officers, parliamentary matters, approval of board minutes and officer reports, and the like, and does *not*

[1] The Commissioner further notes that the more extended language relied upon by the ALJ in the Order at 9, when read in context, pertains in the first instance solely to participatory and deliberative rights, *not* to voting rights, and in the second means no more than that statutory limitations on the sending district representative's substantive voting rights cannot act to limit the procedural voting rights arising from his status as a board member so as to prevent him from voting on the board's organization pursuant to *N.J.S.A.* 18A:10-3 and 18A:15-1. *Little Ferry, supra*, Slip Opinion at 7-8.

encompass matters arising from the operation *of the school district*, as opposed to the operation of *the board itself*, such as voting on staff appointments or employment matters other than those enumerated in *N.J.S.A.* 18A:38-8.1c,[2] designation of board accounts and required signatures, approval of financial depositories, or use by outside organizations of high school facilities, notwithstanding that such matters may impact on the district as a whole and consequently on the sending district and its students. Indeed, to take the position espoused by Bloomingdale and the ALJ would permit the sending district representative, actually or potentially, to vote on virtually every item before the receiving board, excluding only those few items shown to pertain solely to grades or schools having no impact on the sending district or its students—in clear contravention of a statute that would then be effectively returned to the pre-enactment form expressly rejected by the Governor and the Legislature. (Initial Decision at 6-8; however, see *Lincoln Park, supra,* at 595-96, for a more thorough recitation of the legislative history of *N.J.S.A.* 18A:38-8.1.)

Therefore, apart from two items previously conceded by the Butler Board with respect to appointment of substitute teachers at the high school and approval of Board Officer reports (Butler's Brief at 13; Butler's Reply Brief at 2-3), the present record reveals no instance where the Butler Board prevented the Bloomingdale Board member from voting on a matter falling within the scope of applicable statute or

[2] The Commissioner here notes that *Callowhill, supra*, was *not* repudiated or superseded by *Little Ferry, supra*, contrary to Bloomingdale's contention (Stipulation of Facts, Exhibit F at 2; Brief at 7), but rather is entirely consistent with it in regard to the sending board member's entitlement to vote.

decisional law; to the contrary, the Butler Board has at all times interpreted and applied the law correctly.[3]

Accordingly, for the reasons set forth above, the recommended Order of the ALJ is rejected and summary decision is granted to the Butler Board of Education. The Petition of Appeal is dismissed, and this matter shall be returned to the agency by the OAL pursuant to *N.J.A.C.* 1:1-3.3(a).

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 6/17/04

Date of Mailing: 6/17/04

[3] See Stipulation of Facts, Exhibits D through G, in addition to Butler's Brief and Reply.

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

252-04

CARMELLA MUCCI,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY,

RESPONDENT.

And

IN THE MATTER OF THE TENURE HEARING OF CARMELLA MUCCI, SCHOOL DISTRICT OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY.

COMMISSIONER OF EDUCATION

DECISION

And

CARMELLA MUCCI,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY,

RESPONDENT.

SYNOPSIS

In consolidated matters, Carmella Mucci, tenured teaching staff member, challenged the withholding of her 2000-01 increments; the Board certified tenure charges of unbecoming conduct and incapacity against Ms. Mucci; and Ms. Mucci sought rescission of her letter of resignation, monies due her under the terms of an alleged Employment Separation Agreement, interest and counsel fees.

The ALJ found that, beginning in September 1999, Ms. Mucci was not capable of performing as a tenured teaching staff member. The ALJ found that although Ms. Mucci wanted to effect her retirement through a negotiated agreement with the Board, that agreement never resulted because it was never fully executed and never adopted by the Board. When Ms. Mucci rescinded her resignation, the Board certified tenure charges, then Ms. Mucci retired. Thus, the ALJ concluded that, having withdrawn her opposition to the tenure charges and having retired, Ms. Mucci had waived any claims for relief. Petitions were dismissed.

The Commissioner concluded that the Employment Separation Agreement at issue was never finalized and approved by both parties so as to constitute an enforceable agreement. In that Ms. Mucci retired from the District as of January 1, 2001, the other issues raised in these consolidated matters, including the tenure charges filed against Ms. Mucci and her challenge to her increment withholding, were moot. The Commissioner granted Summary Decision to the Board and dismissed the petitions with prejudice.

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.

June 21, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

CONSOLIDATED

CARMELLA MUCCI,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY,

Respondent.

OAL DKT. NO.EDU 1820-01
AGENCY DKT. NO. 438-12/00

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and

IN THE MATTER OF THE TENURE HEARING OF CARMELLA MUCCI,

OAL DKT. NO. EDU 1901-01
AGENCY DKT. NO. 29-2/01

---

and

CARMELLA A. MUCCI

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY,

Respondent.

OAL DKT. NO. EDU 5286-01
AGENCY DKT. NO. 90-4/01

Barbara E. Reifberg, Esq.
(Baron, Riefberg & Ward, attorneys)

Anthony Sciarrillo, Esq., for Respondent
(Lindabury, McCormick & Estabrook, attorneys)

Record Closed: March 29, 2004 Decided: May 7, 2004

BEFORE **STEPHEN G. WEISS,** ALJ:

PROCEDURAL HISTORY

These three consolidated matters were transmitted separately to the Office of Administrative Law by the Department of Education in 2001. The second filed case, In the Matter of the Tenure Hearing of Carmella Mucci, OAL DKT. NO. EDU 1901-01, concerns the certification of tenure charges by the Board of Education of Moonachie alleging that Mucci had engaged in unbecoming conduct and was incapacitated to such an extent that she should be removed from her employment. The first case, Mucci v. Board of Education of Moonachie, OAL DKT. NO. EDU 1820-01 involved a challenge by Mucci to the withholding of her 2000-2001 increments. The third case, OAL DKT. NO. EDU 5286-01 concerned Mucci's claim that since a letter of resignation she had submitted in late 1999 had been rescinded, she therefore was due back pay, together with interest and counsel fees.

Moving these cases forward was delayed substantially due to a variety of reasons, including an inability to schedule hearing dates accommodating to all concerned, consideration of a Board motion for summary decision and ongoing efforts to settle all three cases. Since settlement no longer is a possibility, the Board asked that its motion for summary decision, first withdrawn, then reinstated, and which has been held in a reserved status pending settlement discussions, should be determined. In particular, the motion, which related to the "Tenure Case" (EDU 1901-01) maintains that since Mucci has been absent from work since the third school day of September

1999 through and including the 2000-2001 school year (and since then as well), there was and is no reasonable basis to conclude that any factual issue existed concerning her chronic and excessive absenteeism and her obvious incapacity for further employment.

However, various superceding events arguably have mooted both the tenure and the withholding of increment cases; namely, Mucci's retirement as of January 1, 2001 and her entry into the Teacher's Pension and Annuity Fund. When that event occurred, I suggested to counsel that perhaps the entire matter should be considered moot. However, counsel for Mucci maintained that while she did not dispute that the tenure and withholding of increment cases need no longer be considered,[1] the third case, involving a "Separation From Employment Agreement" which called for certain entitlements had to be determined.

In her petition respecting the Employment Separation Agreement, (EDU 5286-02, Mucci alleged that she was first employed by the Board in 1964 but, as of September 1999, had taken a paid leave of absence due to an "occupational illness". Thus, during the latter part of 1999 and into early 2000, she negotiated through counsel an agreement with the Board concerning her separation from its employment on terms. One of the requirements set forth in the proposed agreement was that she sign an irrevocable letter of resignation, which was submitted by Mucci. Thereafter, according to petitioner, her attorney was notified that her letter of resignation had been accepted by the Board and the Employment Separation Agreement which she submitted with her resignation letter had been executed. However, according to petitioner, the Board then refused to accept all of the terms of the separation agreement that she desired and soon voted to certify tenure charges of unbecoming conduct and incapacity. Later in 2001, while the three cases were pending, Mucci submitted an early retirement application to the TPAF, to be effective January 1, 2001, which did occur.

[1] In her letter of March 19, 2004, Ms. Riefberg, counsel for Mucci, represented that her client, . . . still wishes to pursue enforcement of the "Employment Separation Agreement".

Mucci maintains that in accepting her resignation, but then failing to accept the terms and conditions set forth in the separation agreement, the Board had acted in an unlawful manner therefore permitting her to: (a) rescind her resignation or, in the alternative, obtain an order compelling the Board to abide by the terms of the agreement and (b) secure interest on moneys due to her under the Employment Separation Agreement.

The allegations surrounding the negotiation, execution and acceptance of the Employment Separation Agreement was the subject of both the original Motion for Summary Decision filed by the Board, together with a separate Motion to Dismiss. In my view, based upon my review and consideration of the evidence submitted in connection with those motions in relation to the Agreement, there is no genuine issue of material fact reasonably in dispute and the Board is entitled to summary decision as a matter of law.

First, it is obvious that by certifying tenure charges against Mucci early in 2001, the Board plainly did not labor under any belief that there had been a binding Separation Agreement between it and Mucci. It was entirely correct in that regard; there was no binding agreement either approved by or fully executed by the Board by resolution or otherwise.

The Separation Agreement involved in this controversy is attached as Exhibit E to Mucci's Certification in Opposition to the Board's original Motion for Summary Decision. Although the document is dated "2001", it has no month or day inserted and the signature page indicates blanks where the signatures of the Board President and the Board Secretary and Mucci were to be placed. The only signature is that of counsel for Mucci, which she apparently executed on January 4, 2001. Also attached to the Brief in Opposition to the Board's Motion, as Exhibit "G" is a handwritten note from Mucci to the Board notifying it of the fact that she was "planning to retire effective December 31, 2000". Exhibit "H" attached to the same Opposition Brief is what I will assume to be a true copy of Board minutes of its meeting of January 9, 2001 wherein under Action 01-190, the Board by a vote of three in favor and none opposed resolved

to accept Mucci's retirement as of the date indicated. Finally, attached as Exhibit "I" was a letter from Board counsel to Mucci's attorney, dated February 1, 2001, setting forth that although the Board had accepted the resignation as noted above, since it appeared Mucci was considering an effort to rescind her resignation, the Board intended to schedule a special meeting to consider the certification of tenure charges. Of course, this is exactly what later occurred.

In her certification in opposition, Mucci concedes she never signed the Agreement because, "I felt that some revisions were needed." According to Mucci, on January 5, 2001, the original and several copies of a fully signed and notarized agreement were picked up by a Board representative from her home along with her letter of resignation. The cover letter, she said, ". . . clearly states that it is conditioned upon the Board's acceptance of the Employment Separation Agreement." However, Mucci then learned through her counsel that although the Board voted on January 9, 2001 to accept her resignation and to make her retirement effective as of December 31, 2000, no action had been taken with respect to the Employment Separation Agreement itself. Mucci then was "shocked to learn" that on February 6, 2001, the Board certified tenure charges against her. Finally, attached to her certification is a copy of a letter she signed on December 31, 2000, addressed to the Superintendent of Schools, wherein she advises him that although she submitted "her irrevocable resignation", it was ". . . expressly conditioned upon the Board's compliance with the Employment Separation Agreement between the Board and me which is of no forced or effect, even if accepted, unless said agreement is fully performed by the Board." (Exhibit 3 to Mucci's Certification in Opposition).

Although the Board did not submit any counter-affidavits or certifications specifically related to the facts, it argues that no such documentation is needed given the concession by Mucci that no Separation Agreement was ever fully executed, no less adopted by the Board. Indeed, Mucci does not dispute this conclusion arguing, instead, that if there was no binding agreement, and if she conditioned her resignation on the same, then her resignation was null and void and should be set aside.

Even assuming Mucci's resignation-retirement was, in her mind, conditioned upon the Board's acceptance of the Agreement, the fact is that for nearly one and one half school years leading up to the events of late December 2000 and early January 2001, Mucci did not at work a single day. At no time did she present herself for active employment, and given various submissions made during the course of these cases it is clear that she had no real capacity to do so. There is, therefore, no need to continue these cases in light of the fact that Mucci: (a) has not worked since September 1999; (b) retired effective January 1, 2001; (c) has been receiving pension benefits for a few years, at least; and (d) no longer opposes the Tenure Charges and claims they are "moot". Her position plainly militates against proceeding any further and it is time, once and for all, to put an end to this litigation. As the Board pointed out in its reply to Mucci's certification nearly three years ago, ". . . this case presents the most severe example of how a teacher's absences impact upon a district. It is also illustrative of the absurdity of certain possible outcomes. To find in favor of Ms. Mucci would force the Board, a one-school district with a small budget, to continue to pay a teacher, who has not worked for two years and admittedly would not return to work, with one of the highest salaries in the State of New Jersey." I agree.

Beginning in September 1999, Mucci simply was not capable of performing as a tenured teaching staff member. Although she wanted to effect her retirement through a negotiated agreement with the Board, that agreement never came to fruition because it was never fully executed, no less adopted by the Board. When Mucci then rescinded her resignation the Board, to protect itself, naturally prepared tenure charges of unbecoming conduct and incapacity. Then Mucci retired. Thus, it would be, as the Board points out, absurd to continue any further. Having withdrawn her opposition to the tenure charges and retired over three years ago, Mucci, for all intents and purposes, has waived any claims for relief she may have had, if any, against the Board. In the interest of economy and efficiency, if nothing else, her petitions should be and hereby are **ORDERED** 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 (45) 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 (13) 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, 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 7, 2004
DATE

STEPHEN G. WEISS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

May 7, 2004
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 10 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

CARMELLA MUCCI, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY, RESPONDENT. And IN THE MATTER OF THE TENURE HEARING OF CARMELLA MUCCI, SCHOOL DISTRICT OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY. And CARMELLA MUCCI, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY, RESPONDENT.	: : : : : : : : : : : : : : :	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Ms. Mucci's exceptions and the Board's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were considered by the Commissioner in reaching his decision.[1]

[1] On June 15, 2004, Ms. Mucci submitted a letter with two attachements which were characterized as "additional documentation." The Board filed a response to Ms. Mucci's submission on June 16, 2004. In that *N.J.A.C.* 1:1-18.4 does not provide for submissions other than exceptions and replies, these additional submissions were not considered.

In her exceptions, Ms. Mucci asserts that this matter is not ripe for summary decision in that genuine issues of material fact exist. (Ms. Mucci's Exceptions at 6) In support thereof, Ms. Mucci reiterates her argument, presented before the Administrative Law Judge (ALJ), that "there is a substantial factual dispute as to whether there was a duly negotiated Employment Separation Agreement (Agreement) that was agreed upon prior to the Board's decision to proffer tenure charges against Ms. Mucci." (*Id.* at 7) Ms. Mucci points out that the Board accepted her letter of resignation, which was expressly conditioned upon the Board's acceptance of the Agreement, before it voted to certify tenure charges against her. (*Ibid.*) If the Board did not agree with the terms of the Agreement, Ms. Mucci avers, it could have refused to accept her letter of resignation since it was not an unconditional resignation. (*Ibid.*) Moreover, Ms. Mucci claims that there appears to be a dispute over whether the Board had communicated a date by which she had to accept the Agreement and whether there was a meeting of the minds with respect to the Agreement, given some minor revisions to the Agreement by Ms. Mucci's counsel. (*Ibid.*) Additionally, Ms. Mucci reasons, since she has not cashed any pension checks to date, there is a factual issue as to whether she has actually retired. (*Ibid.*)

Ms. Mucci also contends that whether her absenteeism warrants her dismissal is a fact-sensitive question that should not be resolved by summary decision, contending that her attendance prior to 1997 was excellent and that it is only since September 1999 that her attendance record dramatically changed due to a severely debilitating environmental illness. (*Id.* at 8) Ms. Mucci points out that the Board did not charge incapacity, but, rather, charged her with chronic and excessive absenteeism and argues that the cases cited by the Board in support of its Motion for Summary Decision highlight the type of analysis that must occur, noting that none of the cases cited by the Board were decided by summary decision. (*Ibid.*)

With respect to *In the Matter of the Tenure Hearing of Pellagatti*, 93 *N.J.A.R.*2d (EDU) 121 (1992), cited by the Board in support of its motion, Ms. Mucci points out that a

two-day hearing was conducted in that matter and, in contrast to her situation, Pellegatti had averaged over 40 absences a year over a 10-year period, had been counseled on numerous occasions about her lateness and absences and had a substance abuse problem she was trying to conceal. (*Id.* at 8-9) Ms. Mucci further points to *In the Matter of the Tenure Hearing of Jerome Kacprowicz*, 93 *N.J.A.R.*2d (EDU) 147 (1993), another case cited by the Board where a teacher was terminated following a hearing on his record of absenteeism, claiming that her situation differs in that Mr. Kacprowicz's attendance was a problem for nine years and there was evidence presented that Mr. Kaprowicz's absences caused a disruption of the continuity of instruction; whereas, this case simply assumes a negative impact on students. (*Id.* at 9) Ms. Mucci claims that a long-term replacement could be hired while she was absent from work, unlike intermittent absences which compel a Board to use substitute teachers who are often not able to provide continuity of instruction. (*Ibid.*) Moreover, Ms. Mucci contends that "increment withholdings have often been used by local boards of education to discipline an employee for excessive absenteeism prior to the pursuit of tenure charges," and that "[i]t is possible that based on all of the circumstances and factors that may be brought forth during a hearing, a conclusion could be reached that an increment withholding is appropriate." (*Id.* at 10)

Ms. Mucci submits that only her absenteeism for the last several years is at issue and that these absences must be evaluated in light of her 37 years of employment with the District. (*Id.* at 10-11) Such evaluation, Ms. Mucci avers, cannot take place without a full hearing. (*Id.* at 11)

Finally, Ms. Mucci avers that there were numerous inconsistencies in the documents submitted to and relied on by the ALJ, including, *inter alia*:

> 1. The minutes of the meeting of January 9, 2001 which were supplied were unsigned. Ms. Mucci has questioned whether this meeting actually took place. The minutes state the Board attorney (Mr. Sciarillo) "would get in touch with Ms. Mucci's attorney to discuss the package further and report back to the Board." (Exhibit "E"). This never occurred.

2. The Board purportedly conducted a special meeting on February 6, 2001 to consider the tenure charges. (Exhibit "G"). Only 3 members attended the meeting and 2 were absent, yet the Resolution indicates that it was "upon a majority vote of the full membership of the Moonachie Board of Education," (Exhibit "H"). The full membership of the Board was not in attendance according to the Board's own minutes.

3. The copy of the Separation Agreement referenced in the Judge's Initial Decision was not signed by Ms. Mucci because all of the ones she signed had been picked up at her home by the Board's Business Administrator. (See Exhibit "A", paragraph 11).

4. The Administrative Law Judge notes that the Board "did not submit any counter-affidavits or certifications specifically related to the facts", yet he makes findings of fact in the Board's favor.

5. Contrary to the Judge's finding, Ms. Mucci has not waived any claims for relief she has against the Board. A waiver must be "knowing" and "intentional". Testimony would need to be taken on those issues since they involve Ms. Mucci's state of mind. (*Id.* at 12)

In conclusion, Ms. Mucci urges the Commissioner to reject the Initial Decision, commenting that "[w]hile it may be economical and efficient to dispose of Ms. Mucci's claims by summary decision, it is neither equitable, fair, just or in accordance with applicable law. (*Id.* at 13)

In response, the Board contends that the ALJ correctly concluded that there was no binding settlement agreement between Ms. Mucci and the Board, noting that the ALJ found that the Board never executed the Agreement. (Board's Reply Exceptions at 1-2) The Board also points out that Ms. Mucci admitted that she revised the Agreement that was circulated between the parties. Thus, the Board argues, "[a]ny issues regarding deadlines to accept the agreement, or issues related to whether her resignation was conditional are irrelevant, as they do not change the fact that the Board never accepted Petitioner's terms, the only material fact at issue." (*Id.* at 2)

With respect to Ms. Mucci's assertion that there is a factual dispute as to whether she is retired since she has not cashed her retirement checks, the Board contends that whether or not Ms. Muccci has cashed her retirement checks is irrelevant in that there is no legal basis to claim that Ms. Mucci's failure to deposit her retirement checks negates her status as retired. (*Ibid.*) The Board points out that Ms. Mucci admits that she applied for her pension and is now receiving checks from the Teachers' Pension and Annuity Fund. (*Ibid.*) Moreover, the Board claims that Ms. Mucci "has acknowledged that her tenure charges are now moot, based in part on her employment status." (*Ibid.*)

The Board also maintains that summary decision on the issue of Ms. Mucci's absenteeism is appropriate in that the law does not mandate a hearing where no material factual issues remain. (*Id.* at 3) The Board points out that Ms. Mucci has been absent since September 1999 and that "[t]he law is clear that chronic or excessive absenteeism 'has been found to constitute both "incapacity" and "unbecoming conduct" within the meaning of N.J.S.A. 18A:6-10, such as to warrant dismissal from employment.'" (*Ibid.*, *citing Kacprowicz, supra,* at 147, *quoting In the matter of the Tenure Hearing of David Williamson, Trenton School District, Mercer County,* 1986 *S.L.D.* 1462, 1467. Moreover, again citing *Kacprowicz, supra*, at 151, the Board avers that "excessive absenteeism constitutes valid grounds for dismissing a tenured teacher *even when the absences have been excused or caused by legitimate reasons of personal illness.*" (*Ibid.*) (emphasis in text) The Board thus claims that the reasons for Ms. Mucci's absences, as well as the history of her absences before 1999, are irrelevant. (*Id.* at 3-4)

Finally, with respect to the alleged inconsistencies which Ms. Mucci raises, the Board contends that none of these facts, if true, are material to this case because they do not change the fact that the Board did not accept any settlement, noting that Ms. Mucci's claim that the ALJ erred in making findings of fact in favor of the Board because the Board did not provide

any counter-affidavits in response to Ms. Mucci's opposition to the Board's motion for summary judgment is flawed because Ms. Mucci admits that she revised the Agreement and that the Agreement was never signed by the Board. (*Id.* at 4) "In light of these admissions, which the Board does not contest, there is no need for the Board to submit any additional factual support for its relief when the Petitioner's admissions provide enough support." (*Ibid.*) The Board thus concludes that no hearing was, therefore, needed to reach a fair, equitable and just decision in light of the magnitude of Ms. Mucci's absences. (*Ibid.*) The Board also points out that Ms. Mucci "has not worked since 1999,*** [is] retired in the eyes of the Board and the Teacher's Pension and Annuity Fund (regardless of what she is doing with her checks), and has no intention of returning to work. (*Id.* at 5)

After a careful and independent review of the papers filed in this matter, the Commissioner has determined that grant of summary decision to the Board is appropriate in this instance. Pursuant to *N.J.A.C.* 1:1-12.5(b) and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121-122 (App. Div. 1995) (*citing Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995), summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. In this regard, notwithstanding Ms. Mucci's assertions to the contrary, the Commissioner finds that there are no "material facts" in dispute in this matter. *Black's Law Dictionary, seventh edition,* at 610-611, defines "fact" as "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation" and a "material fact" as "[a] fact that is significant or essential to the issue or matter at hand." "It is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case." *Frank v. Ivy Club*, 120 *N.J.* 73, 98 (1990), *citing Cunningham v. Dept. of Civil Service*, 69 *N.J.* 13, 24-25 (1975). "Moreover, disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary

judgment." *Contini v. Board of Education of Newark*, 96 *N.J.A.R.*2d (EDU) 196, 215, *citing Lima & Sons, Inc. v. Borough of Ramsey*, 269 *N.J. Super.* 469, 478 (App. Div. 1994); *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, Commissioner's Decision No. 129-97, decided March 20, 1997; and *In the Matter of the Tenure Hearing of Neal A. Ercolano, Board of Education of Branchburg Township, Somerset County*, Commissioner's Decision No. 140-00, decided May 1, 2000. Additionally, the Commissioner finds that the Board is entitled to prevail as a matter of law for reasons provided in the Initial Decision and explicated below.

Notwithstanding Ms. Mucci's challenge to the withholding of her increment and the filing of tenure charges against her by the Board, this matter, in actuality, turns on the resolution of two issues: 1) whether the Employment Separation Agreement at issue was finalized and approved by both parties to this action and 2) whether Ms. Mucci's retirement renders the consolidated petitions in this matter moot.

It is undisputed that Ms. Mucci and the Board were engaged in active negotiations to develop an Employment Separation Agreement during the 1999-2000 school year, but that such negotiations did not ultimately result in a finalized, executed Agreement during that year. (Ms. Mucci's Exceptions at 2, Petition of Appeal Regarding Agreement at 2 and Answer at 1) It is also undisputed that, although negotiations continued into the Fall of 2000, on or about September 5, 2000, the Board voted to withhold Ms. Mucci's employment, adjustment and longevity increments for the 2000-01 school year (Petition of Appeal Regarding Increment Withholding at 1 and Answer at 1), and on December 13, 2000, Ms. Mucci was served with tenure charges. (Ms. Mucci's Exceptions at 3 and Board's Motion for Summary Decision at 5) Moreover, there is no dispute that: 1) Ms. Mucci sent a letter to the Board on December 27, 2000 notifying it of her intention to retire as of December 31, 2000 (*ibid.*, and Ms. Mucci's Opposition to Motion for Summary Decision, Exhibit G); 2) Ms. Mucci's attorney

made changes to the latest version of the proposed Agreement and Ms. Mucci delivered a signed copy of the revised Agreement on or about January 5, 2001, along with the letter of resignation required by the Agreement, to the Board Secretary (*ibid.*); 3) on January 9, 2001, the Board voted to accept Ms. Mucci's retirement effective December 31, 2000, but did not vote on the revised Agreement submitted by Ms. Mucci (*ibid.* and Ms. Mucci's Certification of May 23, 2001 at 3); and 4) on February 6, 2001, the Board voted to certify tenure charges against Ms. Mucci to the Commissioner (*id.* at 4 and Board's Motion for Summary Decision at 5).

The "genuine issues of material fact" set forth in petitioner's exceptions with respect to the Agreement, therefore, *i.e.*, the dispute over whether there was a duly executed Agreement that was agreed upon prior to the Board's decision to proffer tenure charges against Ms. Mucci; whether the Board ever communicated a date to Ms. Mucci, and whether there was a meeting of the minds (Petitioner's Exceptions at 7) are facts not material to the determination as to whether the Employment Separation Agreement at issue was finalized and approved by both parties to this action given Ms. Mucci's concession that the revised Agreement was neither approved by the Board nor signed by a duly designated Board representative. (*Id.* at 3 and Petition of Appeal Regarding Employment Separation Agreement at 2) Moreover, the Commissioner cannot ignore that Ms. Mucci made revisions to and signed the proposed Agreement following the December 13, 2000 notification from the Board that it was contemplating the filing of tenure charges against her. The action of the Board initiating the filing of tenure charges and Ms. Mucci's revisions to and signing of the proposed Agreement shortly thereafter clearly demonstrate that there was no finalized Agreement between the parties. In this context, Ms. Mucci's signature on the Agreement she revised cannot be construed as an acceptance of a settlement, but, instead, was a counteroffer that the Board did not act upon. *See Larson & Fish v. Schultz*, 69 *A.2d* 328 (App. Div. 1949) and *Carlin v. City of Newark*, 114 *A.2d* 761 (Law Div. 1955). Accordingly, the Commissioner finds that the Employment

Separation Agreement at issue in this matter was never finalized and approved by both parties to this action and, thus, Ms. Mucci's request to enforce such Agreement is hereby denied.

Turning to the issue of Ms. Mucci's retirement and its effect on the remaining issues in these consolidated petitions, the Commissioner notes that, in her certification dated May 23, 2001, Ms. Mucci states that she filed an application for retirement with the Division of Pensions for a January 1, 2001 retirement, that there was a delay in the Board submitting its portion, which was finally submitted, and that there is now a delay because she cannot locate a copy of her birth certificate. (Certification of Ms. Mucci, dated May 23, 2001, Item #13) The Board of Trustees at the Division of Pensions subsequently approved Ms. Mucci's retirement, effective January 1, 2001, at their regular meeting on October 11, 2001. (Letter of October 11, 2001 from the Division of Pensions Attached to the Board's Letter to the ALJ of October 18, 2001) Notwithstanding Ms. Mucci's claim in her exceptions that there is a factual issue as to whether she has retired, given that her letter of resignation was expressly conditioned upon the Board's acceptance of the revised Employment Separation Agreement and that she has not cashed any pension checks, the Commissioner observes that, as of May 23, 2001, the date of the above-cited certification, Ms. Mucci was proceeding to complete the process to effectuate her retirement, with an effective date of January 1, 2001, some five months after she was aware that the Board had not acted to accept her proffer of a revised Agreement, and that there is nothing in the record to suggest that Ms Mucci made any attempt to rescind or nullify her retirement with the Division of Pensions, pursuant to *N.J.A.C.* 17:3-6.3(a).[2] Accordingly, there is no basis for

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[2] *N.J.A.C.* 17:3-6.3(a) provides that:

> A member shall have the right to withdraw, cancel or change an application for retirement at any time before the member's retirement allowance becomes due and payable by sending a written request signed by the member. Thereafter, the retirement shall stand as approved by the Board.

and *N.J.A.C.* 17:3-6.2(a) provides that:

> A member's retirement allowance shall not become due and payable until 30 days after the date the Board approved the application for retirement or 30 days after the date of retirement, whichever is later.

the Commissioner to conclude that Ms. Mucci has nullified her retirement status with the Division of Pensions.

Moreover, with respect to Ms. Mucci's not cashing her retirement checks, it cannot be ignored that Ms. Mucci has a history of not cashing checks. In this regard, as of September 11, 1998, the Commissioner observes that Ms. Mucci had not cashed nine of her paychecks totaling $21,662.64 (Tenure Charges, Exhibit 11), and that the proposed Agreement provides that "[t]he Board will reimburse Ms. Mucci for any prior salary checks paid to her by the Board, which she has not yet negotiated, regardless of the age of these checks." (Ms. Mucci's Motion for Summary Decision, Exhibit B at 3, #e) Given the absence of notification to the Division of Pensions nullifying or revoking her retirement status, therefore, Ms. Mucci has provided no basis for the Commissioner to conclude that there is a question as to her retirement status simply because she has not cashed her retirement checks.

In light of the Commissioner's conclusions that the Employment Separation Agreement at issue was never finalized and approved by both parties so as to continue an enforceable Agreement and that Ms. Mucci retired from the District as of January 1, 2001, the other issues raised in these consolidated matters, including the tenure charges filed against Ms. Mucci and Ms. Mucci's challenge to her increment withholding,[3] are moot and there is, therefore, no basis upon which this matter can be ordered to proceed.

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[3] The Commissioner notes that, by letter to the ALJ of May 13, 2002, counsel for Ms. Mucci states:

> I believe the dismissal of the Workers' Compensation cases probably does dispose of the issues contained within the increment withholding and the tenure cases. [The Workers' Compensation matters were dismissed for failure to sustain the burden of proof. (See Counsel for Ms. Mucci's letter of April 29, 2002 with Attachment, and the Board's Letter of May 7, 2002 with Attachment.)] I must point out, as I'm sure Ms. Mucci will, that there still remains one pending Workers' Compensation matter which she filed pro-se concerning occupational exposure after 1995. (Counsel for Ms. Mucci's Letter, May 13, 2002)

Additionally, with respect to the withholding of Ms. Mucci's increment for the 2000-01 school year, there is nothing in the record to suggest that there would be any effect on her retirement benefits should she prevail in that Ms. Mucci was not in pay status at any time during the 2000-01 school year prior to the effective date of her retirement.

Accordingly, for the reasons set forth above, as well as those expressed in the Initial Decision, the Commissioner grants Summary Decision to the Board and dismisses the within petitions, with prejudice.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 6/21/04

Date of Mailing: 6/23/04

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

251-04

IN THE MATTER OF THE TENURE :
HEARING OF GLORIA JIMENEZ, :
SCHOOL DISTRICT OF THE CITY OF :
LONG BRANCH, MONMOUTH COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

June 21, 2004

AGENCY DKT. NO. 136-4/04

IN THE MATTER OF THE TENURE :
HEARING OF GLORIA JIMENEZ, :
SCHOOL DISTRICT OF THE CITY OF : COMMISSIONER OF EDUCATION
LONG BRANCH, MONMOUTH COUNTY. : DECISION

For Petitioner: McOmber & McOmber, P.C.

This matter was opened before the Commissioner of Education on April 19, 2004 through the certification of tenure charges against a tenured custodian alleging abandonment of her position with the Long Branch School District.

By notice dated April 20, 2004, the Commissioner directed respondent, via both certified and regular mail, to file an Answer to the tenure charges against her.[1] This communication from the Bureau of Controversies and Disputes clearly provided respondent notice 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 date such charges are filed with the Commissioner* to file a written response to the charges, and that failure to answer within the prescribed period, where no extension has been applied for and granted, or where there has been a submission by the charged employee of a responsive filing indicating that she does not contest the charges, **will** result in the charges being deemed admitted by the charged employee. Because no reply has been received from respondent, or on her behalf, in response to the District's charges, each count of the charges against respondent is deemed to be admitted. *N.J.A.C.* 6A:3-5.3(c).

[1] Although the notice sent via certified mail was returned to the New Jersey Department of Education indicating it was "not deliverable as addressed," the notice sent via regular mail was not returned.

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicates that respondent has been employed with the Board since May of 1989. In April of 1996, respondent claimed an injury at work and was involved in subsequent workers' compensation claims and litigation. Based on information provided by the workers' compensation carrier, respondent should have returned to work in January 2003; repeated efforts to reach her at her last known address have not led to any contact. Respondent is not receiving a salary, has not attempted to contact the Board office or any of her direct supervisors, and has not responded to any of the Board's inquiries. (Sworn Affidavit of Evidence by Archie Greenwood, Assistant Superintendent at 1-2)

Deeming the within charges to be admitted, and noting that respondent does not deny the specific allegations, the Commissioner finds that the Board has demonstrated that respondent has abandoned her position as a tenured custodian with the Long Branch School District.[2]

IT IS ORDERED this 21st day of June 2004 that summary decision shall be granted to the District, and respondent shall be dismissed from her tenured position as a custodian in the Board's employ as of the date of this order.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 6/21/04

Date of Mailing: 6/23/04

[2] As provided by law, public school janitors, or custodians, shall, unless appointed for a fixed term, hold office or employment under tenure of good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance the law, or except for neglect, misbehavior or other offense. *N.J.S.A.* 18A:17-3.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

256-04

256-04E

OAL DKT. NO. EDU 7010-04
AGENCY DKT. NO. 225-6/04

S.A.S., on behalf of minor child, D.T.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	
RESPONDENT.	:	

The record of this emergent matter, including the audiotape of proceedings before the Office of Administrative Law (OAL) and the oral Initial Order of the Administrative Law Judge (ALJ), have been reviewed by the Assistant Commissioner to whom this matter has been delegated for hearing pursuant to *N.J.S.A.* 18A:4-34.

Upon such review, the Assistant Commissioner concurs with the ALJ that petitioner has not met the standard established by law for grant of emergency relief. *N.J.A.C.* 6A:3-1.6 and *Crowe v. DeGioia,* 90 *N.J.* 126 (1982) In particular, the Commissioner finds that petitioner has not demonstrated a likelihood of success on the merits of her claim, since it does not appear that any position thus far taken by the respondent Board with regard to D.T.S.'s promotion to ninth grade and his attendance at summer school, including denial of the requested accommodation for planned absences, is in any way unlawful or an abuse of the Board's discretionary authority.

Accordingly, the Order of the OAL denying the application for emergent relief is adopted as the final decision in this interim matter; however, the Order is

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

JAMES E. McGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

June 25, 2004

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Dear Parties:

S.A.S., on behalf of minor child, D.T.S., V. BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY, Agency Dkt. No. 226-6/04

We are enclosing a copy of the decision of the Assistant Commissioner of Education dated June 25, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library
Kathryn A. Brock, J.S.C.

modified to the extent that it returns the file to the Department of Education, and the Assistant Commissioner instead directs that proceedings with respect to the underlying appeal on the merits shall continue at the OAL as necessary to bring the matter to closure once D.T.S.'s summer school performance has been assessed.

IT IS SO ORDERED. *

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: June 25, 2004
Date of Mailing: June 25, 2004

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

257-04

257-04

B.F., on behalf of minor child, O.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged the expulsion of daughter, O.N., from school for allegedly assaulting a teacher.

The ALJ found that petitioner failed to meet the burden of showing that the Board's action in expelling O.N. was arbitrary, without rational basis or induced by improper motives. The ALJ also found that the alternative education program offered by the District at the MAECOM Adult High School Program is a comprehensive program that meets all core curriculum content standards, as well as all State guidelines and is required to comply with statutory and regulatory requirements related to health and gym.

The Commissioner adopted the Initial Decision and dismissed the petition.

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.

June 28, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 67-04

AGENCY DKT. NO. 8-1/04

B.F., ON BEHALF OF MINOR CHILD O.N.,

Petitioner,

v.

BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

B.F. and H.W., parents of O.N., a minor child, petitioners, *pro se*

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Barger & Steel, attorneys)

Record closed: March 30, 2004 Decided: May 12, 2004

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioners challenge the expulsion of their daughter from school for allegedly assaulting a teacher. Petitioners submitted a petition to the Commissioner of Education

dated January 9, 2004, and the matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case on January 12, 2004. The matter was scheduled for oral argument on January 16, 2004, on the petitioners' request for emergent relief. On that date, oral argument was held and some limited testimony was taken. As a result of that hearing, an order was entered on January 20, 2004, denying the emergent relief request to stay the expulsion of O.N. from school. On January 28, 2004, the Commissioner affirmed the denial of petitioners' application for emergent relief, but remanded the matter to the OAL for supplementary testimony on an emergency basis as to whether the alternative education program offered by the school district satisfies the requirements of *P.H. v. Board of Education of the Borough of Bergenfield, Bergen County*, OAL Dkt. No. EDU 7381-00, State Board of Education Decision on Motion (September 5, 2001) <http://lawlibrary.rutgers.edu/oal/search.html>. Accordingly, the matter was rescheduled for a second emergent relief hearing, which was held on February 2, 2004. Following this emergent relief hearing, an order granting emergent relief as to placement was entered on February 3, 2004.

The plenary hearing was scheduled for March 30, 2004. On that date, a hearing was held and concluded and the record closed.

FACTUAL DISCUSSION

It is undisputed that prior to her expulsion O.N. was in her junior year at Monmouth Regional High School. Her parents stated that they moved to the area in August 2003. O.N. has a twin sister who also attends Monmouth Regional High School.

It is also undisputed that on December 18, 2003, O.N. was involved in an altercation with several other students. When the altercation broke out, Andrew Teeple, the principal of Monmouth Regional High School, grabbed O.N.'s twin sister, and Joseph Pingitore, a teacher, attempted to grab O.N. by the arms in an effort to restrain her.

At the emergent relief hearing in this matter, the parents contended that Mr. Pingitore used excessive force in holding O.N.'s arms, and was hurting her, thus compelling O.N. to flail her arms in an attempt to break free from his grip, and that it was as a result of this flailing action

that O.N. struck Mr. Pingitore. The parents contended that this striking was inadvertent, and that Mr. Pingitore acknowledged that it was an accident and not intentional, and that at the hearing before the Board, he expressed that he did not believe that O.N. had intentionally struck him. The parents contended that there was no assault in this matter, but there was a mishap, and O.N. did not intend to harm the teacher.

Also at the emergent relief hearing, Mr. Barger, attorney for respondent, stated that the policy of the Board of Education is zero tolerance for striking a teacher. He represented that at the hearing before the Board the testimony was to the effect that O.N. repeatedly struck the teacher, justifying the expulsion. Mr. Barger indicated that the school district is aware of *P.H. v. Board of Education of the Borough of Bergenfield, Bergen County, supra*, OAL Dkt. No. EDU 7381-00, State Board of Education Decision on Motion (September 5, 2001) <http://lawlibrary.rutgers.edu/oal/search.html>, and has offered to O.N. Monmouth Adult School, where, if she completes the course of study, she will be given a diploma from Monmouth Regional High School.

The testimony at the plenary hearing in this matter can be summarized as follows.

The first witness to testify for respondent was Joseph R. Pingitore. Mr. Pingitore is an employee of the Monmouth Regional Board of Education and has been a teacher for eighteen years, and in addition to teaching he coaches football and baseball. He is also an SAAD advisor.

Mr. Pingitore testified that on December 18, 2003, at approximately 7:30 a.m. or 7:35 a.m., he heard a ruckus in the school hallway and saw a group of students yelling at each other, and there were certain students being restrained. He stepped between several of the girls and he started to escort one of the girls away. Mr. Teeple, the school principal, and Mr. Larkin, another teacher, also came running and started breaking up the ruckus and leading away some of the other girls. Mr. Pingitore was standing between O.N. and the other girls and was attempting to walk her away from the incident while she was trying to return to the area of the incident. He did not know who she was at the time, but he recognized her as a student. She was very angry and upset with one of the other girls. O.N. attempted to go around him and he put his arms out and tried to grab onto her arms, but was unable to do so. He was holding his hands out in an effort to

stop her from going past him. It was at that point that she began flailing and struck him approximately five times with her closed fist, hitting him on the back of the head, on his shoulder and on his face. While this was occurring, she was still screaming at the other girl. He was simply attempting to prevent her from going past him. Officer Robert DeLaune stopped O.N. from hitting Mr. Pingitore and escorted O.N. away, and Mr. Pingitore had no further contact with her. As a result of this incident, he pulled something in his shoulder and it was necessary for him to take off sick the next day, which was a Friday.

On cross-examination, Mr. Pingitore testified that the testimony he gave at the hearing is the same testimony that he gave before the Board of Education. He denied that he ever held on to O.N.'s arms. He stated that she was definitely trying to hit him because she was very frustrated and angry. On redirect examination, he reiterated that he believes that O.N. struck him intentionally. He said that she was enraged and she was not flailing to get away from him, but was intentionally striking him. She was telling him to get out of her way. She later apologized to him.

The next witness to testify for respondent was Robert DeLaune, a sergeant with the Tinton Falls Police Department. He is in charge of the School Resource Program and he was on-site at Monmouth Regional High School on December 18, 2003. That day at approximately 7:30 or 7:35 a.m. he witnessed a fight. He was called over the radio and told that there was a fight in the hallway. He and Officer McBride went to the location, and he believes he was wearing his uniform at the time. He remembers seeing one student in particular, O.N. He observed Coach Pingitore[1] attempting to hold the student, and she was breaking free and flailing her arms. He saw O.N. strike Coach Pingitore approximately four to six times, at least twice in the head and shoulders. Officer DeLaune then approached O.N. and grabbed and held her by the biceps and took her away. He arrested her and charged her with aggravated assault against a school board employee. She was committing an assault when he observed her. She was very aggressive, belligerent and very determined, but when he held her and got her away she calmed down immediately.

[1] During their testimony, the witnesses referred to Mr. Pingitore as "Coach" Pingitore. I have used that appellation where it was used by the witnesses in order to be consistent with their testimony.

On cross-examination, Sergeant DeLaune testified that Coach Pingitore was attempting to hold O.N.'s arms, but was not able to grab onto them. From what he observed, he believed that it was O.N.'s intention to physically strike Coach Pingitore. He indicated that she was a "perfect lady" after he got her outside.

On redirect examination, Officer DeLaune testified that in his opinion O.N. intended to strike Coach Pingitore. He did not tell her her rights because he did not question her.

The next witness to testify for respondent was Andrew Francis Teeple. He is employed by the Monmouth Regional Board of Education and this is his first year as a principal. For eleven years before becoming a principal he worked in the district as a math teacher, a math supervisor, and an assistant principal. He did not recall the date of the incident involving O.N., but he remembered that the incident occurred around 7:30 to 7:40 a.m. There was an altercation in the 700 wing of the high school, and when he arrived at the scene, he witnessed Coach Pingitore attempting to hold back O.N. As soon as he got there, he grabbed O.N.'s sister and locked onto her. He then saw O.N. confronting Coach Pingitore. He first saw Coach Pingitore attempting to grab her, and he then held his hands out. She was taking swings at him with a closed fist and he observed her hitting Coach Pingitore on the upper shoulder and on the left side of his head. He saw at least a couple of blows land. Coach Pingitore had his hands up trying to calm her down, but was unable to do so. There was no one else near them when O.N. was hitting Coach Pingitore. She was hitting him and trying to get past him and Mr. Teeple observed that she was in a rage. It was clear to him that the striking of Coach Pingitore was intentional, because she was looking at him. He indicated that later that day O.N. wanted to apologize to Coach Pingitore, but she was not allowed to do so. Coach Pingitore was out sick the next day.

On cross-examination, Mr. Teeple testified that as principal of the high school, he is the building administrator. He said that at the time of the incident he felt that a ten-day suspension for O.N. was adequate. At a meeting held after the incident, O.N. apologized and Coach Pingitore accepted her apology. O.N.'s parent asked for an anger management class plus probation until the end of O.N.'s school term and he felt that was sufficient. However, he stated that he is aware of the school district policy and he knew of the mandatory expulsion hearing.

Patrick Collum testified that he has been employed by the Monmouth Regional Board of Education as its superintendent for approximately fourteen years. He was an assistant superintendent in the school district from 1978 to 1990. He was present at O.N.'s expulsion hearing. He stated that he is aware of the obligation of the school district to provide an alternative education program to an expelled student. He testified that MAECOM is a fully acceptable alternate education program and graduates twelve to sixteen students per year. It is a comprehensive program that meets all core curriculum content standards, as well as all State guidelines.

The next witness to testify was Sister Elizabeth Dalessio. She has been employed by the Monmouth-Ocean Educational Services Commission for two years and it operates the MAECOM Adult High School, Tinton Falls, New Jersey. There are various programs in the MAECOM School, including the adult high school program. She indicated that O.N. will continue in an adult high school program. It is a full and comprehensive high school program and complies with all New Jersey core curriculum content standards. It differs from the regular high school in that its hours are flexible. The program runs from 8:00 a.m. to 4:00 p.m. and then from 6:00 p.m. to 9:00 p.m. A student can come in from 8:00 a.m. to noon and then from 1:00 to 4:00 p.m. During those time periods, the student would take all required courses. Over the past two years, MAECOM has had twelve to sixteen students from Monmouth Regional. It is a learning center environment with each of the students doing his or her work under the guidance of a teacher, but most of the work is done by the student and then reviewed with the teacher.

On cross-examination, Sister Elizabeth Dalessio testified that initially a student is tested for four to six hours to determine an appropriate placement. The adult school is the same as the regular high school in course content. She testified that the adult high school is better than home instruction. She admitted that some of the students in the high school are there because of disciplinary problems. However, 40 percent of the graduates go on to college. Twenty of the current students are under seventeen years old.

At the conclusion of the foregoing testimony, the school district rested.

B.F., O.N.'s mother, testified that verbal threats made to her daughters on December 17, 2003, led to the altercation the next day. On December 18, 2003, she received a call from Mr. Larkin about the altercation. He advised her that O.N. had been brought to juvenile detention, but he never told her that O.N. had been arrested. She then picked up O.N. and called Mr. Larkin and Mr. Teeple to set up a meeting. The meeting involved her and her two daughters. There were almost 100 students involved in the altercation. She testified that Coach Pingitore had his hands on O.N. and that she had to be taken to the nurse for injuries to her arms. O.N. apologized to Coach Pingitore and he accepted the apology. The principal and the parents agreed to a ten-day suspension and agreed that O.N. was to be sent to anger management class and that she would be placed on probation until graduation. Despite this agreement, there was an expulsion hearing held by the Board of Education in January 2004 at which the Board of Education determined to expel O.N.

B.F. testified that they went to visit MAECOM, but O.N. was not allowed into the high school program, which they were told is just like the Monmouth Regional High School program. Because of this, O.N. was placed on home instruction, but the school district would not permit the teacher to go to their home and be alone with O.N. O.N. is now taken by bus to the school Monday through Thursday, from 2:30 p.m. to 5:30 p.m. on three days and from 2:30 p.m. to 4:30 p.m. the fourth day, where she receives home instruction in the school. As far as health and gym requirements for graduation, she has been advised that the State does not have to waive the health and gym requirements.

H.W., O.N.'s father, testified that the MAECOM program is inadequate. It is a self-taught program and there is no actual teaching going on. With home instruction, O.N. is at least getting the same instruction as her sister. He also feels that O.N. must have health and gym in order to graduate from high school. He does not believe the school district is able to waive the health and gym attendance requirements and he feels that there is no alternative to home instruction at the present time. He believes that there would be irreparable harm if O.N. loses a full year, and asks that she be allowed to return next year.

O.N., age sixteen, also testified. Her testimony was limited to the inadequacy of the MAECOM program. She testified that she went to MAECOM for several days and all they did

was test her. They would simply give her the work and then she would leave. She would then have to leave the work that she did in the mailbox. If she had a question she had to ask a teacher who was not in charge of her because her regular teacher was not there. This is not the same as it was in high school. Only four or five of the twenty people in the class were under the age of eighteen. Some people simply got up and left. She felt like a prisoner and was not learning anything. She was only being tested and was there for only two or three weeks at the most.

LEGAL DISCUSSION AND ANALYSIS

N.J.S.A. 18A:37-2.1 provides for the suspension or expulsion of a pupil for assault:

> a. Any pupil who commits an assault, as defined pursuant to *N.J.S.* 2C:12-1, upon a teacher, administrator, board member or other employee of a board of education, acting in the performance of his duties and in a situation where his authority to so act is apparent, or as a result of the victim's relationship to an institution of public education of this State, not involving the use of a weapon or firearm, shall be immediately suspended from school consistent with procedural due process pending suspension or expulsion proceedings before the local board of education. Said proceedings shall take place no later than 30 calendar days following the day on which the pupil is suspended. The decision of the board shall be made within five days after the close of the hearing. Any appeal of the board's decision shall be made to the Commissioner of Education within 90 days of the board's decision. The provisions herein shall be construed in a manner consistent with 20 *U.S.C.* section 1400 et seq.
>
> b. Whenever a teacher, administrator, board member, other employee of a board of education or a labor representative on behalf of an employee makes an allegation in writing that the board member or employee has been assaulted by a pupil, the principal shall file a written report of the alleged assault with the district's superintendent of schools. The superintendent to whom the alleged assault is reported or, if there is no superintendent in the district, the principal who received the allegation from the board member, employee, or labor representative shall report the alleged assault to the board of education of the district at its next regular meeting; provided that the name of the pupil who allegedly committed the assault, although it may be disclosed to the members of the board of education, shall be kept confidential at the public board of education meeting.

> Any person who fails to file a report of an alleged assault as required pursuant to this subsection may be liable to disciplinary action by the board of education of the district.

N.J.S.A. 2C:12-1(a) sets forth the definition of assault as follows:

> A person is guilty of assault if he:
>
> (1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
>
> (2) Negligently causes bodily injury to another with a deadly weapon; or
>
> (3) Attempts by physical menace to put another in fear of imminent serious bodily injury.

In this matter there is no *Tibbs* issue; that is, the petitioner did not allege any constitutional due process insufficiency or irregularity with regard to the hearing process under the doctrine of *Tibbs v. Bd. of Educ., Franklin Township*, 59 *N.J.* 506, *aff'g* 114 *N.J. Super.* 287 (App. Div. 1971). *See* decision of the Commissioner in *R.W. v. Bd. of Educ., Hunterdon Cent. Reg. High Sch.*, 93 *N.J.A.R.*2d (EDU) 113, 114-15 (suspension procedure reviewed and approved). Thus, the only issue is whether petitioner met the burden of proof so as to justify the reversal of the Board's decision to expel O.N.

In assessing the propriety of an expulsion, the scope of review of the Commissioner of Education is circumscribed. As noted by Administrative Law Judge Metzger in *M.G. v. Monmouth Regional High School Board of Education*, 91 *N.J.A.R.*2d (EDU) 38, 40, *aff'd in part, rev'd in part*, State Bd. of Educ., 92 *N.J.A.R.*2d (EDU) 364: "[The board's] decisions in this matter carry a presumption of validity and [it is the] petitioners who must show that the actions taken were arbitrary and unreasonable, if they are to be disturbed." In adopting the administrative law judge's decision, the Commissioner of Education likewise noted the limited scope of review:

> . . . it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards.
>
> [91 *N.J.A.R.*2d (EDU) at 42, quoting *Boult v. Bd. of Educ., City of Passaic,* 1939-49 *S.L.D.* 7, 13 (1946), *aff'd*, State Board of Education (Sept. 13, 1946), *aff'd*, 135 *N.J.L.* 329 (Sup. Ct. 1947), *aff'd*, 136 *N.J.L.* 521 (E. & A. 1948).]

There are many judicial decisions expressing the same concepts, such as *Quinlan v. Board of Education of North Bergen Township,* 73 *N.J. Super.* 40, 46-47 (App. Div. 1962); *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288, 294 (App. Div. 1960); *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd*, 46 *N.J.* 581 (1966); and *Boyle v. Riti,* 175 *N.J. Super.* 158, 166 (App. Div. 1980). In *Boyle,* the court declared:

> It is well established that a presumption of reasonableness attaches to the action of an administrative agency and the party who challenges the validity of that action has the burden of showing that it was arbitrary, unreasonable or capricious. . . . Also, where the administrative record discloses a reasonable basis for findings and accordant administrative action, [the reviewing court's] duty is ordinarily to uphold such action.
>
> [175 *N.J. Super.* at 166 (citations omitted).]

Based upon the foregoing, it is clear that in a matter such as this, the burden of proof is on the petitioners, and the legal standard to be applied is that an action of a local school board that lies within the area of its discretionary powers may not be upset, unless patently arbitrary, without rational basis, or induced by improper motives, *Kopera, supra*, 60 *N.J. Super.* at 294. Applying this standard does not leave discretion in this tribunal to recommend, or in the case of the Commissioner of Education, to decide that a new judgment should be substituted. Thus, mere disagreement, if any, with the Board is insufficient legal grounds for substituting one's own judgment for that of the Board. The Board must first be found to have been arbitrary, capricious

or unreasonable for reversal or modification to occur. *See K.L. v. Bd. of Educ. of Matawan/Aberdeen High Sch. Dist.*, 91 *N.J.A.R.*2d (EDU) 74. The rationale for this deference to local boards of education appears to be twofold: (1) the ability of the local board of education as the fact-finder in the first instance to see and hear the witnesses and to determine credibility, and (2) the expertise of the local board with respect to its knowledge of local conditions and circumstances.

In *K.L., supra*, 91 *N.J.A.R.*2d (EDU) 74, the teacher made an inappropriate comment to the petitioner, following which the petitioner became angry, his face reddened, and he sat bolt-upright in his seat and threw a pen at the teacher. In a state of angry agitation the petitioner then left his seat, and addressed the teacher in a loud voice. In front of the other students, the petitioner then pushed the desk behind which the teacher was seated against the teacher until the teacher was forced, in his chair, against the wall. The petitioner persisted in pushing the chair, despite the continuing direction by the teacher to stop, and despite the teacher's exclamation to the petitioner that he was being hurt. The teacher could be seen at that time to have an expression of fear on his face. Afterwards, the teacher complained of pain, and continued to do so for about a week.

The ALJ held that given these circumstances it was not possible to find that the Board was arbitrary, capricious or unreasonable. The ALJ stated:

> It is fully believable that the atmosphere in [the teacher's] class fell well short of the mark. Similarly, it has been found that the teacher did make the provocative comment of which petitioner rightly complains. However, the competence or incompetence of the teacher is not at issue. Petitioner's behavior is. More importantly, the extent to which petitioner retaliated, as found above, justifies the Board's penalty. The Board's decision takes into account not only the offense, but the need for good order and a secure learning environment for all students. Petitioner had other avenues to pursue a remedy, outside physical force, not the least of which was to have his parents bring a formal complaint to school authorities. The Board's response, under these circumstances, cannot be seen as arbitrary, capricious or unreasonable. Petitioner's emphasis on his aptitude does not mitigate his misconduct. Neither would his marks, even if they were found to be superior.

> The inescapable fact is that petitioner resorted to physical aggression against a teacher. He did so in a classroom, taking a course he had failed twice before, in front of students considerably younger. His history in Matawan High, as demonstrated without persuasive rebuttal on the record, is consistent with past defiance of lawful direction. It is also consistent with believable testimony describing inappropriate and unwanted horseplay with younger students, and on one occasion, outright fighting. Against this background, expulsion is neither unreasonable, arbitrary nor capricious.
>
> [91 *N.J.A.R.*2d (EDU) at 76.]

In *L.B. v. Board of Education of the City of Elizabeth, Union County*, 95 *N.J.A.R.*2d (EDU) 110, *aff'd*, 95 *N.J.A.R.*2d (EDU) 253, the Board expelled student D.B. for brandishing a weapon and attempting to assault another high school student in violation of *N.J.S.A.* 18A:37-2. The ALJ found that D.B.'s assaultive conduct upon students, teachers and administrators in the hallway was no last-ditch effort to protect himself from harm, but he had armed himself long before he arrived at the classroom. He could have avoided confrontation entirely by simply leaving the scene and going elsewhere. The evidence failed to substantiate D.B.'s claim that he had acted only to defend himself. Thus, the ALJ held that the action of the Elizabeth Board of Education in expelling D.B. for egregious assaultive behavior in the high school was reasonable and proper. *Cf. Kobb v. Bd. of Educ., Township of Ocean*, 1980 *S.L.D.* 262-63 (welfare and safety of other pupils is paramount).

In *K.O.H. v. Board of Education, Township of Edison, Middlesex County*, 95 *N.J.A.R.*2d (EDU) 275, *aff'd*, 96 *N.J.A.R.*2d (EDU) 445, R.H. was charged with insubordination and physically assaulting a teacher. With respect to the decision of the Board to expel R.H., rather than to impose a lesser penalty, it was noted that R.H. had a long record of insubordination, tardiness, disrespect for authority, and initiating violent behavior; on one occasion she pushed another teacher in the chest. It was held that the Board gave a full and fair opportunity for the petitioner to present her case, including all mitigating circumstances, and its decision to expel, under the circumstances, including the need to protect its teachers from assault and students from violence, was found to be justified.

In *R.L. v. Board of Education, Kingsway Regional High School District, Gloucester County*, 95 *N.J.A.R.*2d (EDU) 296, the ALJ stated:

> The authority of a board of education to act is set forth in language appropriate for this matter in *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327, 332 (App. Div. 1965), where it is stated:
>
> > 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.
>
> There is no showing that the Board action in this matter is arbitrary or capricious. Consequently, it is not the province of this tribunal to determine whether it disagrees or agrees with the Board or to determine whether it would have decided the matter differently had it been a member of the Board or whether the decision is right or wrong.

However, the Board in *R.L.*, through counsel, stated that it was willing to change the expulsion to a long-term suspension and continue student B.L.'s homebound instruction until the end of school so that he would graduate; however, he could not participate in the graduation ceremony. That modification made by the Board was accepted by the ALJ and the Commissioner.

In the present matter, it is undisputed that O.N. was involved in an altercation with another student. This was established by the witnesses presented by the Board and not disputed or otherwise challenged by the petitioners. It is also undisputed that a teacher, acting in the performance of his duties, and in a situation where his authority was apparent, stepped in and attempted to restrain O.N. during this altercation. At the emergent relief hearing, the parents contended that the teacher's use of force was excessive and that in an attempt to get away from this excessive use of force, O.N. flailed her arms and accidentally struck the teacher. However, based on the testimony before me, that clearly was not the case, and I so **FIND**. Thus, based on the undisputed testimony in this matter, I **FIND** the following as fact:

1. On December 18, 2003, at approximately 7:35 a.m. there was an altercation in the 700 wing of Monmouth Regional High School, during which Coach Pingitore escorted O.N. away from the altercation and attempted to prevent O.N. from returning to the altercation.

2. O.N. was confronting Coach Pingitore when Coach Pingitore attempted to grab O.N.

3. When Coach Pingitore was unable to grab on to O.N.'s arms, he then held his hands out to prevent O.N. from returning to the scene of the altercation.

4. O.N. began taking swings at Coach Pingitore with a closed fist and she struck Coach Pingitore on the upper shoulder and on the left side of his head with approximately five blows landing.

5. Coach Pingitore had his hands up trying to calm O.N. down, but was unable to do so.

6. There was no one else near them when O.N. was hitting Coach Pingitore. She was hitting him and trying to get past him and she was in a rage.

7. O.N.'s striking of Coach Pingitore was intentional, because she was looking at him as she was striking him.

8. *N.J.S.A.* 2C:12-1 provides that a person is guilty of assault if he (or she) attempts to cause or purposely, knowingly, or recklessly causes bodily injury to another.

Based on the foregoing, it is clear that the Board of Education had a sufficient basis in fact and in the record to make the finding that O.N. was guilty of assaulting a teacher. Since the actions of the Board are entitled to a presumption of validity, and since the Board could have made a finding that O.N. was guilty of assaulting the teacher, I **FIND** that the petitioners herein have failed to meet their burden of showing that the action of the Board of Education in this matter was patently arbitrary, without rational basis, or induced by improper motives.

I feel it necessary to state that while I agree with the conclusion of the Board of Education that O.N. is guilty of intentionally striking a teacher, I would not have expelled O.N., but would have considered a long-term suspension. I acknowledge that local school districts cannot permit their teachers to be subjected to assaults by students, and that permitting such conduct in one case may be viewed as an invitation for other students to engage in the same type of conduct. However, I would have given significant consideration to the fact that O.N. is a good student with a clean record, that she expressed remorse for her actions by immediately seeking to apologize to Mr. Pingitore and by subsequently apologizing to him, and that at the hearing she did not seek to blame others for her actions. I believe that O.N. now realizes that such conduct cannot and will not be tolerated in the future. I also believe that O.N.'s parents would take all necessary steps to see to it that a similar incident does not occur in the future. O.N.'s parents were very supportive of their daughter, but also were fair in acknowledging the position of the Board of Education.

Despite these statements, the law is clear that it is not the province of this tribunal to determine whether it disagrees or agrees with the Board or to determine whether it would have decided the matter differently had it been a member of the Board, or whether the decision is right or wrong. Accordingly, I am constrained to **CONCLUDE** that the decision of the respondent Board of Education expelling O.N. must be **AFFIRMED**.

The only dispute at the plenary hearing of this matter was whether the placement being offered by the school district at MAECOM was adequate and appropriate. B.F. testified that when they went to visit MAECOM, O.N. was not allowed into the high school program, which they were told is just like the Monmouth Regional High School program. Further, she has been advised that the State does not have to waive the health and gym requirements for graduation. H.W., O.N.'s father, testified that the MAECOM program is a self-taught program where there is no actual teaching going on, and is inadequate. He also feels that O.N. must have health and gym in order to graduate from high school, and he does not believe the school district is able to waive the health and gym attendance requirements, and he feels that there is no alternative to home instruction at the present time. He feels there would be irreparable harm if O.N. loses a full year and he asks that she be allowed to return to the high school next year. O.N. also testified to the inadequacy of the MAECOM program. She went to MAECOM for several days and all they did

was test her. She was simply given the work to do, which she left in the teacher's mailbox when it was completed, and then she would leave. If she had any questions she had to ask another teacher because her regular teacher was not there. Most of the class consisted of adults and she was not learning anything.

However, school superintendent Patrick Collum testified that MAECOM is a fully acceptable alternative education program and graduates twelve to sixteen students per year. It is a comprehensive program and meets all core curriculum content standards. He certified that MAECOM meets all State guidelines. His testimony was supported by Sister Elizabeth Dalessio of the Monmouth-Ocean Educational Services Commission, which operates the MAECOM Adult High School, Tinton Falls, New Jersey. She indicated that O.N. will continue in an adult high school program, which is a full and comprehensive high school program and complies with all New Jersey core curriculum content standards. It differs from the regular high school in that its hours are flexible. It is a learning center environment with each of the students working under the guidance of a teacher; the work is done by the student and then reviewed with the teacher. Initially a student is tested to determine an appropriate placement and the testing is from four to six hours. The adult school is the same as the regular high school in course content. She testified that the adult high school is better than home instruction.

No school district witness responded directly to the parents' concerns as to the requirements for taking health and gym in order to graduate. Mr. Collum stated that the school district would comply with all applicable State requirements.

N.J.S.A. 18A:35-5 requires each board of education to conduct as a part of the instruction in the public schools courses in health, safety and physical education, which courses shall be adapted to the ages and capabilities of the pupils in the several grades and departments. *N.J.S.A.* 18A:35-7 requires every pupil, except kindergarten pupils, attending the public schools, insofar as he or she is physically fit and capable of doing so, as determined by the medical inspector, to take such courses, which shall be a part of the curriculum prescribed for the several grades, and the conduct and attainment of the pupils shall be marked as in other courses or subjects, and the standing of the pupil in connection therewith shall form a part of the requirements for promotion or graduation. *N.J.S.A.* 18A:35-8 states that the time devoted to such courses shall aggregate at

least two and one-half hours in each school week, or proportionately less when holidays fall within the week.

The State regulation that implements the foregoing statutory provisions is *N.J.A.C.* 6A:8-5.1(a)(1)(i)(5), which provides that district boards of education shall develop, adopt, and implement requirements for a State-endorsed diploma which include local high school graduation requirements including at least 3¾ credits in health, safety, and physical education during each year of enrollment, distributed as 150 minutes per week, as required by *N.J.S.A.* 18A:35-5, -7 and -8. *N.J.A.C.* 6:30-3.7(b)(1) relates to adult high schools and provides that the district board of education of each adult high school shall establish minimum credit requirements for graduation which shall meet the requirements of the district's regular high school and shall not be less than 110 credits for newly enrolled adults, and of the required credits, no more than 15 credits may be in physical education.

Based upon the foregoing provisions, it is clear that the MAECOM Adult High School Program is required to comply with statutory and regulatory requirements related to health and gym, and I so **FIND**. Therefore, I **FIND** that it would be appropriate to order the school district to see to it that these requirements are met in the case of O.N.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that since the petitioners herein have failed to meet their burden of showing that the action of the Board of Education in this matter was patently arbitrary, without rational basis, or induced by improper motives, the decision by the respondent Board of Education expelling O.N. as a student at Monmouth Regional High School is hereby **AFFIRMED**. It is further **ORDERED** that respondent shall be responsible for seeing to it that: (1) the MAECOM Adult High School Program complies with statutory and regulatory requirements related to health and gym; and (2) the alternative education program offered by the school district at the MAECOM Adult High School Program shall be required to satisfy the requirements of *P.H. v. Board of Education of the Borough of Bergenfield, Bergen County, supra*, OAL Dkt. No. EDU 7381-00, State Board of Education Decision on Motion (September 5, 2001) <http://lawlibrary.rutgers.edu/oal/search.html>.

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 (45) 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 (13) 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, 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 12, 2004
DATE

JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

5/12/04 mph
DATE

Mailed to Parties:

MAY 18 2004

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX

LIST OF WITNESSES

For petitioner:

B.F.

H.W.

O.N.

For respondent:

Joseph R. Pingitore

Sgt. Robert DeLaune

Andrew Francis Teeple

Patrick Collum

Sister Elizabeth Dalessio

LIST OF EXHIBITS

For petitioner:

None

For respondent:

None

OAL DKT. NO. EDU 67-04
AGENCY DKT. NO. 8-1/04

B.F., on behalf of minor child, O.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, the Commissioner concurs that petitioner has failed to meet her burden of proving that the action of the Board expelling her daughter for striking a teacher was arbitrary, capricious, unreasonable or induced by improper motives. Moreover, the Commissioner finds that the alternative education program offered by the Board is consistent with the requirements set forth by the State Board in *P.H., supra.*

Accordingly, the Initial Decision is adopted for the reasons expressed therein and the within petition is dismissed.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 6/28/04

Date of Mailing: 6/29/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

258-04

S.P., on behalf of minor child, S.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

June 28, 2004

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11701-03

AGENCY DKT. NO. 381-10/03

S.P. ON BEHALF OF MINOR CHILD, S.P.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON,

PASSAIC COUNTY,

Respondent.

No appearance by or on behalf of petitioner

Anthony D'Elia, Esq., for respondent, (Chasan, Leyner, Bariso & Lamparello, attorneys)

Record Closed: May 13, 2004 Decided: May 14, 2004

BEFORE **EDITH KLINGER**, ALJ:

On October 17, 2003, petitioner, S.P., filed a petition before the Commissioner of Education to compel the respondent, Board of Education of the City of Clifton (District), to provide her daughter, S.P., with a free public education in the District's schools pursuant to *N.J.S.A.* 18A:38-1b.

On November 20, 2003, the District filed its answer to the petition and cross claim for reimbursement of tuition. On December 19, 2003, the Department of

Education transmitted the matter to the Office of Administrative Law (OAL) 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.

A hearing was scheduled on April 20, 2004 at 9:00 a.m. at the Office of Administrative Law, 33 Washington Street, Newark, New Jersey. At the scheduled time, petitioner failed to appear and never contacted OAL to explain her non-appearance. Respondent's attorney appeared and, at the direction of the undersigned, submitted an affidavit, dated May 10, 2004, in support of respondent's uncontested counterclaim for tuition. The record closed on May 13, 2004 when the affidavit was received.

The burden of proof is on the parent to show that the child is entitled to a free public education in the District. *N.J.S.A.* 18A:38-1b(2). Since the parent, S.P., failed to appear, I **CONCLUDE** that she has failed to carry her burden and is entitled to no relief as a result of this appeal.

I, therefore, **CONCLUDE** that the District is entitled to tuition "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(2). This amount is to be collected in the manner in which orders of the commissioner are enforced. *Ibid.*

The Affidavit of Karen Perkins, the Business Administrator and Board Secretary for the District, stated that she reviewed the District's business records and she provided the following evidence. I **FIND** that:

1. S.P., the minor child in this matter, was enrolled in the Clifton school system between October 20, 2003 and November 21, 2003.

2. The annual per pupil cost for the minor child for that period of time at Clifton High School, the school of attendance, was $42.48 per day.

3. The total tuition due to the District is $934.56 (22 days x $42.28).

Based upon the above, I **CONCLUDE** that S.P. has failed to prove that her daughter, S.P., was entitled to a free public education in the City of Clifton between October 20, 2003 and November 21, 2003 and therefore petitioner S.P. is liable to the District for tuition in the amount of $934.56 for her daughter's school attendance during this period of ineligibility.

ORDER

It is, therefore, **ORDERED** that S.P. pay respondent tuition in the amount of $934.56, pursuant to *N.J.S.A.* 18A:38-1(b), for S.P.'s ineligible attendance in the District high school.

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 (45) 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 (13) 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, 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 14, 2004
DATE

EDITH KLINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

May 14, 2004
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 17 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Exhibits:

Affidavit of Karen Perkins

OAL DKT. NO. EDU 11701-03
AGENCY DKT. NO. 381-10/03

S.P., on behalf of minor child, S.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
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.

Upon careful and independent review of the record in this matter, the Commissioner concurs that petitioner has failed to carry her burden of demonstrating that S.P. is entitled to a free public education in respondent's district pursuant to *N.J.S.A.* 18A:38-1b(1).

Accordingly, the Petition of Appeal is dismissed. Pursuant to *N.J.S.A.* 18A:38-1b(1), the Commissioner directs that petitioner remit to the Board $934.56 representing tuition for S.P.'s ineligible attendance in the district from October 20, 2003 until November 21, 2003.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/28/04

Date of Mailing: 6/29/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

260-04

#260-04

E.C., on behalf of minor child, M.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 30, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2263-04

AGENCY DKT. NO. 41-2/04

E.C. O/B/O M.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX,

Respondent.

E.C., parent, *pro se*

John F. McDonnell, Esq., for respondent (McDonnell Antiglieve)

Record Closed: May 13, 2004 Decided: May 13, 2004

BEFORE **DOUGLAS H. HURD,** ALJ:

This matter was transmitted to the Office of Administrative Law on March 31, 2004, 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 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 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 (45) 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.

5-13-04

DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

5-18-04

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 19 2004

DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/lam

E.C. O/B/O M.T.
Petitioner

vs.

Borough of Middlesex
Board of Education,
Respondent

Office of Administrative Law
OAL Docket No. EDUOS
02263-2004S

Agency Ref. No. 41-2/04

CONSENT ORDER

This matter having come before the Court for a hearing on May 13, 2004, and the parties having agreed to resolve the matter during the Hearing; and the Parties having consented to the following:

1) Petitioner Eva Cunningham and Mr. and Mrs. Michael Taylor hereby agree that Michael Brandon Taylor is not eligible to attend Middlesex High School on a free basis pursuant to NJSA 18A:38-1 and he will not seek to enroll in Middlesex High School on a free basis for the 2004-2005 school year;

2) In exchange for the above agreement, Middlesex Board of Education agrees to forego and waive any tuition owed for the 2002-2003 & 2003-2004 school years and allow Michael Brandon Taylor to remain a student in Middlesex High School until the end of the 2003-2004 school

year;

3) On or before September 1, 2004 Mrs Sharon Taylor shall inform the Superintendent of the Middlesex Schools in writing of the name and address of the school district or other school in which Michael is enrolled for the 2004-2005 school year.

The parties hereby consent to the form and entry of this Consent Order.

Eva Cunningham

Eva Cunningham

Michael Taylor

Michael Taylor

Sharon Taylor

Sharon Taylor

Dated: 5/13/04

John F. McDonnell, Esq. for the Middlesex Borough Bd of Ed.

It Is So Ordered

OAL DKT. NO. EDU 2263-04
AGENCY DKT. NO. 41-2/04

E.C., on behalf of minor child, M.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Consent Order, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/30/04

Date of Mailing: 6/30/04

262-04

#262-04

EAST BRUNSWICK EDUCATION ASSOCIATION, on behalf of WILLIAM CZOK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

July 1, 2004

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

July 1, 2004

Nancy I. Oxfeld, Esq.
Oxfeld Cohen
60 Park Place, 6th Floor
Newark, NJ 07102-5504

Martin R. Pachman, Esq.
60 East Main Street
Freehold, NJ 07728

EAST BRUNSWICK EDUCATION ASSOCIATION, ON BEHALF OF WILLIAM CZOK V. BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY, AGENCY DKT. NO. 344-9/03, OAL DKT. NO. EDU 8678-03

Dear Parties:

We are enclosing a copy of the decision of the Commissioner of Education dated, July 1, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/dec ltr/Czokolddecltr.
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8678-03

AGENCY DKT. NO. 344-9/03

EAST BRUNSWICK EDUCATION ASSOCIATION, on behalf of WILLIAM CZOK,

Petitioner,

v.

BOARD OF EDUCATION OF EAST BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Martin R. Pachman, Esq., for respondent

Record Closed: May 19, 2004 Decided: May 19, 2004

BEFORE **RICHARD F. WELLS**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 26, 2003, for determination as contested cases, 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 indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the settlement agreement and the terms thereof 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 settlement 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 (45) 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.

5-19-04
DATE

RICHARD F. WELLS, ALJ

Receipt Acknowledged:

5-25-04
DATE

M. Kathleen Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 26 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

jh

OXFELD COHEN, PC
60 Park Place, 6th Floor
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

RECEIVED
2004 MAY 19 A 11:46
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY
AGENCY DKT. NO. 334-9/03
OAL DKT. NO. EDUOA 08678-2003S

EAST BRUNSWICK EDUCATION ASSOCIATION, on behalf of WILLIAM CZOK,

Petitioner,

-vs-

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK,

Respondent.

SETTLEMENT AGREEMENT

The above matter having been amicably resolved between the parties, it is hereby agreed as follows:

1. William Czok, on the date of his termination, June 26, 2003, was a tenured employee of the Respondent;

2. William Czok's termination as of June 26, 2003 was therefore improper;

3. William Czok is entitled to no back pay or other benefits as a result of his termination in violation of the tenure laws by reason of the following: (a) his retirement effective July 1, 2003 extinguished any right of William Czok to return to employment with the East Brunswick Board of Education; and (b) as a result of his unavailability for work from the date of his last paycheck, and due to the fact that as of that date he was

entitled to no more paid leave days, he is entitled to no back pay between the date of his last paycheck and the effective of his retirement, July 1, 2003.

4. This Agreement represents a final agreement as to all issues set forth in this matter.

OXFELD COHEN, PC
Attorneys for Petitioner
By:

NANCY I. OXFELD, ESQ.

Dated: 5/12/04

MARTIN R. PACHMAN, PC
Attorneys for Respondent
By:

MARTIN R. PACHMAN, ESQ.

Dated: May 5, 2004

/

3b

OAL DKT. NO. EDU 8678-03
AGENCY DKT. NO. 344-9/03

EAST BRUNSWICK EDUCATION ASSOCIATION, on behalf of WILLIAM CZOK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/01/04

Date of Mailing: 7/01/04

264-04

#264-04

IN THE MATTER OF THE TENURE	:	
HEARING OF RICARDO HINOSTROZA,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ELIZABETH, UNION COUNTY.	:	
_____	:	

July 1, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1683-04

AGENCY DKT. NO. 17-1/04

IN THE MATTER OF THE TENURE HEARING OF RICHARDO HINOSTROZA, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY

Timothy R. Smith, Esq., for petitioner
(LaRocca, Feeley & Smith, attorneys)

Mary E. Hennessy, Shotter, Esq., for respondent
(The Murphy Law Firm, LLC, attorneys)

Record Closed: May 13, 2004 Decided: May 17, 2004

BEFORE **BARRY N. FRANK**, ALJ:

On February 18, 2004 this 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 hearing on March 2, 2004 and continued to April 7, 2004. During the April 7, 2004 hearing, the parties agreed to settle the matter. A signed copy of the Settlement Agreement was forwarded to the OAL on May 13, 2004 and is attached hereto.

I have reviewed the record and terms of the attached settlement/dismissal 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 (45) 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 17, 2004
DATE

BARRY N. FRANK, ALJ

Receipt Acknowledged:

5-19-04
DATE

M. Kathleen Duncan/CH
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 20 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

THE MURRAY LAW FIRM, LLC
3 Revmont Drive, Suite 318
Shrewsbury, New Jersey 07702
(732) 389-1010
Attorneys for Petitioner, Elizabeth Board of Education

IN THE MATTER OF THE TENURE HEARING OF RICARDO HINOSTROZA, BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY.	**STATE OF NEW JERSEY, OFFICE OF ADMINISTRATIVE L AW** **AGENCY REF NO. 17-1/04** **OAL DOCKET NO:** **EDUTH 01683-2004N** **SETTLEMENT AGREEMENT**

INTRODUCTION

Counsel for the Elizabeth Board of Education (hereinafter "Board") and counsel for its tenured employee Ricardo Hinostroza join in moving for an order finding that the following Settlement Agreement between the parties meets the requirement of N.J.A.C. 1:1-19.1, recommending that the attached Settlement Agreement be adopted by the Commissioner of Education, and ordering on condition that the Commissioner approves the Settlement Agreement without modification, that the Settlement Agreement be implemented and the tenure charges filed by the Board, be withdrawn and this matter be dismissed.

SETTLEMENT AGREEMENT IN THE ACTION PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Board and Mr. Hinostroza.

I. STATEMENT OF INTENT

On January 20, 2004, the Board filed tenure charges against Mr. Hinostroza with the

Commissioner of Education captioned In the Matter of the Tenure Hearing of Ricardo Hinostroza, Board of Education of the City of Elizabeth, Union County, OAL Docket No. EDUTH 01683-2004N , Agency Ref. No. 17-1/04; and

WHEREAS this Agreement is the end product of settlement negotiations conducted by the parties and is intended to fully and finally dispose of the issues in controversy as based upon the mutual understanding set forth below;

II. DISMISSAL OF TENURE CHARGES

The Board shall withdraw the pending tenure case against Mr. Hinostroza. The Board shall take all necessary actions to notify the Clerk of the Office of the Administrative Law and the Administrative Law Judge that it is withdrawing the tenure charges. The Board's withdrawal of the tenure charges is predicated upon Mr. Hinostroza satisfying his obligations under Section III of this Agreement.

III. DRUG TESTING DURING EMPLOYMENT

It is agreed that Mr. Hinostroza shall submit to a drug test at a lab of the Board's choosing within five (5) days of executing this Settlement Agreement. It is further agreed that Mr. Hinostroza shall be subject to random drug tests for a period of one (1) year from the time he returns to employment.

IV. COMMISSIONER OF EDUCATION APPROVAL

The Board of Education and Mr. Hinostroza acknowledge that this Settlement Agreement must be approved by the Commissioner of Education. While the Commissioner's approval is pending, Mr. Hinostroza's suspension shall be converted to with pay effective April 1, 2004. Mr. Hinostroza may return to his work site upon the approval of this agreement by the Commissioner of Education.

V. SETTLEMENT

The parties have agreed to settle this case to save the time and expense of an expedited hearing. The Board also has agreed to settle this matter due to the downgrading of the criminal charges against Mr. Hinostroza, lack of a lab evidence report, failure of the arresting officers to testify and subsequent dismissal of all criminal charges by the Municipal Prosecutor.

VI. AGREEMENT MAY NOT BE USED AS EVIDENCE IN ANY SUBSEQUENT PROCEEDING

The Board and Mr. Hinostroza agree that this Agreement shall not be used as evidence in any subsequent proceeding should the Commissioner not approve the terms and conditions agreed hereto by the parties.

VII. VOLUNTARINESS OF AGREEMENT

The signatories to this Agreement certify that they have read the terms of this Agreement, that they have had the opportunity to discuss the terms with their respective attorneys, are satisfied with the services of their respective attorneys in connection therewith, and that they understand the terms of this Agreement and its effects. The signatories to this Agreement acknowledge further that they are executing it of their own volition, with full understanding of its terms and effects, and with the intention of releasing all claims herein for consideration which they acknowledge is adequate and satisfactory to them. The signatories to this Agreement further acknowledge that they have not received any representations concerning its terms and effects other than those contained herein. The signatories to this Agreement acknowledge that they enter into it with a full understanding of their rights. The signatories acknowledge that the Commissioner of Education may still make a determination on the charges that were filed against Mr. Hinostroza. The signatories further acknowledge that Mr. Hinostroza was advised of the Commissioner's duty, pursuant to N.J.A.C. 6:11-3.6, to refer tenure determinations for possible revocation of any teaching certificate which may

be held by Mr. Hinostroza.

VIII. ENTIRE AGREEMENT

This Agreement represents the full and entire agreement between the Board and Mr. Hinostroza. It can only be modified by a written agreement between the parties. It is binding upon the Board and its officers, agents, servants and employees as well as their successors and assigns. It is binding upon Mr. Hinostroza as well as his heirs, executors and administrators.

IX. BINDING AGREEMENT

Intending to be legally bound hereby, the Board and Mr. Hinostroza execute the foregoing Agreement.

FOR THE ELIZABETH BOARD OF EDUCATION

By: Mary E. Hennessy-Shotter
Mary E. Hennessy-Shotter, Esq.
Attorney for the Petitioner

Date: 5/12/04

FOR RICARDO HINOSTROZA:

By: T. R. Smith
Timothy Smith, Esq.
Attorney for Respondent

Date: 5-10-04

Ricardo P. Hinostroza
Ricardo Hinostroza

Date: 5-10-04

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O
P
Y

BOARD OF EDUCATION

RESOLUTION

SETTLEMENT AGREEMENT BETWEEN THE
ELIZABETH BOARD OF EDUCATION AND RICARDO HINOSTROZA

WHEREAS, Ricardo Hinostroza is a tenured custodian with the Elizabeth Board of Education;

WHEREAS, the Elizabeth Board of Education filed tenure charges against Ricardo Hinostroza with the Commissioner of Education based upon his arrest by the Elizabeth Police Department;

WHEREAS, all criminal charges against Mr. Hinostroza were dismissed by the Prosecutor;

WHEREAS, the Board of Education and Mr. Hinostroza desire to amicably resolve the litigation between them due to the favorable outcome of the criminal case;

WHEREAS, Mr. Hinostroza has agreed to the terms and conditions set forth by the Board of Education to settle the matter in controversy including a random drug test prior to returning to work and at the continued discretion of the District for a period of one (1) year;

WHEREAS, the Commissioner of Education has to approve the proposed settlement between Mr. Hinostroza and the Elizabeth Board of Education prior to Mr. Hinostroza returning to work;

WHEREAS, Mr. Hinostroza understands and agrees that a positive drug voids any and all terms of his settlement agreement;

NOW THEREFORE, BE IT RESOLVED, by the Board of Education of the City of Elizabeth that the Board will settle the tenure litigation involving Mr. Hinostroza in accordance with the terms and conditions set forth in the Agreement between Mr. Hinostroza and the Board of Education to be approved by the Commissioner of Education. Pending the Commissioner's approval, Ricardo Hinostroza shall remain suspended, with pay, effective April 1, 2004.

Elizabeth, New Jersey
April 29, 2004

3e

OAL DKT. NO EDU 1683-04
AGENCY DKT. NO. 17-1/04

IN THE MATTER OF THE TENURE	:	
HEARING OF RICARDO HINOSTROZA,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ELIZABETH, UNION COUNTY.	:	
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/01/04

Date of Mailing: 7/01/04

265-04

#265-04

ERNEST WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 06860-03S

AGENCY DKT. NO. 329-8/03

ERNEST WILLIAMS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,

Respondent.

Mary L. Crangle, Esq., for petitioner (Jennings Sigmond, attorneys)

Karen A. Murray, Esq., for respondent (The Murray Law Firm, attorneys)

Record Closed: May 13, 2004 Decided: May 17, 2004

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the filing of a Petition of Appeal by Ernest Williams ("petitioner"), to the Commissioner of Education challenging a determination of the Board of Education of the City of Camden, Camden County, ("respondent") to withhold his increment for the 2003-2004 school year. The case was transmitted to the Office of Administrative Law ("OAL") from the Department of Education on October 2, 2003, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to –13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement, which was approved by the Camden Board of Education by Resolution #300-SY'03 on May 3, 2004, both of which are attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their 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 (45) 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 17, 2004
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

5-19-04
DATE

M. Kathleen Duncan/OR
DEPARTMENT OF EDUCATION

MAY 20 2004
DATE

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

Attachments
mjm

In the Matter Of

ERNEST WILLIAMS

and

CITY OF CAMDEN BOARD
OF EDUCATION, CAMDEN COUNTY

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
Docket No. EDUOA 06860-2003S
Agency Ref. No. 329-8/03

SETTLEMENT AGREEMENT

This Agreement, made and entered into this _____ day of April, 2004, by and between Ernest Williams and the City of Camden Board of Education, Camden County ("Board") is intended to amicably resolve the dispute between the parties in the above captioned matter pursuant to the following terms:

1. The Board will withhold Ernest Williams' increment for the 2003-2004 school year in a maximum amount of $1,000. Mr. Williams will remain at the top step on the salary guide for his position. Having received a satisfactory evaluation for the 2003-2004 school year, Ernest Williams will be entitled to receive his full increment for the 2004-2005 academic year and thereafter and be paid the negotiated salary for his position at the top step of the applicable salary guide.

2. The parties agree that this Agreement resolves all claims between the parties arising from the allegations set forth in the instant Petition currently pending before the Commissioner of Education.

3. The parties further agree that they have been duly represented by their respective attorneys and that they have voluntarily, without coercion, consented to the resolution of this matter in accordance with the terms as set forth above.

4. This Agreement contains all of the terms of the parties' Agreement and cannot be modified or changed unless all parties agree to do so in writing.

5. The parties agree that this Agreement is non-precedential; shall be kept confidential and shall not be used by any party in any other litigation or forum.

IN WITNESS WHEREOF, the parties have signed, delivered and acknowledged this Agreement.

For the Camden Board of Education

For Ernest Williams

Dated: 4/22/04

Witness: Mary E. Hennessy-Slotter

Dated: 4/23/04

Witness: Mary L. Clough

RESOLUTION
#300-SY '03
SETTLEMENT AGREEMENT
(DOCKET NO. EDU-OA-06860-2003S)
(EW)

WHEREAS, the Camden Board of Education (Board) and EW have negotiated a settlement of EDU-OA-06860-2003S to save the expense and time of a hearing and associated litigation costs;

WHEREAS, EW has agreed to the terms of this Agreement;

NOW, THEREFORE, BE IT RESOLVED, the Board hereby agrees to accept the terms of the confidential agreement, which shall be on file with the Board Secretary's office.

Adopted: May 3, 2004

CERTIFICATION

I, **N. JOHN AMATO**, SCHOOL BUSINESS ADMINISTRATOR/BOARD SECRETARY OF THE BOARD OF EDUCATION OF THE CITY OF CAMDEN, IN THE COUNTY OF CAMDEN, STATE OF NEW JERSEY, **HEREBY CERTIFY** THAT THE FOREGOING ANNEXED EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF SAID CITY DULY CALLED AND HELD ON **Monday, MAY 3, 2004**, HAS BEEN COMPARED BY ME WITH THE ORIGINAL MINUTES AS OFFICIALLY RECORDED IN MY OFFICE IN THE MINUTE BOOK OF SAID BOARD OF EDUCATION AND IS A TRUE, COMPLETE AND CORRECT COPY THEREOF AND OF THE WHOLE OF SAID ORIGINAL MINUTES SO FAR AS THE SAME RELATES TO THE SUBJECT MATTERS REFERRED TO IN SAID EXTRACT.

IN WITNESS WHEREOF, *I HAVE SET MY HAND AND AFFIXED THE CORPORATE SEAL OF SAID BOARD OF EDUCATION THIS 4TH DAY OF MAY, 2004*

School Business Administrator/Board Secretary

OAL DKT. NO. EDU 06860-03
AGENCY DKT. NO. 329-8/03

ERNEST WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/01/04

Date of Mailing: 7/02/04

266-04

#266-04

A.L.D., on behalf of minor child, N.D.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE NORTHERN BURLINGTON REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning parent appealed the Board's refusal to allow her son to play on the exclusively female middle school lacrosse team.

The ALJ concluded that the Board could legally limit participation on the lacrosse team to females. Citing the appellate decision in *B.C.*, which stands for the proposition that the exclusion of boys from girls' athletic teams is permissible under the Federal and State Constitutions and the Law Against Discrimination, as well as the ban on gender discrimination in education law, the ALJ determined the Board's action was not arbitrary or capricious.

The Commissioner adopted the Initial Decision as his own. 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.

July 1, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02401-04S
AGENCY DKT. NO. 98-3/04

A.L.D., ON BEHALF OF MINOR CHILD, N.D.,
Petitioner,
v.
BOARD OF EDUCATION OF THE NORTHERN BURLINGTON REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,
Respondent.

A.L.D., petitioner, *pro se,* on behalf of minor child **N.D.**

Frank P. Cavallo, Jr., for respondent (Parker McCay & Criscuolo, attorneys)

Record Closed: May 20, 2004 Decided: May 24, 2004

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from a petition filed with the Commissioner of Education ("Commissioner") by A.L.D., acting on behalf of her minor son, N.D., an eighth grade student at the respondent District's Middle School. The petition asserts that N.D. was excluded from participation in the school's lacrosse team on the grounds that the team was a "girl's team." The Board of Education replied to the petition, asserting that its conduct in excluding males from the lacrosse team was lawful, relying specifically upon case law, citing the Appellate Division decision of *B.C., o/b/o C.C. v. Board of Education, Cumberland Regional School District and New Jersey State Interscholastic Athletic Association*, 220 *N.J. Super.* 214 (App. Div. 1987) (hereinafter "*B.C.*"). The Commissioner transmitted the case to the Office of Administrative Law ("OAL") for a contested case hearing. In a letter dated March 12, 2004, the Director of the Bureau of Controversies and Disputes advised the parties that the case was being transferred to

the OAL "for development of legal argument and such fact-finding as is necessitated by the Board's contention that it is specifically in compliance with *N.J.A.C.* 6A:7-1.9(d)2." The letter also noted the need for prompt resolution of the dispute and therefore recommended priority scheduling and agreed that the Commissioner would consent to accelerated proceedings if the parties and the OAL so determine pursuant to *N.J.A.C.* 1:1-9.4.[i] Despite this, for reasons unknown to this judge, the file was not transmitted to the OAL until April 5, 2004. It was assigned to this judge on April 15 and a conference call was set up for April 21. During that call counsel for the Board related the Board's belief that its actions were entirely lawful under the *B.C.* decision, which had interpreted constitutional law, state statute and regulations. He indicated that in his opinion the Board's action was therefore defensible as a matter of law and that the appropriate method for resolving the case was a motion for summary decision, as permitted by *N.J.A.C.* 1:1-12.5. By letter dated April 27, I outlined to the *pro se* litigant and the Board's attorney my understanding of the content of our April 21 discussion and the issues that appeared to be presented in the case, and I set a schedule for the submission of the motion. In the letter the exact date for the submission by the Board of its motion was not stated; however, as counsel for the Board later acknowledged, the understanding during the telephone conference (an understanding which he refers to as "informal") was that the motion would be filed by April 30, with the response due, as stated in the letter, within one week of receipt of the Board's brief. However, counsel later wrote on May 4 that as a result of his involvement in several special education proceedings involving emergent relief he had been unable to comply with the "informal" schedule and requested to file his brief by May 14. After discussions with A.L.D., it was agreed that she would have the same week to file a response to the brief as had been previously allowed. The Board's brief was actually received on May 17 and the response thereto on May 20.[ii]

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[i] This regulation provides that with the consent of the parties, the judge and the transmitting agency head, the time in which the judge must issue an initial decision is restricted to 15 days following the conclusion of the hearing and the agency head must then decide the matter within 15 days of receipt to the initial decision. Prehearing motions, such as the motion for summary decision filed in this case, are not permitted, except if requested by the judge. As will be explained, given the legal context of this case, the filing of such a motion was a proper means of seeking to rapidly resolve the case.

[ii] While the delay herein is most unfortunate, and it is recognized the lacrosse season has largely passed, counsel for the Board agreed that he would not argue that this matter was moot. Given that the delay was in no way attributable to the petitioner, counsel's position is indeed appropriate.

SUMMARY DECISION

Summary decision is a legal process designed to permit the early resolution of controversies in which the facts material to the dispute are not in controversy and the law is sufficiently settled so that a decision may be rendered upon those undisputed material facts. The New Jersey Supreme Court defined the standard for determining motions for summary decision in *Robin 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, as before, 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 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, supra.*, at 75 (citations omitted). The *Brill* decision focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." *Brill, supra.* 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 v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 251-52, 106 *S.Ct.* 2505, 2512, 91 *L.Ed.*2d 202, 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 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.

In the present case, the Board of Education contends in its motion for summary decision that the issue raised by the petitioner has been settled as a matter of law by a previous ruling of an appellate court, *B.C., supra.*, that is binding both on the administrative law judge and the Commissioner and State Board of Education. In order to determine whether the motion is appropriately granted or denied, that decision and the facts asserted as to the current case must each be examined to determine whether the agreed upon or disputed facts relevant herein, materially impact upon the legal effect of the prior ruling. If the material facts relevant to this case are sufficiently similar to the facts that were before the court in *B.C.*, then the legal analysis therein must be applied to these facts to see if they apply. If there are instead factual differences of a material nature, that is, in this context, factual differences that could limit the applicability or eliminate the underpinnings of the prior ruling, then it is necessary to consider the legal issues anew, and to the extent that these material facts are in dispute between the parties, a hearing with testimony would be required before the ultimate legal ruling could be rendered.

DISCUSSION

There are certain facts that are apparently not in dispute herein. The petitioner's son and other boys sought to participate on the lacrosse team. After they at first may have been led to think that they could participate, the school officials denied them the right to do so. It is also undisputed that at least one or two of the teams from other school districts that the lacrosse team competes against do allow boys to participate on their lacrosse teams.

THE *B.C.* DECISION

In *B.C.*, the Commissioner of Education ruled that C.C., a male high school student at Cumberland Regional High School, would not be permitted to play on the girl's field hockey

team at that school. The Appellate Division found that the issue presented on appeal was whether the Commissioner was correct in holding that the policy of the New Jersey State Interscholastic Athletic Association ("NJSIAA") of prohibiting boys from playing on girl's field hockey teams did not deprive C.C. of his rights under the Fourteenth Amendment to the United States Constitution, the New Jersey Constitution, the New Jersey Law Against Discrimination ("LAD"), *N.J.S.A.* 10:5-1 *et seq.*, and/or *N.J.S.A.* 18A:36-20, a statute pertaining to equal rights within the educational system. Reviewing the record below, which had included extensive expert testimony before an administrative law judge, the court concluded that there was no violation of the Constitution, the LAD or the Title 18A statutory provision when a school district excluded males from female teams.

The court noted that the NJSIAA policy was adopted in 1985. It provided: "1. Males shall be excluded from female athletic teams although there are no teams for boys in the same sport until such time as both sexes are afforded overall equal athletic opportunities." It further stated: "The purposes of section 1 are twofold: (1) the promotion of equal athletic opportunities for females, and (2) to redress the effects of past discrimination and disparate treatment relating to girls' athletics. If boys are permitted to participate on girls' interscholastic athletic teams there would be a substantial risk that boys would dominate the girls' program and thus cause a displacement of girls from participating on those teams. Any displacement of girls from those teams would further limit their opportunities for participation in interscholastic athletics. Further, this policy is constitutionally sound because males have historically enjoyed greater athletic opportunities than have girls. Similarly, boys currently have ample opportunity for participation in interscholastic sports and sufficient avenues for interscholastic participation." The Commissioner of Education neither approved or disapproved this statement within twenty days and as such it became policy in accordance with *N.J.S.A.* 18A:11-5.[iii]

The *B.C.* court reviewed the legality of this regulation in light of the significant expert testimony received at the hearing. In the end, the court found that the determination of whether a constitutional deprivation of rights had occurred had to be judged under the differing standards applicable for Fourteenth Amendment violations under the United States Constitution and

[iii] This regulation provides for Commissioner review of such policies, statements and regulations, but if no action occurs within 20 days, such matters become official.

possible violations of the New Jersey State Constitution. The Fourteenth Amendment extends the requirement that citizens receive the equal protection of the laws to the States. In regard to classifications based upon gender, these are judged under an "intermediate scrutiny" test that requires that the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 *U.S.* 190, 197, 97 *S.Ct.* 451, 457, 50 *L.Ed.*2d 397 (1976). The court viewed the objective to be served as the promotion of overall athletic equality for both sexes. The court was convinced that, in view of the fact that "overall athletic opportunities for females have been and continue to be less than those provided for males," the "challenged determination operates to achieve equality of athletic opportunity for both sexes and to rectify the historical denial of athletic opportunities for women." Id. at 225. The regulation "prevents males from dominating and displacing females from meaningful participation in available athletic opportunities." As such, it did not violate the Fourteenth Amendment. *Id.* at 223.

As for the State Constitution, the court noted that the phrase "equal protection" does not appear in the New Jersey Constitution. However, "it has long been recognized . . . that Article I, paragraph 1 of the State Constitution, like the Fourteenth Amendment, seeks to protect against injustice and against the unequal treatment of those who should be treated alike." *Greenberg v. Kimmelman*, 99 *N.J.* 552, 568 (1985). In considering whether a violation of this provision occurred, the New Jersey Supreme Court has employed a "balancing test." This is measured by examining the nature of the right affected, the extent to which the governmental restriction intrudes upon the right and the public need for the restriction. *Greenberg, supra* at 567. Utilizing this test, the court held that in balancing C.C.'s right not to be discriminated against on the basis of sex against the public need to promote equalization of athletic opportunities, the governmental interest was advanced by the exclusion of C.C. "If C.C. is permitted to play on the girls' field hockey team, his personal interest would be attained at the expense of denying females the right to have equality of athletic opportunities with their male counterparts." *Id.* at 227. Thus, the court saw no violation of the New Jersey Constitution arises from the implementation of the policy.

The court also rejected the allegation that the exclusion violated the LAD. The LAD has been construed to "permit reasonable restrictions which promote important governmental

objectives." Similarly, as to *N.J.S.A.* 18A:36-20, which precludes discrimination based upon gender in education, the court noted that it had construed that statute to "simply extend the New Jersey constitutional bases of proscribed discrimination in respect to student opportunities to include gender in the education system. *Hinfey v. Matawan Regional Board of Education*, 147 *N.J. Super.* 201, 371 *A.*2d 78 (app. Div. 1977) rev'd on other grounds 77 *N.*J. 514, 391 *A.*2d 899 (1978)."

Thus, *B.C.* stands for the proposition that the exclusion of boys from girls' interscholastic athletic teams is permissible under the Federal and State Constitutions and the LAD and the statutory ban on gender discrimination in education.

ANALYSIS

In the present matter, the sport is not field hockey; instead it is lacrosse. The students are not in high school, but are in a middle school. It is asserted by petitioner in her brief that this age/class level difference is important because "students in high school are more developed physically and emotionally then middle school students. . . . In middle school the physical and emotional development of both sexes is much more varied than by the time one has reached grades 9th, 10th, 11th and 12th." She also argues that since the case does not involve secondary school teams, the NJSIAA regulation does not apply. Additionally, she notes that in *B.C.* other schools within the district complained about a boy playing on the girl's team, while in the present case it was the school itself that acted to bar her son and the other boys, prior to any such outside complaint. Also, she states that the "displacement" issue is not present here, as it was in *B.C.*, for she claims that the Middle School "by history has a no cut policy to allow everyone who is interested in an activity a chance to participate." She states that the very reason given as to why Mrs. Dunham, the Middle School principal, had at first told the boys who expressed interest in the lacrosse team that they could participate was because of Dunham's "belief that all children should be given an opportunity to participate." A.L.D. adds, "Therefore, there is no indication that allowing the four boys access to the team would have displaced or denied the girls an opportunity to play."

The petitioner argues that the action of the respondent was arbitrary and capricious. She cites the Board's athletic competition policy, #2431, and language from the Middle School's Student/Parent Handbook for 2003-2004. The first reference deals with high school students, while the latter is clearly addressed to the Middle School population, and this suggests that the Board sees the high school situation as separate from that of the Middle School regarding athletic participation. She also notes that the Middle School did not list lacrosse as a "female sport" on its web site, whereas soccer and basketball are listed as boys or girls.

It must be noted that in regard to this motion for summary decision, neither party has filed any certifications or affidavits in support of their respective positions.[iv] To the extent that the Board believes that its right to a favorable decision is established by the *B.C.* decision, it is understandable that it did not see any need to supplement its arguments with affidavits or certifications regarding factual matters. As for the *pro se* litigant, to the extent that her letter brief asserts facts that she believes are important in distinguishing this case from *B.C.* and others in its line, the absence of affidavits or certifications is troubling, as factual allegations must be made through persons having direct knowledge of the facts asserted. However, as will be explained, despite the absence of appropriate evidence to establish the differing facts asserted, in the end, I do not find the factual issues raised by the petitioner to be sufficient to remove this case from the reach and control of *B.C.*

That this case involves a different sport than the field hockey at issue in *B.C.* is of no moment. Lacrosse, even if played under rules that are adapted to a game played by females, is still a sport in which sticks are utilized by the players and physical contact is not absent from the game. While no evidence has been presented that might arguably demonstrate any differences in the sports that could possibly lead to a conclusion that this form of lacrosse was materially different than the field hockey at issue in *B.C.*, I fail to see that any genuine difference in the outcome could arise. The reasons why the Appellate Division determined as it did turn far more

[iv] *N.J.A.C.* 1:1-12.4 requires that motions and answering papers shall be accompanied by all necessary supporting affidavits and briefs or supporting statements. To the extent that the petitioner, in opposing the motion for summary decision, relies on alleged disputes of material facts, affidavits or certifications from persons with personal knowledge of such facts would be required in order to establish a proper foundation upon which the judge could determine that such disputes did exist. The statements of counsel, or *pro se* litigants, as to facts not personally known to them, are not evidential, but fall within the realm of argument. However, as explained in the text above, given the legal context herein, the lack of such evidential materials is not crucial to determination of either the motion or the case.

on issues of public policy regarding civil rights and past discrimination in the world of sports than on the actual specifics of the game or games. In essence, the ruling reflects an understanding that in the past women were denied the ability to participate in sports to such a degree that constitutional guarantees against discrimination are implicated, calling for a redress of past wrongs and therefore allowing what would otherwise be prohibited discrimination against males to exist as a necessary means of allowing such redress to occur. As the court noted, if males are permitted to participate on girls' teams they will displace females who are the very persons for whom redress is necessary. These public policy concerns do not change between field hockey and lacrosse. As for the difference in the age and school grade levels, while the *B.C.* case and the NJSIAA policy speak to secondary schools, the policy grounds upon which they are founded cannot reasonably be said to be inapplicable to interscholastic competitions involving females at the junior high or middle school level. Nothing regarding these policy reasons suggests that there is less reason to seek to redress the past discrimination or to promote equal athletic opportunities for girls in the middle school years than for older girls in high school; indeed it is certainly within common knowledge that to the extent that students may choose to participate in sports at the high school level, the opportunities to do so at younger levels provide an introduction to and encouragement for such later participation. As for the possibility that a no cut policy might make a difference, while the fact that all males and females may be allowed to remain on the team may mitigate to a degree the displacement that would clearly occur if the number of team members were limited and boys were permitted to take up slots on the team, it is nevertheless still true that any boys who are team members and play any minutes during a lacrosse game must do so at the expense of a girl playing those minutes. This is just as much displacement, and *B.C.* directly cites displacement as a problem directly addressed by a policy excluding males. The policy that avoids displacement directly serves a public purpose and as such, is allowable under Fourteenth Amendment jurisprudence.

It is difficult to see how a school board can be said to act in an arbitrary and capricious manner when it follows existing law. While the District may not have officially designated lacrosse as a "girl's team" sport on its website or in its Handbook, there is nothing that suggests it could not lawfully decide, when confronted with the question, that it would do what the law said it could. While other school districts may have made different choices and allowed males to play on lacrosse teams that are largely made up of female students, their choice to do what the

law neither requires them to do, or not to do what some might say the law favors (that is, limit participation to girls only), does not in any way prevent this district from deciding not to allow what it was not legally required to allow. Indeed, given the rationale for exclusion, as identified and supported by *B.C.* and the cases cited therein, it could be argued that a school district that allowed males to participate on "girls' teams would open itself up to litigation charging it with ignoring its obligation to foster the very concerns that *B.C.* found supported an exclusion policy. Thus, no reasonable fact finder viewing the issue in the context of decided law and public policy could find that this Board acted in an arbitrary and capricious manner.

Based upon the above considerations, I **CONCLUDE** that the Board could legally limit participation on the lacrosse team to females and, given the legal context, its decision to do so cannot be labeled arbitrary or capricious. Given the legal context, no facts material to deciding the case are in dispute and summary decision is an appropriate means for resolving the case.

It is of course possible that a time will come when the need to redress past discrimination will no longer be necessary, opportunities for women in sports will be so prevalent that fostering them by means of exceptions to general policies against gender discrimination will be unnecessary and the rationale of *B.C.* and like cases will be viewed as truly outdated. There is no suggestion in the petitioner's papers that she is prepared to undertake the significant task of producing a record of expert sociological, legal and economic evidence that would be necessary to make out such a case. While the fostering of opportunities and redress of past discrimination resulting from the exclusion herein challenged is no doubt miniscule when viewed in the context of larger society, and the exclusion no doubt is a difficult reality for the petitioner and her son to accept, nevertheless, on the micro scale the result does protect the advancement of policies deemed necessary to address past wrongs. Therefore, I **CONCLUDE** that the Board did not violate the law and the petition must be **DISMISSED**.

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. Pursuant to *N.J.A.C.* 1:1-9.4(e)8 and the agreement of the parties and Department of Education, Commissioner of the Department of Education shall issue a final decision within fifteen (15) days.

Within six (6) 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, 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 24, 2004
DATE

JEFF S. MASIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

May 24, 2004
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 27 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

None

FOR THE RESPONDENT:

None

OAL DKT. NO. EDU 02401-04
AGENCY DKT. NO. 98-3/04

A.L.D., on behalf of minor child, N.D.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE NORTHERN BURLINGTON REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs that, under the facts presented, the respondent Board of Education did not act unlawfully in determining to limit participation on its middle school lacrosse team to female students.

Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter and the Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/01/04
Date of Mailing: 7/02/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

267-04

#267-04

KATHLEEN M. TEMPLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

July 2, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01083-03

AGENCY REF.NO.68-4/99

KATHLEEN M. TEMPLE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,

Respondent.

Gregory Syrek, Esq., for petitioner (Bucceri and Pincus)

Jack Gillman, Esq., for respondent (Law Offices of Joseph J. Ryglicki)

Record Closed: March 10, 2004 Decided: May 18, 2004

BEFORE **CAROL I. COHEN**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on January 9, 2004 for determination as a contested case. A hearing was scheduled for March 10, 2004.

On the date of the hearing the parties were able to resolve the matter. On May 4, 2004, the parties submitted the attached Settlement Agreement indicating the terms of the agreement. Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signature of the parties and/or 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 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 (45) 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.

5/18/04
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

5-25-04
DATE

M. Kathleen Duncan/CA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 27 2004
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

AGREEMENT

This Agreement is made by and between Kathleen Temple ("Temple", who resides at 514 Madison Street, Apt. 211, Hoboken, New Jersey 07030, and the Hoboken Board of Education ("Board"), with its offices at 1114 Clinton Street, Hoboken, New Jersey 07030-3201. In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is herby acknowledged, the undersigned state:

WHEREAS, Temple filed a Verified Petition with the Commissioner of Education alleging that she had suffered a work-related injury and that the Board had charged her sick days for her thirty-one (31) absences in violation of *N.J.S.A.* 18A:30-2.1; and,

WHEREAS, the Board filed an Answer denying the substantive allegations raised in the petition; and,

WHEREAS, the underlying Workers' Compensation proceeding between the parties was resolved by the issuance of an Order Approving Settlement on January 8, 2002; and,

WHEREAS, in lieu of further processing this matter, the parties desire to enter into an agreement amicably resolving the issues in dispute,

IT IS on this 20th day of April, 2004, agreed that:

7. The parties shall be bound by the terms and conditions of This Agreement, finding it to be in the best interests of the public, consistent with public policy, fair and equitable under all circumstances surrounding this matter.

8. Both parties acknowledge that their agreement to dismiss the petition is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approval is not given, this Agreement and all of the stipulations, releases and acknowledgements shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

WITNESS:

Gregory T. Syrek, Esq.

Kathleen Temple

Dated:

WITNESS:

HOBOKEN BOARD OF EDUCATION

Jack Gillman, Esq.

By:

Dated: 4/20/04

OAL DKT. NO. EDU 01083-03
AGENCY DKT. NO. 68-4/99

KATHLEEN M. TEMPLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observed that two unidentified individuals signed the Settlement Agreement on behalf of the Board. In that neither the file nor the Settlement Agreement contains a copy of the Board's resolution approving the settlement and designating these individuals to sign the agreement on its behalf, and the agreement is not signed by the Board attorney,[1] who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within Settlement Agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7/02/04

Date of Mailing: 7/02/04

[1] The Board attorney's signature appears on the Settlement Agreement only as a witness.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

#269-04E

269-04

OAL DKT. NO. EDU. 5867-04
AGENCY DKT. NO. 192-5/04

HINENI AT SINAI, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included the audiotape of the hearing conducted at the Office of Administrative Law (OAL) and the Order of the Administrative Law Judge (ALJ), have been reviewed.

Upon such review, the Deputy Commissioner, to whom this matter has been delegated for review in accordance with *N.J.S.A.* 18A:4-33, adopts the July 1, 2004 Order denying emergent relief as he concurs with the ALJ's determination that petitioner has not satisfied the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby denied. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 7/02/04

Date of Mailing: 7/02/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF

OAL DKT. NO. EDU 5867-04
AGENCY DKT. NO. 192-5/04

HINENI AT SINAI, INC.,
Petitioner,
v.
DEPARTMENT OF EDUCATION,
DIVISION OF FINANCE,
Respondent.

John B. Comego, II, Esq., for petitioner
(Comegno Law Group, attorneys)

Kathleen Asher, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

BEFORE **DIANA C. SUKOVICH**, ALJ

This Order shall memorialize the oral ruling rendered on June 25, 2004.

Petitioner is a private, non-sectarian school specializing in the provision of special education and related services to students having autism, which facility is

located in Livingston, New Jersey. Petitioner was granted preliminary approval by respondent as having the status of a private school for classified students on October 15, 2002, pursuant to *N.J.A.C.* 6A:23-4.3. That approval allowed petitioner to operate as an approved private school in New Jersey for the disabled for the 2002-03 and 2003-04 school years. The notice granting preliminary approval stated, in part, that petitioner "must" provide documentation that the school had a minimum average daily enrollment (ADE) of 16 by the end of the 2003-04 school year. (Respondent's brief, Exhibit A.). By letter dated February 19, 2004, respondent notified petitioner that a staff member of the latter had determined that the ADE for the 2002-2003 school year had been 10.22 and was estimated to be 8.80 for the 2003-04 school year. That letter also gave notice that petitioner could lose its preliminarily approval status. In a letter dated April 20, 2004, respondent requested that petitioner complete, and submit, enrollment information for February and March 2004 and provide estimated enrollments for April, May, and June 2004. Petitioner did so, indicating that the estimated 2003-04 ADE would be 9.2. By letter dated April 27, 2004, respondent advised petitioner that its preliminary approval was being revoked effective July 1, 2004 because of a failure to achieve the required minimum ADE by the end of the 2003-04 school year. Copies were sent to various County Superintendents of Schools and local school districts.

Petitioner filed a petition of appeal with respondent's Commissioner on May 27, 2004. On June 11, 2004, respondent's Bureau of Controversies and Disputes notified petitioner that service had to be made on the Attorney General's Office. Such was effectuated on June 16, 2004. On June 22, 2004, petitioner filed a Motion for Emergent Relief, *i.e.,* a stay of respondent's April 27, 2004 decision to revoke the preliminary approval.

Respondent transmitted the request for emergent relief to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to 13 on June 22, 2004. Oral Argument, at which testimony was taken, was conducted on June 25, 2004. This judge rendered a detailed decision, denying petitioner's request, at that time. The parties, particularly, petitioner, were given until

June 28, 2004 to provide their views on processing of the matter. This Order summarizes the oral ruling.[1]

To obtain emergent relief, a petitioner must establish that the "petitioner" will suffer irreparable harm if the requested relief is not granted; the legal right underlying its claim is settled; petitioner has the likelihood of prevailing on the merits of the underlying claim; and when the equities and interests of the parties are balanced, petitioner will suffer greater harm than respondent if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b). For the reasons stated on the record, this judge determined that petitioner had not met any part of its burden. The parties stated on the record that there is no dispute regarding the legal right underlying petitioner's claim. As indicated, a detailed oral ruling was rendered, and that ruling shall be summarized herein; however, the oral ruling is incorporated herein.

Petitioner had not met the required ADE as of June 25, 2004, and it is clear that it would not do so within the near future. Petitioner requested six months to one year additional time to attempt to do so. Petitioner's evidence regarding irreparable harm was conclusionary, not specific. For example, petitioner did not provide specific data regarding financial impact on it, including persuasive evidence regarding how many of its current students whose expenses are paid by local school districts are likely not to return for the next school year. Additionally, petitioner did not sufficiently address the fact that local school districts may determine to fund expenses of students in their districts at petitioner's facility, even if petitioner is not a State approved facility for the education of classified students. Petitioner's evidence demonstrated that it suffered a substantial deficit during the current school year, although it continued to operate. Petitioner's arguments regarding "irreparable harm" to current and prospective student and their families was vague, and, not particularly relevant, as the pertinent regulation requires that irreparable harm be established *vis a vis* the party requesting emergent relief. In any event, as this judge noted on the record, there are other forums for such

[1] It is this judge's understanding that a tape-recording of the June 25, 2004 proceeding was transmitted to respondent.

concerns to be addressed, in light of the fact that local school districts are required to provide a free and appropriate education to classified students.

I was also not persuaded by petitioner's arguments that "premature" action by respondent negatively impacted petitioner's ability to maintain and recruit students. The pertinent regulations do not specify time periods pertinent to notice of revocation of preliminary approvals. In addition, respondent's argument that it took action at the time in question, not effective until after the current school year, so as not to disrupt the education of students was persuasive. Additionally, petitioner's evidence in that respect was vague and conclusionary.

Petitioner also did not demonstrate a likelihood of prevailing on the merits of the underlying claim. An applicant applying for approval of a new private school for the disabled "shall" provide evidence to respondent that there is sufficient need for the new private school. *N.J.A.C.* 6A:23-4.3(b). Such "shall" include documentation of the need "for a minimum" of 16 students. *Id.* at §(2). Programs meeting the pertinent requirements "shall" be approved as follows. The school "shall" receive preliminary approval to operate for a two-year period, after which the school "shall" provide documentation that it has a "minimum" ADE of 16 by the end of the second school year. A school not meeting the required minimum ADE "shall" have its preliminary approval status revoked and will no longer be considered an approved private school for the disabled. *Id.* at §(c). For reasons similar to those articulated on the record regarding the question of irreparable harm, I was persuaded that petitioner did not prove a likelihood of prevailing on the merits. The pertinent regulations are mandatory in nature, and petitioner presented no evidence contradicting respondent's position that it applies the pertinent regulations in similar fashion in all cases.

Petitioner also did not prove that the equities are in its favor, as any financial impact of respondent's action was not demonstrated. Additionally, as noted on the record, respondent has an interest in maintaining the integrity of its regulations, especially in light of the mandatory language contained in those in question.

For the reasons stated on the record, and as summarized hereinabove, it is hereby **CONCLUDED** that petitioner did not demonstrate that it will suffer irreparable harm if the requested relief is not granted; petitioner did not demonstrate that it has a likelihood of prevailing on the merits of the underlying claims; and petitioner did not demonstrate that when the equities and interests of the parties are balanced, it will suffer greater harm than respondent if the requested relief is not granted. Therefore, it is hereby **ORDERED** that petitioner's request for emergent relief be and is hereby **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 (45) 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 (45) 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.

Diana C. Sukovich

DATE

DIANA C. SUKOVICH, ALJ

Email Receipt of Order Confirmed by the Department of Education on:

DATE

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

287-04

#287-04

OAL DKT. NOS. EDU 1840-03 AND EDU 9894-03 (ON REMAND)
AGENCY DKT. NO. 395-12/02

O.S., on behalf of minor child, K.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY AND ANTHONY P. CAVANNA, SUPERINTENDENT,	:	DECISION ON REMAND
RESPONDENTS.	:	

The record of this matter and the Initial Decision on Remand of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

In her exceptions, petitioner points out that, on remand, this case was reassigned to the original judge who previously rendered an Initial Decision in this matter and that she believes "that Judge Giordano could not be totally impartial since ruling in my favor on the remand would indicate that his own prior decision was wrong."[1] (Petitioner's Exceptions at 1) With respect to her specific exceptions to the Administrative Law Judge's (ALJ) decision on remand, petitioner argues, *inter alia*, that, even accepting the ALJ's interpretation of Regulation 5120, the District is still not excused from administering the standardized math test. (*Ibid.*) Petitioner posits that, if her daughter had been given the standardized test in math, it would have proved that she should have been learning math at a higher level. (*Id.* at 1-2) Based

[1] The Commissioner lacks jurisdiction over this issue. Issues concerning a judge's ability to provide a fair and impartial hearing must be addressed in the first instance with the judge, pursuant to *N.J.A.C.* 1:1-14.12(c), with appeals of the judge's ruling on the issue thereafter being addressed to the Director of the OAL, pursuant to *N.J.A.C.* 1:1-14.12(d).

on the (presumed) test results, petitioner claims that her daughter should have been afforded the curriculum consistent with her skills and knowledge and could have been placed in the gifted and talented program. (*Id.* at 2)

Petitioner further asserts that her daughter was not given any standardized tests during the three months she was in attendance. (*Ibid.* at 2) Petitioner points out that the Assistant Superintendent testified that Regulation 5120 provides that standardized tests are to be administered to new students, but that the earliest standardized tests were given in April, eight months after the start of the school year. (*Ibid.*) Petitioner contends that this means that a new student has to wait eight months to be evaluated for proper grade placement or to be placed in a gifted and talented program. (*Ibid.*)

Moreover, petitioner takes issue with the ALJ's conclusion that the regulation at issue is ambiguous, asserting that there is nothing ambiguous about Regulation 5120 in that it clearly states that the standardized test must be administered to all new pupils. (*Ibid.*) Petitioner also disagrees with the Board's use of age and English language ability in determining her daughter's grade placement, pointing out that the Board, over her objections, placed her daughter in the sixth grade, a grade she had completed in Russia. (*Id.* at 3) Additionally, petitioner asserts that the Board's use of English language ability for grade placement is discriminatory and that the Board failed to produce any evidence proving that it has extended the kindergarten and first grade entrance policy to all grades including high school transfers. (*Ibid.*)

Upon careful and independent review of the record in this matter, the Commissioner initially notes that, pursuant to Board Policy 5120, "[t]he building principal may assign pupils in his or her school to grades, classes and groups on the basis of the needs of the pupil***" with the final decision on such matters to be made by the superintendent of schools. (Exhibit R-2, in evidence) Moreover, the Board has established that its intent in promulgating Regulation 5120, the implementing regulation for Board Policy 5120, was to specify the use of

the District Approved Standardized Test for the assessment for in-grade placement of students in gifted and talented or remedial programs, as appropriate. In support thereof, the Board's three witnesses at hearing provided uncontested testimony[2] that Regulation 5120 was constructed as a device for in-grade placement and that the regulation had been consistently applied to in-grade placement. (Initial Decision at 3-5) Additionally, the Commissioner's independent review of Regulation 5120 finds that the language in the regulation supports the Board's contention that this regulation applies to in-grade placement of new students in that A.3. and A.4. and B.3 of the regulation (see below) specifically state that, based on the results of the District Approved Standardized Test referenced therein, pupils may be placed in gifted and talented programs or remedial programs. (Exhibit P-7, in evidence)

> The Board requires that the following screening procedures be performed for all new pupils to insure the best possible grade placement in this school district for each.
>
> A. Grades 1-6
>
> 1. The nurse will administer hearing, vision, and scoliosis screening to all new pupils.
>
> 2. The guidance counselors will administer the District Approved Standardized Test to grades 1 – 6.
>
> 3. *Based on results of the above*, pupils who score extremely high will be referred to the gifted and talented teacher for further evaluation. The gifted and talented teacher may call upon the resources of the Child Study Team to assist in the evaluation.
>
> 4. Pupils who score extremely low will be referred to either the BSI math or reading improvement teacher for further evaluation. Either teacher may call upon members of the Child Team for assistance.

[2] The Commissioner relies herein on the ALJ's summary of Mr. Emr's testimony in that transcripts of the hearing before the ALJ were not provided by the parties.

5. The classroom teacher will refer all observed speech problems to the school's speech teacher for evaluation.

B. Grades 7 – 12

1. The nurse will administer hearing, vision and scoliosis screening to all new pupils.

2. The guidance counselors will administer the District Approved Standardized Test to all new pupils.

3. Pupils who score extremely low will be referred to either the BSI math or reading improvement teacher for further evaluation. Either teacher may call upon members of the Child Study Team for assistance.

4. The classroom teacher will refer all observed speech problems to the school's speech teacher for evaluation.
(emphasis supplied) (*Ibid.*)

The Commissioner also emphasizes that "an agency's interpretation of its own rule is owed considerable deference since the agency that drafted and promulgated the rule should know the meaning of that rule." (Initial Decision at 8) *See, also, In re Revision in Rates Filed by Plainfield-Union Water Co., supra*, at 177.

Accordingly, for the reasons set forth above, the Commissioner finds that Regulation 5120 does not require the administration of the District Approved Standardized Test to determine the grade placement of transfer students. However, Regulation 5120, by the Board's own admission, requires the administration of the District Approved Standardized Test to determine the in-grade placement of new students for the purpose of placing students in a gifted and talented program and/or to provide necessary remedial programs. Notwithstanding the District's contention that the LAS test, a test utilized to determine the English language proficiency of foreign born and other students, administered to K.S., was a standardized test that

satisfied compliance with the requirement that "guidance counselors will administer *the* District Approved Standardized Test" set forth in Regulation 5120 (Initial Decision at 3, Testimony of Dr. Taffaro; Board's Letter Brief, dated February 19, 2004; and Exhibit P-7, in evidence), the LAS test is obviously not *the* test to which Regulation 5120 refers in that the regulation specifies that the results of *the* District Approved Standardized Test is utilized to determine whether pupils may be placed in gifted and talented programs or remedial programs. Moreover, the Board has not claimed, nor is there anything in the record to suggest, that K.S. does not possess the English language skills necessary to take the District Approved Standardized Test or that the administration of the test was delayed so that an accommodation could be made for any language difficulties.

Principal Peter Emr testified that the LAS test is utilized to test new pupils with limited English proficiency and that there is no other test used for the placement of new pupils in the District. (Initial Decision at 5) Mr. Emr further testified that standardized testing is used with large populations of students in the spring, primarily to develop standard norms, and that the Terra Nova II standardized test is used by the District for grades 2, 5 and 6 and the State-authorized standardized test is given to grades 3 and 4. (*Ibid.*) Presumably the District Approved Standardized Test in Regulation 5120 refers to the standardized test administered at each grade level in the spring, as Superintendent Taffaro appears to be referring to these same tests in testifying that the District contemplated testing K.S. in April, eight months after K.S.'s enrollment in the district schools.

> The witness acknowledged that the Regulation 5120 provides that the standardized tests are to be administered by the guidance counselor. K.S. was not given a standardized test in math. That test would be given in April. If K.S. were to score well on that test, she might be placed in a Gifted and Talented Program. (*Id.* at 3)

Although Regulation 5120 does not specify a timeline for the administration of the District Approved Standardized Test, the stated purpose of the regulation is to insure the best possible grade placement for new students. Thus, it can be reasonably inferred that new students are to be immediately administered the District Approved Standardized Test upon entering the District's schools. Principal Jack Foster testified that the regulation is poorly written. (*Id.* at 4) That may be the case, but what is clear is that the *practice* of the District with respect to administering the District Approved Standardized Test to new students is not in concert with Regulation 5120. The Commissioner, therefore, directs that either the regulation be re-written to reflect District practices or that the District conform its practices to the regulation as written.

Turning to the District's administrative decision placing K.S. in the sixth grade, rather than in seventh grade as her mother requested, the Commissioner notes that, by letter of November 13, 2002, the superintendent of schools (at the time Anthony P. Cavanna) informed petitioner that the administrative determination to place K.S. in the sixth grade was made based on K.S.'s chronological age, English language ability, educational opportunities in middle and secondary schools, equivalent grade level in her previous school and country, social adjustment, peer acceptance and preparation for secondary level honors courses. (Exhibit R-3, in evidence) K.S. was born on February 28, 1991 and was eleven-and-a-half years old when she enrolled in the District. Thus, if she had started attending school in the Fort Lee School District in kindergarten, she would be in the sixth grade pursuant to the District's policy regarding entrance age for attending school. (Policy 5112, Exhibit P-6, in evidence). Moreover, a review of her Russian transcript indicates that K.S. was enrolled in "1B" class on September 1, 1998 and 1st class in 1999,[3] 2nd class in 2000, 3rd class in 2001 and 6th class until June 2002. (Transcript, R-1, in evidence) Additionally, K.S. scored in the 42.5 percentile in language proficiency.

[3] There is no record of the courses she took or her grades in any classes for these first two years.

(Exhibit R-4, in evidence) Given these facts, the Commissioner finds that the District's carefully weighed decision to place K.S. in the sixth grade is not unreasonable, but makes sound educational sense. Moreover, petitioner has presented no evidence that her daughter was treated any differently from any other similarly situated pupil or that the Board acted with any improper motive. The Commissioner, therefore, concludes that the District did not act in an arbitrary, capricious or unreasonable manner in placing K.S. in the sixth grade.

It is well established that when a 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 such decision was arbitrary, capricious or unreasonable." *Thomas v. Bd. of Ed. of Morris Tp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966). *See, also, J.M. v. Hunterdon Central Regional High School District*, 96 *N.J.A.R.*2d (EDU) 415, 419, (1996), *citing Kopera v. West Orange Bd. of Education,* 60 *N.J. Super.* 288 (App. Div. 1960).

Accordingly, the Initial Decision on Remand is adopted as modified above for the reasons expressed herein.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 7/07/04
Date of Mailing: 7/08/04

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

#288-04

OAL DKT. NO. EDU 9050-03
AGENCY DKT. NO. 507-12/01

MARIE ROSE IULIANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/07/04

Date of Mailing: 7/08/04

289-04

OAL DKT. NO. EDU 6859-03
AGENCY DKT. NO. 241-7/03

ALEXANDER NICOLAS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS	:	DECISION
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 careful and independent review, the Commissioner concurs with the Administrative Law Judge that, based upon the record herein, the determination of the State Board of Examiners should not be disturbed.

Accordingly, the Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/07/04

Date of Mailing: 7/08/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

289-04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6859-03

AGENCY DKT. NO. 241-7/03

ALEXANDER NICHOLAS,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, NEW JERSEY STATE BOARD OF EXAMINERS,

Respondent.

Robert M. Schwartz, Esq., for petitioner

Cindy Campbell, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: May 13, 2004 Decided: May 26, 2004

BEFORE **BRUCE M. GORMAN**, ALJ:

STATEMENT OF THE CASE

Petitioner applied to the New Jersey Department of Education (DOE) for a supervisor's certificate. Petitioner received his masters and doctoral degrees from Pacific Western University (PWU). The State Board of Examiners (Respondent) denied petitioner's application on the basis that PWU lacked proper accreditation, and petitioner

therefore lacks the degrees required for receipt of a supervisor's certificate. Petitioner appeals that determination.

The issue before me is whether petitioner has the degrees from an appropriately accredited university to qualify for a school supervisor's certificate.

PROCEDURAL HISTORY

Petitioner applied to the DOE for issuance of a supervisor's certificate. By letter dated January 27, 2003, the DOE Office of Licensing and Academic Credentials denied the application. Petitioner appealed to respondent State Board of Examiners. On June 17, 2003, respondent issued a decision denying petitioner's appeal. Petitioner filed a Notice of Appeal dated July 11, 2003 with the DOE Division of Controversies and Disputes. The Notice of Appeal was acknowledged by Controversies and Disputes on July 17, 2003, and formally docketed on July 30, 2003. Respondent filed an Answer on September 3, 2003.

Respondent filed a Motion for summary Decision on March 12, 2004. Petitioner filed a Cross-Motion on April 8, 2004. Those motions were argued on May 13, 2004 telephonically and were recorded on tape.

FACTS

N.J.A.C. 1:1-12.5(b) sets forth the standard for granting a motion for summary decision:

> The (summary) decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show 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.

Although petitioner notes in his moving papers that the parties were unable to agree upon a statement of material facts, the facts required to adjudicate this matter are either undisputed or are contained in the numerous documents submitted by both parties.

It is undisputed that petitioner is 34 years old (see PWU transcript, P-8). He has been employed as a teaching staff member in the Trenton School District for a period in excess of three years.

Petitioner enrolled in a post-graduate program at PWU. PWU is a private postsecondary educational institution. Petitioner received a Masters Degree from PWU, and on April 15, 2002 he received a Doctor of Philosophy in Educational Administration.

Petitioner then sought a supervisor certificate from DOE. His application was rejected because PWU was determined to lack the accreditation required to qualify under *N.J.A.C.* 6A:9-12.6. Put another way, DOE held that petitioner's degrees fail to meet the standards required for certification. Respondent upheld that determination.

Therefore, this case turns on one issue: do petitioner's degrees meet the minimum standards necessary to qualify for a supervisor's certificate?

Both parties submitted documentation ostensibly in support of their respective positions. To resolve the issue, I must analyze that documentation.

Petitioner submitted the following:

P-1: Authorization to Operate – This document was issued by the California State Department of Education. Based upon this document, it appears that PWU is a California corporation. Dated December 18, 1978, P-1 authorized PWU to operate as a private postsecondary educational institution in California between December 13, 1978 and December 13, 1979.

The lower portion of P-1 provides five different possibilities which can be checked by the issuing agency. In the case of P-1, the box checked refers to "94310(c)", apparently a section of the California Education Code. 94310(c) designates PWU:

> "Degree-granting institution, *unaccredited and unapproved*, authorized by filing of public disclosure information (May not issue diplomas)" (Emphasis added)

P-1 appears to be the type of document which the Department of State would issue to new corporations in New Jersey

P-2: Authorization To Operate As A California Degree-Granting Institution. Effective May 20, 1987 through May 20, 1989, this document appears to be some form of renewal of P-1.

P-3: Certificate of Good Standing – Issued by the Hawaii Department of Commerce and Consumer Affairs, this document would appear to be PWU's authorization to do business in the State of Hawaii. As was true of P-1, P-3 appears to be a document that would be issued to foreign corporations by the Department of State in New Jersey.

P-4: Certificate of Good Standing – Issued by the Hawaii Department of Commerce and Consumer Affairs, P-4, like P-2, attests that PWU was a corporation in good standing in the State of Hawaii as of August 10, 1994.

P-5: Directory of Approved California Private Postsecondary Institutions – This document consists of three excerpted pages from a large volume issued by the Council for Private Postsecondary and Vocational Education. That entity describes itself as an "independent state agency" which "regulates private postsecondary degree-granting and vocational institutions in California". Its duties appear to involve oversight of private postsecondary schools such as PWU. It serves as an ombudsman to handle consumer complaints and insure that such entities maintain appropriate standards. Interestingly,

one of its functions is to administer "the Student Tuition Recovery Fund, which reimburses students unable to get back their money from schools that failed to provide the promised educational services". It is also instructive to note that nowhere among its functions is it authorized to accredit such schools.

Page 3 of the exhibit shows that PWU is listed in the Council's Directory.

P-6: Directory of Postsecondary Institutions Volume 1 – This three-page document is apparently issued by the US Department of Education Office of Educational Research and Improvement. The third page of the document shows a listing for PWU. Significantly, the line marked "ACCREDITATION" is empty, indicating that PWU is not accredited.

P-7: 2002 Higher Education Directory – This document appears to be a listing of agencies authorized to accredit institutions of higher education.

P-8: This document comprises petitioner's academic transcript at PWU for the term 1/30/02 through 4/15/02.

P-9: PWU Course Descriptions – This document contains a delineation of the courses required by PWU to attain a Ph.D. in Education.

From the above documents I am able to draw certain conclusions. I therefore **FIND** as follows:

Based upon P-1, PWU was a corporation authorized to do business in the State of California beginning in 1978.

Based upon P-2, PWU remained an active California corporation as recently as 1989.

Based upon P-3 and P-4, PWU was incorporated in Hawaii in 1988 and remained in good standing as of 2001.

Based upon P-5, PWU is a private postsecondary degree-granting and vocational institution in California. Exactly what a private postsecondary degree-granting and vocational institution is remains unexplained.

Based upon P-1 and P-6, PWU situated in California is not accredited. I note that the relationship between PWU in California and PWU in Hawaii remains unexplained by petitioner.

Based upon P-8, petitioner's degree was issued by the Hawaii Corporation.

Respondent likewise submitted documentation as follows:

R-1 is respondent's decision rejecting petitioner's application for supervisor's certificate.

R-2 is petitioner's notice of appeal.

R-3 is the Certification of Margaret L. Smith. Ms. Smith is a Coordinator of Licensing Programs in the New Jersey Department of Education, Office of Licensing and Credentials. Ms Smith states that professional education preparation programs from out-of-state colleges that are approved by the appropriate state board in their state of origin are accepted by New Jersey on the basis of reciprocal agreements. She goes on to certify that neither PWU of Hawaii nor PWU of California are approved by NJ DOE on the basis of such reciprocal agreement.

R-4 is a document issued by the US Department of Education entitled Accreditation in the United States. This document states that the Western Association of Schools and Colleges, Accrediting Commission for Senior Colleges and Universities

(WASC) is the entity which grants accreditation to senior colleges and universities in California and Hawaii.

R-5 is a WASC-generated document which lists the accredited schools and collegiate institutions situate in, inter *alia*, California and Hawaii. The document is 33 pages long. PWU does not appear therein as an accredited institution.

R-6 is the homepage of PWU's website. It covers both the Hawaii and California corporations. On page 2 thereof in bold letters, the website advises:

> "PACIFIC WESTERN UNIVERSITY IS NOT ACCREDITED BY AN ACCREDITING AGENCY RECOGNIZED BY THE UNITED STATES SECRETARY OF EDUCATION."

R-7 is entitled State Approved Teacher Education Programs (SATE), and is issued by the Hawaii Teacher Standards Board. The Hawaii Teacher Standards Board is the agency authorized to regulate teacher licensing and credentials in the State of Hawaii. See Hawaii Administrative Rules Section 8-54-1. PWU is not listed as an approved program.

R-8 is a document prepared by the California Bureau for Private Postsecondary & Vocational Education. R-8 delineates the programs for which PWU is authorized to issue a degree in California. Petitioner's program, Educational Administration (see P-8) is not listed as a program for which PWU may issue a degree in California.

R-9 is a listing of Approved Professional Preparation Programs prepared by the California Commission on Teacher Credentialing. PWU is not listed.

Based upon the above, I am able to arrive at further conclusions. I therefore **FIND**:

Based upon R-3, neither branch of PWU is accepted by New Jersey on the basis of reciprocal agreement.

Based upon R-5, PWU is not accredited by any agency authorized to do so.

Based upon P-6, PWU admits it is not accredited.

Based upon R-7, R-8, and R-9, neither branch of PWU is recognized by either California or Hawaii as a teacher-credentialing institution.

LEGAL CONCLUSIONS

In the Office of Administrative Law, the standard for granting summary judgment is controlled by *N.J.A.C.* 1:1-12.5(b), which states in pertinent part:

> The 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.

Although petitioner avers in his moving papers that the parties have not agreed to a statement of material facts, after reviewing the moving papers and, more importantly, the numerous exhibits submitted by each party, I **FIND** and **CONCLUDE** that the issue before me can and should be decided on the basis of the relevant documentation. The documents speak for themselves, and nothing more can be gained from a plenary hearing.

Accordingly, I **FIND** that this matter can be disposed of through the motions now before me.

N.J.A.C. 6A:9-12.6 sets forth the standards for the granting of a supervisor's certificate. That regulation states in pertinent part:

> (a) To be eligible for the standard administrative certificate with a supervisor endorsement, a candidate shall be required to:
>
> 1. Hold a master's or higher degree from a regionally accredited college or university;
>
> 2. Successfully complete one of the following:
>
> i. A college curriculum approved by the Department of Education as the basis for issuing this endorsement; or
>
> ii. A program of college studies at the graduate level including six credits in curriculum development, three credits in staff supervision, and three elective credits in staff supervision or curriculum development. A candidate must complete graduate study in general principles of staff supervision and curriculum development and evaluation for grades kindergarten through 12. The elective credits must be in supervision and/or curriculum development in particular grade levels, or in specific subject fields; and
>
> 3. Hold a standard New Jersey instructional or educational services certificate or its out-of-State equivalent, and complete three years of successful, full-time teaching experience under the appropriate certificate.
>
> (b) Applicants in possession of a written evaluation for the supervisor certificate completed by the office prior to January 20, 2004 will have until January 20, 2009 to complete the requirements set forth in the written evaluation.

Petitioner acknowledges at the outset that because he obtained his degrees from an out-of-state school, he must demonstrate that his degrees come from an accredited institution. *N.J.A.C.* 6A:9-12.6. Additionally, Petitioner admits that DOE has interpreted the term "accredited" to mean an institution that is regionally accredited by an accrediting agency recognized by the US Department of Education. Yet based upon his own documentation, most notably P-1 and P-6, PWU is not accredited. That conclusion is buttressed by R-5, R-6, R-7, R-8, and R-9. R-6 is particularly persuasive. R-6 is PWU's own website, and on that website PWU specifies that it is not accredited.

The conclusion is inescapable that PWU is not accredited. Accordingly, I **FIND** and **CONCLUDE** that petitioner's degrees do not meet the requirements of *N.J.A.C.*

6A:9-12.6. He cannot be awarded a supervisor's certificate. Respondent was correct to deny petitioner's application.

But Petitioner urges that there is an exception to that rule, and that PWU meets that exception. *N.J.A.C.* 6A:9-5.11(b)2 states in pertinent part:

> (b) Professional education preparation programs required for New Jersey certificates shall be accepted from:
>
> * * *
>
> 2. Out-of-State colleges approved by the State board or department of education or department of higher education in the state in which the college is established and approved by the Department on the basis of reciprocal agreements;

The certification of Margaret L. Smith, R-3, states that no such reciprocal agreement exists between New Jersey and either Hawaii or California covering PWU. Absent such an agreement, petitioner's degrees cannot be accepted for supervisory certification. Accordingly, petitioner's degrees do not fall within the exception provided by *N.J.A.C.* 6A:9-5.11(b)2.

Based upon the above analysis, I **FIND** and **CONCLUDE** that respondent correctly denied petitioner's application for supervisor's certificate. Respondent's action must be **AFFIRMED**.

ORDER

I **ORDER** that petitioner's motion for summary judgment be **DENIED**.

I further **ORDER** that respondent's motion for summary judgment be **GRANTED**.

I further **ORDER** that respondent's denial of petitioner's application for supervisor's certificate by **AFFIRMED**.

I further **ORDER** that the petition herein 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 (45) 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 (13) 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, 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.

5/26/04
DATE

BRUCE M. GORMAN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

5-26-04
DATE

Mailed to Parties:

JUN 2 2004
DATE

Laura Sanders
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

LIST OF EXIHIBITS

For petitioner:

P-1 Authorization to Operate as a Private Postsecondary Educational Institution

P-2 Authorization To Operate As A California Degree-Granting Institution

P-3 Certificate of Good Standing – Issued by the Hawaii Department of Commerce and Consumer Affairs

P-4 Certificate of Good Standing – Issued by the Hawaii Department of Commerce and Consumer Affairs

P-5 Directory of Approved California Private Postsecondary Institutions

P-6 Directory of Postsecondary Institutions Volume 1

P-7 2002 Higher Education Directory

P-8 Petitioner's Academic transcript at PWU

P-9 PWU Course Descriptions

For respondent:

R-1 Respondent's decision rejecting petitioner's application for supervisor's certificate

R-2 Petitioner's Notice of Appeal

R-3 Certification of Margaret L. Smith

R-4 U.S. Department of Education – Accreditation in the United States

R-5 Western Association of Schools & Colleges – Accredited Institutions of Higher Education-Senior Colleges and Universities

R-6 Homepage of PWU's website

R-7 Hawaii Teacher Standards Board - State Approved Teacher Education Programs

R-8 California Bureau for Private Postsecondary & Vocational Education listing of PWU Degree-Granting Programs

R-9 Listing of Approved Professional Preparation Programs prepared by the California Commission on Teacher Credentialing

#292-04

292-04

OAL DKT. NO. EDU. 4270-00
AGENCY DKT. NO. 122-4/00

HAMILTON TOWNSHIP EDUCATION ASSOCIATION AND RICHARD NENNO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge that this matter is appropriately dismissed for failure to prosecute.

Accordingly, the Initial Decision of the OAL is adopted and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/08/04

Date of Mailing: 7/09/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL OF CONTESTED CASE

OAL DKT. NO. EDU04270-00S

AGENCY DKT. NO. 122-4/00

HAMILTON TOWNSHIP EDUCATION ASSOCIATION AND RICHARD NENNO,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

Respondent.

Richard A. Friedman, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Dennis M. DeSantis Esq., for respondent (Destribats, Campbell, DeSantis & Magee, attorneys)

Record Closed: June 9, 2004 Decided: June 10, 2004

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from a Petition of Appeal filed by the Hamilton Township Education Association and Richard Nenno, ("petitioners") with the Commissioner of the Department of Education alleging that the Board of Education of the Township of Hamilton ("respondent") failed to suspend and institute suspension/expulsion proceedings against a student who assaulted

Richard Nenno. The respondent transmitted the contested case to the Office of Administrative Law on May 31, 2000, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

During an audit of files at the OAL, questions were raised concerning the status of the above matter. The current status of this matter was requested of the parties by letter dated March 1, 2004, which is attached hereto. Counsel for the petitioners responded by letter of March 15, 2004, attached. By letter dated May 4, 2004, attached, counsel for petitioners was permitted additional time to supply information to OAL by May 14, 2004. By letter of May 14, 2004, attached, counsel for petitioners requested an extension of time to May 21 to supply the requested information. No further communications have been received from counsel for the petitioners or counsel for the respondent. Therefore, I **CONCLUDE** that this matter is now closed for failure to prosecute and failure to respond with any information about the status of the case. It is **ORDERED** that this matter be **DISMISSED** for failure to prosecute and returned to the transmitting agency.

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 (45) 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 (13) 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, 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 10, 2004
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

6/14/04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 14 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

Attachments

mjm

293-04

OAL DKT. NO. EDU 4326-99
AGENCY DKT. NO. 81-4/99

L.K.B., SR., on behalf of minor child, L.K.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
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 careful and independent review, and noting that petitioner has not responded to recent status inquiries dated March 1, 2004 and April 27, 2004, the Commissioner concurs that this matter is properly dismissed for failure to prosecute.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/08/04

Date of Mailing: 7/09/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL OF CONTESTED CASE

OAL DKT. NO. EDU04326-99S

AGENCY DKT. NO. 81-4/99

L.K.B., SR., ON BEHALF OF MINOR CHILD, L.K.B.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,

Respondent.

L.K.B., Sr., on behalf of minor child, **L.K.B.**, *pro se*

Paul H. Green, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: May 10, 2004 Decided: June 9, 2004

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from a Petition of Appeal filed by L.K.B., Sr., on behalf of minor child, L.K.B., ("petitioners") with the Commissioner of the Department of Education alleging that the Board of Education of the Township of Cherry Hill ("respondent") improperly decided to place L.K.B. in an alternative school. The respondent transmitted the contested case to the Office of Administrative Law on June 7, 1999, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

During an audit of files at the OAL, it was discovered that the matter was never properly resolved. The current status of this matter was requested of the parties by letters dated March 1 and April 27, 2004, which are attached hereto. No response to these inquiries has been received by the OAL within the seven days provided in the April 27 letter. Therefore, I **CONCLUDE** that this matter is now closed for failure to prosecute and failure to respond with any information about the status of the case. It is **ORDERED** that this matter be **DISMISSED** for failure to prosecute and returned to the transmitting agency.

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 (45) 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 (13) 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, 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, 2004
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

6/11/04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 14 2004

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

Attachments

mjm

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
PO Box 049
Trenton, New Jersey 08625-0049
(609) 588-6582

JEFF S. MASIN
DEPUTY DIRECTOR
ADMINISTRATIVE LAW JUDGE

Fax. No. (609) 588-6536

April 27, 2004

Larry K. Banks, Sr.
535 Main Street
Cherry Hill, NJ 08002

Paul H. Green, Esq.
Schwartz, Simon, Edelstein
Celso & Kessler
Ten James Street
Florham, NJ 07932

Re: L.K.B., Sr., on Behalf of Minor Child, L.K.B. v. Bd. of Ed. of the Twsp. of Cherry Hill, Camden Co.
OAL DKT. NO. EDU 04326-99S
AGENCY DKT. NO. 81-4/99

Dear Messrs. Banks & Green:

I recently wrote you about the above matter seeking your input in regard to the status of the case and whether further proceedings were necessary. I have received no response from you in regard to the letter. Unless I receive a specific response within seven days regarding the status of the case and whether there is a need for further proceedings, the file will be administratively closed and returned to the transmitting agency.

Thank you for your attention.

Yours very truly,

Jeff S. Masin

mjm
c Thomas F. Lowe, Clerk

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
PO Box 049
Trenton, New Jersey 08625-0049
(609) 588-6582

JEFF S. MASIN
DEPUTY DIRECTOR
ADMINISTRATIVE LAW JUDGE

Fax. No. (609) 588-6536

March 1, 2004

Larry K. Banks, Sr.
535 Main Street
Cherry Hill, NJ 08002

Paul H. Green, Esq.
Schwartz, Simon, Edelstein
Celso & Kessler
Ten James Street
Florham, NJ 07932

Re: L.K.B., Sr., on Behalf of Minor Child, L.K.B. v. Bd. of Ed. of the Twsp. of Cherry Hill, Camden Co.
OAL DKT. NO. EDU 04326-99S
AGENCY DKT. NO. 81-4/99

Dear Messrs. Banks & Green:

During a recent audit, questions were raised concerning the status of the above matter. Please advise as to whether this case was ever resolved and if documents exist with regard to that resolution, please forward them to me. If however you believe that the matter was never resolved in any fashion, please advise as to whether any additional proceedings appear necessary at this time.

Thank you for your cooperation and your reply.

Yours very truly,

Jeff S. Masin

mjm
c Thomas Redmond, Board Secretary
Thomas F. Lowe, Clerk

295-04

OAL DKT. NO. EDU 6665-95
AGENCY DKT. NO. 187-5/95

LULA SKIPPER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
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 careful and independent review, and noting that petitioner has not responded to recent status inquiries dated March 1, 2004 and April 27, 2004, the Commissioner concurs that this matter is properly dismissed for failure to prosecute.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/9/04

Date of Mailing: 7/9/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL OF CONTESTED CASE

OAL DKT. NO. EDU06665-95S

AGENCY DKT. NO. 187-5/95

LULA SKIPPER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

Richard A. Friedman, Esq., for petitioner, (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners and George, attorneys)

Record Closed: May 10, 2004 Decided: June 9, 2004

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from a Petition of Appeal by Lula Skipper ("petitioner") to the Commissioner of the Department of Education alleging that the City of Trenton Board of Education (respondent"), did not pay her statutory sick leave and improperly charged her sick leave. The respondent transmitted the contested case to the Office of Administrative Law on June 26, 1995, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

During an audit of files at the OAL, it was discovered that the matter was placed on the inactive list quite some time ago because of a pending Workers' Compensation proceeding. The

current status of this matter was requested of counsel for the parties by letters dated March 1 and April 27, 2004, which are attached hereto. No response to these inquiries has been received by the OAL within the seven days provided in the April 27 letter. Therefore, I **CONCLUDE** that this matter is now closed for failure to prosecute and failure to respond with any information about the status of the case. It is **ORDERED** that this matter be **DISMISSED** for failure to prosecute and returned to the transmitting agency.

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 (45) 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 (13) 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, 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, 2004
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

6/11/04
DATE

Kathleen Duncan /gp
DEPARTMENT OF EDUCATION

Mailed to Parties:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 14 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

Attachments

mjm

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
PO Box 049
Trenton, New Jersey 08625-0049
(609) 588-6582

JEFF S. MASIN
DEPUTY DIRECTOR
ADMINISTRATIVE LAW JUDGE

Fax. No. (609) 588-6536

April 27, 2004

Richard A. Friedman, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
150 West State Street
Trenton, NJ 08608

Thomas W. Sumners, Jr., Esq.
Sumners & George
849 West State Street
PO Box 630
Trenton, NJ 08604

Re: Lula Skipper v. Bd. of Ed. of the City of Trenton, Mercer Co.
OAL DKT. NO. EDU 06665-95S
AGENCY DKT. NO. 187-5/95

Dear Counsel:

I recently wrote you about the above matter seeking your input in regard to the status of the case and whether further proceedings were necessary. I have received no response from you in regard to the letter. Unless I receive a specific response within seven days regarding the status of the case and whether there is a need for further proceedings, the file will be administratively closed and returned to the transmitting agency.

Thank you for your attention.

Yours very truly,

Jeff S. Masin

mjm
c Thomas F. Lowe, Clerk

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
PO Box 049
Trenton, New Jersey 08625-0049
(609) 588-6582

JEFF S. MASIN
DEPUTY DIRECTOR
ADMINISTRATIVE LAW JUDGE

Fax. No. (609) 588-6536

March 1, 2004

Richard A. Friedman, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
150 West State Street
Trenton, NJ 08608

Thomas W. Sumners, Jr., Esq.
Sumners & George
849 West State Street
PO Box 630
Trenton, NJ 08604

Re: Lula Skipper v. Bd. of Ed. of the City of Trenton, Mercer Co.
OAL DKT. NO. EDU 06665-95S
AGENCY DKT. NO. 187-5/95

Dear Counsel:

During a recent audit of files, it was determined that the above matter remains open on the records of the Office of Administrative Law. Apparently this case was placed on the inactive list quite some time ago because of a pending Workers' Compensation proceeding. Can you please advise whether this matter has ever been resolved, whether the Workers' Compensation matter is still pending, and whether in light of the events that have occurred, the Office of Administrative Law can close this file. If however, there is a reason for further proceedings, please advise me immediately of the circumstances and we will proceed accordingly.

I appreciate your cooperation in respect to this matter.

Yours very truly,

Jeff S. Masin

mjm
c Charles Milewski, Bd. Secretary
Thomas F. Lowe, Clerk

296-04

OAL DKT. NO. EDU 5290-04
AGENCY DKT. NO. 175-5/04

DR. R.L., on behalf of minor children, C.L. and K.L.,	:	
PETITITONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY, DR. MICHAEL F. RICE, SUPERINTENDENT OF SCHOOLS, MARILYN KENT, SCHOOL HEALTH SERVICES SPECIALIST, NEW JERSEY DEPARTMENT OF EDUCATION, DR. ROBERT VALENTE, PRINCIPAL, CLIFTON MIDDLE SCHOOL, AND MARY HARTIG, RN, CLIFTON MIDDLE SCHOOL,	:	COMMISSIONER OF EDUCATION
RESPONDENTS.	:	DECISION

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/9/04

Date of Mailing: 7/9/04

Date: 6-4-2004

Jason Michael Ross
Deputy Attorney General
Attorney for Respondent,
Marilyn Kent, School Health
Services Specialist, New Jersey
Department of Education

State of New Jersey
DEPARTMENT OF HEALTH AND SENIOR SERVICES
DIVISION OF EPIDEMIOLOGY, ENVIRONMENTAL AND OCCUPATIONAL HEALTH
PO BOX 369
TRENTON, N.J. 08625-0369
www.state.nj.us/health

JAMES E. McGREEVEY
Governor

CLIFTON R. LACY, M.D.
Commissioner

May 21, 2004

Jason Michael Ross, DAG
State of New Jersey
Division of Law
PO Box 112
Trenton, NJ 08625-0112

RE: IMO Dr. R.L. on behalf of minors C.L. and K.L. vs. Board of Education City of Clifton

Dear Mr. Ross:

As discussed with the Attorney General's Office on Wednesday, May 19, 2004, the Department of Health and Senior Services – TB Program will recognize religious exemptions to the Mantoux tuberculin skin test mandated for entry into New Jersey schools. If a religious exemption is claimed, however, a tuberculosis symptom assessment must be completed on a state form by a licensed physician or registered nurse (see attached form). If no symptoms are identified, the physician or nurse must sign to that effect. This form will substitute for mandated tuberculosis screening if no symptoms are identified. If any TB-like symptoms are identified, a chest radiograph must be done and read by a licensed medical doctor. The chest radiograph must be free of any active disease process resembling tuberculosis. The physician must sign a statement indicating that the child is free of communicable tuberculosis and this signed statement must be delivered to school officials before admission will be permitted.

If subsequent questions or concerns arise, please call me at (609) 588-7522.

Sincerely,

Thomas D. Privett

Thomas D. Privett
Tuberculosis Program Manager
Department of Health and Senior Services

c: Eddy Bresnitz, M.D., M.S.
Christina Tan, M.D.
Janet DeGraaf
Susan Martz

Attachment

New Jersey Department of Health and Senior Services
Symptom Assessment Form for Pulmonary Tuberculosis (TB)
Religious Exemption – School Tuberculin Skin Testing Mandate

Name (Last, First, MI): _____ Birthdate (mm/dd/yyyy): _____

Street Address: _____ Phone: (____) _____

City: _____ State: _____ Zip: _____

Date of Symptom Assessment (mm/dd/yyyy): _____

Check all TB-like symptoms that apply:

- ☐ Productive Cough of Undiagnosed Cause (more than 3 weeks in duration)
- ☐ Coughing Up Blood (Hemoptysis)
- ☐ Unexplained Weight Loss (10 pounds or greater without dieting)
- ☐ Night Sweats (regardless of room temperature)
- ☐ Unexplained Loss of Appetite
- ☐ Very Easily Tired (Fatigability)
- ☐ Fever
- ☐ Chills
- ☐ Chest Pain

If any symptoms are reported a chest radiograph is an essential criterion for school admission.

☐ No TB-Like Symptoms Reported or Observed

Person Completing Assessment (Print): _____

Signature of Person Completing Assessment: _____

297-04

OAL DKT. NO. EDU 11091-03
AGENCY DKT. NO. 383-10/03

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES MOTLEY,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	

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

Initially, the Commissioner observes that the settlement included with the Initial Decision sets forth terms that were to be effectuated prior to approval of the settlement terms by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. Notwithstanding the Commissioner's concerns with respect to this issue, upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed subject to compliance with the terms of the settlement, and the Administrative Law Judge and the parties are cautioned against effectuating terms of a settlement agreement in controverted matters that have been duly transmitted to the OAL prior to its submission to, and approval by, the Commissioner.

In light of the *allegations* of corporal punishment and conduct unbecoming, however, wherein the District asserts that Mr. Motley screamed at the principal and a number of teachers, students and parents, refused to meet with parents on several occasions, pushed a student out of class, pushed a student against a wall and hit a student twice with the door, all of which

Mr. Motley denies, this matter is being referred to the State Board of Examiners pursuant to *N.J.A.C.* 6A:9-17.6(a)1, which authorizes the Commissioner to refer a tenure matter to the State Board of Examiners for possible action against a teacher's certificate in instances where tenure proceedings are concluded prior to adjudication because the charged party has resigned or *retired.*

Accordingly, a copy of this decision shall be transmitted to the State Board of Examiners for its consideration.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/9/04

Date of Mailing: 7/9/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11091-03

AGENCY DKT. NO. 383-10/03

IN THE MATTER OF THE TENURE HEARING OF CHARLES MOTLEY, STATE OPERATED SCHOOL DISTRICT OF NEWARK, ESSEX COUNTY

Arsen Zartarian, Esq., for petitioner (Perry L. Lattiboudere, General Counsel, attorney)

Robert M. Tosti, Esq., for respondent (Wilson, Elser, Moskowitz, Edelman & Dicker, attorneys)

Record Closed: May 12, 2004 Decided: June 10, 2004

BEFORE **ROBERT J. GIORDANO**, ALJ:

On November 12, 2003, the matter was transmitted to the Office of Administrative Law 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. A telephone pre-hearing conferences was held on December 1, 2003. Thereafter, a status conference was held on January 21, 2004. The hearings scheduled for February 2, 3, 4, 5, 6, 9, 10, and 11, 2004, were adjourned and rescheduled to March 1, 2, 3, 4, 5, 8, 9, and 10, 2004, at the Office of Administrative Law, 33 Washington Street, Newark, New Jersey. After the first day of hearing was

postponed, the hearing commenced on March 2, 2004. During a conference prior to the start of the hearing, the matter was tentatively settled wherein the respondent would tender his resignation from his tenured teaching position with the petitioner, State Operated School District of the City of Newark. The terms of the proposed settlement agreement were placed on the record. Thereafter, the matter was adjourned pending the receipt of the executed settlement agreement. The stipulation of settlement was received by the undersigned on May 12, 2004.

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

1. On September 22, 2003, Don Marinaro, Assistant Superintendent of the State Operated School District of the City of Newark, executed a statement of charges, including twenty-two separate charges of conduct unbecoming and/ or corporal punishment against the respondent Charles Motley, which, if true, are sufficient to warrant dismissal or reduction in salary.

2. On October 17, 2003, Marion Bolden, District Superintendent of the State Operated School District of the City of Newark, executed a Certificate of Determination in support of the tenure charges. Superintendent Bolden determined that there was probable cause to credit the evidence in support of the charges.

3. The respondent understands his rights to a full hearing in the within matter. By tendering his resignation, and otherwise agreeing to the terms of the settlement, he has freely and voluntarily waived that right to a hearing. The parties have voluntarily agreed to the terms of the Stipulation of Settlement marked Exhibit J-1 as evidenced by the signatures of the parties. Marion Bolden, Superintendent of the Newark Public Schools, duly approved the Stipulation of Settlement on behalf of the petitioner.

4. The settlement of this matter is in the public interest, and will avoid the necessity of a protracted hearing over eight to ten days, with the attendance of numerous pupils, teaching staff members, and administrators. The cost of this litigation would be a significant burden on the respective parties.

5. The respondent has been advised the Commissioner of Education may refer the matter to the State Board of Examiners for action against the charged party's certificate as it deems appropriate, when such referral is warranted under the provisions governing resignation or retirement prior to conclusion of tenure charges in accordance with *N.J.A.C.* 6A:3-5.6(d).

6. The Settlement Agreement conforms with the *Cardonick* standards and with the concerns of the Commissioner of Education as set forth in the decision *In re Cardonick*, decided by Commissioner, April 7, 1982, *affirmed*, State Bd. of Ed., 1990 *S.L.D.* 842, 846 (April 6, 1983).

I **CONCLUDE** that the agreement is in the public interest and serves the interests of justice. The agreement further meets the safeguard requirements of *N.J.A.C.* 1:1-19.1, as well as the provisions of *N.J.A.C.* 6A:3-5.6. Accordingly, I approve the settlement and **ORDER** that the parties 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 (45) 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.

6/10/04
DATE

Robert J. Giordano
ROBERT J. GIORDANO, ALJ

Receipt Acknowledged:

6-16-04
DATE

M. Kathleen Dunson
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 17 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-7139

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 MAY 12 A 9:13

In the Matter of the Tenure Hearing of	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY**
CHARLES MOTLEY, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	**OFFICE OF ADMINISTRATIVE LAW** **Agency Ref. No. 383-10/03** **Docket No. EDU 11091-03N**
	STIPULATION OF SETTLEMENT

WHEREAS, the parties, State-Operated School District of the City of Newark ("District"), having offices at 2 Cedar Street, Newark, New Jersey 07012, and Charles Motley ("Mr. Motley"), a tenured teacher, residing at 554 Westminster Avenue, Elizabeth, New Jersey 07208, hereby stipulate and agree as follows:

1. Mr. Motley hereby agrees to irrevocably retire from his tenured teaching position, effective May 31, 2004, and to relinquish any rights to such position under *N.J.S.A.* 18A:28-5. Attached is a copy of the signed Letter of Retirement (Exhibit A). Upon the final approval of the signed Stipulation, the District shall and hereby does withdraw the Tenure Charges of Conduct Unbecoming certified on or about October 20, 2003.

2. Mr. Motley will receive his salary and benefits as an employee from October 20, 2003 through May 31, 2004.

J-1
5/12/04

3. As of May 31, 2004, all of Mr. Motley's employment rights, including, but not limited to salary, insurance coverage, tenure and seniority, will permanently end. Mr. Motley agrees not to seek employment with the District in the future.

4. Mr. Motley will receive all benefits accrued as per the terms of the Collective Bargaining Agreement between the District and the Newark Teachers Union.

5. The District will not pursue tenure charges against Mr. Motley as long as this Stipulation remains in effect and is not voided by any court of competent jurisdiction or agency with jurisdiction over this matter. However, if the Stipulation is voided, the District retains the right to file and consider for certification tenure charges against Mr. Motley, including such charges that have previously been filed by the District against Mr. Motley. Mr. Motley will have the right to renew his answer and denial and fully defend himself in any subsequent tenure hearing.

6. Mr. Motley acknowledges that he has been advised of the duty of the Commissioner of Education pursuant to *In re Cardonick* concerning referral to the State Board of Examiners for possible action regarding his teaching certification. The parties agree that settlement of this matter will be in the public's best interest and avoid the necessity of numerous days of testimony of numerous students, teaching staff, and administrators.

7. The parties acknowledge that each party has been separately represented by counsel of their choice and that this Stipulation is entered freely and voluntarily without duress, coercion or pressure from any source.

8. Except as set forth above, Mr. Motley waives all claims of any nature in any forum against the State-operated School District of the City of Newark with regard to this matter, including fees, or other monetary relief. This agreement includes, without limitation, any and all claims directly or indirectly related to or arising out of his employment by the District (with the exception of enforceability of this Stipulation). This release specifically includes, but is not limited to, discrimination on any basis, including claims Mr. Motley may have in connection with his employment with Respondent under the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the New Jersey Law Against Discrimination, the Older Workers Benefit Protection Act, the Conscientious Employees Protection Act, and any other federal or state civil rights laws, wrongful discharge claims, *with the exception of any claim under the workers compensation laws*.

9. This Stipulation constitutes the full agreement between the parties and is subject to approval by the Commissioner of Education.

Dated: 4/30/04

Charles C. Motley
Charles Motley

NEWARK PUBLIC SCHOOLS

Dated: 5/11/04

By: _____
Marion Bolden, Superintendent

CERTIFICATION

I, CHARLES MOTLEY, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my attorney and the Court 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 to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Charles C. Motley 4/30/04

CHARLES MOTLEY DATE

Exhibit A

April 30, 2004

Ms. Marion Bolden
State District Superintendent
Newark Public Schools
2 Cedar Street
Newark, New Jersey 07102

Dear Ms. Bolden:

I hereby place the District on notice that I am retiring from my teaching position with the State Operated School District of the City of Newark effective May 31, 2004. I believe the record will show that I have dedicated more than 30 years to the students of the City of Newark. I have enjoyed many of my experiences as a teacher in Newark and leave my position knowing that I have positively influenced the lives of many of my students. It is with considerable pride that I now venture forth into a new chapter in my life.

Very truly yours,

Charles C. Motley

Charles Motley

298-04

OAL DKT. NO. EDU 3680-04
AGENCY DKT. NO. 127-4/04

A.P., on behalf of minor child, A.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEW MILFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/12/04

Date of Mailing: 7/13/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3680-04

AGENCY DKT. NO. 127-4/04

A.P., ON BEHALF OF MINOR CHILD, A.P.

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NEW MILFORD,

Respondent.

A.P., mother of **A.P.**, appearing *pro se*

Ellen Marie Walsh, Esq., appearing for Respondent
(Fogarty & Hara, attorneys)

Record Closed: June 9, 2004 Decided: June 15, 2004

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on April 21, 2004, 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.

An oral argument was scheduled for May 5, 2004 at the OAL, 33 Washington Street, Newark, New Jersey. Prior to the hearing, settlement discussions were held and a settlement was reached.

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.

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 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 (45) 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 15, 2004
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

6/23/04
DATE

Kathleen Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 24 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 JUN -9 P 2:42

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
Facsimile (201) 791-3432
Attorneys for Respondent,
Board of Education of the
Borough of New Milford
Our File No. 11/302

A.P. on behalf of Minor Child, A.P.,	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DEPARTMENT OF EDUCATION
Petitioners,	
vs.	OAL Dkt. No. EDUOS 03680-2004N Agency Dkt. No. 127-4/04
Board of Education of the Borough of New Milford,	**STIPULATION OF SETTLEMENT**
Respondent.	

WHEREAS, A.P. is a six (6) year old student who attends first grade at B.F. Gibbs School in New Milford, New Jersey; and

WHEREAS, A.P. was disciplined for alleged inappropriate behavior in the classroom and was suspended by the B.F. Gibbs School; and

WHEREAS, A.P.'s parents filed an appeal to the Commissioner of Education in which they objected to the discipline and the manner in which it was implemented; and

WHEREAS, A.P.'s parents have conducted their own independent investigation regarding the possibility that A.P. may have in-school behavioral issues; and

WHEREAS, the parties wish to amicably resolve their dispute.

NOW, THEREFORE, the New Milford Board of Education (hereinafter referred to as the ''Board'') and A.P. on behalf of A.P., herein agree to resolve their dispute as follows:

1. All references to the suspension imposed on A.P. in April 2004 shall be removed and expunged from A.P.'s pupil records, with such pupil records to contain no reference to that suspension.
2. This shall resolve all issues set forth in the Petition of Appeal filed with the Commissioner of Education under OAL Docket No. EDUOS-03680-2004N, Agency Ref. No. 127-4/04.
3. This settlement is the compromise of disputed claims and shall never be treated as an admission of liability by either party for any purpose.
4. The parties recognize that each has been represented by legal counsel or a representative of his or its own choosing and that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

5. A.P.'s parents and A.P. release the Board, its officers, employees, administrators, agents and servants from any and all claims arising from the suspension imposed upon A.P. in April 2004, and the Board, its officers, employees, administrators, agents and servants all reciprocally release A.P.'s parents and A.P. from all claims in connection with the Petition of Appeal referenced above.

6. This Agreement shall be subject to the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties have hereunto set their hand and seals the day and year first written below.

WITNESS:

Stacy Garvey
Board Secretary/Business Administrator

Dated:

NEW MILFORD BOARD OF EDUCATION

James McCarten
Board President

Dated:

WITNESS:

Robert Pellegrino

Dated:

Dated: 6/3/04

WITNESS:

Witness to signatures by Robert Pellegrino & Angela Pellegrino
Dated: 6/3/04

Angela Pellegrino

Dated: 6/3/04

NEW MILFORD BOARD OF EDUCATION
145 Madison Avenue
New Milford, NJ 07646

RESOLUTION BA26

BE IT HEREBY RESOLVED that the terms, stipulations, and conditions and established in the Stipulation of Settlement in the matter of A.P. on behalf of Minor Child, A.P. v. Board of Education of the Borough of New Milford, OAL Docket No. EDUOS 03680-2004N, Agency Docket No. 127-4/04 which is annexed to this Resolution, are hereby adopted and approved by the New Milford Board of Education. The Board President and Secretary of the Board of Education are hereby authorized and directed to execute the attached Stipulation of Settlement and any other documents necessary to effect said settlement.

ROLL CALL VOTE:

AYES: 9

NAYS: 0

ABSTENTIONS: 0

CERTIFICATION

I hereby certify that this is a true copy of a Resolution adopted by a majority vote of the New Milford Board of Education at a meeting held on May 24, 2004 in New Milford, New Jersey.

Stacy C. Garvey
Board Secretary
May 24, 2004

299-04

OAL DKT. NO. EDU 9449-01
AGENCY DKT. NO. 398-9/01

MARK KRAMER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner excepts to the Administrative Law Judge's (ALJ) conclusion that the Board acted pursuant to its discretionary authority under *N.J.S.A.* 18A:11-1, inasmuch as that statute requires that a Board's actions be consistent with law. Here, petitioner argues that while the Board "may have the authority to amend its policies, *** it cannot do so with impunity where such action has the effect of reducing the tenured Petitioner's compensation." (Petitioner's Exceptions at 3)

Petitioner additionally asserts that the ALJ's determination that the Board's change in its interpretation of policy governing vehicle use by employees did not effect a reduction in his compensation "defies the factual findings made," including the testimony and documentary evidence supporting petitioner's declaration of the vehicle on his income tax

returns and his consideration of such vehicle as a "fringe benefit." (*Id.* at 3-4) In this connection, petitioner contends that the ALJ "has restricted her review of the issue in this case by limiting her interpretation of the term 'compensation' to the definition set forth at *N.J.S.A.* 18A:66-2d." (*Id.* at 5) Relying upon regulations promulgated by the Department of Treasury, petitioner contends that because the value of his personal use of the district owned vehicle was reported in regular, periodic installments in accordance with the Board's payroll cycle, it must be considered within the definition of "base salary" as per *N.J.A.C.* 17:3-4.1.[1]

In reply, the Board underscores that it has been given broad powers by the Legislature, pursuant to *N.J.S.A.* 18A:16-1[2], *N.J.S.A.* 18A:17-14.1[3], *N.J.S.A.* 18A:17-5[4] and *N.J.S.A.* 18A:11-1(c) to fix petitioner's compensation by a majority roll call vote. Moreover, the Board argues that the only administrator in its district with authorization for personal use of a vehicle is the Superintendent, "who has an express clause in his contract which was passed by a majority roll call vote of the Board." (Board's Reply at 3) The Board reasons that no Board member, including the Superintendent of Schools as an *ex-officio* member, can unilaterally fix petitioner's compensation. (*Id.*)

---

[1] This regulation defines "base salary" as "the annual compensation of a member, in accordance with contracts, ordinances, resolutions, or other established salary policies of the member's employer for all employees in the same position, or all employees covered by the same collective bargaining agreement, which is reported in regular, periodic installments with the payroll cycle of the employer ***." *N.J.A.C.* 17:3-4.1

[2] This statute provides that "Each local board of education *** shall employ and may dismiss a secretary or a school business administrator to act as secretary *** and fix and alter their compensation and the length of their terms of employment." *N.J.S.A.* 18A:16-1.

[3] Concerning the appointment of school business administrators, *N.J.S.A.* 18A:17-14.1 provides that local board(s) of education may appoint a school business administrator by a majority vote of all members of the board, define his duties and fix his salary.

[4] This statute provides, in pertinent part, that each school board secretary shall be appointed by the board by a recorded roll call majority vote of its full membership and the board shall fix his compensation. *N.J.S.A.* 18A:17-5.

The Board further contends that the ALJ correctly determined that compensation is contractual, pursuant to *N.J.S.A.* 18A:66-2d, and it never made any determination, contractual or otherwise, that the use of a vehicle was to be included as "compensation" for petitioner. (*Id.* at 2) Further, the Board supports the ALJ's finding that petitioner's choice to pay taxes on the value of the use of the car is not binding on the Board, noting that "Board [m]ember Carolyn Nelson testified that no member of the Board knew that Petitioner paid taxes on the car." (*Id.* at 4) As to the itemization of the car on petitioner's pay stub, the Board points out that it was petitioner's office that was responsible for putting certain line items into employees' pay stubs, and as per the testimony of other Board employees who used cars, none had line items placed into their respective pay stubs. The Board reasons, therefore, that "this was not a blanket policy that was authorized by the Board, and that Petitioner through his office unilaterally decided to place this line item into his stub." (*Ibid.*)

Upon careful and independent review of the record herein, the Commissioner determines to modify the Initial Decision, as set forth below.

Initially, the Commissioner notes that the parties stipulate that petitioner, a school business administrator, acquired tenure in his position pursuant to *N.J.S.A.* 18A:28-5.[5] (Initial Decision at 2) Further, the Commissioner concurs with the ALJ that the central issue in this matter is whether the Board reduced petitioner's compensation in violation of applicable tenure statutes when it directed that all district-owned vehicles were to be returned to the Board

[5] The Commissioner acknowledges that petitioner also contends that he has acquired tenure pursuant to *N.J.S.A.* 18A:17-2a. (Petitioner's Letter Brief, January 26, 2004 at 9) (See, for example, *Shenekji v. Passaic County Vo-Tech School Board of Education*, Commissioner Decision No. 292-88, November 18, 1988, *aff'd* as modified, State Board of Education, Dkt. No. 64-88, May 3, 1999)

premises at night, thus preventing petitioner from the use of such vehicle on a 24-hour basis, as he had enjoyed from the time of his employment in 1994 until June 28, 2001. The Commissioner additionally concurs with the ALJ that the testimony of the former Superintendent of Schools is not necessary to resolve this controversy (Initial Decision at 4); neither is it essential to address whether petitioner was acting in conformity with Board policy, practice or convention when he used the district-owned vehicles on a 24-hour basis.

It is undisputed that, pursuant to *N.J.S.A.* 18A:28-5, "teaching staff members" serving in any school district or under any board of education "shall not be dismissed or reduced in compensation" except as specifically prescribed under *N.J.S.A.* 18A:6-10(b). In this connection, the ALJ appears to rely on the definition of compensation as provided in the Teacher's Pension and Annuity Fund Law at *N.J.S.A.* 18A:66-2d to determine that petitioner's use of a district vehicle was not "compensation," since it was not specifically included in his contract (Exhibits P-7, P-8); consequently, the ALJ concludes that the Board properly exercised its discretionary authority pursuant to *N.J.S.A.* 18A:11-1, in adopting, or amending, its district-owned vehicle policy. The Commissioner finds it unnecessary to reach the ALJ's analysis, however, in light of a recent decision interpreting "compensation" within the intendment of the tenure laws.

In *Arlene C. Allen, et al. v. Board of Education of the Township of Clark, Union County*, Commissioner Decision No. 189-04, April 30, 2004, petitioners, tenured teachers formerly employed by the Union County Regional High School District No. 1, alleged that the respondent Clark School Board, their new employer when the Regional District was dissolved, violated their rights under *N.J.S.A.* 18A:6-31.5 and *N.J.S.A.* 18A:13-64 when it improperly calculated their compensation for sick leave upon retirement in that they were entitled to

compensation for sick leave accumulated while employed by the Regional School District at the rate provided in the collective bargaining agreement in effect at the time the days were accumulated. Additionally, the petitioners in *Allen* argued "that the word 'compensation' as used in the tenure statutes includes the payment for accumulated, unused sick leave upon retirement." *Allen, supra,* slip. op. at 14. Thus, they reasoned, respondent's failure to provide them with their requested sick leave payments constituted a "reduction in compensation" in violation of *N.J.S.A.* 18A:6-10.

Upon review of applicable case law, and, in particular, the State Board of Education's decision in *Stagaard v. Contini*, 97 *N.J.A.R.* 2d (EDU) 217, the Commissioner found that:

> it was implicitly determined that payment for accumulated sick leave was not entitled to protection or preservation pursuant to *N.J.S.A.* 18A:13-64 either as a tenure right or under the "other benefits" provision of that statute. First, the decision in *Stagaard* evidences that the State Board accepted that the tenure entitlement of the petitioners in that matter was satisfied by the preservation of their salary. Had the State Board found any other claimed right of petitioners in that matter to be one which was protected by tenure, they would have identified and included it. **Therefore, the Commissioner concludes that "compensation" for purposes of the protections provided by *N.J.S.A.* 18A:6-10 and *N.J.S.A.* 18A:13-64 has implicitly been defined as "salary."** *Allen, supra* at 44-45 (emphasis supplied)

Thus, notwithstanding that *Allen* addressed the issue of petitioners' tenure rights in conjunction with the "save harmless" provisions of *N.J.S.A.* 18A:13-64 and the case law arising therefrom, the Commissioner must likewise conclude in the instant matter that "compensation" for the purpose of *N.J.S.A.* 18A:28-5, implicitly defined in a related tenure statute as "salary," does not include the value of petitioner's prior use of a district-owned vehicle[6].

[6] This analysis would similarly apply to the protections provided in *N.J.S.A.* 18A:17-2(c).

Accordingly, the Initial Decision of the ALJ is modified as set forth above and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 7/12/04

Date of Mailing: 7/13/04

[7] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9449-01

AGENCY DKT. NO. 398-9/01

MARK KRAMER,

Petitioner,

v.

BOARD OF EDUCATION OF EAST ORANGE, ESSEX COUNTY,

Respondent.

Francis J. Campbell, Esq., appearing for Petitioner
(Kenney, Gross, Kovats, Campbell & Pruchnik, attorneys)

Melvin C. Randall, Esq., appearing for Respondent
(Love & Randall, attorneys)

Record Closed: March 10, 2004 Decided: June 3, 2004

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner, a tenured School Business Administrator, asserts when Respondent Board discontinued assignment of a district owned vehicle to him he suffered a reduction in compensation in contravention of *N.J.S.A.* 18A: 28.5.

The case was heard on December 8 and 9, 2003; the parties requested and were granted the opportunity to submit written summations. The record closed on March 10, 2004; however, the undersigned sought and was granted an extension of the 45-day time frame for filing the Initial Decision to June 7, 2004.

FINDINGS OF FACT

A. Stipulated Facts

The parties stipulated to the following **FACTS** at the hearing; these stipulations are incorporated herein as factual determinations in this matter.

1. Petitioner was first employed by Respondent as the School Business Administrator and Board Secretary for the School District on November 1, 1994. He achieved tenure in that position pursuant to *N.J.S.A.* 18A:28-5.

2. From the date of Petitioner's first employment by Respondent, the Petitioner received particular remuneration including fringe benefits recited generally in his employment contract with Respondent as "the same fringe benefits which accrue to all other administrative employees."

3. Petitioner was assigned an automobile for use in conducting the business of Respondent. Petitioner used the assigned vehicle to travel to the District from his residence and from the District to his residence. Petitioner used the vehicle exclusively, on a 24-hour a day basis.

4. On June 28, 2001, Petitioner was informed that the Policy Committee of the East Orange Board of Education decided that all School District owned vehicles were required to be returned every night to the School District premises located at 715 Park Avenue in the City of East Orange.

5. Petitioner promptly complied with the directive he received and no longer used the vehicle to drive to and from his residence.

6. On September 11, 2001, the members of the East Orange Board of Education determined that the Board would not reverse or modify the directive that all district owned vehicles were required to be returned to District premises at night.

B. Undisputed Facts

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact, which are essentially undisputed, in this matter.

7. The vehicle used by Petitioner was owned and insured by Respondent; Respondent also serviced and maintained the vehicle and paid for the fuel.

8. Because a portion the Petitioner's use of the School District-owned automobile accrued to his personal benefit, Petitioner annually declared the value of the use of the vehicle on his income tax returns as compensation on which he paid taxes to the State and Federal governments.

9. Various other high level administrators used the vehicles assigned to them to travel between home and the District, *i.e.,* for commuting purposes.

ANALYSIS AND CONCLUSIONS

Although the ultimate issue to be decided in this matter is whether the compensation of a tenured employee, as defined by statute, has been reduced in violation of the tenure statute, two seemingly significant ancillary issues arose during

the hearing. The first is whether statements made by a former Superintendent of Schools for the Respondent District were admissible as evidence as statements of a party to the action in under *N.J.R.E.* 803(b); the second is whether the Board policy governing the use of district vehicles was and is clear.

Because I have determined this matter based on statutory language, it is not necessary to decide the issue of admissibility of the former Superintendent's statements and I decline to do so.

With respect to the issue of the clarity of the Board policy, the determination to be made in this matter is whether, after the Board issued a policy determination to require district owned vehicles which had previously been driven by various administrators for commuting purposes to be returned to District premises at the end of the day, Petitioner suffered a loss of compensation in violation of the tenure statute. There is no issue of insubordination or conduct unbecoming because Petitioner failed to follow Board policy. I am cognizant of Respondent's argument that Petitioner was in violation of Board policy and the ensuing discussion with regard to that policy; however, the underlying issue to be determined in this matter is not whether Petitioner was in compliance with a policy which may or may not be vague; the issue to be determined is whether, after having had exclusive use of a vehicle on a 24-hour a day basis from 1994 to 2001, the termination of such use constituted a reduction in compensation. As noted in the factual determinations set forth above, the practice in which Petitioner engaged was followed by other high level administrators as well.

A determination of the clarity of the Board policy is not germane to the issue to be resolved herein; consequently, I decline to make such a determination.

I turn now to the predicate issue in this matter, whether Petitioner's compensation with illegally reduced when he was required to leave the District owned vehicle which had been assigned to him on district premises at the close of the business day. That Petitioner is a certificated employee who enjoys the protections afforded by the tenure statute is clear and has been stipulated. The pertinent section of

the tenure statute requires the compensation of such certificated teaching staff members and such other employees as are in positions which require them to hold appropriate certificates issued by the Board of Examiners *shall not be reduced except* for inefficiency, incapacity, or conduct unbecoming such teaching staff member. *N.J.S.A.* 18A:28-5. (Emphasis added).

The language of the tenure statutes in general, and the one cited above in particular, makes clear any reduction in compensation except for inefficiency, incapacity, or conduct unbecoming would be a violation of tenure rights. Since there is nothing in the record to justify the reduction of compensation on any of the grounds specified in the statute, the question is whether the assignment of a district-owned vehicle can be considered compensation. Only if that answer is in the affirmative can the termination of such use constitute a violation of tenure rights.

The only definition of compensation in the education statutes is found in the section dealing with pensions:

> "Compensation" means the contractual salary, for services as a teacher as defined in this article, which is in accordance with established salary policies of the member's employer for all employees in the same position but shall not include the individual salary adjustments which are granted primarily in anticipation of the member's retirement or additional remuneration for performing temporary or extracurricular duties beyond the regular school day of the regular school year. *N.J.S.A.* 18A:66-22d.

According to this statute, then, compensation is contractual. Furthermore, the terms of compensation must be in accord with the board's established salary policies. Petitioner asserts that, because he has had the exclusive use of an automobile for six years and he has paid taxes on the value of the car to him, the policy of allowing administrators to have exclusive use of an automobile for commuting purposes is an "established salary policy." First, his determination to pay taxes on the value of the car to him does not bind Respondent in any way. Second, boards of education have been specifically empowered by the Legislature to

> *[m]ake, amend* and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district . . .
>
> and
>
> [p]erform all acts and do all things, consistent with law and rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

N.J.S.A. 18A:11-1c,d. (Emphasis added).

Read together, these two sections of the statute give local boards of education the authority to set ground rules, policies, so to speak, for the governance of the district. With the authority to make policy comes the authority to amend policy which is clearly what happened in this instance. Respondent Board has determined it to be in the best interest of the district to enforce a policy of having passenger cars owned, maintained and fueled by the district returned to the district at the close of the district's business day. I **FIND**, therefore, in requiring administrators to return District owned vehicles to a designated location in the District each day, Respondent exercised its power to make and/or amend policy.

Accordingly, I reject Petitioner's assertions and **FIND** he has not sustained his burden of proving a reduction in compensation in violation of his tenure rights.

I **CONCLUDE,** therefore, this petition should be dismissed with prejudice.

ORDER

I hereby **ORDER** this petition 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 (45) 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 (13) 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, 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 2, 2004
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

6/3/04
DATE

Mailed to Parties:

JUN 4 2004
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

301-04

OAL DKT. NO. EDU 2356-03
AGENCY DKT. NO. 359-11/02

ARTI SAHNI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record, the Commissioner finds that this matter turns on the credibility of the witnesses. In this regard, the Commissioner recognizes that the Administrative Law Judge's (ALJ) credibility determinations are entitled to his deference. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility. *In the Matter of Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div.) *certif. denied*, 121 *N.J.* 615 (1989)." *In the Matter of the Tenure Hearing of Frank Roberts*, 96 *N.J.A.R.* 2d (EDU) 549, 550. The Appellate Division has affirmed this principle, underscoring that "[u]nder existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor based judgments." *Whasun Lee v. Board of Education of the Township of Holmdel*, Docket No. A-5978-98T2, decided by the New

Jersey Superior Court, Appellate Division, August 7, 2000, slip op. at 14. Indeed, the Commissioner

> *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. (emphasis added) *N.J.S.A.* 52:14B-10(c).

Here, upon review of the full record,[1] the Commissioner finds that the ALJ's credibility assessments are not arbitrary, capricious or unreasonable, but, instead, are supported by sufficient, competent and credible evidence in the record. The Commissioner, therefore, finds no cause to disturb the factual findings, and he concurs with the legal conclusions of the ALJ.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/14/04

Date of Mailing: 7/15/04

[1] The parties did not provide the Commissioner with transcripts of the hearing before the ALJ.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2356-03

AGENCY DKT. NO. 359-11/02

ARTI SAHNI,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

Michael T. Barrett, Esq., appearing for Petitioner (Bergman & Barrett, attorneys)

Thomas W. Sumners, Jr., Esq., appearing for Respondent (Sumners George, P.C., attorneys)

Record Closed: January 23, 2004 Decided: June 11, 2004[1]

BEFORE **ISRAEL D. DUBIN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Arti Sahni, contends that her teaching contract was renewed for the 2002-2003 school year by operation of *N.J.S.A.* 18A:27-11 when respondent Trenton Board of Education

[1] By Orders of Extension, the time limit within which to file this Initial Decision with the Commissioner of the Department of Education was extended until July 22, 2004.

failed to offer her a contract of employment for the following year, or serve notice that such employment would not be offered, by May 15, 2002.

Petitioner filed her petition with the Commissioner of Education on November 11, 2002, and the Board filed its answer on December 19, 2002. By letter to the parties dated December 24, 2002, M. Kathleen Duncan, Director of the Department of Education's Bureau of Controversies and Disputes, questioned whether petitioner had (1) filed her petition within ninety days of receiving the notice of nonrenewal, and (2) stated a cause of action upon which relief could be granted given a Board of Education's virtually unlimited discretion in hiring or not renewing the contracts of non-tenured teachers. She therefore requested that the parties submit briefs or memoranda of law outlining their legal arguments.

By letter to the parties dated February 18, 2003, Director Duncan noted that a review of their respective memoranda disclosed that the Board had not submitted proof of its compliance with *N.J.S.A.* 18A:27-10. Specifically, the Board had not provided any affidavits or certifications establishing that its letter of non-renewal had actually been mailed. Therefore, she directed the parties to submit supplemental memoranda addressing the effect, if any, a failure by petitioner to notify the Board in writing of her acceptance of employment by the deadline of June 1, 2002, would have on her status.

By letter dated April 3, 2003, Director Duncan advised the parties that she had completed her review of their respective supplemental memoranda and determined that a plenary hearing would be necessary in order to resolve the disputed issues relating to (1) the renewal/nonrenewal of petitioner's teaching contract, and (2) petitioner's claim to tenure status. Therefore, the matter would be referred to the Office of Administrative Law for further proceedings.

On April 22, 2003, the matter was transmitted to the Office of Administrative Law 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. A prehearing conference was then scheduled for and held on June 17, 2003, at which time the parties agreed that the matter raised two legal issues: First, whether petitioner's teaching contract was renewed for the 2002-2003 school year by operation of law because of the Board's alleged failure to notify

her of its intention not to renew, and second, whether petitioner was/is entitled to tenure by virtue of her years of service and the fact that she became a United States citizen in September 2002.

The matter was scheduled to be heard on November 17 & 18, 2003. Although the initial day of hearing was adjourned in advance at the request of the Board's counsel, the matter was heard as scheduled on November 18, 2003, at the Office of Administrative Law, 9 Quakerbridge Road, Mercerville, New Jersey. The parties requested the opportunity to submit post-hearing briefs and the record subsequently closed upon receipt of the final brief on January 23, 2004. The names of the witnesses who testified and a list of the exhibits admitted into evidence are set forth in the appendix to this decision.

SUMMARY OF THE RECORD

Petitioner is a science teacher and began her employment with the Trenton Board of Education as a long-term substitute teacher on September 8, 1998. Although petitioner contends she began her permanent employment in January 1999, the Board asserts that she was not granted a permanent position until October 9, 1999, when she was formally assigned to the Holland Middle School, effective September 1, 1999. In any event, she held the position of science teacher, albeit in different schools, for the 1999-2000, 2000-2001, and 2001-2002 school years. Consequently, had her contract been renewed, she would have been eligible for tenure at the beginning of the 2002-2003 school year.[2]

On January 30, 2002, petitioner received a memorandum from Eugene W. Harris, Principal of the Hedgepeth/Williams Middle School, advising her that it was his intention to recommend that her contract not be renewed. Principal Harris based his recommendation on the results of three formal classroom observations conducted by supervising administrators disclosing that she had "failed to make necessary and sufficient progress." *Harris Memorandum*, Exhibit R-1.

[2] Although she had not yet become a United States citizen at the time of the alleged non-renewal, she was sworn in and received her Certificate of Naturalization (Exhibit P-3) on September 28, 2002.

Sometime in March 2002, petitioner received notification that the Superintendent of Schools had recommended she be terminated from her position and that the Board would be considering the matter at its conference meeting on April 22, 2002. According to the Minutes of the Executive Session held on that date, "Ms. Sahni was present and represented by her Attorney Mr. Barrett. Attorney Barrett spoke on her behalf and Ms. Sahni gave a detailed presentation why she feels she should not be terminated. The Board plans to withdraw her termination." *Minutes, Board Conference Meeting, April 22, 2002*; Attachment 1, Respondent's Brief (January 13, 2003). The following week, at the Regular Board Meeting of April 29, 2002, the item concerning petitioner's termination was "**PULLED**." *Minutes, Regular Board Meeting, April 29, 2002*; Attachment 2, Respondent's Brief (January 13, 2003).

In lieu of terminating her employment, the Superintendent decided not to renew her contract for the 2002-2003 school year. Therefore, on May 2, 2002, Fougere J. Aupont, the Board's Human Resources Manager, dictated a letter-advising petitioner that "The Superintendent of the Trenton Board of Education has decided not to recommend to the Board that your contract be renewed for the 2002-2003 school year. This means that your position as Science Teacher at the Hedgepeth/Williams School is not offered to you for the new school year 2002-2003." *Nonrenewal Letter*, Exhibit R-2. The letter further advised her that she had fifteen days within which to submit a written request for a statement of reasons for the decision, and the right to request a *Donaldson* hearing upon receiving the statement.

Mr. Aupont's secretary, Maryellen Ricigliano, testified that the letter and the two envelopes that were to be used were embossed with the Board's return address and addressed to petitioner at 140 Palmer Lane, Ewing, New Jersey. This is the address petitioner had provided on April 11, 2002, when she filled out the Board's *Information Record*, Exhibit R-3, and checked off the box for "Address Change." Ms. Ricigliano then attached a green certified mail receipt card to one of the envelopes, enclosed a copy of the letter in each and personally walked them down to the mailroom for delivery to the Postal Service. According to both Mr. Aupont and Ms. Ricigliano, neither the green card nor the letters themselves were returned.

Petitioner testified that she never received notice of the Board's decision on the recommended termination. Nor did she receive the letter of nonrenewal via certified or regular

mail. Therefore, on May 16, 2002, she hand delivered a letter to the Human Resources Department accepting a teaching position for the 2002-2003 school year. The letter, which bore the 140 Palmer Lane address, advised Superintendent of Schools James Lytle that "This letter confirms my acceptance of the position of a Science Teacher in the Trenton School District for the following year, 2002-2003." *Acceptance Letter*, Exhibit P-2.

Sometime in August 2002, petitioner advised Thomas Moore, President of the Trenton Education Association, that her health benefits had been discontinued. Mr. Moore, in turn, contacted[3] the Board regarding petitioner's status. By way of reply he received a letter from Carolyn Gibson, Assistant Superintendent of Human Resources, advising him that it was the Board's contention that it had "provided correspondence to Ms. Sahni indicating the status of her employment with the Trenton Public Schools. Therefore, we confirm that she is no longer an employee of the district." *Gibson Letter*, Exhibit R-4.

ANALYSIS AND APPLICATION OF THE LAW

A district board of education has virtually unlimited discretion in hiring, or deciding not to renew the contracts of, non-tenured teachers. *Dore v. Board of Education*, 185 *N.J. Super.* 447, 453 (App. Div. 1982); *Guerriero v. Bd. of Ed. of the Borough of Glen Rock*, State Board decision (February 5, 1985), *aff'd* Dkt. No. A-3316-85T6 (App. Div. 1986); *Pratt v. Board of Education of the Borough of Butler*, State Board decision (January 6, 1999); *Cordell Wise v. Bd. of Ed. of the City of Trenton*, State Board decision (January 3, 2001). However, that does not mean an affected teacher is without rights, and one of those rights is that she be given timely notice of the board's decision on whether to offer her a contract for the following year.

Pursuant to *N.J.S.A.* 18A:27-10, on or before May 15 of a given year, a board of education must provide a nontenured teacher with a written offer of employment or notice from the chief school administrator that no such contract shall be offered for the next succeeding year. Should the board of education fail to give the teacher such written notice of its intentions by that

[3] The record does not disclose whether Mr. Moore contacted the Board in writing, by telephone, or during a conversation with a Board representative at a meeting. Therefore, the phrasing of his inquiry, which might have provided additional information concerning the extent of the Association's knowledge concerning petitioner's status, is unknown.

date, it "shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education." *N.J.S.A.* 18A:27-11. In any event, if the nontenured teacher decides to accept the actual or constructive offer of employment, she must provide the board with written notice of her acceptance by no later than June 1. Should she do so, the employment shall be continued. *N.J.S.A.* 18A:27-12.

Petitioner contends that she received an offer of employment for the 2002-2003 school year by operation of law when the Board failed to provide her with written notice of its intentions by May 15, 2002. The Board disagrees, arguing that the "chief school administrator," Mr. Aupont, sent her a letter of non-renewal by regular and certified mail, return receipt requested, on May 2, 2002.

"New Jersey cases have recognized a presumption that mail properly addressed, stamped, and posted was received by the party to whom it was addressed. The conditions that must be shown to invoke the presumption are (1) that the mailing was correctly addressed; (2) that proper postage was affixed; (3) that the return address was correct; and (4) that the mailing was deposited in a proper mail receptacle . . .." *SSI Medical Services, Inc. v. State, Dept. of Human Services*, 146 *N.J.* 614, 621 (1996) (citations omitted). Proof of mailing can be demonstrated by evidence of habit or routine practice. However, evidence of office custom requires other corroboration that the custom was followed in a particular instance, in order to raise a presumption of mailing and receipt and meet the preponderance of the evidence standard." *Id.* at 622-23.

Here, the totality of the evidence presented by the Board as to the routine business custom and the specific practice followed on May 2, 2002 establishes a presumption that the letter of nonrenewal was received by petitioner. As recited earlier, Mr. Aupont's secretary, Maryellen Ricigliano, whom I found to be an extremely credible witness, testified that the letter and the two envelopes that were to be used were embossed with the Board's return address and addressed to petitioner at 140 Palmer Lane, Ewing, New Jersey. This is the address petitioner had provided on April 11, 2002, when she filled out the Board's *Information Record* form and checked off the box for "Address Change." Ms. Ricigliano then attached a green certified mail receipt card to one

of the envelopes, enclosed a copy of the letter in each and personally walked them down to the mailroom for delivery to the Postal Service. According to both Mr. Aupont and Ms. Ricigliano, neither the green card nor the letters themselves were returned. In fact, none of the other letters of termination or nonrenewal sent that year were returned. This only strengthens the presumption of receipt.

The "presumption of receipt derived from proof of mailing is 'rebuttable and may be overcome by evidence that the notice was never in fact received.'" *Id.* at 625 (citations omitted). In this regard, petitioner testified that her mail is delivered daily at 4:00 p.m., although the time differs on Saturdays when delivery is dependent upon whether she is first or last on the route that day. She picked up her mail everyday and was certain she had not received the Board's letter.

However, it is curious that even as the May 15, 2002, deadline rapidly approached, petitioner did not even think to call Dr. Lytle, Mr. Aupont, or her principal at the Hedgepeth/Williams Middle School, Mr. Harris, concerning her status. What makes this even more surprising is her testimony that she had never received notice of the Board's decision on the recommended termination of her employment from Mr. Aupont, Mr. Barrett, or her union representative. In other words, although she knew she was in jeopardy of losing her job and had possibly been terminated, which would have relieved the Board of sending a nonrenewal letter, she did not make inquiry of the Board in order to obtain information and consider her options. Even after the deadline had passed and she reported for work the next morning, she did not contact her principal or anyone else concerning her status. Instead, at 12:48 p.m. that afternoon, she hand-delivered her letter to the Human Resources Department accepting a teaching position for the 2002-2003 school year, a position that for all she knew may not have been there to accept.

Adding to the presumption of receipt is the reliability of the mails. "[T]he mails today are recognized as an efficient and inexpensive means of communication." *Mullane v. Central Hanover Bank & Trust Co.*, 339 *U.S.* 306, 319, 70 *S.Ct.* 652, 660, 94 *L.Ed.* 864, 876 (1950). Attesting to this reliability, the New Jersey Supreme Court has incorporated service by mail into the court rules, which are binding on the bench and bar. In the Rules of General Application, *R.* 1:5-2 permits service of process "by registered or certified mail, return receipt requested, to the party's last known address; or if the party refuses to claim or to accept delivery, by ordinary mail

to the last known address; . . .. Where mailed service is made upon a party, the modes of service may be made simultaneously."

Similarly, *R.* 1:5-4(a) provides that "[w]here under any rule, provision is made for service by certified or registered mail, service may also be made by ordinary mail simultaneously or thereafter. If the addressee fails or refuses to claim or to accept delivery of certified or registered mail, the ordinary mailing shall be deemed to constitute service." Moreover, with certain exceptions not applicable here, "service by mail of any paper referred to in *R.* 1:5-1[4], when authorized by rule or court order, shall be complete upon mailing of the ordinary mail." *R.* 1:5-4(b). Only if no ordinary mailing is made will service "be deemed complete upon the date of acceptance of the certified or registered mail." *Ibid.*

Additionally, "[w]here service has been made by registered or certified mail, filing of the return receipt card with the court shall not be required." *R.* 1:5-3. Nor need the proof of service recite the specific disposition of the certified mail, as such a requirement would only serve to defeat the purpose of the simultaneous mailing authorized by *R.* 1:5-2. *First Resolution Inv. v. Seker*, 171 *N.J.* 502, 506 (2002). Therefore, absent exceptional circumstances, a failure to provide proof of service will not affect the validity of service. *R.* 1:5-3.

The Appellate Division had occasion to visit this issue in *Morristown Memorial Hospital v. Caldwell*, 340 *N.J. Super.* 562 (App. Div. 2001). In a decision written by the Hon. Francine Axelrad, J.T.C., T/A, the Appellate Division held that service by regular mail of a motion satisfied statutory and rule requirements for service, even without proof of service by certified mail, and did not otherwise violate due process requirements. More specifically, the court held that "[a]ctual knowledge of the failure or refusal to claim or accept delivery of the certified mail is not a prerequisite for ordinary mail to be deemed to constitute service under *R.* 1:5-4. If ordinary mail has not been returned, we can presume that it was properly addressed and delivered, and can expect that certified mail sent to the same address was delivered or will be refused or unclaimed." *Morristown Memorial Hospital v. Caldwell*, *supra*, 340 *N.J. Super.* at 568.

[4] "In all civil actions," such papers include "orders, judgments, pleadings subsequent to the original complaint, written motions (not made ex parte), briefs, appendices, petitions and other papers . . .." *R.* 1:5-1(a).

Judge Axelrad concluded the discussion of ordinary mail by referring to the Supreme Court's establishment in Special Civil Part of a county by county "Service by Mail Program," in which the court clerk simultaneously mails a summons and complaint to a defendant by both certified and regular mail. *R.* 6:2-3(d). The rule, which she described as "provid[ing] a common sense approach that satisfies due process," *Morristown Memorial Hospital v. Caldwell*, *supra*, 340 *N.J. Super.* at 571, provides:

> Consistent with due process of law, service by mail pursuant to this rule shall have the same effect as personal service, and the simultaneous mailing shall constitute effective service unless the mail is returned to the court by the postal service marked "moved, unable to forward," "addressee not known," "no such number/street," "insufficient address," "forwarding order expired," or the court has other reason to believe that service was not effected.

Although *Morristown Memorial Hospital* concerned the filing of a motion for turnover of a debtor's assets in a bank account, the Appellate Division has also approved the simultaneous service by regular and certified mail of an "Order for Arrest" issued in accordance with *R.* 6:7-2(g) to enforce a litigant's rights in a commercial matter. *New Century Financial Services, Inc. v. Nason*, 367 *N.J. Super.* 17 (App. Div. 2004). Since *N.J.S.A.* 18A:27-10 simply requires that the notice of nonrenewal be in writing and does not prescribe that a particular mode of service be employed, I can see no good reason why service of the notice cannot be made simultaneously by regular and certified mail.

There are any number of reasons why the green card has, to this day, not been returned to the Board. Among other things, it is possible that it was not detached from the envelope upon delivery, or was detached but lost by the postal service during its return trip. Regardless of the reason, having had the opportunity to hear the testimony and adjudge the credibility of Ms. Ricigliano, I cannot accept petitioner's implication that the letter was never sent. *See* Petitioner's

Brief (January 13, 2004), pg. 3.[5] That being so, service of the written notice was "complete upon mailing of the ordinary mail." *See R.* 1:5-4(b).

After careful review of the record before me, I find that the evidence presented by petitioner was insufficient to rebut the presumption of receipt and that she has, therefore, failed to establish by a preponderance of the evidence that she did not receive the May 2, 2002 nonrenewal notice.

DECISION AND ORDER

Based upon the foregoing, I find that on or before May 15, 2002, respondent Board of Education of the City of Trenton provided petitioner Arti Sahni, a nontenured teacher, with a written notice from the chief school administrator advising her that she would not be offered a contract of employment for the 2002-2003 school year and thereby satisfied the requirements of *N.J.S.A.* 18A:27-10. Since her contract was not been renewed, she is not an employee of the Board of Education of the City of Trenton and I therefore conclude that her petition should be **DISMISSED**. It is so **ORDERED**.

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 (45) 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.

[5] "The Respondent has been unable to produce evidence of a certified mailing and it is unclear, from the evidence addressed at hearing, that one was ever sent."

Within thirteen (13) 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, 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 11, 2004
DATE

ISRAEL D. DUBIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

6/17/04
DATE

Mailed to Parties:

JUN 17 2004
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

APPENDIX

WITNESSES

For Petitioner:

Arti Sahni

Thomas Moore

For Respondent:

Fougere J. Aupont

Maryellen Ricigliano

EXHIBITS

For Petitioner:

P-1 N/A

P-2 Letter of Acceptance

P-3 Certificate of Naturalization

For Respondent:

R-1 Harris Memo, January 30, 2002

R-2 Aupont Non-Renewal Letter, May 2, 2002

R-3 Human Resources Information Record – Address Change

R-4 Gibson Letter, September 10, 2002

304-04

OAL DKT. NO. EDU 2730-04
AGENCY DKT. NO. 60-2/04

J.J., on behalf of minor children, K.G.J. and K.G.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of petitioner's failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of the notification sent to the parties by OAL on June 30, 2004, providing petitioner ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, the petition of appeal is hereby dismissed with prejudice due to petitioner's failure to appear at hearing or provide an explanation for his nonappearance.

Notwithstanding the dismissal of the petition, the Commissioner notes that the Board's Answer in this residency matter contained a counterclaim for tuition which was left unresolved by the Administrative Law Judge. In that the record before the Commissioner contains no affidavit of a responsible Board official attesting to the amount of tuition claimed by the Board as a consequence of the ineligible attendance of petitioner's two children in its schools, this matter must be remanded to the OAL for supplementation of the record in this regard and an appropriate recommended order regarding the payment of tuition.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/20/04
Date of Mailing: 7/20/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.*

305-04

OAL DKT. NO. EDU. 11336-03
AGENCY DKT. NO. 393-10/03

M.N. and E.Y., on behalf of minor child, K.N.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY, DR. CHARLES EPPS, FRANKLIN WALKER, ANNE BUTLER AND LAURA BUCCINNA,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge that the instant petition is appropriately dismissed because it was filed well outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(d) and petitioners have failed to set forth a legal or factual basis for waiving the timely filing requirement.

Accordingly, the Initial Decision is adopted for the reasons stated therein. Summary decision is granted to the Board and the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/21/04
Date of Mailing: 7/21/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

302-04

OAL DKT. NO. EDU 4427-04 (ON REMAND EDU 8874-03)
AGENCY DKT. NO. 375-10/03

A.C., on behalf of minor child, K.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MT. EPHRAIM, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. 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: 7/15/04

Date of Mailing: 7/16/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4427-04
(ON REMAND EDU 8874-03)
AGENCY DKT. NO. 375-10/03

A.C. o/b/o MINOR CHILD, K.C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MT. EPHRAIM, CAMDEN COUNTY,
Respondent.

A.C., petitioner, *pro se*

Frank P. Cavallo, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: June 17, 2004 Decided: June, 2004

BEFORE **JOSEPH F. MARTONE**, ALJ:

This matter was remanded to the Office of Administrative Law on June 4, 2004, purusnat to the Commissioner of Education's decision of May 14, 2004 (OAL Dkt. No. EDU 8874-03). The matter was remanded because the Board attorney did not sign the Settlement Agreement and there was no Board resolution designating the Board President to sign the agreement on its behalf. A modified Settlement Agreement has been prepared and submitted with the Board attorney's signature, attaching a copy of the Board Resolution approving the Board President's signature.

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 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 (45) 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 24, 2004
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

6-25-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 28 2004

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mph

File No. 7138-0008

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 MAR 15 A 2:20

PARKER, MCCAY & CRISCUOLO
Three Greentree Centre, Suite 401
Route 73 & Greentree Road
PO Box 974
Marlton, New Jersey 08053
Attorneys for Respondent, Board of Education of the Borough of Mount Ephraim

RECEIVED
2004 JUN 1 A 11:36
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ANTHONY COAN, on behalf of minor, child, Kristal Coan,	:	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY**
Petitioner,	:	
vs.	:	**AGENCY DOCKET NO. 375-10/03**
	:	**OAL DOCKET NO. EDUOS-08874-2003S**
BOARD OF EDUCATION OF THE BOROUGH OF MOUNT EPHRAIM,	:	**CIVIL ACTION**
	:	**SETTLEMENT AGREEMENT**
Respondent.	:	

WHEREFORE, the Petitioner, Anthony Coan, on behalf of his minor daughter, Kristal Coan, filed a Petition of Appeal with the Department of Education on or about October 14, 2003;

WHEREFORE, the Petition of Appeal sought payment of the costs of Kristal Coan's attendance at the Gloucester County Institute of Technology, Southern New Jersey Academy of Performing Art;

WHEREFORE, the Respondent, Borough of Mount Ephraim Board of Education filed an Answer on or about November 3, 2004, contesting the Petitioner's right to attend the

Gloucester County Institute of Technology.

WHEREFORE, the parties entered into settlement negotiations in an effort to resolve the outstanding issues;

NOW THEREFORE, IT IS on this 27th day of February 2004 AGREED as follows:

1. The Respondent, Borough of Mount Ephraim Board of Education, agrees to be financially responsible for the tuition charged by Gloucester County Institute of Technology for Kristal Coan's attendance at Gloucester County Institute of Technology Southern New Jersey Academy of the Performing Arts from January 1, 2004 through the remainder of the 2003-04 school year and continuing thereafter until Kristal Coan either graduates from the Gloucester County Institute of Technology or is no longer a resident of the Borough of Mount Ephraim School District.

2. The Petitioner, Anthony Coan will be responsible for tuition for Kristal Coan's placement at the Gloucester County Institute of Technology from September 1, 2003 through and including December 31, 2003.

3. The Petitioner, Anthony Coan shall be responsible for transporting Kristal Coan to and from the Gloucester County Institute of Technology. The Respondent, Borough of Mount Ephraim Board of Education shall bare no responsibility for Kristal Coan's transportation.

4. The Respondent, Borough of Mount Ephraim Board of Education shall reimburse Anthony Coan for one month's tuition covering the month of January, 2004, upon presentation of proof that the tuition had been paid directly by Anthony Coan to the

Gloucester County Institute of Technology.

We hereby agree to the terms and conditions set forth above.

ANTHONY COAN, Individually and
on behalf of his minor daughter, Kristal Coan

_____
, President
Borough of Mount Ephraim Board of Education

Gloucester County Institute of Technology.

We hereby agree to the terms and conditions set forth above.

ANTHONY COAN, Individually and
on behalf of his minor daughter, Kristal Coan

Kathryn E. Cain
, President
Borough of Mount Ephraim Board of Education

FRANK P. CAVALLO, JR. ESQUIRE
Attorney for Borough of
Mount Ephraim Board of Education

LAW OFFICE
PARKER, McCAY &
CRISCUOLO, P.A.

MOUNT EPHRAIM PUBLIC SCHOOLS

125 South Black Horse Pike
MOUNT EPHRAIM, NJ 08059

RECEIVED
2004 JUN 17 A 11:36
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

RICHARD J. SERFLING
Chief School Administrator
(856) 931-1634
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MICHAEL A. PROFICO
Supervisor of Special Services
(856) 931-1785
FAX (856) 931-0202

MARY LOU HIRSHMILLER
Supervisor of Curriculum & Instruction
(856) 931-7807

MELISSA E. RAYWOOD
Business Administrator/Board Secretary
(856) 931-4134
FAX (856) 931-6630

Mt. Ephraim Board of Education
Regular Meeting
R.W. Kershaw School
Monday, February 9, 2004
7:30PM

TUITION-FREE ATTENDANCE and GCIT SETTLEMENT

A motion was made by Rocco Vespe and seconded by Michael Minutola as follows:

(2) to approve the proposed settlement with Gloucester County Institute of Technology Performing Arts Academy as outlined by our attorney.

Motion Carried – All Ayes

I, Melissa Raywood, Business Administrator/Board Secretary of the Board of Education of the Borough of Mt. Ephraim in the County of Camden, New Jersey, HEREBY CERTIFY that the foregoing extract from the minutes of a meeting of the Board of Education duly called and held on February 9, 2004 *has been compared by me with the original minutes as officially recorded in my office in the Minute Book of the Board of Education and is a true, complete and correct copy thereof and of the whole of the original minutes so far as they relate to the subject matters referred to in the extract.*

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the Board of Education this 7th day of June 2004

Melissa Raywood

Melissa Raywood, Board Secretary

[SEAL]

7138-8

RESOLUTION OF
BOROUGH OF MOUNT EPHRAIM BOARD OF EDUCATION

APPROVING SETTLEMENT AGREEMENT AND
AUTHORIZING SIGNATURE BY BOARD OF EDUCATION PRESIDENT

WHEREAS, the Borough of Mount Ephraim Board of Education has been named as a Respondent in a Petition of Appeal filed with the Commissioner of Education by A.C. o/b/o his minor child, K.C.; and

WHEREAS, the Commissioner of Education transmitted the Petition of Appeal to the Office of Administrative Law for a hearing; and

WHEREAS, the parties, with the assistance of the Honorable Joseph F. Martone, A.L.J., engaged in settlement discussions; and

WHEREAS, the provisions of a Settlement Agreement have been set forth in writing and previously agreed upon by the respective parties; and

WHEREAS, the Borough of Mount Ephraim Board of Education wishes to ratify its earlier determination to approve of the form and entry of the Settlement Agreement by and between the parties dated February 27, 2004;

IT IS, THEREFORE, on this 9th day of February, 2004 hereby resolved as follows:

1. The terms of the Settlement Agreement dated February 27, 2004 are hereby approved by the Borough of Mount Ephraim Board of Education; and

2. The President of the Borough of Mount Ephraim Board of Education, Kathryn E. Cain, and the Special Counsel for the Borough of Mount Ephraim Board of Education, Frank P. Cavallo, Jr., Esquire, are hereby authorized to execute the Settlement Agreement on behalf of the Borough of Mount Ephraim Board of Education.

LAW OFFICE
PARKER, McCAY &
CRISCUOLO, P.A.

#317-04

OAL DKT. NO. EDU 112-02
AGENCY DKT. 489-11/01

LINDENWOLD EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision, including a Joint Stipulation of Dismissal, have been reviewed. Noting the absence of any document containing the terms of the parties' settlement so as to permit his review under *N.J.A.C.* 1:1-19.1, the Commissioner shall consider this matter a withdrawal pursuant to *N.J.A.C.* 1:1-19.2. The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/29/04

Date of Mailing: 7/30/04

#306-04

OAL DKT. NOS. EDU 4207-03 AND EDU 2869-04 (ON REMAND)
AGENCY DKT. NO. 72-3/03

EUGENE LEGGETT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the settlement agreement as the final decision in this matter.

Accordingly, the settlement is adopted as the final decision and the matter is dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/21/04

Date of Mailing: 7/21/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2869-04

(On Remand from EDU 4207-03)

AGENCY DKT. NO. 72-3/03

EUGENE LEGGETT,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

Arnold M. Mellk, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners, George & Dortch, attorneys)

Record Closed: May 24, 2004 Decided: June 3, 2004

BEFORE **STEVEN C. REBACK,** ALJ:

This matter was transmitted to the Office of Administrative Law on June 13, 2003, 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 are attached and fully incorporated herein, together with the respondent's Resolution approving the settlement.

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 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 (45) 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.

6/3/04
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

6/11/04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 14 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

CHIEF ADM

cmo

TRENTON BOARD OF EDUCATION
Trenton, New Jersey

RESOLUTION

WHEREAS, Eugene Leggett has filed a Petition of Appeal against the Trenton Board of Education with the Commissioner of Education, Agency Docket No. 72-3/03, OAL Docket No. EDUOR 4207-03, challenging his assignment to teaching duties with respect to reading instruction on the grounds that it violates ***N.J.S.A.*** 18A:26-2 and ***N.J.A.C.*** 6:11-6.1 et. seq.; and

WHEREAS, the Trenton Board of Education denies that Mr. Leggett's assignment violates state law and regulation; and

WHEREAS, the parties agree it is in their respective best interest to settle this Petition without admission of any wrongful conduct of either party;

NOW, THEREFORE, BE IT RESOLVED on this 18th day of May, 2004 that the attached settlement agreement is approved by the Trenton Board of Education whereby Mr. Leggett dismisses his Petition of Appeal in consideration for the Board's agreement that it will no longer assign him to duties with respect to reading instruction during his employment in the School District unless he possesses the appropriate valid teaching certificates required by law.

Melvin L. Wyns
Melvin L. Wyns, Board Secretary

Bernard J. McMullan
Bernard J. McMullan, Board President

RECEIVED
2004 MAY 24 A 10: 44
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SUMNERS GEORGE
A Professional Corporation
849 West State Street
Trenton, NJ 08618
(609) 393-6604
Attorneys for Respondent, Trenton Board of Education

EUGENE LEGGETT, Petitioner, v. TRENTON CITY BOARD OF EDUCATION, Respondent.	: BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY : : Agency Docket No.: 72-3/03 : OAL Docket No.: EDUOR 4207-03 : : : : : ***STIPULATION OF SETTLEMENT*** :

The parties to the within matter agree that the matter shall be deemed settled and resolved, subject to the following terms and conditions:

1. It is agreed that Petitioner, Eugene Leggett, cannot be assigned any duties with respect to reading instruction during his employment with the Respondent, Trenton Board of Education, unless he possesses an appropriate teaching certificate in accordance with ***N.J.S.A.*** 18A:26-2 and ***N.J.A.C.*** 6:11-6.1 et. seq.

2. The parties agree that they have considered the merits of each other's position and agree that there is no admission of any wrongful conduct on either party.

3. The parties agree that each and every term of this agreement is material and an integral part of this agreement.

4. The Petitioner agrees to dismiss his Petition of Appeal in consideration for the Respondent's agreement that it will not longer assign him to duties with respect to reading instruction with the Trenton School District unless he possesses the appropriate valid teaching certificate as set forth above.

5. The parties agree that this agreement must be approved by Administrative Law Judge Steven C. Reback and the Commissioner of Education and that if either rejects any term or condition of this agreement, this agreement shall be deemed null and void and this matter shall remain or be returned to the Office of Administrative Law for resumption of the proceedings as a contested case.

6. The parties agree that this settlement is entered into voluntarily, without duress, and there are no other promises, agreements, or expectations that are not set forth herein.

Arnold M. Mellk, Esq.
Petitioner's Attorney

Eugene Leggett
Petitioner

Melvin L. Wyns
Secretary, Trenton Board of Education

Joyce M. Kersey
President, Trenton Board of Education

Thomas W. Sumners Jr
Attorney, Trenton Board of Education

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SEVERING THE LINDENWOLD TOWNSHIP EDUCATION ASSOCIATION MATTER AND ACCEPTING STIPULATION OF DISMISSAL
OAL DKT. NO. EDU 112-02
AGENCY DKT. NO. 489-11/01

LINDENWOLD EDUCATION ASSOCATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY,

Respondent.

Keith Waldman, Esq., for petitioners (Selikoff and Cohen, attorneys)

Vito A. Gagliardi, Jr., Esq. for respondents (Porzio, Bromberg & Newman, attorneys)

Record Closed: June 8, 2004 Decided: June 28, 2004

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners Lindenwold Education Association, Pine Hill Education Association and Winslow Township Education Association (the Education Associations), filed petitions in which they are challenging the alleged refusal of respondents Boards of Educations to honor and recognize the rights of petitioners' affected members as established by contract or past practice and enjoyed by them in their former school district. Petitioners allege that these actions and failures to act violate the Education laws and, in particular, *N.J.S.A.* 18A:13-64, and the administrative regulations promulgated thereunder. Petitioners are seeking a determination restoring to the affected members all of the terms and conditions of employment formerly enjoyed by them as employees of the former regional school district, and requesting the restoration of all back pay, benefits and emoluments of employment which they have lost to date as a result of respondents' actions and failures to act. These matters were transmitted to the Office of Administrative Law (OAL) on January 9, 2002, for hearing as contested cases. On April 30, 2002, these three matters were consolidated.

On March 1, 2002, petitioners filed unfair practice charges with the Public Employment Relations Commission (PERC) against the same three respondents. The unfair practice charges are captioned *Winslow Township Association and Winslow Township Board of Education*, PERC Dkt. No. C0-2002-235, *Lindenwold Ed. Association and Lindenwold Board of Ed.*, PERC Dkt. No. C0-2002-236; and *Pine Hill Ed. Association and Pine Hill Board of Education*, PERC Dkt. No. C0-2002-237.

By Order of Consolidation and Predominant Interest entered on October 21, 2002, I recommended that the three PERC matters be consolidated with the consolidated OAL matters. By an Order entered by the Chair of the Public Employment Relations Commission on November 25, 2002, and by the Commissioner of Education on December 5, 2002, this recommendation was accepted.

Following numerous discussions between the parties and a number of telephone conferences with the ALJ, this matter originally captioned *Lindenwold Education Association vs.*

Board of Education of the Borough of Lindenwold, OAL Dkt. No. EDU 112-02, Agency Dkt No. 489-11/01 and the unfair practice charge captioned *Lindenwold Ed. Association and Lindenwold Board of Education*, PERC Dkt. No. C0-2002-236, have been settled and resolved by and between the parties as the product of contract negotiations, and they have submitted a Joint Stipulation of Dismissal. In order to effectuate the dismissal it is necessary to sever these two matters from the remaining ongoing matters.

Therefore, it is **ORDERED** that the contested case originally captioned *Lindenwold Education Association vs. Board of Education of the Borough of Lindenwold,* OAL Dkt. No. EDU 112-02, Agency Dkt No. 489-11/01 and the unfair practice charge captioned *Lindenwold Ed. Association and Lindenwold Board of Education*, PERC Dkt. No. C0-2002-236, are hereby **SEVERED** from the remaining ongoing cases in this matter. It is further **ORDERED** that the Joint Stipulation of Dismissal filed herein by the parties is hereby accepted, and this matter is hereby **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the **COMMSSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Pursuant to *N.J.A.C.* 1:1-17.8, upon rendering its final decision the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** shall forward the record, including this recommended decision and its final decision, to the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION** who may subsequently render a final

decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** shall, pursuant to *N.J.A.C.* 1:1-17.8(c) request an extension to permit the rendering of a final decision by the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION** within forty-five (45) days of the predominant agency decision. If the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

Within thirteen (13) 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, 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 28, 2004
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

7-1-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL - 6 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mph

SELIKOFF & COHEN, P.A.
307 Fellowship Road, Suite 314
Mt. Laurel, NJ 08054-1233
(856) 778-6055
Counsel for Petitioner,
Lindenwold Education Association

RECEIVED
2004 JUN -7 P 1:41
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

LINDENWOLD EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF LINDENWOLD, CAMDEN COUNTY,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. 112-02
AGENCY REF. NO. 489-11/01

JOINT STIPULATION OF DISMISSAL

It is hereby stipulated and agreed by and between the parties hereto, thorough their respective counsel, the matters in controversy having been amicably adjusted as the product of contract negotiations, the above cause may be dismissed with prejudice, each party to bear its own costs. The parties also consent (a) that this Joint Stipulation may be signed in counterparts, (b) that facsimiles of signatures will have the same force and effect as original signatures, and (c) that facsimiles of signatures may be submitted to the Office of Administrative Law.

SELIKOFF & COHEN, P.A.
Attorneys for Petitioner
Lindenwold Education Association

BY: _____
KEITH WALDMAN

Dated: 5/6/14

PORZIO, BROMBERG & NEWMAN, P.C.
Attorneys for Respondent
Board of Education of
Lindenwold

BY: _____
VITO A. GAGLIARDI JR.

Dated: 6-1-04

#321-04

OAL DKT. NO. EDU 6053-01
AGENCY DKT. NO. 303-7/01

BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
E.F. AND G.F.,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondents sought and were granted an extension of time within which to file exceptions to the Initial Decision and such submission was made in accordance with the extended timeframe. The Board filed timely reply/cross exceptions. All of these materials were fully considered by the Commissioner in reaching his determination herein.

Upon his full and independent review of the record in this matter,[1] the Commissioner, finding respondents' exceptions without merit, agrees with the conclusion of the Administrative Law Judge (ALJ) that respondents were not legally domiciled in the Hunterdon Central Regional School District during the 2000-2001 school year so as to allow their child, C.F., free attendance in the District's schools, and the Board, therefore, is entitled to recover tuition from respondents for this school year.

[1] It is noted that the record contains transcripts of the hearings conducted on May 5, 2000 and August 14, 2002.

In so finding, the Commissioner was cognizant that it is well-established that "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 an intention of returning, and from which he has no present intention of moving." *Matter of Unanue*, 255 *N.J.Super.* 362, 374 (Law Division 1991) citing *Kurilla v. Roth*, 132 *N.J.L.* 213, 215 (Sup. Ct. 1944). Once established, a domicile continues until superseded by a new domicile. *Lyon v. Glaser*, 60 *N.J.* 259, 263 (1972). Moreover, notwithstanding that an individual may subsequently acquire another residence, he can have only one true domicile. *State v. Benny*, 20 *N.J.* 238, 251 (1955). Elaborating on the concept of residence vis-à-vis that of domicile, this Court stated:

> Residence, *** though parallel in many respects to domicile, is something quite different in that the elements of permanency, continuity and kinship with the physical, cultural, social and political attributes which inhere in a "home" according to our accepted understanding, are missing. Intention adequately manifested is the catalyst which converts a residence from a mere place in which a person lives to a domicile. *Ibid.*

Guidance in ascertaining whether a residence is merely a place to live or a domicile was provided by the Court in *Lyon v. Glaser, supra*, wherein it found that three elements must be considered: 1) physical presence in the residence; 2) an intent to make the residence a permanent or at least an indefinite home; and 3) an intent to abandon the old domicile. (*Lyon* at 264) Although there is no dispute that the within respondents satisfied the first of these elements, having taken up physical presence in the Flemington apartment, the Commissioner's review persuades him that the preponderance of the credible evidence in this matter leads to a determination that elements 2 and 3 have not been demonstrated. As recognized by the ALJ, although there is objective evidence here supporting respondents' claim that the family's domicile was, during the time period at issue, the apartment in Flemington (Initial Decision at

10-11), there are also a number of persuasive objective factors which undermine this contention and support the Board's position that respondents' domicile continued to be their Branchburg home. Specifically, there is no evidence in the record to establish that respondents made any effort either to sell their Branchburg residence or to rent it at a fair market value; by their own admission, respondents leased the apartment in Flemington to provide their high school-aged children with a better education; in an April 2001 amendment to respondents' petition in the U.S. Bankruptcy Court, they stated that they intended to return to the Branchburg residence as their full-time residence in September 2001;[2] and on or about September 3, 2001, subsequent to their youngest child's graduation from Hunterdon Central Regional High School, respondents vacated the Flemington apartment and returned to their Branchburg residence where they have continued to remain. (Initial Decision at 11) The Commissioner concludes that these factors are compelling indicia that respondents' Flemington apartment was no more than a residential living arrangement of a limited duration, fully concurring with the evaluative conclusion of the ALJ, "that it is proper for me to infer from these facts that it was never respondents' intention to remain at the Flemington apartment as their domicile, but their intention has always been to return to their Branchburg residence after their children completed attending the schools in petitioner's school district." (Initial Decision at 12) Therefore, because respondents were not

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[2] It is noted that respondents' exceptions object to the ALJ's consideration of their bankruptcy petition as an indication of their intent here, citing to *Mazza v. Cavicchia*, 15 *N.J.* 498, 514 (1954), wherein the Court held:

> [i]n any proceeding that is judicial in nature, whether in a court or in an administrative agency, the process of decision must be governed by the basic principle of the exclusiveness of the record. "Where a hearing is prescribed by statute, nothing must be taken into account by the administrative tribunal in arriving at its determination that has not been introduced in some manner into the record of the hearing." (Respondents' Exceptions at pp. 5-6)

The Commissioner finds respondents' contention in this regard specious, as the Amendment to their Chapter 13 Plan was admitted into evidence in this matter as Exhibit P-12, without objection by respondents, except as to relevancy, and, as such, is a legitimate component of the record. Moreover, the Commissioner fully concurs with the ALJ's discussion on pp. 11-12 of his Initial Decision with respect to the propriety of utilizing this and respondents' subsequent move back to Branchburg as probative factors in making his domicile determination.

legal domiciliaries of the Hunterdon Central Regional High School District during the 2000-2001 school year, the Board is entitled to recoup payment of $13,742 from respondents for the cost of audited tuition for their child's ineligible attendance in its schools during this period.

Notwithstanding this result, the Commissioner declines to grant the Board's cross exception request for interest in this matter. With respect to pre-judgment interest, the Commissioner concludes that the record before him does not support a finding that respondents' actions were taken in bad faith or in deliberate violation of the law (*N.J.A.C.* 6A:3-1.17(c)l). As to post-judgment interest, such a request is premature, as the 60-day timeline relative to the granting of this interest does not even begin to toll until the Commissioner renders his decision in the instant matter. (*N.J.A.C.* 6A:3-1.17(c)2)

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Respondents are hereby directed to pay the Board tuition, in the amount of $13,742, for their child's ineligible attendance in its schools during the 2000-2001 school year.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: 8/04/04

Date of Mailing: 8/04/04

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6053-01

AGENCY DKT. NO. 303-7/01

HUNTERDON CENTRAL REGIONAL HIGH SCHOOL BOARD OF EDUCATION,

Petitioner,

v.

E.F. AND G.F.,

Respondents.

James P. Granello, Esq., for petitioner

Arnold M. Mellk, Esq., for respondents (Wills, O'Neill and Mellk, attorneys)

Record Closed: October 5, 2003 Decided: May 17, 2004

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner Board of Education asserts that respondents were not domiciled within the Hunterdon Central Regional High School District during the 2000-2001 school year, and is seeking reimbursement from respondents for the cost of tuition incurred during that year. Respondents assert they were domiciled within the School District during 2000-2001. The

matter was transmitted to the Office of Administrative Law (OAL) on September 4, 2001, for hearing as a contested case and was assigned to Hon. Kathryn A. Clark, ALJ.

On December 3, 2001, petitioner filed a motion for summary decision, and on February 11, 2002, respondents responded to the motion. Judge Clark entered an Order Denying Petitioner's Motion for Summary Decision on May 6, 2002. The matter was then scheduled for hearing on August 14, 2002. At the conclusion of the hearing on that date, the record remained open for the parties to file written submissions after their receipt of a transcript. It appears from the file that the submissions of the parties were received by November 19, 2002, and the record closed as of that date.

On July 2003, Judge Clark went on a leave of absence for medical reasons. This matter was reviewed by Hon. John Tassini, ALAJ and it was learned that an Initial Decision had not been issued. This matter was then reassigned to me because of Judge Clark being on a leave of absence and eventually retiring. By letter dated August 8, 2003, Hon. Jeff S. Masin, Acting Director and Chief ALJ notified the parties that Judge Clark had gone on a leave of absence from the OAL without being able to issue an Initial Decision in this matter. The attorneys were offered the opportunity to take a position as to whether the matter should be the subject of a new hearing, or whether the matter could be decided based on the existing record of testimony and evidence. Both attorneys took the position that the matter could be decided based on the existing record. Thus, the record in this matter was reopened and the matter was reassigned to me to complete pursuant to *N.J.A.C.* 1:1-14.13(b).

The transcript was then obtained and reviewed, and the record in this matter was closed on October 5, 2003. Because of an extensive current caseload with a heavy hearing schedule, a number of other complex, completed cases with earlier deadlines, and a family medical emergency, the time limit for filing the Initial Decision was extended by Orders of Extension until May 17, 2004.

FACTUAL DISCUSSION

The following is intended to summarize the testimony and evidence set forth in the transcript of the hearing in this matter that I found to be relevant to the issues herein.

At the commencement of the hearing on August 14, 2002, counsel for both parties agreed on the record that the findings of fact made by Judge Clark in her Order Denying Motion for Summary Decision are of record and that the parties need not plead or address those findings. Accordingly, the following facts of record are hereby adopted as **FINDINGS OF FACT:**

1. The District's Policy 5118 was first enforced by petitioner during the 1996-1997 school year. The policy requires non-resident employees of the District wishing to enroll their children in the District high school to pay the District's tuition fees for the cost of the education.
2. Respondent, E.F. has been employed by the District since 1968 as a secondary education teacher.
3. Respondents resided at 219 County Line Road, Somerville in Somerset County, New Jersey, within the Branchburg School District (Branchburg) from 1971 to 1997.
4. In July 1997, respondents leased a one-bedroom apartment at Hunter Hills in Flemington, New Jersey, within the Hunterdon School District (Flemington).
5. Respondents leased the Flemington apartment to provide their high school-aged children with a better education. *Hearing Transcript,* p. 42, Lines 8-12 (May 5, 2000).
6. Respondent's youngest child, C.F., attended the District's High School, tuition free, from August 1997 until May 1998.
7. Respondents filed a Bankruptcy Petition with the United States Bankruptcy Court, District N.J. on May 4, 1998.
8. On May 15, 1998, petitioner made a demand for tuition reimbursement from respondent based on allegations that respondent was not domiciled in Flemington. Respondent denied the allegations and refused to pay tuition.
9. The matter was transmitted to the Office of Administrative Law ("OAL") on July 14, 1998, for hearing as a contested case. Hearing dates where scheduled for February 1999 and the initial petition was amended by petitioner to include the 1998-1999, and 1999-2000, school years.
10. By letter order dated January 13, 1999, the February hearing dates cancelled and the matter was stayed pending relief from the automatic stay provision of the bankruptcy code. On April 28, 1999, the United States Bankruptcy Court granted petitioners relief from the automatic stay with regard to judgment only.

11. On December 21, 1999, Administrative Law Judge (ALJ) Martone granted petitioner's motion for summary decision with regard to the 1997-1998 school year and denied the motion with regard to the 1998-1999 and 1999-2000 school years. Judge Martone determined that respondents were not legally domiciled within the Hunterdon Central Regional High School District during the 1997-1998 school year, and ordered respondents to pay tuition expenses and other such relief as appropriate with respect to that school year.
12. On February 2, 2000, the Commissioner of Education adopted Judge Martone's Initial Decision and on July 9, 2000, the State Board of Education affirmed the Commissioner's decision.
13. Hearings concerning the 1998-1999 and 1999-2000 school years were held on May 5, 8, and 10, 2000 before Judge Martone. However, on July 10, 2000, upon receiving notification from petitioner that the continued litigation of the pre-bankruptcy claims was in violation of the automatic stay provisions of the Bankruptcy Code, Judge Martone adjourned the matter indefinitely.
14. On July 10, 2001, the United States Bankruptcy Court confirmed respondents' Chapter 13 Bankruptcy Plan.
15. Respondents' youngest daughter, C.F. was a student in the District during the 2000-2001 school year. Respondents' Bankruptcy Plan does not include tuition costs owed by respondent to petitioner incurred during the 2000-2001 school year.
16. On September 4, 2001, petitioner, seeking tuition reimbursement for the 2000-2001 school year, filed the present claim with the Commissioner.
17. Respondents have continuously been the owners of record of the Branchburg residence from 1971 to present.
18. Respondents have been responsible for the payment of property taxes and paid for the utility services charged to the Branchburg residence and the Flemington address, including telephone, electric and gas bills.
19. [Blank].
20. Since September 1, 2000, Respondents' daughter, K.F., is permitted to reside in the Branchburg residence without a written lease and respondents have kept some personal items as well as furniture and clothing at the residence.
21. On April 3, 2001, respondents amended their Chapter 13 Bankruptcy plan to reflect a change in residence from the Flemington apartment to the Branchburg residence

beginning September 1, 2001. On or about September 1, 2001, respondents returned to the Branchburg residence at 219 County Line Road, where they are now permanently residing.

The only witness to testify at the hearing of this matter was E.F. who was called by the School District. E.F. testified that he and his wife entered into a lease agreement for the Flemington apartment in June 2000 covering the period from September 1, 2000 through August 31, 2001 (P-1). He also obtained apartment insurance from August 11, 2000, to August 11, 2001, and he identified the insurance policy covering personal property in the apartment in the amount of $42,000. The apartment was unfurnished when they rented it, and respondents furnished it with furniture brought from their Branchburg property with the exception of a couple of items.

E.F. testified that there came a point in June 2001 when he notified the landlord that he no longer wanted to lease the Flemington apartment. He received a notice from his landlord, Biltmore Realty, and he responded to that notice on June 23, 2001, that he had no intention of renewing the lease. It was stipulated by the parties that respondents left the apartment at the conclusion of the lease on August 30, 2001, although they actually left the apartment on September 3, 2001, with the agreement of the apartment superintendent.

E.F. stated that he is employed by the Hunterdon Central Regional High School. When he returned to work at Hunterdon Central Regional High School for the 2001-2002 school year, he notified the school district of the change in his residency. He identified his memo of September 5, 2001 (P-3, pp. 2-3). He admitted that he originally gave the incorrect telephone number but corrected that to the number of his Branchburg residence. He admitted that the telephone number for the Branchburg residence has never changed even when he left the Branchburg residence to live in Flemington. He has had that number since 1971 or 1972. He also identified his handwritten memo that he was moving to Flemington on September 1, 1997 (P-3, p. 1).

E.F. identified an amendment to his Chapter 13 Bankruptcy Plan executed by E.F. and G.F. on April 2, 2001 (P-12). In the attachment to this amendment, debtors E.F. and G.F. state that they will be making the Branchburg property located on County Line Road their residence beginning September 1, 2001. He stated that at that point of time he knew his lease would be

coming to an end and since he had been domiciled in Flemington for about four years and knowing that his job would be terminated for the duration of that school year and looking ahead, they decided to move back to the Branchburg residence as of September 2001. He stated that he and his wife contemplated on it and decided that after the lease was terminated and his daughter had graduated from Hunterdon Central Regional High School, it would no longer be beneficial financially for them to maintain the Flemington apartment so they changed their domicile from the apartment in Flemington to the Branchburg home. The first time he and his wife decided to move back to Branchburg home was sometime in April 2001.

E.F. testified that in response to a request for admissions, he stated that some outdated and outgrown clothing and some furniture were stored at the Branchburg residence. There are four bedrooms at the Branchburg residence and one and a half were furnished during the 2000-2001 school year. The master bedroom had a bed and one of the other bedrooms was half furnished with a bed and a dresser. The master bedroom had more than one dresser, a chair, and a nightstand. The other bedroom had a bed and a dresser. The dinning room had a table and a hutch but there were no chairs. Several of the chairs had deteriorated in the prior year. There was a tablecloth, silverware, napkins, candleholders and Lenox salt and pepper holders in the dining room, and they remained there during the 2000-2001 school year. There was also an oil painting, a love seat in the living room and a sofa and a piano a radio, a grandfather clock, a stove, some plates for eating, and a few glasses. E.F. stated that he returned to the Branchburg residence during the 2000-2001 school year to maintain the property. Sometime he had to go once or twice a week to mow the lawn, but the number of times varied.

E.F. testified that he had insurance coverage on the Branchburg house for the period from January 18, 2001 to January 18, 2002 (P-4). The policy was sent by mail to the Flemington apartment. In January 2001, personal property valued at $141,000 was covered at the Branchberg residence (P-4). At the same time E.F. insured personal property at the apartment for $42,000.

The attorneys agreed to submit into evidence responses to petitioner's request for supplemental discovery (P-5). G.F. indicated he has seen these responses before. He identified a tax assessment from the Branchburg Township Tax Assessor on the Branchburg resident (P-5 at page 8). Mr. F. stated that the mortgage company paid the taxes on the Branchburg property and he paid his mortgage to the mortgage company. All of the utility bills, tax statements and other

bills regarding the Branchburg residence were sent to the Flemington address. E.F. and G.F.'s daughter, K.A.F., was residing at the Branchberg residence during the 2000-2001 school year. She lived there seven days a week and she paid rent. He indicated that there were times that she was unable to pay rent. He admitted that in responding to interrogatories he responded that his daughter did not pay rent, but he believes that it was at a time she was not employed and unable to pay. He also indicated that he could not find any documents supporting his claim that his daughter paid rent to him. She did make payments toward the telephone bill at the Branchburg house. The copies of these receipts were attached to discovery responses that were eventually admitted into evidence (P-11). A summary prepared by attorney from petitioner was marked for identification only (P-6). The actual phone bills were also identified in the record (P-7). The receipts for these bills were also identified (P-8). E.F. explained that he could not produce a Verizon bill for each month during the 2000 – 2001 school year because during the transition of packing and moving, they were misplaced and could not be located. He also explained that he only provided six receipts from monies paid to him by his daughter. Several times his daughter would give him telephone bill money and he did not take the time to write out a receipt. She gave the money when she had it and the money did not necessarily reflect the actual bill. E.F. was also questioned why the numerical sequence of the receipts did not seem to match the dates. For example, the receipt for June 2001 ends in 11 whereas the rent receipt for the previous month of May 2001 ends in a 12. He explained that it could have been a receipt that he skipped over and then went back and used it, and there was no intention of doing anything wrong. He denied that he prepared the receipts in preparation for the hearing. He said the possibility was that he simply skipped over a receipt or went back and used a receipt that had not been used. He does not know how many months his daughter paid him rent but he admitted that he paid the mortgage, utility bills and taxes the entire period of time.

E.F. identified the Chapter 13 Bankruptcy Plan submitted to the Bankruptcy Court by him and his wife (P-9). Schedule A lists the Branchberg property as an investment property rather than as a rental property. Schedule G of the petition does not list the lease on the Flemington apartment as an executory contract or unexpired lease. E.F. explained that it was not listed because it is not a rental property or an investment property.

E.F. was shown a letter from the Hunterdon County YMCA dated July 8, 2002 (P-10). E.F. stated that the letter is inaccurate because it reflects his daughter's address as the Flemington apartment.

On cross-examination by his counsel, E.F. stated that he first moved into the Flemington apartment on August 28, 1997, and he lived there continuously through August 30, 2001. He used the Flemington apartment address on his federal and state income tax forms as his home address, from 1997 to the 2001 school year. He used the Flemington apartment as his address on his driver license and vehicle registration (P-5). He also used it for his voter registration as shown by his voter registration card. He has been registered to vote in Flemington from 1997 through 2001-2002. For his credit cards, he has used the Flemington apartment as his home address for the past 4 years. He is a member of the MEA and JEA and has used the Flemington apartment as his home address with regard to those organizations and correspondence received from them. He has had a telephone listing for the Flemington apartment in the phone book from 1997 until 2001.

E.F. testified that the YMCA reflects his home address as being the Flemington apartment, but denies that K.A.F. ever resided in Flemington. He did not register K.A.F. with the YMCA. His life insurance and any correspondence with the life insurance company used his Flemington apartment as his home address. He also has auto insurance (P-5) and used the Flemington apartment as the home address. His wife G.F. was a member of the Hunterdon County Library in Flemington Borough as shown on the library record. Property tax bills for the Branchburg residence were sent to the Flemington address. All bills, correspondence and the like, including tax bills, were sent to the Flemington apartment address. He admitted that he did not have a written rental agreement with his daughter and he explained that, because it is his daughter, he was not going to hound her about any late payments of rent, and he was not doing to throw her out or evict her.

E.F. admitted that it took him from August 28, 1997, until May 26, 1998, to have a new voter registration card issued to him. He admitted that it was around May 1998 that the Board of Education began questioning his residence at the Flemington apartment.

The parties, through counsel, have stipulated that the audited tuition for the 2000-2001 school year for the Hunterdon Central Regional High School was $13,742.00 (C-1).[1]

LEGAL DISCUSSION AND ANALYSIS

Pursuant to *N.J.S.A.* 18A:38-1, free public education shall be provided to any person over five and under twenty years of age who is domiciled within the school district. In general, domicile is the place of a person's abode where he or she has the present intent 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), affirmed, 58 *N.J.* 112 (1971).

The terms "residence" and "domicile" are not synonymous; a person may have several residences or places of abode, but only one domicile at a time. See, *Collins v. Yancy,* 55 *N.J. Super.* 514, 520-21; *State v. Benny,* 20 *N.J.* 238, 251 (1955); *In re Jaffe,* 74 *N.J.* 86, 90-91 (1977); *Lea v. Lea,* 18 *N.J.* 1, (1955). In *Matter of Unanue,* 255 *N.J. Super.* 362, 376 (Law Div. 1991), it was stated:

> 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.
>
> [*Matter of Unanue, supra,* at 374, citing *Kurilla v. Roth,* 132 *N.J.L.* 213, 215, 38 *A.2d* 862 (Sup. Ct. 1944).]

See also, *Mercadante v. The City of Paterson, supra,* at 39. Thus, the domicile is what one regards as a true and permanent home. *In re Jaffe, supra,* at 90, 91.

In the *Mercadante* case, the court stated that the following factors are important in determining the domicile of a person:

> . . . the physical characteristics of each [place], the time spent

[1] While finalizing the Initial Decision, I realized that there was nothing in the record of this matter reflecting the amount of the tuition being claimed. Accordingly, I contacted counsel and asked them to confer and attempt to stipulate to this information rather than reopening the record and further delaying this matter, and they were kind enough to do so.

> and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to return.
>
> [111 *N.J. Super.* at 39-40]

The Court in *In the Matter of Unanue, supra,* 255 *N.J. Super.* at 376, stated that "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 general, the courts have recognized that intent is a decisive factor in establishing domicile, *State v. Benny, supra,* 20 *N.J.* 238; *Unanue, supra,* 225 *N.J. Super.* 362, *Collins v. Yancey,* 55 *N.J. Super.* 514 (Law Div. 1959). *See, also, D.L. v. Bd. of Educ. of Princeton,* 366 *N.J. Super.* 269 (App. Div. 2004).

In *Fort Lee Board of Education v. Kintos,* 92 *N.J.A.R.2d* (EDU) 96, 103, the Commissioner recognized that the determining factor in deciding a family's domicile is a matter of intent. The Commissioner stated:

> Establishing a domicile involves an act of volition. "A person has the right to choose his own domicile, and his motive in doing so is immaterial." *Lyon v. Glaser,* 60 *NJ.* 259, 264, 288 *A.2d* 12 (1972). In accordance with this principle, it has been held that one does not relinquish his domicile by having another residence based on reasons of health, society, business or employment. * * * .
>
> [*Matter of Unanue, supra* at 375]

The decision in this matter turns on the element of intent in accordance with *Fort Lee Board of Education v. Kintos, supra,* aff'd. State Board April 13, 1994. The concepts of home and domicile embody both a subjective and objective relationship to a physical residence. *Matter of Unanue, supra,* at 375. There is objective evidence in this matter that supports respondents' contention that the family's domicile is the Flemington apartment. E.F. and G.F. and their younger daughter who attended petitioner's school lived in the Flemington apartment on a full time basis. Respondents' driver licenses, motor vehicle registration and voter registration record all reflect the Flemington address as their place of residence. All of their bills, including the tax bills on their home in Branchburg Township, are mailed to their Flemington apartment. They

have resided in the Flemington apartment on a continuous basis since 1997. Most of their furniture and furnishings from the Branchberg residence has been moved to the Flemington apartment. The Branchberg residence is a four-bedroom home with two of the bedrooms not furnished. The Branchberg residence is used by respondent for storage of unneeded furniture and clothing and as a residence for an older daughter who pays them rent when she is employed and is able to pay.

On the other hand, there are a number of objective factors that support petitioner's position and undermine the position of respondents herein. First, there is no evidence in the record to establish that respondents have made any efforts either to sell their Branchburg residence or to rent it at fair market rental. Thus, this case is distinguishable from *D.L. v. Bd. of Educ. of Princeton, supra,* 366 *N.J. Super. at* 274. Second, by their own admission, respondents leased the Flemington apartment to provide their high school-aged children with a better education. This was stated by E.F. at a prior OAL hearing in a matter entitled *Board of Education of Hunterdon Regional High School vs. E.F. and G.F.*, OAL Dkt. No. Edu 6247-98, at the hearing held on May 5, 2000 (transcript, page 42 lines 8-12).[2] Third, in an amendment to respondents' petition for a Chapter 13 Wage Earners Plan in the U.S. Bankruptcy Court, respondents stated in April 2001 that they intended to return to the Branchberg residence as their full time residence in September 2001 (P-12, Attachment at p.2). Finally, there is the fact that in or about September 3, 2001, respondents actually vacated the apartment in Flemington, New Jersey and returned to their Branchburg residence and have remained there since on a full-time basis.

I had a difficult time deciding the propriety of considering respondents' Amended Petition in Bankruptcy in which they state their intention to move back to Branchburg, and considering the subsequent conduct of the respondents actually moving back to their Branchburg residence from Flemington. These are occurrences that took place quite some time after petitioner made its assertion that respondents were not domiciled in its school district. It may be

[2] The transcript reads as follows:

> Q (by Mr. Granello) Did you decide to rent the apartments [sic] at Hunter Hills for the purpose of educating your two children at Hunterdon Central?
> A (by E.F.) I rented the apartment so that my kids could get a good education.
> Q Was that the primary purpose for renting that apartment sir?
> A Yes.

argued that considering these after-occurring facts would be using hindsight, and that it is unfair and improper to consider this information in order to make a determination concerning domicile. However, I have concluded that relying upon these subsequent events as probative factors is proper under the circumstance. I reached this conclusion for a number of reasons.

R. 407 of the *New Jersey Evidence Rules* provides that evidence of remedial measures taken after an event is not admissible to prove that the event was caused by negligence or culpable conduct. The rule goes on to provide that evidence of such subsequent remedial conduct, may, however, be admitted as to other issues. While *R.* 407 is not applicable in this case, a consideration of the rationale for this rule is helpful in this matter. It was stated in *Dickson v. Jacobsen Mfg. Co.,* 270 *N.J. Super.* 569, 587 (App. Div. 1994), that this rule is based upon social policy as opposed to the relevance of such evidence on the issue of fault and, as such, is designed to encourage remedial measures to be taken in order to avoid the occurrence of similar accidents. Thus, while a subsequent event such as a remedial measure may be relevant and probative as to fault, such evidence is excluded because of social policy reasons rather than based upon lack of relevance.

In the present matter, I can think of nothing more relevant to show the intent of respondents herein concerning their domicile than their subsequent statements and conduct with respect to their living arrangements. As of April of 2001, they stated in a Bankruptcy Court document that it was their intention to leave their Flemington apartment at the conclusion of the lease and return to their former residence in Branchburg. In September 2001, they actually took this step and moved back to their Branchburg residence. I believe that it is proper for me to infer from these facts that it was never respondents' intention to remain at the Flemington apartment as their domicile, but their intention has always been to return to their Branchburg residence after their children completed attending the schools in petitioner's school district. This inference is supported by E.F.'s own admission in a prior OAL proceeding that respondents leased the Flemington Apartment to provide their children with a better education.

If 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, then I **FIND** that respondents were not domiciliaries of Flemington, New Jersey. I **FIND** that the proofs relied upon by the school

district in this matter have established that respondents herein were domiciliaries of the Township of Branchburg, New Jersey, while they were residing in petitioner's school district. I **FIND** that during the 2000-2001 school year, it was respondents' continuing intention to remain in Flemington only while their children were attending the Hunterdon Central Regional High School. Therefore, I **CONCLUDE** that the actions of petitioner in determining that respondents are not domiciliaries of the Hunterdon Central Regional High School District is correct, and the order of the petitioner Board of Education requiring that respondents' child be removed from the school district and that respondents shall be responsible for the payment of tuition for the 2000-2001 school year should be **AFFIRMED.** With respect to the claim for tuition, I **FIND** that petitioner is entitled to reimbursement from respondents for the cost of audited tuition incurred during school year 2000-2001 in the amount of $13,742.00.

DECISION AND ORDER

Based on the foregoing, it is hereby **ORDERED** that petitioner's determination that respondents E.F. and G.F. and their child are residents and domiciliaries of the Township of Branchburg, New Jersey, and were not domiciled within the Hunterdon Central Regional High School District during the 2000-2001 school year is hereby **AFFIRMED**. It is further **ORDERED** that petitioner is entitled to reimbursement from respondents for the cost of audited tuition incurred during school year 2000-2001 in the amount of $13,742.00 for the 2000-2001 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 (45) 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 (13) 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, 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 17, 2004
DATE

JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

5/17/04 mph
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 20 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

LIST OF WITNESSES:

For petitioner:

E.F.

For respondent:

E.F. (on cross-examination)

LIST OF EXHIBITS:

ALJ exhibits:

C-1 James P. Granello, Esq., letter dated May 10, 2004 re: stipulation as to tuition

For petitioner:

P-1 Lease Agreement, dated June 1, 2000

P-2 Renewal Declaration, Homeowner's Policy from August 11, 2000 to August 11, 2001, on Flemington apartment

P-3 Memos and writing concerning E.F.'s change of address

P-4 Amended Declaration, Homeowner's Policy, from January 18, 2001, to January 18, 2002, on Branchburg property

P-5 Package of documents provided in discovery

P-6 (for identification only)

P-7 Verizon telephone bills for January, April, May, June, July and August 2001

P-8 Receipts for payments for telephone bills

P-9 Chapter 13 Plan, U.S. Bankruptcy Court for E.F. and G.F., Case No. 00-57137

P-10 Hunterdon County YMCA letter, dated July 8, 2002

P-11 Petitioner's Request for Admissions with responses of respondent and Attachments

P-12 April 3, 2001, Amendment to Chapter 13 Plan

For respondent:

None

#325-04

325-04

OAL DKT. NO. EDU 6437-02
AGENCY DKT. NO. 246-8/02

BRENDA STITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
	:	
RESPONDENT.	:	

The record, Separation Agreement/Release and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner observes that the President of the City of Perth Amboy Board of Education signed the agreement on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf, and the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Separation Agreement/Release consistent with the concerns set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/05/04

Date of Mailing: 8/05/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT
OAL DKT. NO. EDU 6437-02
AGENCY DKT. NO. 246-8/02

BRENDA STITH,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,
Respondent.

Emanuel S. Fish, Esq., appearing for petitioner

Philip E. Stern, Esq., appearing for respondent (Sills, Cummis, Radin, Tischman, Epstein and Gross, attorneys)

Record Closed: June 30, 2004 Decided: July 1, 2004

BEFORE **ISRAEL D. DUBIN**, ALJ:

This matter was transmitted to the Office of Administrative Law (hereinafter OAL) on September 12, 2002, 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 matter was scheduled for hearing at the OAL, Mercerville, N.J. on May 16, 2003. On that date the parties met and negotiated the matter.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1)

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, as well as the testimony under oath.

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 (45) 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.

7/1/04
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

7-7-04
DATE

M. Kathleen Duncan/CR
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL - 8 2004
DATE

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement agreement

SEPARATION AGREEMENT/RELEASE

RECEIVED
2004 JUN 18 P 12:08
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

This Separation Agreement and Release ("Separation Agreement") is made this day of March, 2004 by and between Brenda Stith ("Ms. Stith"), and the Board of Education of the City of Perth Amboy ("Board").

RECITALS

WHEREAS, Ms. Stith is an employee of the Board, serving as a tenured teaching staff member; and

WHEREAS, the Board and Ms. Stith have concluded that, effective at the close of business on June 30, 2004, Ms. Stith shall retire and/or resign from employment with the Board; and

WHEREAS, the Board and Ms. Stith desire to resolve amicably and in good faith all matters and issues arising out of Ms. Stith'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. Stith and the Board agree as follows:

ARTICLE I
Retirement and/or Resignation and Release

1. Retirement and/or Resignation From Employment – Ms. Stith and the Board hereby agree that, effective at the close of business on June 30, 2004, Ms. Stith shall retire and/or resign from her employment with the Board.

2. Mutual Releases – In return for their obligations pursuant to this Separation Agreement, Ms. Stith and the Board hereby release and discharge each other as well as any and all of their 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 they may have had, now as or may hereafter have for any reason whatsoever on account or arising out of or in consequence of their employment relationship, including, but not limited to:

A. Any pending litigation, including, but not limited to Brenda Stith v. Perth Amboy Board of Education, Office of Administrative Law Docket Number EDUOR 06437-02s, Agency Reference Number 246-8/02, which the parties agree

will be withdrawn and dismissed, with prejudice upon execution of this Agreement..

B. 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;

C. 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;

D. Any claims arising out the terms and conditions of Ms. Stith's employment with the Board, Ms. Stith's retirement and/or resignation from such employment, and/or any of the events relating directly or indirectly to or surrounding that retirement and/or resignation;

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;

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.

Ms. Stith does not waive or release her right to seek indemnity pursuant to NJSA 18A:16-6 and/or NJSA 18A:16-6.1 in the event of a claim or accusation by a third party. Nothing in this release shall be construed as waiving or releasing the Board's right to assert any defenses it may have to such a claim or indemnity.

ARTICLE II
Terms of Settlement

2.1 Retirement and/or Resignation - Simultaneously upon the execution of this Separation Agreement, Ms. Stith shall submit an irrevocable letter of retirement and/or resignation, effective at the close of business on June 30, 2004.

2.2 Consideration - As consideration for Ms. Stith's retirement and/or resignation and Release as set forth herein, the Board agrees to the following:

a.) Contemporaneously upon the signing of this Agreement, the Board shall reinstate Ms. Stith's salary increment which was withheld for the 2002-2003 school year. Within thirty (30) days of the signing of this Agreement, the Board shall pay Ms. Stith the sum of one thousand eight hundred fifty ($1,850.00), representing the amount lost as a result of the increment withholding set forth above.

b.) Upon Ms. Stith's retirement and/or resignation from the Board, Ms. Stith shall receive all benefits and emoluments due her pursuant to the Collective Bargaining Agreement between the Board and the Perth Amboy Federation/AFT Local 857, AFT, NJSFT, AFL-CIO.

c.) The Board will expunge and remove from Ms. Stith's personnel file and its records any alleged incidents where she has been accused or charged with improper distribution of student grades.

d.) The Board will expunge and remove from Ms. Stith's personnel file and its records any references to the disciplinary charge and decision to withhold her increment raise for the 2002-2003 school year.

e.) As consideration for the above, the Board shall pay Mr. Stith the additional sum of twenty thousand ($20,000.00) dollars within thirty

(30) days following her retirement and/or resignation from the Board on June 30, 2004.

f.) The Board shall furnish Ms. Stith with a letter of recommendation.

Ms. Stith 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.

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 – Nothing contained in this Separation Agreement shall be construed to constitute an admission or acknowledgment by any party hereto of any wrongful or improper conduct, nor of any liability to any other 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.

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.

2.9 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 Confidentiality -- The parties agree, with respect to the confidentiality of this Agreement, to the extent permitted by applicable law and regulation, not to disclose or cause to be disclosed to, directly or indirectly, any person the existence of or terms of this Agreement.

3.11 **BY SIGNING THIS SEPARATION AGREEMENT MS. STITH 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 TENURE LAWS SET FORTH IN TITLE 18A OF NEW JERSEY STATUTES, 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 OTHER 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 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 WHEREOF, the parties have executed this Separation Agreement on the date above written.

Witnessed this 23d Day of March 2004 as to Brenda Stith
Emanuel S. Fish
An Attorney At Law of N.J.

Brenda Stith 3/23/04
BRENDA STITH

CITY OF PERTH AMBOY BOARD OF EDUCATION

AUSTIN GUMBS, PRESIDENT

326-04

#326-04

OAL DKT. NO. EDU 2159-04
AGENCY DKT. NO. 38-2/04

P.J., on behalf of minor child, J.Y.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his full and independent review of this matter, the Commissioner concurs with the Administrative Law Judge, for the reasons clearly detailed in his Initial Decision, that, by failing to appear at the scheduled hearing without good reason, petitioner has abandoned prosecution of her appeal in this matter necessitating its dismissal. Consequently, because petitioner has therefore failed to satisfy her burden of establishing, by a preponderance of the credible evidence, J.Y.'s entitlement to a free public education in the District's schools, the Board's counterclaim for tuition must be granted.

Accordingly, the Initial Decision of the OAL is adopted and the instant Petition of Appeal is dismissed. Petitioner is hereby directed to pay the Board of Education of the Township of Hamilton $7,597.20 for the period of J.Y.'s ineligible attendance in its schools.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/05/04

Date of Mailing: 8/05/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02159-04S
AGENCY DKT. NO. 38-2/04

P.J., ON BEHALF OF MINOR CHILD, J.Y.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

Respondent.

No appearance by or on behalf of **P.J. on behalf of minor child J.Y.**, petitioner

Dennis M. DeSantis, Esq., for respondent (Detribats, Campbell, DeSantis, Magee and O'Donnell, attorneys)

Record Closed: June 24, 2004 Decided: July 8, 2004

BEFORE **JEFF S. MASIN**, ALJ:

On September 4, 2003, D.Y., parent of J.Y., a high school student, filed with the Hamilton School District an Affidavit of Non-Resident Parent, in which he claimed that his daughter would be living throughout the 2003-2004 school year with P.J., who lived on Nottingham Way and was the guardian of J.Y. He noted that a court had granted custody of the child to the guardian and the student would be residing in the Hamilton School District ("District") for the purpose of receiving a free education. P.J. asserted in her own affidavit that she was supporting the child *gratis*. She also agreed that if it were determined that the child was

not eligible for a free education in the district, that she would be obligated to pay the district tuition for all days of illegal attendance. On January 21, 2004, the Hamilton Township Board of Education, ("Board"), acting through Residency Officer John E. Conner, issued a letter/notice to P.J., advising her that J.Y. had been found ineligible to attend the district's school because it had been determined that the child's residency actually was in Trenton. The letter advised Ms. J. of her right to file an appeal of the decision, first with the Board of Education and then, if necessary, with the Commissioner of Education. It also advised that if an appeal were filed with the Commissioner and it was determined that there was no entitlement to attend the schools of the district, "or the applicant abandons the appeal through withdrawal, failure to prosecute or any means other than settlement, the applicant may be assessed, by order of the Commissioner, enforceable in Superior Court, tuition for any period of ineligible attendance, including the initial 21 day period and the period during which the appeal was pending before the Commissioner." The letter then advised the basis upon which tuition would be calculated.

On February 5, 2004, Ms. J. issued a letter "To: Whom this may concern," in which she asserted that she had been given custody of J.Y. by the courts of Mercer County because Mr. and Mrs. Y. felt that it was in J.'s best interests "because of Mrs. Y.'s medical history." The letter also indicated that Ms. J. had given J.Y. permission to visit her family at any given time. Accompanying the letter was a *Pro Se* Residency Appeal dated February 5, 2004. The Board filed an Answer and Counterclaim on February 17, seeking an order dismissing the appeal and directing that the petitioner pay tuition owed to the respondent, as well as attorney's fees.

The Commissioner transferred the matter as a contested case to the Office of Administrative Law ("OAL") pursuant to *N.J.S.A.* 52:14B-1 to –15, *N.J.S.A.* 52:14F-1 to –13, and *N.J.S.A.* 18A:38-1. On April 12, 2004, I directed a letter to the parties, advising them that the matter was scheduled for a hearing before me on May 24, 2004 at 9:00 am. and advising further of the procedure to be followed at that hearing. A Notice of the scheduled hearing date was also sent to Ms. P.J. on April 19, 2004. On the day of the scheduled hearing, Ms. J. did not appear and no one appeared on her behalf. No request had been made to adjourn the hearing. Counsel for the Board of Education appeared with a witness, prepared to proceed. When Ms. J. did not appear by one-half hour after the scheduled 9:00 a.m. start of the hearing, the Board of Education proceeded with its proofs in order to establish the counterclaim for tuition. The details of that testimony will be presented below.

After the Board presented its case and had departed the OAL, a telephone call was received later that day from Ms. J. She was advised that if she was presenting an excuse for her failure to appear for the hearing that she needed to put said reason in writing. On May 25, 2004, she faxed a letter to this judge as well as to counsel for the Board. In that letter she indicated that she had failed to appear on May 24 because "I was out of town in West Virginia on my honeymoon." She asked that the matter be rescheduled. In response to that letter counsel for the Board faxed a letter to this judge and to Ms. J. in which he asserted that following the hearing on May 24, J.Y. was informed by the district that she could no longer attend school and he believed that "that action precipitated this letter (Ms. J.'s letter) as opposed to any real reason for Ms. J.'s failure to appear on May 24, 2004." He asserted that her absence was "intentional and was not the result of any emergent or unforeseeable matter that would excuse her failure to attend."

On June 2, 2004, I wrote to both parties advising that in light of Ms. J.'s letter and Mr. DeSantis' objections that, pursuant to *N.J.A.C.* 1:1-14.4, and in order to determine whether or not the "explanation received that the non-appearing party represented is intentionally attempting to delay the proceeding," that I required that Ms. J. provide me with a copy of her marriage license, as well as details as to the dates during which she was out of town in West Virginia on her honeymoon. I advised that this material had to be supplied within one week of the letter of June 2 "or I will proceed to issue an initial decision based on the presentation made by the Board on May 24, 2004. If the information is received, and it does establish that the failure to appear was inadvertent, or at least not an intentional attempt to delay the proceedings, I will reschedule the matter for a prompt hearing at which Ms. J. will have the opportunity to appear. " I also advised that in light of the non-appearance and the fact that the Board had appeared on the day of the hearing that I would consider any application for sanctions that might be filed, including reasonable expenses, including attorneys' fees. The letter closed "[t]hank you for your attention to this letter. I urge Ms. J. to be very prompt in her response, as any delay beyond the listed date will result in the matter being decided without any further input from her."

As this decision was being prepared in late June, I had not received any reply to the July 2 letter from Ms. J. However, on June 26, Kendall S. Murphy, Esq., wrote, advising that he had been retained to represent Ms. Murphy and requesting that a hearing be scheduled. He also asked for a short time to supply the information requested in the June 2 letter. He was advised

by my secretary to seek consent from Board counsel to a delay, but Board counsel would not consent. Nevertheless, on June 28, I wrote to counsel and advised that I would give Mr. Murphy until July 2 to submit the documentation. As of the date of issuance of this decision, no further contact has been received from Mr. Murphy and no documentation has been supplied. Based upon the foregoing and pursuant to *N.J.A.C.* 1:1-14.4(b)2, I **FIND** that "the explanation received that the non-appearing party . . . is intentionally attempting to delay the proceeding," and therefore I will not reschedule the matter, but instead "shall issue an initial decision explaining the basis for the conclusion that there has been an intentional delay." For the reasons stated above, I **CONCLUDE** that Ms. J. has abandoned prosecution of her appeal and it is therefore **DISMISSED**.

During the hearing, Albert Alfredo testified that he has been a residency investigator for the district for six years and was formerly a Hamilton Township Police Officer for twenty-five years. Mr. Alfredo testified that he had received information that J.Y. lived at an address on South Broad Street in Trenton and conducted surveillance at that location on Monday November 17, 2003. He had determined that the location was the home of D. and D.Y., who are the mother and father of J.Y. He observed the residence from 6:30 a.m. to 7:20 a.m., and saw a vehicle with a license plate number MXA-18U, a four-door, maroon Dodge, depart the property at 7:20 a.m. and arrive at Nottingham High School at 8:00 a.m. J.Y. then entered into the school. An examination of records indicated that the car was registered to D.Y. Further surveillance was conducted on November 19, 2003, when the same location was observed from 6:30 a.m. until 7:25 a.m., when J.Y. left in the same car being driven by a female. Ms. Y. entered Nottingham High School at 7:40 a.m. On November 21, 2003, surveillance at the same location from 6:30 a.m. to 7:32 a.m. produced an observation of J.Y. leaving the same car and proceeding to Nottingham High School where she arrived at 7:42 a.m.

On Tuesday, November 25, 2003, Mr. Alfredo observed the property from 6:45 a.m. to 7:40 a.m. at which time J.Y. left in the same car and proceeded to Nottingham High School, as she did again on Tuesday, December 23, when she left at 7:43 a.m. and arrived at the school at 7:55 a.m. and again on January 5, 2004, when she left the South Broad Street premises at 7:30 a.m., this time in the company of a male, and arrived at the school at 7:40 a.m. Another surveillance occurred on January 8, at which time observations were made from 6:40 a.m. to

7:20 a.m., at which time J.Y. left the premises in the same car and arrived at Nottingham High School at 7:30 a.m.

Mr. Alfredo testified that he confirmed the identity of J.Y. by entering Nottingham High School on the first day of surveillance and having the school authorities identify her to him.

In addition to his testimony concerning observations, Mr. Alfredo identified various forms, such as an enrollment form, a non-residency form, an affidavit of guardianship and notices of non-residency as well as tuition demands.

A tuition demand made on February 6, 2004, indicated that tuition had been computed for eighty-nine days of ineligible attendance at a cost of $44.81 a day, which constituted one, one-eightieth (1/180) of the total annual per-pupil cost of $8,066 in the district. The total amount due at that time was $3,988.09. On May 24,2004, following Ms. J.'s failure to appear at the hearing a further letter was sent which calculated the tuition due for a total of 156 days at $48.70, based on a per pupil cost of $8,766 for the period from September 16, 2003, to May 24, 2004. The total due was $7,597.20.

Discussion

N.J.S.A. 18A:38-1 provides that the "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;

b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term . . . If in the judgment of the board of education the evidence does not support the

> validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing . . . on the validity of the claim 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. . . .

As previously determined, as the petitioner has failed to prosecute her appeal from the board's determination, the petitioner herein has failed to meet her burden of proving by a preponderance of the evidence that the claim for a free education is valid under the terms of *N.J.S.A.* 18A:38-1and her appeal has therefore been dismissed. As for the board's counterclaim for an order granting it tuition for the period of illegal attendance, based upon the above credible testimony concerning Mr. Alfredo's observations of the seemingly regular circumstance of J.Y. leaving the home of her parents in Trenton in the normal morning hours prior to school and being taken to school, it would appear that the child does actually reside with her parents. While Ms. J. supplied documentation with her hearing request indicating that the Superior Court had ordered that Ms. J., the child's godmother, "shall have primary residential custody as agreed between the parties and specified in the attached complaint," nevertheless, the fact of legal custody does not in and of itself guarantee a right to a free public education in a district when the child does not in fact actually reside in the district. This requirement that the student actually reside within the district is the result of the statutory provision that the student be "kept in the home" of the other person domiciled within the district. Since Ms. J. did not appear at the hearing, and she has failed to document the legitimacy of the alleged reason for her failure to appear despite notice, the preponderance of the credible evidence as presented by the respondent is such that I **FIND** that J.Y. actually resides at the South Broad Street address in Trenton and that she is not entitled to receive a free education in the Hamilton Township School District. Therefore, I **CONCLUDE** that the district is entitled to an order that tuition be paid in the amount of $7,597.20.

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 (45) 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 (13) 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, 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 8, 2004
DATE

JEFF S. MASIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

July 8, 2004
DATE

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 15 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

None

FOR THE RESPONDENT:

R-A Hamilton Twsp. School Pupil Enrollment Form dated 9/16/03

R-B Non-Resident Parent-Information Sheet dated 9/4/03

R-C Affidavit-Guardian form completed 9/4/03

R-D Notice of ineligibility to attend Hamilton Twsp. Schools dated 1/21/04, mailed to P.J. c/o D. & D.Y. at 1217 S. Broad Street

R-E Notice of ineligibility to attend Hamilton Twsp. Schools dated 1/21/04, mailed to P.J. at 1009 Nottingham Way

R-F Notice of denial of application for enrollment of child into Hamilton Twsp. School District, dated 2/6/04, mailed to P.J. at 1009 Nottingham Way

R-G Notice of denial of application for enrollment of child into Hamilton Twsp. School District, dated 2/6/04, mailed to P.J. c/o D. & D.Y. at 1217 S. Broad Street

R-H Notice of denial of application for enrollment of child into Hamilton Twsp. School District, dated 5/24/04

327-04

AGENCY DKT. NO. 188-5/04

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
DAVID SNYDER, KEYPORT SCHOOL :
DISTRICT, MONMOUTH COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

For the Petitioning Board, Joan M. Damora, Esq.

This matter having been opened by way of Motion for an Order to Show Cause before the Commissioner of Education by the Board of Education of the Borough of Keyport, seeking suspension of the instructional certificate of David Snyder for resigning from employment on inadequate notice; and

The Commissioner having issued, on May 19, 2004, an Order directing Mr. Snyder to show cause why further order should not be entered suspending his teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 and *N.J.A.C.* 6A:9-17.9;[1] and

The Order and accompanying Affidavit of Miguel Hernandez, Principal of the High School in the Keyport School District, having been sent by the Board via certified and regular mail to David Snyder; and

The Commissioner having directed respondent, by notice dated June 7, 2004, to submit an answer within 20 days of receipt of the Order; and

There being no Answer filed in that time, and the Commissioner having provided respondent, by notice dated July 1, 2004, sent via certified and regular mail,[2] an additional

[1] Previously codified at *N.J.A.C.* 6:11-3.8.

[2] The letter sent via certified mail was returned as "unclaimed" on July 18, 2004. The letter sent via regular mail was not returned.

10 days to file an Answer, pursuant to *N.J.A.C.* 6A:3-1.3(e), or else allegations raised by the Board would be deemed true and this matter would be resolved in summary fashion by the Commissioner of Education; and

As of this date, neither respondent nor any attorney on his behalf having filed an Answer to the Order to Show Cause, and each allegation against the respondent having been deemed to be admitted; and

Respondent having ceased to perform his duties as a high school biology teacher in the Keyport School District before the expiration of the term of his employment, without the Board's consent, and under the circumstances set forth in the Affidavit of Miguel Hernandez, Principal of the High School in the Keyport School District and, thereby David Snyder being deemed to have engaged in unprofessional conduct, pursuant to *N.J.S.A.* 18A:26-10 and *N.J.A.C.* 6A:9-17.9; now therefore

IT IS ORDERED on this 10th day of August 2004, that David Snyder's instructional certificate shall be suspended for a period of one year, to commence upon the date of this decision. A copy of this decision is hereby forwarded to the State Board of Examiners for the purpose of effectuating this order and taking such further action, if any, as it deems appropriate.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 8/10/04

Date of Mailing: 8/10/04

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

#329-04

329-04

OAL DKT. NO. EDU 1910-3
AGENCY DKT. NO. 52-2/03

D.G. and R.G., on behalf of minor children,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH HALEDON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the President of the North Haledon Board of Education signed the agreement on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf, and the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement and Release consistent with the concerns set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/11/04

Date of Mailing: 8/11/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1910-03

AGENCY DKT. NO.: 52-2/03

D.G. AND R.G. O/B/O MINOR CHILDREN,

Petitioners,

v.

BOARD OF EDUCATION OF THE BROUGH OF NORTH HALEDON, PASSAIC COUNTY,

Respondent.

Craig S. Hughes, Esq., for petitioner

Anthony P. Sciarillo, Esq., for respondent
(Lindabury, McCormick & Estabrook, attorneys)

Record Closed: June 21, 2004 Decided: June 23, 2004

BEFORE **JEFFREY A. GERSON**, ALJ:

On March 10, 2003 this 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 hearing on several occasions and during that time the parties agreed to settle the matter. On June 21, 2004, the parties submitted a signed Stipulation of Settlement indicating the terms of settlement. A copy of the Stipulation of Settlement is attached hereto.

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 (45) 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.

6/23/04
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

6-30-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties

JUL 1 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

LINDABURY, MCCORMICK & ESTABROOK
53 Cardinal Drive
P.O. Box 2369
Westfield, N.J. 07091
(908) 233-6800
Attorneys For Respondent
North Haledon Board of Education

DARREN GILMORE and RITA GILMORE, on behalf of minor children	: BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioners,	: AGENCY DOCKET NO.:52-2/03 : OAL DOCKET NO.:EDUOUS 01910-03N
-vs-	:
NORTH HALEDON BOARD OF EDUCATION	: **SETTLEMENT AND RELEASE**
Respondent.	:

This Settlement Agreement is made this 26th day of May, 2004, between Darren & Rita Gilmore ("Gilmores") and North Haledon Board of Education (hereinafter the "Board").

Whereas, there are currently legal proceedings pending before the Commissioner of Education of New Jersey, Office of Administrative Law, captioned Darren Gilmore and Rita Gilmore, on behalf of minor children v. North Haledon Board of Education, bearing Docket No.: 52-2/03; and

Whereas, the parties have reached a settlement of all disagreements and disputes between them and now wish to record the terms of their settlement,

Now, therefore, in consideration of the terms contained herein, the parties agree as follows:

1. The Gilmores shall pay the Board the sum of $30,000.00 in settlement of any and all of Board's claims;

2. All legal actions currently pending before the Commissioner of Education of New Jersey, Office of Administrative Law, captioned Darren Gilmore and Rita Gilmore, on behalf of minor children v. North Haledon Board of Education, bearing Docket No.: 52-2/03; and any other legal tribunal, shall be immediately dismissed with prejudice upon the parties signing of this Agreement;

3. The Board releases any and all claims that it has against the Gilmores, whether known or unknown, in consideration for the Gilmores' entering into this Agreement;

4. The parties recognize that each has been represented by legal counsel of their own choosing and that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein;

5. This Agreement shall be subject to the laws of the State of New Jersey; and

6. All terms of this Agreement are deemed material. This document may not be altered, amended or modified or revoked accept by an instrument executed in writing by the parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

NORTH HALEDON BOARD OF EDUCATION

By: _____
Name: Anthony Vaccaro
Title: Board President
Date: 5/26/04

DARREN & RITA GILMORE

By: _____ 5/10/04
Darren Gilmore

By: _____
Rita Gilmore

#335-04

335-04

OAL DKT. NO. EDU 11818-03
AGENCY DKT. NO. 420-11/03

J.L. AND R.C., on behalf of minor child, R.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Release, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/12/04

Date of Mailing: 8/12/04

* Paragraph one of the settlement agreement references a due process matter which is being withdrawn by separate stipulation. The Commissioner clarifies that his review and approval of the within agreement pursuant to *N.J.A.C.* 1:1-19.1 does not reach to matters arising under the Individuals with Disabilities Education Act (IDEA) and/or Section 504 of the Rehabilitation Act of 1973, which he is without jurisdiction to hear and determine. *I.D. and M.D. on Behalf of C.D. v. Board of Education of the Township of Hazlet, Monmouth County*, State Board Decision April 2, 1997; *see also, East Brunswick Board of Education v. New Jersey State Board of Education,* EHLR DEC. 554:122 (DCNJ 1982); *A.N. v. Clark Bd. of Ed.*, 6 *N.J.A.R.* 360 (1983).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11818-03
AGENCY DKT. NO. 420-11/03

J.L. AND R.C. ON BEHALF OF MINOR CHILD, R.C.,

Petitioners,

v.

BOARD OF EDUCATION OF RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,

Respondent.

George Surgent, Esq., for petitioners

Allan P. Dzwilewski, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: July 14, 2004 Decided: July 15, 2004

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

This matter involves an appeal by petitioners J.L. and R.C. on behalf of R.C. from a residency determination by the respondent, the Board of Education of Ramapo Indian Hills Regional High School District (the Board). The Department of Education transmitted the matter to the Office of Administrative Law (OAL) where, on December 29, 2003, it was filed for a hearing as a contested case. Subsequently, the undersigned denied the Board's Motion to Dismiss petitioner's petition in a letter Order dated February 13, 2004 and the matter was scheduled for hearing on May 13, and 14, 2004. Counsel for the parties, as well as petitioners, appeared at the OAL on May 13, 2004, at which time counsel presented a Stipulation of Settlement and Release executed by petitioners which was subject to Board approval. At the joint request of counsel, the hearing was adjourned

to provide additional time toward finalizing an amicable resolution of the matter. Under letter dated July 13, 2004, counsel for the Board submitted a fully executed Stipulation of Settlement and Release indicating the terms of the settlement, coupled with a resolution adopted by the Board on June 21, 2004 approving the Stipulation of Settlement and Release. The aforesaid Stipulation of Settlement and Release, along with the Resolution, which the undersigned received on July 14, 2004, are attached hereto and incorporated herein by reference.

Having reviewed the record and the terms of the settlement, 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 the 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 (45) 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 15, 2004
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

7-21-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 27 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, NJ 07932
(973) 301-0001
Attorneys for Ramapo-Indian Hills Regional
High School District Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 JUL 14 P 4:

R.C. and J.L. INDIVIDUALLY AND ON BEHALF OF R.C.,	BEFORE THE STATE OF NEW JERSEY
	OFFICE OF ADMINISTRATIVE LAW
-and-	OAL Docket No. EDUOS 11818-2003N
RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION.	**STIPULATION OF SETTLEMENT AND RELEASE**

WHEREAS, R.C. has been a pupil within the jurisdiction of the Ramapo-Indian Hills Regional High School District; and

WHEREAS, the parties seek to resolve any and all potential issues between them;

NOW THEREFORE, in consideration of the following and valuable consideration, it is agreed by and between the parties hereto as follows:

1. The parties will each withdraw their respective claims set forth in the above captioned matter with prejudice. R.C. will withdraw as a pupil in the District no later than June 30, 2004 and his current classification will remain in effect. With this Stipulation, the parties, by separate Stipulation, will also resolve the due process matter between them with Agency Docket No. 2004-883, by R.C. and J.L. withdrawing same with prejudice.

AMD

BOARD OF EDUCATION
RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT
FRANKLIN LAKES, NEW JERSEY 07417

RAMAPO HIGH SCHOOL
Franklin Lakes, N.J. 07417
(201) 891-1500

(201) 891-1505
FAX (201) 891-9672

INDIAN HILLS HIGH SCHOOL
Oakland, N.J. 07436
(201) 337-0100

Moved by: Stride Seconded by: Petersen
Approved Unanimously

EDUCATION

E8. Move to approve the Stipulations of Settlement and Release in the R.C. and Ramapo Indian Hills Regional High School District matter.

RC): Belsky ✓, Chorman ✓, Kleinert ✓, Madigan ✓, Petersen ✓, Piccoli ✓, Scarpelli **ABSENT**, Stride ✓, Lane ✓

I do hereby certify that the aforegoing is a true and exact copy of a resolution adopted by the Ramapo Indian Hills Board of Education on Monday, June 21, 2004.

David L. Rinderknecht, Board Secretary

332-04

#332-04

OAL DKT. NO. EDU 11252-03
AGENCY DKT. NO. 345-9/03

B.M.A., on behalf of minor child, C.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and petitioner's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4.

The Board's exceptions dispute the Administrative Law Judge's (ALJ) conclusion that petitioner has demonstrated that C.H.'s mother, B.H., is unable to care for C.H. due to family hardship. (Initial Decision at 6) In this connection, the Board first asserts that the underlying facts on this record do not support the conclusion that B.H. is *currently incapable* of supporting or providing care for her C.H., notwithstanding that she has "experienced scheduling inconveniences and difficulties in the past ***." (Board's Exceptions at 4) The Board additionally charges that the ALJ's analysis of B.H.'s scheduling conflicts fails to consider the fact that M.H., her older daughter, has now graduated from high school, and, therefore, B.H.'s current morning routine is no longer burdened by the need to drive M.H. to the bus stop before B.H. goes to work and may, indeed, be alleviated by the possibility that M.H. could watch C.H. and help her get ready for school in the mornings after B.H. leaves for work. (*Id.* at 5-6)

Next, the Board argues that the fact that B.H. has two other children in her Fort Lee home does not support the ALJ's finding of a family hardship or B.H.'s current inability to support or care for C.H. With respect to her son, although B.H.'s certification demonstrates that he has special needs which require extra attention and commitment, the Board avers that "this information in no way supports the conclusion that because of her efforts directed toward her son, she is therefore incapable of caring for C.H." (*Id.* at 8-9) As for M.H., the Board contends that the ALJ improperly relied upon B.H.'s characterization of her daughter as angry, defiant and belligerent since her separation from her husband, while ignoring the fact that the separation occurred approximately two years ago, yet M.H. has excelled academically, making honor roll every year in high school. (Board's Exceptions at 10) Furthermore, as to the "ugly divorce proceedings" which the ALJ finds to have resulted in "a hostile home environment," the Board argues that the record offers "no such assertions" and, indeed, "it strains credulity for the ALJ to have reached such a conclusion since the mother's seven year old son has lived in the Fort Lee home for his entire life, and the record makes no indication whatsoever that his welfare has at any point been threatened." (*Id.* at 18-19)

The Board also contends that the fact that B.H. experienced additional strains during the 2002-2003 school year does not support the ALJ's findings of a family hardship and *current* inability to support or care for C.H. The Board reasons that facts relating to B.H.'s emotional difficulties in the past cannot be used to draw conclusions about her current emotional state. Moreover, the Board notes that because M.H. has graduated from her private high school, her mother no longer has to make the $8,300 tuition payment. (*Id.* at 13)

Finally, the Board argues that the ALJ's conclusion that B.H. is incapable of caring for C.H. is inconsistent with case law and, essentially, rewrites the affidavit student statute to establish a dangerous precedent for a new standard of "inconvenience." (*Id.* at 19) The

proper legal standard, the Board attests, is one where a hardship determination is based upon unique and compelling circumstances rendering parents presently incapable of taking care of their children. (*Id.* at 20-21) The "scheduling conflicts" that otherwise allow B.H. to care for her daughter on weekends and during the summer, do not, the Board maintains, satisfy the family hardship standard required by law. (*Id.* at 23)

In reply, petitioner asserts that the ALJ applied the appropriate standard for determining whether a family or economic hardship exists under the pertinent statute. That is, the ALJ applied the standard endorsed by the Appellate Division in *P.B.K. on behalf of minor child E.Y. v. Board of Education of Tenafly*, 343 *N.J. Super.* 419 (App. Div. 2001), wherein the Court considered the purpose of the amendments to the residency statute, as discussed in *Gunderson v. City of Brigantine Bd. of Education*, 95 *N.J.A.R.* 2d (EDU) 39. "Clearly," petitioner asserts,

> the Appellate Division did not adopt the stringent standard [of incapability] advanced by the Board here, but interpreted the statute based on its purpose of protecting school districts from having to support students who either claim to be domiciled within a district and are not or have moved to a district solely for the purpose of attending school in that district. ***
>
> (Petitioner's Reply at 3)

Further, petitioner contends that the standard advanced by the Board would be contrary to sound public policy in that education laws should not "encourage or discourage particular living arrangements which may serve the interests of families and children." (*Id.* at 4) In this connection, petitioner also argues:

> To deny C.H. a free public education *** in this case where there is no question that she legitimately lives with her grandmother because of family and economic hardship, and not simply to attend the Englewood Cliffs public schools, would not be based on a bona fide residency requirement. In fact, such a requirement would surely run afoul of C.H.'s fundamental constitutional right to

> liberty, privacy and autonomy in matters related to the rearing of children. *** (*Id.* at 5-6) (citation omitted)

Finally, petitioner challenges the Board's argument regarding the relevance of the facts contained in B.H.'s certification, asserting that hardships are not neatly separated into categories, as the Board would urge, but, rather "must be considered as they would cumulatively impact the family ***." (*Id.* at 6.) Moreover, petitioner underscores that the petition in this matter challenged the Board's determination issued for the 2003-2004 school year and, therefore, the ALJ appropriately relied on facts relating to that year. To the extent the Board contends that facts are out of date, as with mother's past financial problems and nervous breakdown, petitioner argues that some problems are not easily resolved and may have lingering effects which would render them relevant to the within family's circumstances today. (*Id.* at 9)

Upon careful and independent review of the record, the Commissioner initially notes the Appellate Division's language in *P.B.K., supra*, with respect to the appropriate standard for review of "affidavit student" cases:

> The State Board correctly noted that the issue is to be determined by *N.J.S.A.* 18A:38-1(b)1, which requires a showing by the child's parent or guardian **that he or she is incapable of caring for the child due to "family or economic hardship"** and that the child is not residing in the district solely for purposes of receiving a free public education in the district.*** *P.B.K., supra* at 428. (citation omitted) (emphasis added) *Accord, J.B., on behalf of her grandchild, R.H. v. Board of Education of the Township of Ocean, Monmouth County*, State Board decision, September 3, 1997.

Thus, the Commissioner determines that a finding of "incapability" remains a condition of the statute and its interpreting case law.[1]

[1] The Commissioner notes that in applying the above standard, he carefully considers all relevant facts on a case-by-case basis, irrespective of whether such a review may be perceived as "measuring degrees of misery in domicile disputes." (*See*, Initial Decision at 9.)

Here, C.H. has undisputedly lived with petitioner, virtually since her birth, as "a matter of necessity" rather than to affect her eligibility for school attendance (Initial Decision at 10). Since that time, petitioner has undisputedly cared for C.H. gratis "as if she were her own." (*Id.* at 4) Notably, the Board does not challenge the fundamental declarations made by petitioner and B.H. in their respective certifications which evidence, in effect, a "single" mother who "is unable to juggle the conflicting responsibilities of caring for [C.H.] together with her two other children and earning her livelihood," (*id.* at 10), notwithstanding that the Board no doubt disagrees with the *conclusions to be drawn* from those factual attestations. Having so found, the Commissioner is satisfied, under the particular circumstances in this matter, that petitioner has demonstrated B.H. is incapable of caring for C.H. due to family or economic hardship.

Accordingly, for the reasons set forth herein, the Commissioner concurs with the ALJ that petitioner has demonstrated C.H.'s entitlement to attend school in the Board's district, free of charge, pursuant to *N.J.S.A.* 18A:38-1b(1).[2] The Board is hereby ordered to continue to admit C.H. into its public school system so long as there is no change in circumstances that would alter her entitlement.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 8/12/04

Date of Mailing: 8/12/04

[2] For the record, it is noted that this matter was transmitted to the OAL on November 3, 2003 and stamped as received by that agency on November 19, 2003, rather than on January 6, 2004, as indicated in the Initial Decision at page three.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11252-03

AGENCY DKT. NO. 345-9/09

B.M.A., on behalf of her minor grandchild, **C.H.**

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS,

Respondent.

David R. Giles, Esq., for petitioner
(Education Law Center, attorneys)

Nicole G. Centanni, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: June 1, 2004 Decided: July 13, 2004

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of Case

This is an appeal on behalf of a five-year old child seeking enrollment in the Englewood Cliffs School District. Petitioner has lived with her maternal grandmother in the Borough of Englewood Cliffs, New Jersey since birth. She came to live with her grandmother because of significant pressures on her mother, including martial discord, difficulty in balancing home and job responsibilities, difficulty in looking after two other children (one of whom has special needs), conflicting demands on her time and financial problems. Meanwhile, petitioner's father left the home and has been separated from her mother for nearly two years. Her grandmother has assumed responsibility for caring for petitioner and provides full financial support for her. Petitioner's mother opted to place her daughter with the grandmother for what she perceived as the best interests of her child, as well as her own emotional and mental well-being.

The legal dispute involves whether the child is entitled to a free public education in the Englewood Cliffs School District under the "affidavit-student" provision of *N.J S.A.* 18A:38-1(b), which applies to students living with relatives (other than parents) or friends who reside in the district. For petitioner to prevail, she must satisfy a two-prong test: First, petitioner must be supported "by such other person gratis as if [s]he were such other person's own child." Second, her parent must be unable to support or care for her due to a "family or economic hardship".

Procedural History

On August 20, 2003, the grandmother filed an appeal to the Commissioner of Education ("Commissioner") requesting that her granddaughter

should be allowed to attend school in the district. Respondent Borough of Englewood Cliffs Board of Education ("Board") filed its answer and counterclaim on October 7, 2003. Pursuant to *N.J.S.A.* 18A:38-1(b), the child was admitted to school pending the outcome of the appeal, but the Board's counterclaim asks that the grandmother pay tuition for schooling already received by the child.

Subsequently, on January 6, 2004, the Commissioner transmitted the matter to the Office of Administrative Law as a contested case. On March 3, 2004, the Board filed a motion for summary decision, together with supporting certifications and exhibits. Petitioner filed her cross-motion for summary decision, together with supporting certifications, on May 3, 2004. Respondent filed reply papers on May 14, 2004. The OAL conducted oral argument on May 25, 2004. Thereafter, the record remained open until June 1, 2004 to allow the Board additional time to respond to new arguments made by petitioner during oral argument.

Findings of Fact

All of the material facts necessary for disposition of these cross-motions are uncontested. From the pleadings, certifications, interrogatories and attached exhibits, I **FIND** the following facts:

(1) Gratis Test

Petitioner's mother lives with two older children in the Borough of Fort Lee, New Jersey. When petitioner was born, her mother felt that she was unable to provide the necessary care for her new baby. She and her husband, the child's father, were experiencing serious marital discord that resulted in their separation and institution of divorce proceedings. In order to support herself and her remaining two children, the mother works as a teacher in the Newark school district. Concerned about the strain on her daughter and the potential adverse

effect on the baby, the grandmother offered to keep and care for her grandchild. One month after giving birth, the mother returned to work because she could not afford to take more time off. On her first day back to work the mother brought her baby to the grandmother's house and returned home to prepare her other two children for school before leaving for work. Since then, the grandmother has sheltered and cared for the child as if she were her own. Such care includes preparing the child for school everyday and bringing the child to tutoring, ballet, and piano lessons. The end result of the grandmother's uninterrupted care for a period of five years is an established psychological bond between the grandmother and the child.

The grandmother owns her own home in Englewood Cliffs, where she has been a resident and taxpayer since 1984. She voluntarily undertook responsibility of paying preschool tuition at a cost of $14,824 for the period stretching from January 1, 2000 to December 31, 2003. Additionally, she pays for tutoring, piano, and ballet lessons for petitioner. Except for the child remaining on her mother's employer-provided health insurance, the grandmother provides all financial support for the child.

(2) Economic or Family Hardship

Resolution of the legal issue turns on whether the largely undisputed factual circumstances satisfy the legal criteria for "economic or family hardship." As a tenured teacher employed by the Newark public school system, the mother earns over $70,000 a year. She pays $8,300 a year in tuition for her eldest daughter's private high school, although this expense is totally discretionary. Similar to other homeowners, the mother incurs utility bills. She owes over $1,000 to PSE&G and received a shut-off notice last April 2004. In her certification, the mother recites that she has been forced to dip into her pension fund to address debt that she has incurred over the past two years. Beyond ordinary living expenses, the mother has medical bills arising from the treatment

of her son. She owes $2,050 to Columbia University Medical Center and $1,362 for continuing orthodontic expenses. While failing to cite a specific amount, the mother notes that she has incurred thousands of dollars in attorney's fees in connection with her divorce.

In terms of family hardship, the mother would encounter serious scheduling difficulties if petitioner were to live with her in Fort Lee. In order to reach her teaching job by the required arrival time of 8:05 a.m., the mother must leave her home by 7:20 a.m. Her nine-year-old son does not begin school until 9:00 a.m. and requires supervision, which is provided free of charge by a former preschool teacher. Before dropping off her son with his former preschool teacher, the mother drops off her eldest daughter at a bus stop at shortly past 7:00 a.m.

If the petitioner were to live with her mother, she would not begin public school in Fort Lee until 9:00 a.m. Due to the mother's hectic schedule, somebody would have to watch petitioner from 7:00 a.m. until she went to school. Notwithstanding reasonable efforts to arrange for suitable supervision, the mother has been unable to find any responsible adult, other than the grandmother, willing to look after petitioner in the morning. Petitioner's father rejected the mother's request to arrive in the morning to prepare his daughter for school. Because the grandmother also watches another granddaughter in the morning, it would not be feasible for her to travel to Fort Lee to care for the child. An attempt was made to have petitioner ride the same bus as her brother, in order to allow her to be dropped off for supervision with her brother. This arrangement was not possible because Fort Lee only provides transportation for handicapped students.

Continuing in her efforts to find a suitable morning accommodation for her youngest child, the mother asked two neighbors if they could help out. Both neighbors declined because they were already caring for other children.

Alternatively, the mother sought someone to rent a room in her house for $300 a month. While she was able to find some potential candidates, there were complications preventing each one from renting the room and providing the necessary childcare.

Petitioner's younger brother has special needs that would diminish the amount of care and attention that the mother would be able to devote to petitioner. He is a special education student who has medical problems that affect his speech, breathing and sleep. To address his medical needs, the mother has sent him to four different specialty doctors and he is currently having orthodontic work done as a result of his speech and breathing difficulties. She has attended several meetings at the son's school and also spends approximately one and-a-half hours every night assisting him with his homework. While the older daughter does not experience medical or learning difficulties, she has a rebellious nature and has become angry, defiant, and belligerent since her mother separated from her father.

Last year the mother suffered a emotional problems as the result of additional strain from working while still having to cook, help her son with homework, and put her two children to bed. As a result of her illness, the mother lost twenty-five pounds, took three separate medications, and missed three weeks of work. In addition to financial and time stress, the mother may not be emotionally stable enough to handle another child living at home.

I **FIND** that the mother is unable to care for petitioner due to a family hardship. Scheduling conflicts that exist in this case are different than the common conflicts that may exist with most families. Being only five-years old, the child must be supervised at all times. The mother has attempted, but has been unsuccessful in finding supervision for the time periods when she is traveling to or is at work. Great indulgence should be given to the mother's inability to find care for her child, since, prior to the decision of Englewood Cliffs

School District, she never had to consider making arrangements for supervision of the child. The existence of family hardship extends beyond scheduling conflicts to the current state of the mother's household. Due to the son's special needs along with an upset daughter, petitioner would be placed in a house where she would receive less attention and exposed to the turmoil of a bitter divorce. Finally, the uncertain emotional ability of the mother to care for another child cannot be discounted, especially when the additional child is a developing five year old who is coming from a stable environment with her grandmother.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that petitioner satisfies the statutory criteria and is entitled to a free public education in the Englewood Cliffs School District.

N.J.S.A. 18A:38-1(b) provides that public schools shall be free to "any person over five and under twenty years of age who is kept in the home of another person domiciled within the school district and supported by such other person gratis as if he were such other person's own child." Eligibility for attendance in a particular school district may be established by the filing of two sworn statements: the first from the resident attesting that she "is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to the school requirements and that [s]he intends to keep and support the child gratuitously for a longer time than merely through the school term;" and the second from the parent or guardian showing that she "is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district." School districts, however, may not automatically deny an application on the basis of inadequate documentation without consideration of the full

circumstances developed at an evidentiary hearing. *J.A. v. Board of Educ. for South Orange and Maplewood*, 318 *N.J. Super.* 512 (App. Div. 1999).

The Board does not really deny that the *gratis* test is satisfied. Petitioner has lived continuously with her grandmother in Englewood Cliffs since birth and the grandmother provides virtually all of the child's financial support. The mere fact that the mother's health insurance happens to extend to petitioner is not enough to defeat the overwhelming weight of the evidence that the grandmother has assumed full financial responsibility for supporting her granddaughter. *E.L. and J.L. ex rel. A.H. v. Bd. of Educ. of Morris Hills Reg. Sch. Dist.*, OAL Dkt. No. EDU 3172-97 (Comm'r Feb. 15, 2000), 2000 WL 148207 (N.J. Adm.); *R.A. v. Bd. of Educ. of Ewing Twp*, 95 *N.J.A.R.*2d (EDU) 49, 50 (Comm'r Oct. 5, 1994), 1994 *WL* 760481 (N.J. Adm.).

Instead the more contentious issue is whether the circumstances satisfy the second requirement of a family or economic hardship rendering the parent incapable of supporting or caring for the child. The family or economic hardship language is "clearly directed at instances where the student is living with a parent or guardian claiming to be but not actually domiciled in the school district or, alternatively, where a child is placed with a person other than the parent or guardian to obtain the benefit of a free education in that district." *P.B.K. ex rel. E.Y. v. Board of Educ. of Borough of Tenafly*, 343 *N.J. Super.* 419, 428 (App. Div. 2001). Generally, reported cases have taken an indulgent attitude towards recognizing what constitutes family hardship in affidavit student cases. Significantly, the statutory language does not require an "extreme" family hardship, but recognizes that ordinary family difficulties may suffice.

Existence of a family conflict that will adversely affect the welfare of the child can be sufficient to establish a family hardship. Illustratively, in *J.B. v. Bd. of Educ. of the Twp. of Ocean*, 96 *N.J.A.R.*2d (EDU) 628 (Comm'r March 25, 1996), 1996 *WL* 769148 (N.J. Admin.), *rev'd* (St. Bd. Oct. 2, 1996), *on remand*,

(Comm'r Feb. 11. 1997), a child unable to tolerate his father's unrealistic academic expectations exhibited suicidal tendencies and had threatened to run away from home. He went to live with his grandmother, where he was "much happier than when he was at his parent's home. *J.B.,* at 629. Notwithstanding that his parents could afford to send him to private school, the Commissioner held that the "unique and compelling circumstances . . . rise to the level of family hardship sufficient to meet the standard of the pertinent statute." "To hold otherwise," the Commissioner explained, "harms a party the Legislature never meant to penalize . . . and overlooks the substantial State interest in ensuring the education of all its children." *J.B.* at 632.

So too, in *U.S.K. ex rel. J.W.Y. v. Board of Educ. of Fort Lee,* OAL Dkt. No. EDU 3958-99 (Comm'r Oct. 28, 1999), 1999 *WL* 777917, the Commissioner upheld the entitlement to school attendance of a child who came to live with his aunt because his father abused his mother and had abandoned the family. Factors considered by the Commissioner included the fact that the mother "made very little money and worked very long hours" and pleaded with her sister "to take the child for his own well-being." *See also, E.L. and J.L. ex. rel. A.H., supra,* where the grandparents provided a safe haven for their grandchild after her own mother had rejected her. Although the Board contends that these cases implicated family hardships that are more "severe in nature," the Commissioner customarily refrains from measuring degrees of misery in domicile disputes. So long as the primary caretaker has suffered a legitimate hardship (as opposed to the child moving into the district for the purpose of attending school there), the Commissioner will not second-guess the decision of other relatives to offer help. Indeed, the social fabric of our society is tied together by family members helping other family members in times of need.

Those cases in which the Commissioner did examine the severity of the purported family hardship are distinguishable on their facts. In *H.K. and G.K. ex rel. J.K, and C.K. v. Cherry Hill Board of Education,* OAL Dkt. No. 0673-97 (June

19, 1998), 1998 *WL* 658389 (N.J. Adm.), *adopted* (Comm'r Aug. 28, 1998), the parents lived together in an intact family unit and, at the time of the hearing, the two children were 18 and 16 years old. Although the father worked during the day and the mother spent a good portion of the day caring for her elderly parents, one or both parents returned home by 6:00 p.m. every school night. Thus, the Commissioner upheld a determination that the parents were "available in the evenings and weekends to provide guidance and care for them."

Similarly, in *In re E.G.P. ex rel. M.B. v. Board of Education of Rutherford*, OAL Dkt. No. 9881-00 (Aug. 20, 2001), 2001 *WL* 829381 (N.J. Adm.), a young child came to live with his grandparents "as a matter of family choice." Notwithstanding the fact that his parents both worked during the day, there was no showing that they were incapable of caring for him.

In contrast, the instant matter involves a single working mother and a five-year old who is too young to stay alone at home. The mother is unable to juggle the conflicting responsibilities of caring for petitioner together with her two other children and earning her livelihood. Despite diligent efforts, the mother was unsuccessful in arranging for childcare in the morning, when she had to drop her other children off for school and leave the house for work. Much of the mother's spare time is devoted to caring for petitioner's older brother, who has special needs. Moreover, the ugly divorce proceedings in which the parents are engaged presents a hostile home environment in which to raise a young child. Therefore, the decision to entrust petitioner to her grandmother's care was not a question of mere convenience, but rather a matter of necessity.

Given the strong evidence in favor of a family hardship, it is unnecessary to reach the issue of whether petitioner has also demonstrated economic hardship that would constitute alternate grounds for attendance in the Englewood Cliffs school system.

Order

It is **ORDERED** that petitioner is eligible to receive a free public education in the Englewood Cliffs 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 (45) 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 (13) 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, 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 13, 2004
DATE

KEN R. SPRINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

July 13, 2004
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 14 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 4694-02
AGENCY DKT. NO. 186-6/02

C.H., ON BEHALF OF MINOR CHILD, J.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions, to which the Board of Education (Board) duly replied.

In his exceptions, petitioner urges the Commissioner to reject the Initial Decision's findings and conclusions to the extent that they do not hold petitioner to have been domiciled, or temporarily residing, in Princeton during the entire 2001-02 school year. Petitioner specifically objects to the findings of the Administrative Law Judge (ALJ) that petitioner's separation from his wife ended in February 2002, that his residency in Princeton ended on or about February 2002, and that he was not domiciled in Princeton after February 2002. According to petitioner, the record demonstrates that he neither decided nor acted to return permanently to Lawrenceville until the summer, so that the ALJ erred in concluding that, as of February 2002, petitioner intended to return to Lawrenceville on a permanent basis and his intermittent stays there between February and the summer consequently constituted a change in domicile. Petitioner also objects to the ALJ's failure to consider, in addition to his claim of domicile, the proffered

alternative ground of temporary residence in the district pursuant to *N.J.A.C.* 6A:28-2.4(a)4. (Petitioner's Exceptions at 1-11)

In reply, the Board urges adoption of the Initial Decision, contending that petitioner's claim of domicile is belied by testimony demonstrating that petitioner's move to his father's home in Princeton was "only a temporary arrangement to help ease a family crisis. He never changed his legal domicile, as required by *N.J.S.A.* 18A:38-1. His wife described the family separation as a 'plan,' the result of which was unpredictable. She testified on cross-examination that, even from the beginning of the school year, [petitioner] and J.H. stayed overnight in Lawrenceville on Monday nights, since the family had counseling sessions on those evenings. She further admitted that, beginning in February, 2002, and continuing for 'a few months,' [petitioner] and J.H. spent additional nights at the Lawrenceville home. *** [Petitioner] testified that his intention during this February – May period was to return to the Princeton residence. However, this avowed intention was not sufficient to prove that Princeton was his domicile, since the facts do not support such a finding even prior to February, 2002. In other words, [petitioner] could not 'return' to a domicile that did not exist." (Board's Reply at 1-2) The Board further opines that the ALJ did not need to consider petitioner's claim of temporary residence in light of her (correct) finding that petitioner and his wife "reconciled or at least reunited" in their Lawrenceville home in February 2002. (*Id.* at 2)

Upon his own review, the Commissioner determines to modify the Initial Decision of the ALJ. Preliminarily, the Commissioner notes that there is no genuine dispute between the parties about the material facts of petitioner's living arrangements, as opposed to the intention underlying them and the conclusions to be drawn from them; nor do the parties dispute the ALJ's

recitation of testimony or her implicit assessment of witness credibility.[1] In reviewing the body of testimony and evidence presented, however, the Commissioner cannot concur with the ALJ that petitioner was at any point *domiciled* in Princeton. Instead, as the record makes abundantly clear and neither party denies, petitioner's family unit was in crisis and, in an attempt to preserve it, the parents undertook a trial separation until they could determine whether the problems with their children could be resolved and they would then decide either to divorce or to reconcile; if the latter, they would again live together in Lawrenceville. Both parents testified that, when petitioner moved to Princeton, they did not know whether he would return to Lawrenceville. Petitioner himself testified that he returned frequently to Lawrenceville for home maintenance purposes and that he did not change his driver's license or the address at which he received official documents, actions which customarily serve as indicia of intent to establish a new domicile. Under these circumstances, it is difficult to agree that petitioner intended, even for a short time, to make Princeton a "permanent abode," as found by the ALJ. (Initial Decision at 8) That assessment, however, does not end the inquiry in this matter, as the Board would suggest.

The facts herein are, in the Commissioner's view, more appropriately analyzed under the provision of law allowing for free attendance at school by a student whose parent or guardian is temporarily residing in the district, N.J.S.A. 18A:38-1(d), so long as the sole purpose of such residency is not to obtain a free public education, *N.J.A.C.* 6A:28-2.4(a)4; *Whasun Lee v. Board of Education of the Township of Holmdel,* App. Div. A-653-95T5, decided October 9, 1996, published 97 *N.J.A.R.*2d (EDU) 77, 80-82. There is no dispute in this matter that

[1] It is here noted that petitioner submitted, along with his exceptions to the Initial Decision and without objection by the Board, an unofficial copy of the sound recording of the OAL hearing obtained pursuant to *N.J.A.C.* 1:1-14.11(b); that recording, however, was not considered in rendering the within decision. Although it was unnecessary in the present instance for the Commissioner to review the hearing transcript because petitioner, in his exceptions, challenges the conclusions drawn by the ALJ from stated facts rather than the facts themselves, the Commissioner must generally caution that parties challenging an ALJ's findings of fact are required to provide the Commissioner with those portions of the official transcript relevant to the exceptions filed. *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987) An unofficial copy of the sound recording of OAL proceedings may not be substituted for the required transcript, and will not be considered if so submitted.

petitioner and J.H. were living with petitioner's father in Princeton until February 2002. After that time, however, the Commissioner finds that, contrary to the holding of the ALJ, petitioner and J.H. continued to reside in Princeton until the beginning of summer, after the school year had ended, and that their concededly more frequent stays in Lawrenceville are indicative of the family's counseling needs and state of transition rather than of an actual change in residence, which did not finally occur until petitioner and J.H. moved back to the family home in the summer. Moreover, the record amply demonstrates that, while a desire to change J.H.'s school environment undeniably entered into the family's decision to undertake a trial separation, and a desire to have him finish out the school year without interruption may well have colored the timing of the family's actual physical reunification once it became apparent the separation was not working, these factors were but one part of a larger complex of issues giving a legitimate non-school purpose to petitioner's residency in Princeton. Certainly, this matter does not present itself as a case where, contrary to the intent of *N.J.S.A.* 18A:38-1, parents have contrived to establish a temporary residence in another district in order to create a sham "entitlement" for their child(ren) to attend school there. *Lee, supra.*

Accordingly, for the reasons set forth above, the Initial Decision of the OAL is modified to hold that no tuition is due the Board because petitioner was temporarily residing in the Princeton school district for the duration of the 2001-02 school year and such residency was not for the purpose of unlawfully procuring a free public education in the district.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8/11/04

Date of Mailing: 8/11/04

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4694-02

AGENCY DKT. NO. 186-6/02

C.H. ON BEHALF OF MINOR CHILD,

J.H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,

Respondent.

Richard E. Shapiro, Esq., for petitioner

John E. Collins, Esq., for respondent

Record Closed: June 1, 2004 Decided: July 12, 2004

BEFORE **CARIDAD F. RIGO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals the residency determination made by respondent, the Board of Education of the Princeton Regional School District (hereinafter "BOE"). The BOE has demanded $11,318.00 as tuition for the 2001-2002 school year.

On May 7, 2002, the Superintendent for the Princeton BOE notified the petitioner that J.H., his minor son, could no longer attend the Princeton Regional Schools because C.H. did not

reside in Princeton. The BOE on that same date advised C.H. to attend a meeting of the BOE on May 28, 2002 where J.H's attendance and residency within the district was going to be discussed. C.H. did not attend the meeting and neither did his wife, J.H.'s mother.

On June 3, 2002, the BOE sent C.H. a letter advising him that the Board determined that J.H. (son) was ineligible to attend Princeton High School and that C.H. was responsible for J.H.'s (son) tuition in the amount of $11,318.00.

On June 24, 2002, C.H. filed a petition with the Commissioner of Education. On July 15, 2002, the BOE filed its Answer and on July 17, 2002, the matter was transmitted to the Office of Administrative Law.

On November 3, 2003, a hearing was conducted. A post-hearing briefing schedule was established. After extensions, the parties submitted their closing briefs.

ISSUE

Was the petitioner domiciled in Princeton during the 2001-2002 school year?

SUMMARY OF TESTIMONY

Testimony of C.D.H.

C.D.H. is the father of J.H., the student. C.D.H. is married to J.H. and they have a second son named M.H. According to the father, both of his sons are diagnosed with Attention Deficit Hyperactive Disorder and M.H. has Tourette's Syndrome as well.

C.D.H. and J.H. separated because of the stress they were under as parents of two children with ADHD. When they separated, they decided to split temporary physical custody of the boys. J.H., a high school student, went with C.D.H. and M.H. stayed with his mother, J.H. C.D.H. and J.H. (son) moved to Princeton and resided with C.J.H., Jr. at 29 Cuyler Road, Princeton, New Jersey. C.J.H., Jr. is the father of C.D.H. and the grandfather to J.H.

C.D.H. testified that when the parties were together, he, his wife and their two children lived at 7 Edgehill Avenue, Lawrenceville, New Jersey. C.D.H. said that he choose to live with his father (C.J.H., Jr.) in Princeton because he did not have sufficient finances to obtain a residence of his own. C.D.H. said that the sole purpose of the marital separation was to separate the family and relieve some of the family problems and stress.

C.D.H. said that he and his son, J.H., moved into his father's house on Cuyler Road sometime in August of 2001. He said he and his son moved in with most of their personal belongings. C.D.H. testified that he returned to his Lawrenceville home frequently to do general house maintenance such as cutting the grass, attending to the dogs and fixing things. He also said that he would frequently go to the Lawrenceville house to help his wife deal with M.H. He said he and his wife had an amicable separation agreement because they separated only to alleviate the stress of the children. He called this separation a "Family Split" as opposed to a marital separation. He said he and J.H. had talked about a divorce.

C.D.H. testified that he intended to reside in Princeton with his father until either the family reconciled or they divorced. He said in the 2001-2002 school year the entire family was in counseling. He testified that if the problems with the kids were resolved, the family would reunite.

C.D.H. said that as far as he knew, his wife, J.H., filled out all of the registration forms for J.H. (son) to attend the Princeton school. She generally did all of the paperwork.

C.D.H. said he did not change his driver's license, nor his tax return address; all official documents remained with the Lawrenceville address. C.D.H. said that J.H. (son) did not stay in the Lawrenceville school district, even though he (C.D.H.) moved to Princeton, because he would have to do the transporting of J.H. (son). In other words, he would have to travel every morning from Princeton to Lawrenceville to take J.H. to school.

C.D.H. testified that between mid-February 2002 and early May 2002, he was in Lawrenceville intermittently, more so than in the prior months.

C.D.H. further stated that it was not his intention to get J.H. a Princeton High School Education. The intent was a family separation to ease the family stress and tension from dealing with both boys and their disabilities. The attitude was, let's separate and see what this separation yields in terms of the family and its stresses.

Testimony of C.J.H., Jr.

C.J.H., Jr. is the father of C.D.H. and the grandfather to J.H. Mr. C.J.H., Jr. testified that C.D.H. is his oldest son. C.J.H., Jr. is the owner and resident of 29 Cuyler Road, Princeton, New Jersey. This has been his residence for the past 50 years.

C.J.H., Jr. testified that on or about August 15, 2001, he wrote the BOE a letter advising them that his son and grandson were residing with him on Cuyler Road and that J.H. will be attending Princeton High School in the Fall. *See* Exhibit P-2.

C.J.H., Jr. further testified that C.D.H. and J.H. (son) started to live with him around the first of August. He said they moved in with their clothing and that J.H. (son) brought his guitar and sound system. He said they resided in his home until the Spring of 2002. He said they left shortly after the end of the school year. He said they slept at his house most of the year and that J.H. left for school from his house. He said there were times when C.D.H. and J.H. (son) would go back and forth from his house in Princeton to their house in Lawrenceville.

Testimony of J.H.

J.H. is the wife of C.D.H. and the mother of J.H. She resides at 7 Edgehill Avenue, Lawrenceville, New Jersey. She has lived at this address for the last 23 years.

J.H. (mother) testified that in 2000-2001, she called the Princeton BOE and inquired about registration for J.H. (son) at the high school. She said she made the phone call on the last day of school in June of 2001. She said she was given Exhibit P-1. She said she did not

complete it. She testified that, at that time, she and C.D.H. had already decided to separate, but that they wanted to wait until the end of that school year before actually making the separation.

J.H. testified that J.H (son) was suicidal (very distraught) in early February of 2002 and that he wanted to live in the Lawrenceville home. She said they were at the Lawrence house a few days a week for several months. She said that things just became worse "disastrous." She said J.H. missed his brother, M.H., and although things were not good, the separation period had provided some improvement. She further stated that J.H. was depressed that he wanted to live at home in Lawrenceville. She said he was devastated at Princeton High School. She said that educationally Princeton High School was a disaster. In July of 2002, they decided to send J.H. back to a private school.

J.H. (mother) said that when they separated, she did not know if they would reconcile.

Testimony of Nicholas Cream

Nicholas Cream is employed by the Princeton Regional Schools as an attendance officer. He has been in this position for the last 13 years. He does the residency and truancy investigations.

Mr. Cream testified that the matter involving J.H. (son) came to his attention in April 2002, when while in the attendance office, J.H. came in late and said that he was late that morning because of a lot of traffic on the way to school. He said he saw C.D.H. drop J.H. off at school many times. Mr. Cream said this peaked his curiosity because he knew that there were no traffic jams in the vicinity of Princeton High School.

He investigated the situation and discovered that C.D.H. had a residence in Lawrenceville.

Mr. Cream testified that on five occasions, he saw C.D.H. and J.H. (son) leave the house in Lawrenceville and go to Princeton High School. He said he followed C.D.H. in a brown and beige van and that he recognized C.D.H. and J.H. He said at approximately 7:30 a.m. on April

26, 30, May 1, 2 and 3, 2002, he saw C.D.H. and J.H. leave 7 Edgehill Road in Lawrenceville and drive to Princeton High School where J.H. exited the vehicle and entered the high school.

Mr. Cream further testified that on May 13 and 28, he went to the Lawrenceville home in the evening and at night and observed the brown and beige vehicle parked in the driveway.

Testimony of Claire Sheff Cohn

Dr. Cohn testified that she is the Superintendent of Schools for the Princeton Regional School District. She started this position in July of 2002. Prior to her employment with Princeton, she was the Superintendent in Lawrenceville Township.

Dr. Cohn testified that she was familiar with the subject family and their children. She said she had had numerous conversations with the parents regarding J.H.'s schooling and his difficulties. She had also discussed with them their concerns with respect to the district.

Dr. Cohn specifically related a conversation she had with J.H. (mother) wherein J.H. asked if Lawrenceville School District would pay private school tuition for J.H. (son). Dr. Cohen said she told J.H. (mother) that the district would not do so because the private school J.H. (mother) was talking about was not accredited. Dr. Cohn then said J.H. (mother) asked her about J.H. (son) going to Princeton High School and Lawrenceville paying Princeton's tuition. Dr. Cohn said that Lawrenceville would not pay Princeton's tuition either because Lawrenceville School District was capable of handling J.H.'s (son) academic needs.

Dr. Cohn further testified that J.H. (mother) explained that J.H.'s (son) grandfather lived in Princeton and perhaps something could be done that way. Dr. Cohn said she told J.H. (mother) that that would not work either because there had to be an exigent reason for a child to attend a school in a district that he does not live in.

She testified that the petitioner was given the proper notice about attending the May 28, 2002 school meeting but that her office did not hear anything from the petitioner until the last moment. She said that by the time she heard from J.H. (mother) about C.D.H. not attending the

meeting, it was too late to call the meeting off. She said additional notices were sent to the petitioner but the district never received a response. The hearing was not rescheduled because the petitioner never requested it. Dr. Cohn said the BOE predicated its decision on Mr. Cream's report and the lack of information from the petitioner.

FINDINGS OF FACT

Based upon the evidence presented at the hearing and having had an opportunity to observe the witnesses and assess their credibility, I **FIND** the following **FACTS**:

1. Petitioner, C.D.H., is the father of J.H. C.D.H. and J.H. are married and were separated from on or about August 1, 2001 until February 2002. They have two children, J.H. and M.H.
2. C.D.H., the petitioner, and J.H. (son) resided at 29 Cuyler Road, Princeton, New Jersey at the home of C.J.H., Jr. They began their residency in Princeton on or about August 1, 2001 and such residency ended on or about February 2002.
3. During the separation period, J.H. (son) was domiciled with C.D.H. at 29 Cuyler Road, Princeton, New Jersey and J.H. (mother) was domiciled at 7 Edgehill Road, Lawrenceville, New Jersey with their other son, M.H.
4. Petitioner was not domiciled in Princeton, New Jersey after February 2002.

FACTUAL ANALYSIS AND LEGAL DISCUSSION

Pursuant to *N.J.S.A.* 18A:38-1(a), "[a]ny person who is domiciled within the school district" is entitled to a free education from that district "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....the superintendent or administrative principal may apply to the board of education for the removal for the child." *N.J.S.A.* 18A:38-1(b)(2). The parents "shall have the burden of proof by a preponderance of the evidence" to prove domicile in the school district. *N.J.S.A.* 18A:38-1(b)(2).

Domicile is the place of a person's abode where he or she, if absent, intends to return. *Mercandante 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 may only have one true domicile at a time. Therefore, residence may coincide with domicile, but does not alone determine domicile. *State v. Benny*, 20 *N.J.* 238, 151 (1955). Intent is the decisive factor in establishing domicile. It is the manifestation of a person's intent that converts residence from a mere place in which a person lives to a domicile. *State v. Benny,* 20 *N.J.* at 251. The New Jersey Supreme Court held in *Lyon v. Glaser,* 60 *N.J.* 259, 264 (1972), domicile requires proof of physical presence and the intention to remain there indefinitely. Domicile is acquired upon the "concurrence, even for a moment, of physical presence at a dwelling place with the intention of making it a permanent abode." *Lyon v. Glaser, supra* at 264.

The domicile or residence of children, for school purposes under Title 18A, is the domicile of the parent. *I.P. v. Board of Education of the Borough of Leonia,* 93 *N.J.A.R.*2d (EDU) 128, 132 (1993). *See also V.R. on Behalf of A.R. v. Hamburg Board of Education, N.J.A.R.* 283, 286 (EDU) (1980), *aff'd St. Bd.*, 1 981 *SLD* 1553, *rev'd* on other grounds, *Rabinowitz v. New Jersey State Board of Education,* 550 *F.Supp.* 481 (D.N.J. 1982).

The testimony contained in the record shows that C.D.H. and J.H. (son) moved out of the Lawrenceville house and into the home of the grandfather in Princeton sometime in August of 2001. There is nothing in the record saying that this did not happen. Therefore, although C.D.H. had another residence, in Lawrenceville, the house in Princeton was his temporary domicile. The record also shows through the testimony of C.J.H., Jr. that J.H. (son) moved into his grandfather's house with his father.

The petitioner and his wife testified that they separated and they did not know how long they were going to be separated; they said at least until the problems were resolved. This fact supports the legal premise that C.D.H. intended to make the residence in Princeton his temporary home and principal establishment, at least during the separation period or until if and when he and his wife reconciled or their problems were resolved.

The testimony of the petitioner and his wife support the fact that at least up until February of 2002, C.D.H. and J.H. (son) only frequented the Lawrenceville house intermittently, but then in February until the end of the school year, the frequency increased. J.H. (son) had gotten very depressed, was suicidal for he wanted to be in Lawrenceville. This statement by J.H. (mother) is very telling and candid. This statement shows how distraught J.H. (son) was over the separation and how badly he wanted to be in Lawrenceville. The parents, in trying to ease the situation or in accommodating their son, reunited in Lawrenceville. I **FIND** and the facts show through the testimony that the parents reconciled or at least reunited in their Lawrenceville resident in February 2002. They reunited because the separation was too stressful on J.H. (son). The parties re-established family domicile in Lawrenceville until the end of the academic year.

Based on the foregoing, I **CONCLUDE** that the petitioner has proved by a preponderance of the evidence that he was domiciled within the Princeton Regional School District from August 2001 until February 2002.

ORDER

I, therefore, **ORDER** the petitioner to reimburse the respondent the per diem rate of tuition from February 1, 2002 until the end of the school year ending June 2002.

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 (45) 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 (13) 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, 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, 2004
DATE

CARIDAD F. RIGO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/12/04
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 15 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

LIST OF WITNESSES

For Petitioner:

C.D.H.

J.H.

C.J.H., Jr.

For Respondent:

Nicholas Cream

Claire Sheff Cohn, Ph.d.

LIST OF EXHIBITS

For Petitioner:

P-1 Princeton High School Eligibility for Registration Form

P-2 Letter from C.J.H., Jr., dated August 15, 2001

P-3 Final Tax Bill from 29 Cuyler Road, Princeton, NJ

For Respondent:

R-1 Princeton Regional Schools Registration Form

R-2 Residency Investigation Report

R-3 Handwritten Investigation Report from Mr. Cream

R-4 Letter from Princeton Regional Schools, dated May 7, 2002

R-5 (a) and (b) Letter from Princeton Regional Schools, dated June 3, 2002 (2 pages)

337-04L

551-04

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

August 17, 2004

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Dear Parties:

Upon review of the matter entitled *State-Operated School District of the City of Newark, Essex County v. New Jersey State Department of Education*, Agency Dkt. No. 183-5/04, I have determined to dismiss the Petition of Appeal in this matter for failure to prosecute.

This matter was opened May 19, 2004 by way of the filing of a Petition of Appeal, wherein petitioner states that it is appealing "the April 19, 2004 decision of Richard Rosenberg, Assistant Commissioner, Division of School Finance, denying the District's requests for needed funding for the District's pre-school educational program for the 2003-04 school year." (Petition of Appeal at 1) On June 15, 2004, the Department of Education (Department) filed a Motion to Dismiss in Lieu of Answer claiming that the matter is not properly before the Commissioner and that "no final decision has been rendered regarding the results of the audit conducted to test Newark's preschool enrollment." (Motion to Dismiss at 1)

By letter of June 17, 2004, petitioner was provided twenty (20) days to submit a memorandum of law or letter brief setting forth its legal arguments as to why the appeal should not be dismissed. When no filing was received, by letter sent July 13, 2004, via certified[1] and regular mail, petitioner was provided a final opportunity to file a submission with respect to the Department's motion. The July 13 letter specifically advised petitioner that failure to respond to

[1] The "green card," signed by N. Pietro, indicates receipt, but is undated.

536-04

OAL DKT. NO. EDU 5780-03,
OAL DKT. NO. EDU 3247-03 on Remand
AGENCY DKT. NO. 96-3/03

NEW JERSEY LUCKY TOURS, ET AL.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Order for Dismissal with Prejudice and Settlement Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/13/04

Date of Mailing: 8/13/04

332-04

#322-04

OAL DKT. NO. EDU 09053-03
AGENCY DKT. 248-7/03

MAREN BRISTOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The exceptions filed by both petitioner and the Board, as well as the respective replies thereto, were submitted in accordance with *N.J.A.C.* 1:1-18.4.[1]

Although petitioner supports most of the Administrative Law Judge's (ALJ) findings and conclusions, she presents the following exceptions: (1) Given the determination that the reduction in petitioner's position was done in violation of *N.J.S.A.* 18A:28-9 and with improper motive, the back pay and benefit award ordered by the ALJ should have been accompanied by an award of pre-judgment interest as requested pursuant to *N.J.A.C.* 6A:3-1.17(c); (2) The ALJ's finding that the duties of the "Substance Abuse Counselor" may be subcontracted to outside contractors is contrary to law; (3) The ALJ's finding that a person, such as Dr. Vaccaro, who is not certified as a "Substance Abuse Counselor" may perform student counseling services is contrary to law; and (4) Those portions of the Initial Decision relating to

[1] To the extent these submissions contain evidence which was not before the Administrative Law Judge, such evidence was not considered by the Commissioner as part of his decision herein. *N.J.A.C.* 1:1-18.4(c).

whether the Board should have been given limited access to petitioner's medical records are beyond the scope of the issues in this matter and should, therefore, be rejected as irrelevant. (Petitioner's Exceptions at 1-2)

The Board submits the following exceptions to the Initial Decision: (1) The ALJ failed to include a number of significant, undisputed facts in her summary; (2) It is unclear why, in the Initial Decision, the ALJ analyzed Dr. Vaccaro's position and determined that it was more akin to an employer/employee relationship *after* she concluded that the Board had the right to subcontract out those services; (3) The ALJ's statement on page 12 that Dr. Vacarro does not meet the requirements to obtain an emergency certificate is unsupported by the record; (4) The ALJ improperly "bought in" to petitioner's claim that the Board should have negotiated with her attorney concerning the release of at least some of petitioner's medical records (Board's Exceptions at 8-9); (5) The Initial Decision fails to mention "the inconsistencies between [petitioner's] statements at the psychiatric evaluation in May of 2003, and what actually happened in November 2002, when she had her psychiatric episode," and also fails to note the Board's position that the need for some objective medical records was absolute (*Id.* at 9-10); (6) The ALJ's conclusion concerning the reduction in force is wrong, because the Board has "consistently asserted *** that this is a subcontracting situation, not a RIF matter" (*Id.* at 11); (7) The ALJ erred in finding that the Board acted improperly in subcontracting out counseling services to Dr. Vacarro in this instance; (8) The Initial Decision must be rejected because it contains factual and legal errors (*i.e.*, a finding of bad faith absent having heard testimony; reliance upon *Cochran, supra*, which involved the subcontracting of child study team duties; application of tenure/seniority principles which are irrelevant to a subcontracting issue; and a finding that there was no compelling case law for the proposition that an independent medical

examination included access to a patient's medical records); and (9) The ALJ's finding that the Board should have filed tenure charges against petitioner is incorrect and must be rejected.

Upon careful and independent review of the record in this matter, the Commissioner determines to modify the Initial Decision, as set forth herein, and, in so doing, he adopts the factual summary set forth by the ALJ at pages 1-4 of the Initial Decision.

"Substance Awareness Coordinator"

First, it is critical to note that the position of Substance Awareness Coordinator is authorized by statute and administrative code, and the duties for this position are set forth at *N.J.S.A.* 18A:40A-18(c) and *N.J.A.C.* 6A:9-13.2. That is, the Substance Awareness Coordinator is authorized to:

> assist with the inservice training of school district staff concerning substance abuse issues and the district program to combat substance abuse; serve as an information resource for substance abuse curriculum development and instruction; assist the district in revising and implementing substance abuse policies and procedures; develop and administer intervention services in the district; provide counseling services to pupils regarding substance abuse problems; and where necessary and appropriate, cooperate with juvenile justice officials in the rendering of substance abuse treatment services. *N.J.S.A.* 18A:40A-18(c); *See also, N.J.A.C.* 6A:9-13.2(a)[2]

The record herein, however, reflects the consistent use of titles *other than* "Substance Awareness Coordinator" when referring to the position held by petitioner.[3] For this reason, the

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[2] Irrespective of whether a local board of education chooses to hire a Substance Awareness Coordinator, *all* local boards are statutorily obligated to offer the prevention, intervention and treatment-referral programs and services required by *N.J.S.A.* 18A:40A-1 *et seq.* Thus, while a Board may be prudent to employ a Substance Awareness Coordinator to assist it in meeting its broad statutory responsibilities, there is presently no requirement for it to do so. Consequently, the programs and services compelled by the imposition of these mandates need not, as petitioner argues, be provided exclusively by a Substance Awareness Coordinator, or, necessarily, a district employee.

[3] Specifically: (1) In a letter to petitioner dated December 4, 2002, the Superintendent acknowledges the caseload of students petitioner sees in her role as "Student Assistance Counselor." (Brief on Behalf of Respondent, Certification of Jan A. Furman at Exhibit A); (2) In a memorandum dated January 17, 2003, staff were informed that Dr. Vaccaro was hired on an interim basis to serve as the "Student Assistance Counselor" for the district. (Brief in Opposition to Respondent's Motion for Summary Judgment, Certification of Sheldon H. Pincus in Opposition to

Commissioner underscores that every position must have a position title which is recognized in the administrative code. *See, N.J.A.C.* 6:11-3.3(a), now *N.J.A.C.* 6A:9-5.5(a); *Howley and Bookholdt v. Ewing Township Board of Education*, 1982 *S.L.D.* 1328. A position title corresponds either to one of the enumerated endorsements (*e.g.*, the Substance Awareness Coordinator endorsement on the Educational Services Certificate) or is specifically designated within the endorsement description. In the alternative, if a district board of education determines that use of an unrecognized position title is desirable, prior to appointment of the candidate, the title must be approved by the county Superintendent who has made a determination of the appropriate certification for the position. *See, N.J.A.C.* 6:11-3.3(b), now *N.J.A.C.* 6A:9-5.5(b); *Howley, supra* at 1335. Neither "Substance Abuse Counselor," nor "Student Assistance Counselor" is a recognized title, yet both petitioner and the Board appear to have consistently used both titles.[4] Notwithstanding that the record is unclear on this point, petitioner nevertheless asserts, and the Board admits, that she is a tenured teaching staff member (Petition of Appeal at 1; Board's Answer at 1). Therefore, the following analysis presumes that petitioner has acquired tenure in her "position."

Cross Motion for Summary Judgment at Exhibit 3); (3) In a letter dated February 27, 2003 from the Board's prior counsel to Mr. Pincus, counsel indicates that she obtained a description of the job duties for the "Student Assistance Counselor" to supply to Mr. Pincus and the selected psychiatrist. (Brief in Support of Motion for Summary Judgment, Certification of Sheldon H. Pincus at Exhibit K); (4) In a letter to petitioner dated April 17, 2003, the Superintendent stated that the Board will consider and act upon a recommendation to abolish "the full-time position of Student Assistance Counselor in the District and to create a 2/5ths part-time position of Student Assistance Counselor commencing with the 2003-2004 school year." (*Id* at Exhibit L); (5) Petitioner's salary notices, dated April 28, 2003 and June 16, 2003, as issued by the Board, identify her position as "therapist" (*Id.* at Exhibits E and F); and (6) In her Petition of Appeal, petitioner alleges that on or about April 28, 2003, the Board adopted a resolution abolishing her full-time position as "Substance Abuse Counselor" and creating a 2/5ths part-time position of "Substance Abuse Counselor" commencing with the 2003-2004 school year. (Petition of Appeal at paragraph 4)

[4] There is no indication on this record whether the County Superintendent approved the use of an unrecognized title and established the appropriate certification requirements.

Abolishment of Petitioner's Position

There is no dispute that, on April 28, 2003, the Board abolished petitioner's full-time "position" and assigned 3/5ths of her counseling duties to Dr. Vacarro, who did not hold an instructional, educational services or administrative certificate issued by the State Board of Examiners. In a letter to petitioner dated April 17, 2003, the Superintendent stated that the Board "will consider and act upon a recommendation to abolish the full-time position of Student Assistance Counselor in the District and to create a 2/5ths part-time position of Student Assistance Counselor commencing with the 2003-2004 school year." (Petitioner's Brief in Support of Motion for Summary Judgment, Certification of Sheldon H. Pincus at Exhibit L).

Moreover, there is no dispute that the abolishment was *not* effectuated pursuant to a reorganization or declining enrollment. Rather, as the Superintendent indicated in her letter to petitioner's counsel dated July 7, 2003:

> During [Ms. Bristol's] absence, the Board of Education contracted with a private practitioner for these services. The level of satisfaction with this service provider exceeds the satisfaction level with Ms. Bristol's services. For these reasons the district has chosen to continue the students services provided by the private practitioner. (*Id.* at Exhibit Q)

Like the ALJ, the Commissioner is persuaded on this record that, notwithstanding the Board's attempts to characterize its action as a pure "subcontracting issue," the overriding impetus to abolish petitioner's full-time position and to contract with Dr. Vaccaro for 3/5ths of a "Student Assistance Counselor position" was not "genuinely for reasons of economy" as may be permitted by law, *See, e.g. Impey, supra,* but, rather, because the Superintendent was concerned about petitioner's ability to provide counseling services to the students. As the ALJ notes, "The District made it clear that the reason for this action was not economy (even though the result

might have been more economical) but rather an attempt to deal with the continuing problem of Ms. Bristol's perceived incapacity." (Initial Decision at 25)

Thus, while acknowledging that the Board's actions are entitled to a presumption of lawfulness and good faith (*See,* Initial Decision at 10), the Commissioner must nevertheless conclude, for the reasons set forth above, that the Board violated petitioner's tenure rights when it reduced her full-time position to a 2/5ths position, eliminated her benefits and transferred her counseling duties to Dr. Vacarro. Having so found, it is not necessary to reach to the issue of whether Dr. Vacarro was, in fact, an outside contractor or an (uncertified) employee of the district since, in either event, given the particular circumstances in this matter, the reduction of petitioner's full-time position and the transfer of her duties were unlawful.[5]

Accordingly, the Commissioner concurs that petitioner must be reinstated to her full-time "position," with back-pay and emoluments, for the reasons set forth above.[6] Having so determined, the Commissioner does not find it necessary to reach, or adopt, any findings and conclusions issued by the ALJ in her Initial Decision *other than* those specifically addressed in this decision.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 8/04/04

Date of Mailing: 8/04/04

[5]Mindful that this matter is decided pursuant to motions for summary decision, however, the Commissioner declines to find that the Board's action was in bad faith so as to entitle petitioner to pre-judgment interest.

[6]Based on the outcome herein, the Commissioner does not find it necessary to address the third issue in this matter, *i.e.*, whether the reduction constitutes an abuse of discretion because the petitioner's psychiatric evaluation was negative. (Initial Decision at 5)

[7] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT.NO. EDU 09053-03

AGENCY DKT. NO. 248-7/03

MAREN BRISTOL,

Petitioner,

v.

BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,

Respondent.

Sheldon H. Pincus, Esq., for petitioner (Bucceri & Pincus)

James L. Plosia, Jr., Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy)

Record Closed: June 18, 2004 Decided: July 1, 2004

BEFORE **CAROL I. COHEN**, ALJ:

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Petitioner, Maren Bristol, is a tenured member of the Northern Valley Regional High School District Board of Education (hereinafter "NVRHS" or "Respondent"). She has been employed by the District for approximately 15

years. Petitioner holds an Educational Services certificate with a Substance Awareness Coordinator (SAC) endorsement, and has held that endorsement at all times relevant to the instant matter. Until November 2002, Ms. Bristol was a SAC in the District. Her duties included counseling students, coordination with staff, programming and related services.

On November 21, 2002, the petitioner failed to appear for work, and did not notify the school of her absence. The school attempted to contact petitioner by phone, and after several unanswered calls, the school directed two staff members to go to petitioner's home to check on her. Upon arrival at petitioner's home, she answered the door and stated, "I just don't know that life is worth living anymore." The staff members then proceeded to transport petitioner to St. Barnabas Hospital. They did not remain with her for an extended period of time and therefore did not know whether Ms. Bristol was admitted or just received treatment at the emergency room.

Petitioner did not contact the NVRHS or return to work for approximately two weeks. In early December, petitioner attempted to return to work, at which time she was directed to report to the Superintendent of Schools for NVRHS, Dr. Jan Furman (hereinafter, "Furman" or "Superintendent"). During this meeting the Superintendent relayed her concerns about petitioner's psychiatric health and her ability to perform counseling services for students. The Superintendent informed petitioner that she would be required to receive a "clean bill of health" from a psychiatrist prior to returning to work[1]. She was on a paid leave of absence from the time of the incident until June of 2003[2].

After several months of negotiating what psychiatrist would examine the petitioner, the parties finally agreed on Dr. Fridman. On April 2, 2003, prior to Ms. Bristol's seeing Dr. Fridman, the petitioner's attorney sent a letter stating that he

[1] NVRHS asserted that the petitioner voluntarily agreed to be examined by a psychiatrist. The petitioner's attorney asserted that the petitioner did not have the advice of counsel at the time.
[2] It is unclear the exact start date of the leave of absence, but respondent asserts the entire time was approximately five months.

would not allow her medical or psychiatric records to be released to the doctor.[3] (*See Exhibit 2*). The examination took place on May 19, 2003. Dr. Fridman's evaluation was limited solely to petitioner's statements and his own observations during the examination. Dr. Fridman concluded in his report of May 19, 2003 that: "her clinical presentation, during these two interviews, offered no psychiatric contra-indication to her performing her duties as a Student Assistance Counselor at Northern Valley Regional High School. A full review of her psychiatric records would provide a more complete picture of her functioning."

In the spring of 2003, Respondent retained the services of Dr. Vincent Vaccaro to provide substance abuse counseling services to the students during petitioner's absence.[4] It is undisputed that Dr. Vaccaro, who is a psychologist, does not have a teaching certificate, nor does he have an endorsement as a Substance Abuse Counselor. During his employment in the spring of 2003, Dr. Vaccaro was an employee of the District and received a W-2.

On April 28, 2003, respondent adopted a resolution, abolishing petitioner's full-time position as a Substance Abuse Counselor, and creating a 2/5th part-time position of Student Assistance Counselor. The petitioner was given this position commencing with the 2003-2004 school year. For the 2003-2004 school year the school board employed Dr. Vaccaro on a part-time basis as an outside contractor. He continued to provide alcohol and drug counseling services for NVRHS. Ms. Bristol's duties were to work in research areas and programs related to drug and alcohol abuse and to grant writing relative to those matters. Petitioner's salary, in the 2/5ths positions, is $36, 386.80; Dr. Vacarro received approximately $44,000 for twenty hours per week for forty weeks. The combined total remuneration for Ms. Bristol and Dr. Vaccaro was approximately $80,000. Neither Ms. Bristol nor Dr. Vaccaro received health and other benefits. Petitioner's full-time base salary would have been approximately $89,000, but,

[3] Prior to the decision that Dr. Fridman would conduct an examination, the petitioner had stated that she would agree to allow her treating physician to answer certain specific questions put to her by the Board. However, the questions would be prescreened by her attorney. The Board never pursued this offer.
[4] The District attempted to engage the services of a SAC, but they were unable to do so.

when all benefits are included, it would total approximately $100,000. In June 2003, the Superintendent of Schools sent a letter to Ms. Bristol stating that, in order for her to return to work[5], she had to provide a "clearance for duty report" from her personal physician. This was necessary, because Dr. Fridman did not have access to her medical records, when he was preparing the report. On June 9, 2003, Hilda B. Templeton, M.D. Diplomat of the American Board of Psychiatry and Neurology, wrote a note stating that "Ms. Bristol has been under my medical care. She is able to return to full time employment without any limitations."

Petitioner initiated the instant matter on July 22, 2003. At about the same time, Ms. Bristol filed a complaint in the United States District Court, District of New Jersey, against the respondent, Northern Valley Regional High School Board of Education. That matter is stayed pending the outcome of this case. The respondent filed an answer on August 14, 2003. This matter was forwarded to the Office of Administrative Law (OAL) on September 9, 2003. A pre-hearing telephone conference was held on November 14, 2003. Trial dates were set for April 30, May 3 and 6, 2004. On March 2, 2004, the petitioner moved for summary decision, claiming that:

1. Her reduction in hours was a violation of her tenure and seniority rights;

2. The employment of Dr. Vaccaro, a non-tenured "staff member[6]," to perform her prior duties was a violation of her tenure and seniority rights;

3. There was no actual reduction in the workforce, because the petitioner's position was not abolished; and

4. The request for her medical and psychiatric records is an abuse of the Board's discretion.

[5] This would be for her part-time position without counseling duties.
[6] Petitioner claims that Dr. Vaccaro was a "teaching staff member," and as such did not have tenure, but Respondent asserts he was solely an outside contractor.

The Board filed a Notice of Cross-Motion for Summary Decision on March 15, 2004 asserting that:

1. The NVRHS did not violate Petitioner's tenure and seniority rights by utilizing the services of Dr. Vaccaro;

2. Dr. Vaccaro is not a "non-tenured teaching staff member" and therefore his employment does not violate Petitioner's rights; and

3. Petitioner's remaining claims are without merit and must be dismissed.

A brief in Opposition to the Respondent's Motion for Summary Judgment was filed by the petitioner on March 25, 2004. Oral argument on the Summary Decision Motions was heard on May 6, 2004. The district filed a Supplemental Brief on the issue of the psychiatric examination on June 4, 2004. The petitioner filed a reply brief on this issue on June 18, 2004.

ISSUES

1. Whether the Board's abolishment of the petitioner's full-time position and assignment of her duties to a private vendor is a violation of her tenure and seniority rights, contrary to law and arbitrary, capricious and unreasonable.

2. Whether the reduction from a full to part-time position was arbitrary, capricious and done in bad faith.

3. Whether the reduction constitutes an abuse of discretion because the petitioner's psychiatric evaluation was negative.

DISCUSSION

1. Summary Decision

Under the New Jersey Uniform Procedure Rules, a party may move for summary decision upon all or any of the substantive issues in a case, *N.J.A.C.* 1:1-12.5(a). The Administrative Law Judge may make a ruling in favor of the motion, when the papers filed, along with any supporting affidavits, show that no genuine issue as to any material fact exists and that the moving party is entitled to a decision as a matter of law. *Ibid.*

The summary decision rule is essentially the same as the summary judgment rule under the New Jersey Rules of Court, which permits a party to move for 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. 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 Supreme Court in *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520, 529 (1995), provided further guidance for the summary decision analysis, by holding that: "a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a genuine issue of material fact challenged." A contested case can be summarily disposed of, where the undisputed material facts indicate that a particular disposition is required as a matter of law. *In the Matter of Robros Recycling Corp.*, 226 *N.J.Super.* 343, 350 (App. Div.), certif. denied, 113 N.J. 638 (1988). A summary decision must be based on an examination of the totality of circumstances,

mitigating and aggravating factors, adequate factual findings and conclusions of law. *Ibid*.

2. Reduction in Force

A local board of education has the authority to engage in a reduction of the work force, even where tenured positions are affected, if done for reasons of economy. *Klinger v. Cranbury BOE,* 190 *N.J.Super.* 354, 357 (App.Div. 1982), certif. denied, 93 *N.J.* 277 (1983); *Trigani v. Monmouth Beach BOE,* EDU 8644-00 and 8645-00, Initial Decision, (Oct. 11, 2002), <http://lawlibrary.rutgers.edu/oal/search>, adopted, Comm'r (Dec. 2, 2002) <http://lawlibrary.rutgers.edu/oal/search>. Such decisions are subject to review to determine whether the position has been abolished or merely transferred in violation of the tenure statutes. *Viemeister v. Prospect Park BOE,* 5 *N.J.Super.* 215 (App. Div. 1949). In an unpublished opinion, the Appellate Division affirmed that the deciding tribunal (in that case the State Board) should determine whether the local Board's action is arbitrary or capricious in abridging the tenure rights of a teacher. *Lingelbach v. Hopatcong BOE,* A-4783-83, slip op. at 3 (N.J. App. Div. May 17,1985)[7]. The applicable statute controlling this issue, *N.J.S.A.* 18A:28-9, states:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.
>
> [*N.J.S.A.* 18A:28-9 (emphasis added).]

[7] Petitioner refers to the State Board's decision for this case in its initial brief, which is located at 1984 S.L.D. 1955.

A local board of education has the authority to reduce its teaching staff so long as it "is genuinely for reasons of economy." *Impey v. Shrewsbury BOE*, 142 *N.J.* 388, 398 (1995) (citations omitted).

> The determination to reduce the teaching force by abolishing positions need not eliminate the services that may be related to those positions. *E.g., Klinger, supra,* 190 *N.J.Super.* at 357... (concluding that a local school board may alter the full-time status of a tenured employee in order to restructure a department to meet financial constraints while continuing to provide identical services). Whether those services are eliminated, reduced or modified, however, may be a relevant factor in determining whether abolition of a position genuinely advances the goals of economy and efficiency and was undertaken in good faith. *Cf. Viemeister v. Prospect Park Bd. of Educ.,* 5 *N.J.Super.* 215, 218 ...(App. Div. 1949) (stating that the "substance" rather than the form of change controls and if position of "principal" was replaced with an identical position with a different title, it would not constitute a valid reduction in force) ...
>
> [*Impey, supra*, at 399 (internal citations omitted).]

If one looks purely at the dollars and cents factors, it is clear that the reduction in the petitioner's hours, the concomitant removal of her health and other benefits and the contracting out of counseling services to Dr. Vaccaro represented a savings of about $20,000 to the District. However, that is not the end of the investigation. It also must be determined whether the District acted in good faith, and whether it violated the law when it reduced the petitioner's hours and contracted part of the duties, that she previously performed, to Dr. Vaccaro.

While the District properly cited the *Edison* case for the proposition that a District can contract out certain services, it failed to recognize other parts of the opinion that have direct impact on this matter. In the Supplemental final decision the commissioner stated that:

> Like the ALJ, we find no evidence in the record that any staff members employed by the Board have been supplanted as a result of the Board's contract with UMDNJ. It is apparent from the record

> that much of the intervention work in the more serious situations arising in the district was referred to outside agencies even prior to the time when the district entered into the UMDNJ contract....Further, there is no indication that the workloads of staff members in the district have been reduced or even significantly altered as a result of the contract.

None of these conditions exist in the case before me. Prior to the contract with Dr. Vaccaro, counseling services were being performed by Ms. Bristol. In addition, the workload of the petitioner, the only SAC counselor in the District, was significantly reduced and altered as a result of the Board's action.

In his decision, ALJ Metzger pointed out in *Cochran v. Watchung Hills Regional High School Bd. Of Educ.*,1985 D.L.D. 1878, that the State Board found that full-time CST positions were reduced to half-time slots by way of a RIF. The Board then ruled that the half-time positions were being supplemented with outside contractors, who were performing the services previously done by the CST. The district "simply reorganized and transferred functions to a less-expensive provider, which violated tenure rights and the requirements that core CST functions be carried out by school employees." Summarizing the cases in the field, Judge Metzger stated that:

> In each of these cases, work that had been done by tenured staff was contracted out to their detriment. The State Board's decision in each case measured the good faith of the district and whether the law required that the work be accomplished with school employees. Collectively, these administrative decisions stand on footings announced in *Viemeister v. Board of Education of Prospect Park,* 5 *N.J. Super* 215 (App. Div. 1949) There, the position of principal was eliminated, the petitioner's contract was terminated and a new position of "teaching principal" was created and filled with a staff member. The court found that the work of a principal continued and that the district had merely shifted titles around, which, if sustained, would seriously undermine tenure rights.

The present matter parallels the circumstances noted above. The work of the SAC continued, there was no showing that there were less students who needed services. Rather, the duties were split between two people, one of whom

was tenured and previously held the full-time position. Therefore, the Board's actions were not done because of a valid reduction in the workload.

3. Good Faith/Bad Faith—Arbitrary and Capricious

The courts have held that the Districts have discretion in dealing with the management of the public schools.

> The School Law vests the management of the public school ... 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. *Kenney v. Montclair BOE*, 1938 S.L.D. 647 (1935), aff'd., St. Bd. at 653 (emphasis added).

A board of education has broad discretionary authority and its actions are entitled to a presumption of lawfulness and good faith. *Quinlan v. North Bergen BOE,* 73 *N.J.Super.* 40, 46 (App. Div. 1962); *see also Schinck v. Westwood BOE*, 60 *N.J.Super.* 448 (App. Div. 1960). This presumption extends to a board's determination that, for reasons of economy, a tenured employee may be subject to a reduction in force. *Jamison v. Morris Sch. Dist. BOE,* 198 *N.J.Super.* 411, 415 (App. Div. 1985). Actions of a board of education are entitled to a presumption of correctness, as well as a presumption that such actions will be upheld by the Commissioner of Education, absent a showing of bad faith, illegal motive or a lack of rational basis. *See Kopera v. West Orange BOE*, 60 *N.J.Super.* 288 (App. Div. 1960). Bad faith has been explained as meaning improper or evil purpose or motive. *Thompson v. Pleasantville BOE*, 95 *N.J.A.R.*2d (EDU) 278, 282 (citation omitted).

While a District has the power and authority to reduce the work force, pursuant to *N.J.S.A.* 18A:28-9, the courts have held that the Board's decisions are subject to review, to determine if the position was in fact abolished or merely transferred to another person in violation of the incumbent's tenure rights. *See Viemister v. Prospect Park Bd. Of Ed.,* 5 *N.J. Super*, 215 (App. Div. 1947).

Petitioner has the burden of proving, by a preponderance of the credible evidence, that the abolition of the position was undertaken in bad faith or was arbitrary and capricious or was in any other fashion contrary to the dictates of *N.J.S.A.* 18A:28-9. *Dearden v. Trenton BOE*, 96 *N.J.A.R.*2d (EDU) 321, 323; *Wollman v. Trenton BOE,* 96 *N.J.A.R.*2d (EDU) 20, 22, aff'd, Comm'r at 27.

> [I]n order for an aggrieved party to prevail where there has been a reduction in force, it is necessary that he or she demonstrate that the decision is clearly improper, arbitrary and capricious and he will be [sic] generally not prevail in situations where there exists any reasonable justification for the reduction absent such proof of bad faith. *See Klig v. Borough of Palisades BOE*, 1975 S.L.D. 168, 173-174. *In re Maywood Board of Education, supra.*
>
> [*Wollman, supra*, 96 *N.J.A.R.*2d (EDU) at 24 (emphasis added).]

Both parties have characterized the others actions as a sham. The petitioner has pointed out that there was really no reduction in the work force, since Dr. Vaccaro simply took over 3/5 of Ms. Bristol's work load. The respondent, on their side, has asserted that the petitioner's refusal to submit to a full psychiatric examination and her misrepresentations to Dr. Fridman constituted a sham, which necessitated the Board's taking the action of reducing her hours and subcontracting out counseling sources. For the reasons discussed below, I **FIND** that the Board's decision to reduce Ms. Bristol's hours was clearly improper.

4. Certification of Substance Abuse Counselor

Both parties have spent a good deal of time briefing the issue of whether or not the person counseling students on alcohol and drug problems in the school must be a certified substance abuse counselor (SAC) and whether that person also has to be a certified teacher. The petitioner points to the fact that Dr. Vaccaro was neither a SAC nor a certified teacher, as proof that the District violated Ms. Bristol's tenure rights.

N.J.S.A. 18A:40A-18b states that:

> The position of substance awareness coordinator shall be separate and distinct from any other employment position in the district, including but not limited to district guidance counselor, school social workers and school psychologists. The State Board of Education shall approve the education and experience criteria necessary for employment as a substance awareness coordinator. The criteria shall include a requirement for certification by the State Board of Examiners.

Further, *N.J.S.A.* 18A-18c sets forth the responsibilities of a SAC including, but not limited to, assisting in in-service training, serving as an information resource for substance abuse curriculum development and providing counseling services to pupils regarding substance abuse problems. *N.J.A.C.* 6:11-11.5 outlines the requirements for a SAC including a program of study beyond the bachelor's degree, which meets the approval of the New Jersey Department of Education and which includes seven topics of study having to do with drug and alcohol abuse and dependency in the school and family settings. *N.J.S.A.* 18A:40A-3(a) mandates in service training in substance abuse education programs and *N.J.S.A.* 18A:40A-4 requires pre-service training of individuals intending to enter the teaching profession. Ms. Bristol asserted that these sections of the statute demonstrate that the legislature did not contemplate the farming out of these services to a subcontracting entity or the employment of a non-certificated individual who has not met the required standards enacted. In addition, the petitioner argued that the statute clearly envisioned that a SAC would perform the counseling services that Dr. Vaccaro is presently performing. Since Dr. Vaccaro is not a certified SAC, his performance of the counseling service is in violation of the law. Further, any attempt by the District to have Dr. Vaccaro receive an emergency certification is futile, since he does not have the requirements necessary for the position. The employment of an uncertified counselor and the emergency attempt to get the doctor certified are all proof of the District's bad faith.

The Board's position is that, while a SAC may perform the services of a drug and alcohol abuse counselor, this does not mean that the District cannot contract out this service to qualified provider, who is not a certified teacher or a certified SAC.

A. Statutory Requirements

The issue of whether the NVRHS must employ a SAC to perform the duties of counselor to students, who have drug or alcohol abuse problems, is a difficult matter to decide. It is clear that *N.J.S.A.* 18A:40A-18 uses the word "shall" in describing the duties that a SAC will perform, the certifications that he/she is required to possess and the services that the substance awareness coordinator should perform. The regulation that implements the statute, *N.J.A.C.* 6A:9-13.2 (a) states that:

> the position of SAC shall be separate and distinct from any other employment position in the school. The functions of the SAC "may" include: 5. Providing counseling and referral services to students regarding substance abuse and related problems;

Both parties point out that there is a conflict between the imperative language in the statute and the permissive language in the regulation. The petitioner argued that, when there is a conflict, the language of the statute must prevail. In addition, *N.J.S.A.* 18A:40A-18B states that:

> The position of substance awareness coordinator shall be separate and distinct from any other employment position in the district, including but not limited to district guidance counselors, school social workers and school psychologists. The State Board of Education shall approve the education and experience criteria necessary for employment as a substance awareness coordinator. The criteria shall include a requirement for certification by the State Board of Examiners.

According to the petitioner, since the legislature believed that student substance abuse was a critical problem, it had set forth a number of criteria that

had to be met by persons who would perform these duties. The tenor of the statutes made it clear that the requirements of the statute were mandatory, rather than permissive and that teacher certification was among the absolute requirements.

The Board's position was two-fold. In the first place, it argued that the regulation spoke in the permissive. The regulations followed the statute and were designed to implement it. Therefore, it was clear that the SAC may perform counseling services, but was not obligated to do so. Other persons could perform the services as well. Secondly, the law gave managerial discretion to the district to contract out services. *See In Re IFPTE Local 195 v. State of New Jersey,* 88 NJ 393 (1992). Citing *Edison Township Education Association v Edison Township Board of Education,* 94 *N.J.A.R.* 2nd (EDU) 592, aff'd 96 *N.J.A.R.* 2nd (EDU) 463 (App. Div. January 23, 1996) the respondent pointed out that the State Board decided that:

Counseling services provided by the CITs were not demonstrated by petitioner to require certification by the New Jersey Department of Education, or that such services:

> Could only be performed by certified teaching staff members directly employed by the district board... nor does the record support Petitioner's contention that certification of the substance awareness coordinator was required during a period relevant to this litigation in order to authorize individuals to perform the duties assigned to the CITS.
>
> Even if the duties of the CITs were of such a nature as to require that they now possess that endorsement in order to be authorized to perform these function, there is no requirement in education laws that substance abuse counselor must be directly employed by a board of education by district board.

Thus, since the Board has the right to subcontract out substance abuse counseling services, it has a right, irrespective of whether the person performing the work is required to have a certification. There is no legal requirement that

SAC services only be provided by a SAC employed in the district. The fact that the District did not contract out the service to a properly certificated person did not diminish their right to subcontract, which was a separate issue. In such a case the remedy was not giving Ms. Bristol retroactive monetary relief.

As the respondent has pointed out, the purpose of the legislation providing for the SAC position was to strongly encourage districts to deal with the problems of substance abuse in the schools. For those districts who choose to employ SACs, there was a program of study that needed to be followed, which culminated in a certification. There was also a set of responsibilities that the SAC was to provide.

It is the court's opinion that the purpose of the legislation in this area was to make sure that people, who provided SAC services, would be properly qualified. Not just any teacher, school psychologist, nurse, etc. could act as a SAC. They needed to be properly trained. Since teachers need a certificate in order to perform their job, it logically followed that they would have to be certified. This does not mean, however, that SACs are the only people, who would be qualified to perform substance abuse counseling. If a person outside the school system was properly qualified to provide this type of counseling, then I do not believe the statute would prohibit their performing the service. Thus, under proper circumstances, a qualified professional could provide SAC counseling. It would appear that Dr. Vaccaro, as a psychologist with experience in counseling in this field, could provide this service.

B. Confidentiality

The petitioner also brought up the issue of confidentiality as proof that the legislature envisioned that a SAC would perform the services presently contracted to Dr. Vaccaro. *N.J.S.A.* 18A:40A-7.1 discusses the limitations on the release of information of school-based and alcohol abuse counseling programs and subsection 2 provides penalties for violation of confidentiality. Ms. Bristol

queried whether the District could legitimately subcontract the counseling services to an outside contractor and meet the requirements under the statute. The requirements of the statute include that the counselor be a certified SAC and a certified teacher. In sum, the petitioner asserted that the "comprehensive legislative scheme does not contemplate affording a local school district the prerogative to subcontract the interests of the students to private, non-certified vendors. Consequently, it must be concluded that only a certificated teaching staff member employed by the district may perform counseling services to students with substance abuse issues." Since Dr. Vaccaro is neither a SAC nor a certified teacher, he cannot perform the services that he is now performing. This is proof that the District's removal of a tenured teacher and the transfer of her duties to a non-tenured, non-certificated employee violated the tenure laws.

It is clear that counseling students with substance abuse problems involves delicate matters and issues of confidentiality. However, in the *Edison Township Education Association v. Edison Township Board of Education,* 94 *N.J.A.R.* 2nd (EDU) 592, aff'd 96 *N.J.A.R.* 2nd (EDU) 463 (App.Div. January 23, 1996), the court permitted the outsourcing of crisis intervention services, which also involved extremely confidential matters. Dr. Vacarro is a psychologist and is bound by ethical obligations of confidentiality. Therefore, I do not believe that the confidentially issue is determinative of the outcome of this matter.

5. <u>Independent Contractor</u>

The petitioner also questioned the status of Dr. Vaccaro as an independent contractor. The petitioner's initial brief questioned whether the counseling services could be contracted out. The reply brief drew a distinction between the cases that allowed contracting out of services to a separate entity, which then employed individuals, who performed the services for the board and contracting directly with an individual who performed services on a per diem basis. The petitioner argued that, because the Board continued to control the incidents of employment, including the hiring, wages, benefits, work schedule

and hours of work of Dr. Vaccaro, the arrangement was really not that of a subcontractor, but rather an employee. *See Burlington County Board of Special Services,* HE No 97-13, 23 *NJPER* 78, 84 ¶28049 1996; aff'd PERC No. 98-62, 24 *NJPER* 2 ¶ 29001 1997. The District could not simply transfer some of the duties of a full-time tenured Student Assistance Counselor to a part-time untenured employee without running afoul of Ms. Bristol's tenure rights. *See Viemeister v. Prospect Park Bd. Of Ed.,* 5 *N.J. Super.* 215 (App. Div. 1947). Consequently, the actions of the District constituted a sham. There was no indication that there was less of a need for the services of a SAC. Work was not eliminated, it was merely transferred to a non-certificated private vendor.

The District, for its part, has argued that, while *N.J.S.A.* 18A:40A-18(c) states that a SAC shall "provide counseling services to pupils regarding substance abuse problems" there is nothing in the statute, administrative code or case law, which says that only persons working under a SAC endorsement are permitted to provide counseling services to students. This position is borne out by the fact that *N.J.A.C.* 6A:9-13.2 states that: "the functions of the SAC may include...providing counseling and referral services to students regarding substance abuse or later problems" Thus, a District can determine whether it wishes to use the services of a SAC or employee a person qualified to conduct counseling either as an employee or outside contractor. Further, the District can decide whether it wishes to employ a full or part-time person to perform substance abuse counseling to students. *See Impey v. Shrewsbury Board of Education,* 142 N.J. 388, 400 (1995), in which the State Supreme Court upheld the legal authority of a board of education to subcontract speech correction services and abolish the in-district position for reasons of economy, without violating the tenure rights of the teacher who held that position.

The District drew a distinction between the Board's right to decide to subcontract a service, without violating the petitioner's tenure rights, and the question of whether Dr. Vaccaro could provide counseling services. Relying on *Edison Township Education Association v. Edison Township Board of Education,*

Supra, the District pointed out that there was no provision in the education laws, which would preclude a Board from contracting for the services in question, whether or not the individual providing the service was required to possess certification. Thus, the fact that Dr. Vaccaro was not a SAC or a certified teacher had no bearing on the District's right to contract out counseling services without running afoul of the tenure laws. Nor did Dr. Vaccaro's lack of certification translate to a right of Ms. Bristol to obtain retroactive monetary relief.

It is my belief that the District's position is a valid one, as far as the right to contract out counseling services. Clearly, the legislature's creation of the SAC position was motivated by the need to have trained staff minister to the needs of students who had substance abuse problems. It could be ineffective, if not dangerous, for an untrained teacher or school psychologist to be counseling student's who were addicted. However, I do not think that the legislature meant that only SACs could perform this function. Certainly, properly trained psychologists, who had experience in substance abuse, would be qualified to deal with these students. Therefore, the District could engage the services of a qualified independent contractor to perform counseling services.

6. Employee v. Independent Contractor

The petitioner's argument that her tenure rights were violated by the placement of a non-tenured teacher in her position is not applicable to this case. Dr. Vaccaro is not an untenured teacher; it is acknowledged that he is not a teacher at all. Therefore, he cannot be considered a non-tenured teaching staff. The petitioner's argument that the relationship between the District and Dr. Vaccaro was really one of employee-employer, rather than contracting district and independent contractor, is more persuasive. The cases, which allowed for services to be performed by independent contractors, involved situations in which the independent contractor was an entity that then employed individuals to perform services for the district. They did not involve direct contracting between the Board and an individual. *See South Amboy Education Association v. Board of Education of South Amboy,* 1998 S.D.D., decided October 5, 1998; *Trigani et*

al. v. Board of Education of the Borough of Monmouth Beach et al., 2002 S.L.D. (decided December 2, 2002); *Miller v. Burlington Educational Services Unit,* 1999 S.L.D. (decided January 19, 1999) and *Neptune Township Education Association v. Board of Education of the Township of Neptune,* 2000 S.L.D. (decided May 22, 2000). In this case, the relationship more closely resembles than of an employer—employee, than contracting unit—contractor. This is evidenced by the fact that there was a direct one to one relationship between the District and Dr. Vaccaro, which included the respondent dictating the place and time when services would be provided and direct payment to the counselor. In addition, it is noteworthy that for the 2002-2003 school year, Dr. Vaccaro received a W-2 and was listed as an employee. While his duties and hours remained the same for the 2003-2004 school year, he was listed as an independent contractor for purposes of the Board's resolution and financial reporting. The District argued that Dr. Vaccaro was listed as an employee, for the 2002-2003 school year, because it was an emergent situation, caused by Ms. Bristol's hospitalization and her refusal to be seen by a psychiatrist. This argument does not make sense. Whatever the name of the employment relationship denoted in the Board's resolution, the arrangement more clearly resembled an employer-employee relationship.

7. Psychiatric Examination

It was the District's position that they were forced to make the arrangements with Dr. Vaccaro and reduce Ms. Bristol's hours, because of the actions of the petitioner. Ms. Bristol appeared to have a nervous breakdown and to be hospitalized. After two weeks, she reappeared at the school. Initially, she agreed to be examined by a psychiatrist, but then her lawyer spent four months wrestling with the board over what psychiatrist would examine the petitioner. When a psychiatric examination was finally arranged, the petitioner refused to release her medical records to the doctor. The examination results were therefore flawed, because the doctor did not have the benefit of Ms. Bristol's medical records and because the petitioner was not truthful during the

examination process. As a result, according to the respondent, the Board was forced to make emergency arrangements to service the students in the District. They could not find a SAC to replace the petitioner, because the candidates did not want a temporary position. The replacement, Dr. Vaccaro, was well trained, effective with the students (in fact better than Ms. Bristol) and willing to work for an amount that produced a savings to the District. Further, the District had no alternative but to remove the petitioner from contact with students, until Ms. Bristol got a clean bill of health. Since the students that the petitioner counseled were high risk, the respondent had to be extremely careful not to expose itself to liability, which might result from students' contact with a mentally unstable counselor. The District asserted that the only bad faith was that demonstrated by the petitioner, in refusing to cooperate in the examination process.

It is clear that the respondent was in a difficult position. The students that Ms. Bristol worked with were particularly vulnerable and precautions obviously had to be taken to protect their mental health. It is the method utilized by the District that is open to question. The time taken to arrange the psychiatric evaluation was a problem. It appears that an inordinate amount of time was taken finding a psychiatrist acceptable to both sides. Certainly, the District had the right to have Ms. Bristol examined before she returned to work. In addition, despite the petitioner's argument to the contrary, I believe that the respondent had a right to request that the examining doctor have certain medical and psychiatric information available to him, before he rendered an opinion. On the other hand, the petitioner had a right to keep portions of her medical and psychological records, which did not relate to her present situation, confidential. The District's request for records was, I believe, overly broad[8]. On December 3, 2002, shortly after the petitioner attempted to return to school, Ms. Bristol's attorney wrote to the Superintendent of Schools, Dr. Furman, and made it clear that she would resist any attempts to release her medical records in total. *See*

[8] At oral argument I asked the respondent to submit any caselaw that that would support their position that an independent medical examination included access by the examiner to medical records of the patient. After reviewing the letter briefs of the respondent and the petitioner, I find that there is no controlling caselaw on this issue.

Exhibit H of *Sheldon Pincus' Certification.* Her attorney did suggest that Ms. Bristol's doctor would respond to written questions, which were reasonably related to the issues at hand.[9] It is my opinion, that the petitioner's position of only answering questions that they deemed appropriate was overly narrow. There was no explanation as to why the District did not attempt to negotiate this position further.[10] On February 24, 2003, the petitioner's attorney sent a letter to the District's attorney in which he outlined the conditions surrounding the choosing of a psychiatrist for the examination. In addition, he stated that the psychiatric report would only deal with whether Ms. Bristol "is suffering from a significant deviation from normal psychiatric health to preclude her serving as a Student Assistance Counselor." *See Exhibit J* of *Sheldon Pincus' Certification.* The response from the attorney for the District, *See Exhibit K* of Sheldon Pincus' Certification, agreed to the procedure for choosing a psychiatrist and stated that "the scope and character of the examination will be governed by *N.J.S.A.* 18A:16-2 through 18A:16-5." After Dr. Fridman was chosen by the parties to conduct the examination, he sent a letter dated March 25, 2003 outlining the parameters for the examination. In the letter he asked to be provided with any previous psychiatric reports. (*See P-1*). In response to this letter, Mr. Pincus sent a letter dated April 2, 2003 (*See P-2*) in which he stated:

> You are respectfully advised that Ms. Bristol will not consent to your speaking to any medical practitioners or psychiatrists that she is seeing or may have seen. Nor will we consent to your having access to any of her medical records.
>
> The statute under which the Board operated contemplates your making independent assessment of her mental state; specifically, to determine whether she is presently evidencing significant deviation from normal mental health to preclude her from fulfilling the duties of her position. These kinds of assessments are routinely done without a wholesale waiver of rights to privacy. The statute neither contemplates it nor will we consent to it. Consequently, in the

[9] During oral argument Mr. Pincus made it clear that the decision, as to whether a question was reasonably related to the issues at hand, would be his to make.

[10] The District's present counsel was not the attorney of record at the time the negotiations, regarding the psychiatric examination, was taking place.

> event you feel unable to conduct this independent assessment, kindly advise the parties immediately.

The District responded through its attorney at the time, Cherie L. Adams, to Dr. Fridman's and Mr. Pincus' letters, that:

> Although it is true that the statute does not specifically reference prior medical records, there is case law supporting the release of records where necessary to perform a meaningful examination. Accordingly, in the event that you are unable to complete a psychiatric assessment without this information, please advise me as soon as possible so the Board may determine an appropriate course of action with respect to the medical records issue. *See P-3.*

Dr. Fridman did not respond to either letter and moved forward with the examination.

When the respondent's attorney was asked during oral argument why they did not press the issue of getting medical records and/or reports, he said that he assumed that the Board was hoping that the examination would resolve the issue and that Dr. Fridman would give the petitioner a clean bill of health. It was the respondent's position that the report that Dr. Fridman generated still left open questions about the petitioner's mental health. The petitioner, on the other hand, asserted that it was their understanding that the decision of Dr. Fridman would be binding on all parties. The psychiatrist said that Ms. Bristol was psychologically fit to return to work and therefore should have been allowed to resume her duties. The Board's position, that they could not entrust vulnerable students to a counselor, who seemed to have psychiatric issues of her own, is a valid concern. As the respondent pointed out, the petitioner has not, to this day, explained what happened to her in November 2002. Except for the first time she met with the principal, upon her return in December 2002, she has steadfastly refused to release her medical records or reports. While I believe that Ms. Bristol had privacy rights, given the nature of her job, I think that the psychiatrist, who ultimately examined Ms. Bristol, should have had access, at a minimum, to the psychiatric records and reports relating to the November 2002 episode. On the

other hand, the Board knew definitively on April 2, 2003 that the petitioner would not release the records to Dr. Fridman.[11] Yet they choose to go forward with the examination. The Board's present attorney was not the attorney of record, while the negotiations, regarding the choosing of the psychiatrist and his access to Ms. Bristol's records, was going on. He could only conjecture that the Board was hoping that the results of the psychiatric exam would resolve the issue and the doctor would give Ms. Bristol an unqualified bill of health. When the doctor's report stated he had found no reason, based on the examination, why she could not resume her duties, with the caveat that Dr. Fridman still would have liked to review the petitioner's psychiatric records, the Board believed that it was placed in the same position they had been in prior. During oral argument, I asked the District's attorney why they had not brought an action to compel release of medical/psychiatric records as part of the examination, instead of agreeing to an examination, without the documentation that they deemed critical. He stated that he supposed they could have done it. However, it would have taken a long time to get the matter through the system and the petitioner would have continued to receive her salary. This would have been extremely costly.

It is clear that the respondent knew the parameters of the psychiatric examination before it was conducted. If they did not wish to proceed under those circumstances, then they should not have agreed to the examination.

8. <u>Tenure Violation</u>

When asked by the court, why the District had not directly brought tenure charges against the petitioner, since they believed that she was unfit to perform her duties, the Board's attorney stated that NVRHS would have had trouble proving tenure charges, without the psychiatric records that the petitioner refused to release. In addition, he did not know if they would have been successful in obtaining the records; and it would have been a long, drawn out and costly

[11] This was actually just a reassertion of the petitioner's position in all the prior correspondence from her attorney, that she would not allow access to her medical/psychiatric reports or records.

procedure. Further, he believed that the whole situation was caused by the actions of the petitioner and the district was faced with the problem of finding someone to fill the petitioner's shoes. He characterized the District as the good guys who, instead of terminating the petitioner entirely, offered her a part-time position away from contact with the students. While I sympathize with the fact that the revocation of tenure could prove costly to the taxpayers in the Northern Valley Regional District and I do not entirely agree with the petitioner's refusal to release any portion of her psychiatric records or reports, the tenure laws in New Jersey are extensive and specific. The Board's attorney has stated that the tenure laws are protectionist legislation promulgated as the result of pressure from the powerful teacher's union. This may be the case, nonetheless, tenure rights are statutorily mandated in the state and must be followed.

N.J.S.A. 18A:6-10 states that :

> No person shall be dismissed or reduced in compensation...Except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this sub article, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person,

N.J.S.A. 18A:16-2(a) states that:

> Every board of education may require its employees...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.

N.J.S.A. 18A:16-4 states that:

> If the result of any such examination indicates mental abnormality...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 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.

Based on the statutes cited above, it is clear that the District had a course of action that it should have followed. If a question existed as to the petitioner's fitness to perform all the duties of a SAC, then they should have brought tenure charges against her under *N.J.S.A.* 18A:6-10. As part of the action, they could have moved to compel the release of all or part of the petitioner's medical/psychiatric records. While it is not clear whether the District would have been entitled to these records, the issue would have been presented to the Commissioner of Education for his determination. In the interim, the District could have determined whether they wished to grant sick leave to Ms. Bristol under *N.J.S.A.* 18A:16-4. Instead, the Board chose on April 28, 2003, to reduce the petitioner's position to 2/5th, eliminate her benefits and transfer her counseling duties to Dr. Vaccaro. The District has made it clear that the reason for this action was not economy (even though the result might have been more economical), but rather an attempt to deal with the continuing problem of Ms. Bristol's perceived incapacity. In effect, the District attempted to do an end run around the tenure laws by offering Ms. Bristol a part-time position and delegating her counseling duties to Dr. Vaccaro. This was not the proper procedure to be followed and ran afoul of the tenure laws.

CONCLUSION AND ORDER

Based on the briefs and certifications submitted, the exhibits presented and oral argument of counsel, I **CONCLUDE** that there is no issue of material fact and therefore, the matter is ripe for Summary Decision.

I further **CONCLUDE** that the respondent District violated the tenure and seniority rights of the petitioner by reducing her job to a 2/5^{ths} position and transferring her counseling duties, without following the proper procedure of bringing a tenure action against her, based on her incapacity to perform her duties.

In addition I **CONCLUDE** that the reduction of the petitioner's position was done in violation of *N.J.S.A.* 18A:28-9 and with improper motive.

In addition, I **CONCLUDE** that the District abused its discretion under *N.J.S.A.* 18A:16-2 *et seq.*

Therefore, I **ORDER** that the respondent re-instate the petitioner to the full-time position of Substance Awareness Coordinator together with back pay, benefits and seniority.

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 (45) 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 (13) 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, 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.

7/1/04
DATE

CAROL I. COHEN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/1/04
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JUL 6 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

ld

APPENDIX

Exhibits

For Petitioner

P-1 Dr. Fridman's letter, March 25, 2003

P-2 Mr. Pincus' letter, April 2, 2003

P-3 Cherie L. Adams' response to Dr. Fridman and Mr. Pincus' letter, April 2, 2003.

350-04

OAL DKT. NO. EDU. 6213-04
AGENCY DKT. NO. 242-7/04

JOHN CAUCINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT, AND BOARD OF EDUCATION OF THE MONMOUTH COUNTY VOCATIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	
	:	

The record of this emergent matter, which included the audiotape of the hearing conducted at the Office of Administrative Law (OAL) and the Order of the Administrative Law Judge (ALJ) denying emergent relief, has been reviewed.

Upon such review, the Commissioner adopts the August 16, 2004 Order Denying Emergent Relief as he concurs with the ALJ's determination that petitioner has not satisfied the standards necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Most notably, he has not demonstrated a reasonable probability of ultimate success on the merits of his underlying claim.

Accordingly, the within application for emergent relief is hereby denied. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/26/04
Date of Mailing: 8/30/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENCY RELIEF
OAL DKT. NO. EDU 6213-04
AGENCY DKT. NO. 242-7/04

JOHN CAUCINO,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY, AND MONMOUTH COUNTY VOCATIONAL SCHOOL DISTRICT,

Respondents.

Marcie L. Mackolin, Esq., for petitioner (Chamlin, Rosen, Uliano & Witherington, attorneys)

Jason M. Ross, Deputy Attorney General, for respondent Department of Education (Peter C. Harvey, Attorney General of New Jersey, Attorney)

Sanford D. Brown, Esq., for respondent Monmouth County Vocational School District (Brown & Connelly, attorneys)

BEFORE **JOSEPH F. FIDLER**, ALJ:

Petitioner John Caucino is a certified teacher of general business studies employed by Monmouth County Vocational School District Board of Education. On June 11, 2004, the New Jersey Department of Education Criminal History Review Unit issued written notice to Mr. Caucino that he is permanently disqualified from employment in any position with a school or

other educational institution under the supervision of the Department of Education, pursuant to *N.J.S.A.* 18A:6-7.1, because of his 1995 federal felony conviction for bank fraud under 18 *U.S.C.A.* §1344. Petitioner challenges this action, contending that the federal offense to which he pled guilty is not one of the criminal convictions that requires permanent disqualification under *N.J.S.A.* 18A:6-7.1. Pursuant to *N.J.A.C.* 6A:3-1.6(a), petitioner has moved for emergent relief, seeking to stay the Monmouth County Vocational School District Board of Education from acting to terminate him from his teacher position prior to his appeal being heard.

Oral argument on the emergent relief application was heard on August 12, 2004, at the Office of Administrative Law in Mercerville, New Jersey. *N.J.A.C.* 6A:3-1.6(b) provides that for emergent relief to be granted, the applicant must satisfy the following standards under *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.

For purposes of this proceeding, the following facts are undisputed. Petitioner is employed as a teacher in the Monmouth County Vocational School District in Freehold, New Jersey. Prior to his career as a teacher, petitioner worked for Ocean Bay Mortgage Company in Toms River, New Jersey. Between 1985 and 1989, petitioner was involved with other employees in a plan where bank documents were falsified. He pled guilty to 18 *U.S.C.A.* §1344, Bank Fraud, in 1995 and was sentenced in 1999. U.S. Probation Officer Kenneth Manuel wrote to Ida Graham, Director of the Office of Licensing and Credentials, Department of Education in October 1999 to advise of petitioner's conviction and sentencing. Petitioner was ordered to pay restitution of $15,000 to the Federal Deposit Insurance Corporation and to serve a five year term of probation. The letter advised that petitioner had received the benefit of $173,250 in funds of the Action Savings Bank to which he was not entitled. The letter further advised of petitioner's employment as a teacher with the Monmouth County Vocational School District, and that he was

complying with all areas of his conditions of employment. No action was taken against petitioner's teaching position at that time.

A fingerprint search prompted issuance of the Department's permanent disqualification notice of June 11, 2004. By his counsel, petitioner responded by letter of June 21, 2004, to assert that the federal crime to which he pled guilty is not enumerated in *N.J.S.A.* 18A:6-7.1 and is therefore not a disqualifying event. It was requested that the matter be reviewed in light of the differing interpretations of the applicable statute. Criminal History Review Manager Carl Carabelli replied by letter of June 30, 2004, that the statute is clear in its preclusion and suggesting that if petitioner is challenging the disqualification based on a legal issue, review of the determination could be sought by filing a formal appeal with the Commissioner of Education. A Petition of Appeal was filed on July 14, 2004, and an Amended Petition of Appeal was filed on July 19, 2004.

Respondent school district has been advised by the Office of Criminal History Review that it had no option but to immediately terminate petitioner from his employment. Petitioner's counsel has been so advised by counsel for respondent school district. Counsel was further informed that the school district would act to terminate petitioner at the school board's public meeting on August 17, 2004, if his appeal were not successful by that time.

It is the immediacy of respondent school district's action to terminate that has prompted the petition for emergent relief. Petitioner contends that the school district will likely act promptly to fill petitioner's position with another employee, so even if petitioner is eventually exonerated, it is unlikely that his position will still be open for him. Further, his teaching field is narrow and it is also unlikely that he could readily find another such teaching position. These are the circumstance that petitioner contends will create irreparable harm. The school district could bear the inconvenience of a stay while the question of statutory interpretation is resolved with less detriment than the burden petitioner will suffer if emergent relief is not granted.

In regard to the question of statutory interpretation, petitioner contends that his conviction for federal bank fraud is not a disqualifying conviction within the intent of *N.J.S.A.* 18A:6-7.1. He asserts that it is not an enumerated offense under *N.J.S.A.* 18A:6-7.1(c)2, and further asserts

that it is not a disqualifying conviction within the meaning of *N.J.S.A.* 18A:6-7.1(c)3, which provides that such a conviction exists if the individual has at any time been convicted under the laws of this State or under any similar statutes of the United States or any other state for a substantially equivalent crime or other offense. According to petitioner there is no corresponding New Jersey statute listed in *N.J.S.A.* 18A:6-7.1 that is substantially equivalent to the federal statute to which he pled guilty. More particularly, petitioner argues that theft by deception, *N.J.S.A.* 2C:20-4, which is a disqualifier as a third degree crime under *N.J.S.A.* 18A:6-7.1(c)2, involves deceiving individuals and is not substantially similar to federal bank fraud under 18 *U.S.C.A.* §1344, which involves only financial institutions. On this statutory interpretation, petitioner rests his argument that he has a likelihood of prevailing on the merits of his claim.

Respondent school district does not take a position on whether petitioner has satisfied the *Crowe* standards. It understands the viewpoints of petitioner and the Department of Education and its interest is to abide by the applicable statutes and regulations governing petitioner's situation. The district acknowledges that the Department has directed that petitioner be terminated because of his permanent disqualification. If the Department's position is correct, the school board will act to terminate petitioner at its public meeting. However, the district is willing to accept petitioner being in an unpaid leave status pending plenary resolution of this matter, if all parties agreed or if so directed. Finally, respondent district does not now concede that petitioner would be entitled to a position or back pay if ultimately exonerated.

Respondent Department contends that petitioner has not demonstrated that he is entitled to emergent relief because he fails to satisfy three of the four *Crowe* standards. First, petitioner has not established that he will suffer irreparable harm. While harm is generally considered irreparable if it cannot be redressed adequately by monetary damages, it is lost income arising from disqualification that is petitioner's primary complaint. Counsel for the Department asserted that if petitioner were to ultimately prevail on the merits, the Commissioner would direct respondent school district to reinstate him. Thus, the harm petitioner faces is not without adequate remedy.

Second, petitioner has failed to demonstrate that when the equities and interests of the parties are balanced, he will suffer greater harm than the Department if the emergent relief is not

granted. The Department asserts that petitioner's position fails to take into account the issues of the public interest and the Department's obligation to protect students and their educational programs. Petitioner's federal bank fraud conviction is incompatible with the principle that teachers serve as role models for their students.

Finally, the Department contends that petitioner has not made a preliminary showing of a reasonable probability of success on the merits of his underlying claim. I agree that petitioner has failed to meet this standard for granting emergency relief, pursuant to *N.J.A.C.* 6A:3-1.6(b). This is so because it appears at this point in the proceeding that petitioner's conviction under the federal bank fraud statute, 18 *U.S.C.A.* §1344, is a disqualifying conviction within the meaning of *N.J.S.A.* 18A:6-7.1(c)3. That section follows the list of enumerated disqualifying convictions under New Jersey law and provides in part that a disqualifying conviction also exists if the individual has at any time been convicted under any similar statutes of the United States for a substantially equivalent crime or other offense. In other words, it appears that petitioner has been convicted under a statute of the United States that is similar to *N.J.S.A.* 2C:20-4, for a crime substantially equivalent to theft by deception.

18 *U.S.C.A.* §1344 states:

> Whoever knowingly executes or attempts to execute a scheme or artifice-
> (1) to defraud a financial institution; or
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by or under the custody or control of a financial institution, by means of false or fraudulent pretenses, representations, or promises;
> shall be fined not more than $1,000,000 or imprisoned not more than 30 days, or both.

N.J.S.A. 2C:20-4 states:

> A person is guilty of theft if he purposely obtains the property of another by deception.
> A person deceives if he purposely:
> a. Creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind, and including, but not limited to, a false impression that the person is soliciting or collecting funds for a charitable purpose, but deception as to a

> person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise;
> b. Prevents another from acquiring information which would affect his judgment of a transaction; or
> c. Fails to correct a false impression which the deceiver previously created or reinforced, or which the deceived knows to be influencing another to whom he stands in a fiduciary relationship.

Both statutes have similar language to describe the prohibited conduct. Both involve obtaining the property of another by means of false pretenses or impressions. True, *N.J.S.A.* 2C:20-4 does not specifically refer to financial institutions. However, a defendant who fraudulently induced lenders to transfer money to him in the form of loans based on the false impressions which he purposefully created has been held to have committed theft by deception as set forth in *N.J.S.A.* 2C:20-4. *State v. Rogers,* 230 *N.J. Super.* 593, 601 (App. Div. 1989), *certif. denied,* 117 *N.J.* 54 (1989). The misconduct described in *Rogers* is strikingly similar to the federal crime petitioner committed, as both involved falsification of bank documents to obtain loans and misrepresentations regarding the equity in real properties. Further, the minimum amount involved in petitioner's crime is represented by the $15,000 restitution he was required to pay. This places his offense in the category of a third degree theft pursuant to *N.J.S.A.* 2C:20-2, which states that theft constitutes a crime of the third degree if the amount involved exceeds $500 but is less than $75,000.

Based upon the foregoing discussion, I **CONCLUDE** that petitioner has not established a likelihood of prevailing on the merits of his underlying claim. Thus, petitioner has failed to meet all of the standards that would entitle him to the emergent relief that he seeks, and his petition for interim relief or a stay is **DENIED**. Petitioner's amended petition of appeal to challenge his disqualification may proceed to plenary resolution.

I so **ORDER**.

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 (45) 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 (45) 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.

August 16, 2004
DATE

Joseph F Fidler
JOSEPH F. FIDLER, ALJ

#346-04

OAL DKT. NO EDU 543-98
AGENCY DKT. NO. 490-12/97

IN THE MATTER OF THE TENURE HEARING OF LEWIS SHINKLE, SCHOOL DISTRICT OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were untimely, having been dated and filed August 3, 2004 in response to an Initial Decision mailed to the parties on July 19, 2004, and, therefore, these and the Board's reply exceptions were not considered herein.[1]

Upon his full and independent review of the record,[2] the Commissioner concurs with the Administrative Law Judge (ALJ) that the Board has established, by a preponderance of the credible evidence, that respondent is guilty of unbecoming conduct by virtue of his engaging in a sexual relationship with L.K., a sixteen-year-old eleventh grade student at the Board's Nottingham High School, and that respondent's removal from his tenured teaching position is the only appropriate penalty.

In so determining, the Commissioner has given full consideration to all evidentiary proofs which comprise the record and recognized that of particular importance was the ALJ's assessment of the credibility of the witnesses. In this regard, the Commissioner is

[1] It is noted that at no time prior to the expiration of the time period for the filing of exceptions prescribed by *N.J.A.C.* 1:1-18.4 did counsel for respondent seek an extension of time within which to file exceptions in this matter.

[2] The record contains transcripts of the hearing conducted on November 20 and December 5, 2003, January 29, April 7, April 8, April 16, April 29, May 3, May 4, May 5, May 6 and May 7, 2004.

mindful that the ALJ's credibility determinations are entitled to deference. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility. *In the Matter of Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div.) *certif. denied*, 121 *N.J.* 615 (1989)." *In the Matter of the Tenure Hearing of Frank Roberts*, 96 *N.J.A.R.* 2d (EDU) 549, 550. Indeed, with the 2001 amendment to the Administrative Procedure Act (*P.L.* 2001, *c.* 5, §4), the Commissioner "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's considered review of the record before him provides no basis whatsoever for alteration of the ALJ's determinations.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons clearly stated therein.[3] It is hereby directed that Lewis Shinkle be dismissed from his teaching position with the School District of Hamilton Township as of the date of this decision. This matter shall be transmitted to the State Board of Examiners for action, as that body deems appropriate, against respondent's certificate.

IT IS SO ORDERED.[4]



COMMISSIONER OF EDUCATION

Date of Decision: 8/19/04

Date of Mailing: 8/19/04

[3] Also adopted is the September 4, 2003 interim order of the ALJ which, pursuant to *N.J.A.C.* 1:1-14.10(j) and 1:1-18.6, was reviewed at the end of the case rather than on interlocutory review.

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

345-04

OAL DKT. NO. EDU 317-04
AGENCY DKT. NO. 447-12/03

L.A., on behalf of minor children, T.J.A. and P.M.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PORT REPUBLIC, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law, together with the Consent Order of the parties and Board of Education Resolution Concerning Settlement, have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/19/04
Date of Mailing: 8/19/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 317-04
AGENCY DKT. NO. 447-12/03

L.A. o/b/o MINOR CHILDREN,
T.J.A. AND P.M.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PORT REPUBLIC, ATLANTIC COUNTY,
Respondent.

Daniel R. Kehler, Esq., for petitioner (McCrink, Nelson & Kehler, attorneys)

Clement F. Lisitski, Esq., for respondent

Record Closed: July 27, 2004 Decided: July 30, 2004

BEFORE **EDGAR R. HOLMES**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 26, 2004, 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 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 and as placed on the record.

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 (45) 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 30, 2004
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

8-3-04
DATE

M. Kathleen Duncan/eh
DEPARTMENT OF EDUCATION

AUG 4 2004
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sd

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2004 JUL -8 P 1:32
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

CLEMENT F. LISITSKI, L.L.C.
ATTORNEY AT LAW
#3318 Simpson Avenue
Ocean City, New Jersey 08226
TELEPHONE: (609) 398-6100
FACSIMILE: (609) 399-8268

Attorney for Respondent

L.A. on behalf of minor children T.J.A. AND P.M.A. Petitioner , vs. BOARD OF EDUCATION OF THE CITY OF PORT REPUBLIC, ATLANTIC COUNTY, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DOCKET NO. EDUOS 00317-2004S **CONSENT ORDER**

THIS MATTER being opened to the Court by Clement F. Lisitski, L.L.C. (Clement F. Lisitski, Esquire appearing) attorney for Respondent, Port Republic Board of Education, Atlantic County, in the presence of McCrink, Nelson and Kehler (Daniel R. Kehler, Esquire appearing), attorney for Petitioners, L.A. on behalf of minor children, TJA and PMA, and this matter coming on to trial before the Honorable Edgar R. Holmes, A.L.J., on appeal from a determination by the Port Republic Board of Education that L.A. is

not domiciled in the district and her children, TJA and PMA are not eligible to attend school in the Port Republic School District and the court hearing testimony and during the course of the trial the parties having agreed to resolve this matter and desiring to memorialize the terms in the form of a Consent Order,

IT IS on this 13 day of ~~June~~ July 2004 ORDERED as follows:

1. L.A. shall pay the sum of Ten Thousand Dollars ($10,000) to the Port Republic School District for attendance of her children, TJA and PMA, for the school year 2003/2004. The sum due shall be paid in equal installments of $200.00 per month, the first payment beginning August 1, 2004. There shall be a ten (10) day grace period. In the event the payment is not received by the School Board within ten (10) days of its due date, L.A. shall be in default of the terms of this Order, and all payments due shall be accelerated and the entire sum shall be due and owing. In the event that it is necessary to collect this obligation by taking legal action, a reasonable attorney's fee shall be awarded to the Board of Education of the City of Port Republic. The sum of $10,000 set forth herein represents a compromise which includes the sum of all past due obligations for tuition owed by L.A. and any sums paid by L.A. toward the 2003/2004 have been credited before arriving at the $10,000 sum now due.

2. L.A. agrees that her two children are not domiciled in the City of Port Republic and therefore, are not entitled to attend school in the Port Republic School District.

3. L.A. and the Port Republic School Board agree to waive any appeal of the issues presented or that may have been presented in the within proceedings.

4. The parties release and forever discharges each other from any claims, demands, actions and causes of actions of any kind or nature at law or in equity which they may have against each other including any claims, known or unknown which they may have brought against each other including all past and existing claims up to the date of this Order, with the exception of any action with regard to an accident on the playground involving L.A.'s minor son. Other than this accident exception, all other claims have been settled in this action in consideration of the reduction of monies to be paid by L.A. as set forth in paragraph 1 of this Consent Order.

Honorable Edgar R. Holmes, A.L.J.

The undersigned hereby consents to the form and entry of the ~~within~~ Consent Order.

DANIEL R. KEHLER, ESQUIRE
ATTORNEY FOR PETITIONER

CLEMENT F. LISITSKI, ESQUIRE
ATTORNEY FOR RESPONDENT

RECEIVED
2004 JUL 27 P 1:23
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RESOLUTION CONCERNING SETTLEMENT OF THE MATTER L.A. on behalf of minor children, TJA and PMA v. Board of Education of the City of Port Republic

WHEREAS, the Board of Education of Port Republic School District went to trial before the Honorable Edgar R. Holmes, A.L.J., on appeal from a determination by the Port Republic Board of Education that L.A. was not domiciled in the district and her children, TJA and PMA were not eligible to attend school in the Port Republic School District; and the Court heard testimony concerning the matter and decided the domicile issue in the Board's favor; and the Court further hearing testimony to establish the tuition amount owed by L.A.; and prior to the Court's determination on tuition, which decision would have been sent to the Commissioner of Education for review and determination, the parties reached an agreement subject to Board Approval,.

WHEREAS, the Board has considered a resolve of the matter and desires to enter into a form of Consent Order concerning the tuition owed by L.A. to the Port Republic School District for attendance of her children, TJA and PMA for the school year 2003/2004, and all past due obligations for tuition owed, a copy of which is attached to this resolution as Exhibit A; and

WHEREAS, the Board has considered the Consent Order and approves the terms,

NOW THEREFORE on this 21 day of July, 2004, at a regularly scheduled meeting, be it **RESOLVED that:**

The matter concerning the tuition owed by L.A. is memorialized in the Consent Order attached as Exhibit A, and the Board approves the form and substance of the Consent Order requesting it to be signed by Honorable Edgar R. Holmes, and filed with the Office of the

Administrative Law; and

BE IT FURTHER RESOLVED that this matter is now concluded, all parties waiving any rights to appeal in the terms of the Consent Order.

Kathy Piotroski
Board President

CERTIFICATION

I, Michael Cibuliew, School Business Administrator/Board Secretary of the Board of Education of Port Republic, **CERTIFY** that the foregoing is a true copy of the Resolution as it appears in the records of the Board of Education of Port Republic and as was duly and legally adopted by a majority roll call vote, of the full Board at a special meeting of the Board of Education held on JULY 21, 2004; that it has not been modified, amended or rescinded, and is in full force and effect as of the date hereof.

Michael Cibuliew, School Business Administrator/Board Secretary

Dated:

343-04

#343-04

OAL DKT. NO. EDU 2565-03
AGENCY DKT. NO. 92-3/03

DEBORAH M. TRIONFO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
		DECISION
BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the Board of Education (Board) and the reply filed by petitioner. Prior to expiration of the statutory due date for agency review of the Initial Decision, the Commissioner requested and received an extension of the time within which to issue a decision in this matter.

In its exceptions, the Board contends that there is no support in the record for two of the Initial Decision's key factual findings. According to the Board, the Administrative Law Judge (ALJ) erred in stating that the Board's previously operative Displaced Homemakers program was approved for the 1996-97 school year, since the record shows that the program for which the Board voted to accept funding for 1996-97 was not "Displaced Homemakers" but "New Beginnings," a different program which did not require its Project Coordinator to hold a teaching certificate. The ALJ further erred, the Board opines, in finding that, from the time of her appointment as coordinator for the New Beginnings program, petitioner remained in similar positions "in adult education"

until her termination in February 2003, since, in fact, petitioner was never employed in "adult basic education" as defined in *N.J.A.C.* 6:30-2.1 but rather in occupational programs of a type that did not require certification pursuant to *Anthony Polo v. Board of Education of the Vocational Schools of the County of Bergen*, 92 *N.J.A.R.2d* (EDU) 230, *aff'd in relevant part* 92 *N.J.A.R.2d* (EDU) 459. In its legal conclusions, the Board contends, the Initial Decision errs in relying on the Board's purported endowment of petitioner with the emoluments of tenure, when, in fact, the Board's actions can be of no import if petitioner did not serve the requisite time in tenure-eligible positions so as to meet the requirements of statute. (Board's Exceptions at 1-3)

In reply, petitioner reiterates that the coordinator position in which she served remained essentially the same throughout the period in question, as did the nature and purpose of the underlying program, regardless of what it may have been named or what changes in specific course content it may have undergone as it evolved over the years. Moreover, according to petitioner, the record is clear that she did not engage in, nor oversee, the type of limited occupational training for which no certificate is required; instead, she coordinated a comprehensive program involving "a whole host of components in addition to job training, including intake, initial assessment, workshops, life skills, remedial education, computer literacy, support groups, mechanical skills training, mentoring and placement," as well as "self-esteem, nontraditional career exploration, communication skills, ***technical math and study skills, career assessment, basic aptitude and/or basic skills testing***." Finally, petitioner notes that the ALJ did not conclude she was tenured based upon the Board's treatment of her, but rather upon her having satisfied the requirements of statute; the ALJ merely offers the Board's

actions as a further indication of the obviousness of petitioner's tenure status. (Petitioner's Reply at 2-6, quotation at 4)

Upon careful and independent review of this matter, the Commissioner concurs with the ALJ that petitioner long ago attained tenure in the position of teacher. From the time of her part-time employment on February 1, 1992 as Special Populations Coordinator, notwithstanding title changes and some ambiguity with regard to the boundaries of her concurrent part-time assignments once she became employed full-time as a result of additionally being named Coordinator for the Displaced Homemakers Program in September 1993, petitioner served continuously through at least the 1996-97 school year, and arguably for some time thereafter, in positions whose duties required basic educational certification, which she at all times held by virtue of her instructional certificate.

As Special Populations Coordinator, a position for which the need for certification was expressly recognized by the Board in its advertisement for the position (Exhibit D-GBOE 1147), and which petitioner held exclusively from February through June 1992 and for the entire 1992-93 school year, and again as part of her cumulative full-time employment at least through the 1995-96 school year (Exhibit A-Stipulation No. 5; Exhibit D-GBOE 0370-72), petitioner oversaw the Board's Job Training Partnership Act (JPTA) programs for at-risk students (Exhibit D-GBOE 0330-0331, 0332, 0348-49 and 0351 pertaining to 1993-94; GBOE 0354-55 and 0370-71 pertaining to Summer 1994 and 1994-95) and played an integral role in the district's Individual Career and Academic Plan program (Exhibit D-GBOE 0333-34 pertaining to 1993-94; GBOE 0382 and 1073-74 pertaining to 1995-96), both serving the district's K-12 student population. In the

position of Coordinator for the Displaced Homemakers Program and its successors,[1] held from the 1993-94 school year onward, petitioner supervised all activities and staff (Exhibit E-PET 006018, 006038 and 006044 pertaining to 1993-94; Exhibit D-GBOE 0268 pertaining to 1996-97) of a comprehensive project which the record shows to have encompassed, at least through the 1996-97 school year,[2] career assessment, career/academic/personal counseling, aptitude testing, basic skills instruction (ABE, ESL, GED[3]) as well as assessment and instruction in communications, computer literacy and math and study skills (Exhibit D-GBOE 0335, 0347 and Exhibit E-PET 006043 pertaining to 1993-94; Exhibit D-GBOE 0355, 0356-57 and 0371 pertaining to 1994-95; Exhibit D-GBOE 0389-90 pertaining to 1995-96; and Exhibit D-GBOE 0243 pertaining to 1996-97) and targeted educational services for children of clients (Exhibit E-PET 006053-54, pertaining to 1993-94). In that same capacity, petitioner was directly responsible, among other duties, to deliver direct training and counseling services to students and their children (Exhibit E-PET 006044 pertaining to 1993-94; Exhibit D-

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1 The documentary record amply demonstrates petitioner's contention that, as found by the ALJ, the New Beginnings program, and later the Road to Success program, were direct continuations of the Displaced Homemakers program. It further demonstrates that through at least the 1995-96 school year, neither the nature of the program nor the duties of the Project Coordinator changed substantially as the program evolved in response to shifting need, State policy and funding sources. Beginning in 1996-97 and continuing thereafter, the record suggests that, as the program began to focus increasingly, and ultimately exclusively, on enabling participants to obtain a commercial driver's license, the elements of the coordinator position requiring educational certification progressively diminished. Nonetheless, even assuming, *arguendo*, that the Road to Success Coordinator position eventually reached a point where educational certification was no longer required—as the record suggests may have been the case by 1999-2000—petitioner had by that time achieved tenure.

2 See Note 1 above. The Board's position that no certification was required for the 1996-97 New Beginnings Program Coordinator position is belied by the very document it cites as evidence of the ALJ's error in reaching the contrary conclusion. That document, the program management summary of the district's 1996-97 grant application, lists "*certified* social worker" as petitioner's basic qualification (albeit that she is erroneously identified as a social worker rather than a teacher), in contrast to the "*licensed* social worker" qualification listed for a subordinate with less comprehensive responsibilities. (Board's Exceptions at 2; Exhibit D-GBOE 0268, emphasis supplied)

3 Adult Basic Education, English as a Second Language, General Equivalency Diploma.

GBOE 0246 pertaining to 1996-97), conduct individual assessment interviews and review vocational and academic assessment test results (Exhibit D-GBOE 0250, 0252 pertaining to 1996-97), develop career and educational training plans based on student assessments (Exhibit E-PET 006046-48, 006052 pertaining to 1993-94; Exhibit D-GBOE 0252, 0256, 0260 pertaining to 1996-97), identify and arrange for student externships and mentors (Exhibit E-PET 006049-50 pertaining to 1993-94; Exhibit D-GBOE 0262 pertaining to 1996-97), and conduct nontraditional career orientation (Exhibit D-GBOE 0266 pertaining to 1996-97). These are duties that fall squarely within the scope envisioned by State Board regulations requiring certification for persons who coordinate or advise students regarding adult basic education and vocational-technical education, including postsecondary education for special populations such as displaced homemakers. *N.J.A.C.* 6:30-2.1 *et seq.*, *N.J.A.C.* 6:30-3.1 *et seq.*; *N.J.A.C.* 6:43-3.1 *et seq.*, especially 3.12(a)4iii (now incorporated into *N.J.A.C.* 6A:19-2.1 *et seq.*) That the programs coordinated by petitioner were multi-dimensional and her duties project-specific alters neither the nature of those duties nor the requirement that she be certified in order to perform them.

Under these circumstances, then, where the record shows petitioner to have been employed, for part of the 1992-93 school year, the entire 1992-93, 1994-95, 1995-96 and 1996-97 school years, and arguably for at least some time thereafter, in positions requiring basic educational certification, petitioner has unequivocally met the requirements of *N.J.S.A.* 18A:28-5 for the acquisition of tenure in the position of teacher, notwithstanding that the Board has never employed her as a conventional classroom

instructor.[4] Her employment, therefore, could not be terminated while a position existed within the scope of her instructional certificate, that is, while a position requiring instructional certification with endorsement in music was held by a nontenured teaching staff member, or while a position requiring instructional certification with no specific endorsement was held by a nontenured or less senior teaching staff member.

Accordingly, the Initial Decision of the OAL, as clarified herein, is adopted as the final decision in this matter. The Board is directed to reinstate petitioner to a position within the scope of her instructional certificate, with back pay and emoluments subject to mitigation, or, if no such position is presently available, to place petitioner on a preferred eligibility list with mitigated back pay and emoluments for any period during which a position to which she was entitled was held by a nontenured or less senior teaching staff member.

IT IS SO ORDERED.[5] [6]

COMMISSIONER OF EDUCATION

Date of Decision: 8/19/04
Date of Mailing: 8/19/04

[4] Petitioner's responsibilities are in contrast to those of the petitioners in *Brown, supra*, which were essentially child care duties and thus not of a nature to require educational certification, notwithstanding the Board's requirement for same. They are also in contrast to those of the teachers at issue in *Polo, supra,* whose duties were limited to instructing adult evening school students in a particular skilled trade. (*See also N.J.A.C.* 6A:19-2.3 with regard to postsecondary courses at county vocational schools.)

[5] The Commissioner expressly notes that, like the ALJ, he did not consider petitioner's affidavit in rendering the within decision. (*See* Initial Decision at 2)

[6] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

342-04

#342-04

OAL DKT. NO. EDU 9608-03
AGENCY DKT. NO. 324-9/03

H.K., on behalf of minor child, J.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner, who did not appear for the hearing in this matter, has failed to carry his burden of proof that his nephew was entitled to a free education in the Clifton School District. The Commissioner further agrees with the grant of the Board's counterclaim for tuition in the amount of $7,511.60 for the 178 days of J.B.'s ineligible attendance in school in the Clifton School District between September 8, 2003 and June 17, 2004.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/18/04

Date of Mailing: 8/18/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9608-03
AGENCY DKT. NO. 324-9/03

H.K., on behalf of minor child,
J.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

Respondent.

No appearance by or on behalf of petitioner

Anthony D'Elia, Esq., for respondent
(Chasen, Leyner, Bariso & Lamparello, attorneys)

Record Closed: July 27, 2004 Decided: July 27, 2004

BEFORE **ELINOR R. REINER**, ALJ:

On or about September 12, 2003, petitioner, H.K., filed a petition of appeal with the Commissioner of Education, challenging respondent's residency determination in regard to his nephew, J.B. On September 22, 2003, respondent filed its answer seeking dismissal of the petition and counterclaiming for tuition for the period of

ineligible attendance. On October 16, 2003, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) as a contested case for hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

This matter was assigned to the undersigned judge on November 12, 2003, and a telephone prehearing conference scheduled for December 10, 2003. Since H.K. could not be reached for the telephone conference, despite a message being left on his telephone, the matter was scheduled for a hearing on March 22, 2004 at the OAL. Notice of the time and place of the hearing were sent to H.K. at the address listed as his on the court records. On March 22, 2004, no appearance was made by or on behalf of H.K.

With respect to the counterclaim by respondent for tuition owed by H.K., counsel for respondent provided the affidavit of Karen Perkins, Business Administrator and Board Secretary for respondent on June 30, 2004. The affidavit was sent to H.K. by certified and regular mail by counsel for respondent. H.K. has not filed a response or objection to it.

Perkins' affidavit (R-1) indicates in relevant part that as Business Administrator, she is responsible for providing annual reports to the New Jersey Department of Education.[1] She had been requested as part of respondent's request for tuition in this matter to review the business records utilized by her office to compute the annual per pupil costs for the local school district. Her affidavit indicates that J.B. was enrolled in respondent's school district from September 8, 2003 to June 17, 2004. Since the per pupil cost at Clifton High School is $42.20 per day, she computed the cost for J.B.'s attendance of 178 days to be $7,511.60.

[1] It is to be noted that although the affidavit provided appears to be lacking a portion of paragraph 3, as well as paragraph 4, it sufficiently sets forth the tuition calculation to support respondent's counterclaim.

Based on the foregoing, petitioner has failed to prove that respondent's residency determination in regard to J.B. was improper. Thus, it remains undisputed that H.K. failed to prove that he generally supports the child as required by law and also met the requisite family or economic hardship which would allow J.B. to attend respondent school district free of charge, pursuant to *N.J.S.A.* 18A:38-1(b)(1).

Based on the affidavit submitted, I **CONCLUDE** that J.B. was improperly enrolled in Clifton school system between September 8, 2003 and June 17, 2004. I further **CONCLUDE** that the proper tuition reimbursement for that period of time (178 days) is $7,511.60.

Thus, it is **ORDERED** that petitioner's appeal is dismissed. It is further **ORDERED** that tuition reimbursement in the amount of $7,511.60 be paid to respondent 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 (45) 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 (13) 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, 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, 2004
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

July 27, 2004
DATE

Mailed to Parties:

JUL 28 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

AI

APPENDIX

List of Exhibits

For Respondent:

R-1 Affidavit of Karen Perkins, dated June 23, 2004

CHASAN LEYNER BARISO AND LAMPARELLO
300 Harmon Meadow Blvd.
Secaucus, N.J. 07094
201-348-6000
Attorney for Petitioner
Clifton Board of Education

H.K. on behalf of minor child J.B.

Petitioner,

-vs-

BOARD OF EDUCATION OF THE CITY OF CLIFTON

Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

Docket No. 324-9/03

AFFIDAVIT OF KAREN PERKINS

I, Karen Perkins, of full age, being duly sworn according to law, deposes and says:

1. I am employed by the Respondent, Clifton Board of Education and hold the offices of Business Administrator and Board Secretary.

2. I have been employed in the above capacity since January 1, 1995.

3. As part of my duties and responsibilities as Business Administrator, I am responsible for providing annual reports to the New Jersey Department of Education

local school district, including any reports which may have already been filed with the New Jersey Department of Education.

5. The minor child in this matter, Julio Barretto was enrolled with the Clifton school system between September 8, 2003 and June 17, 2004 ,.I have confirmed the above attendance information with business records currently maintained by the Clifton Board of Education.

6. After a review of the reports and other business records on file with my office, I can state that the annual per pupil cost for the minor child for that period of time at Clifton High School (his school of attendance) was (178 days; $42.20/year) =$7,511.60

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.

Karen Perkins
Business Administrator

Sworn to and subscribed before
me this 23 day of June, 2004

Anthony V. D'Elia
Attorney-at-law
State of New Jersey

352-04L



State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRE
Commissioner

August 31, 2004

George F. Hendricks, Esq.
Hendricks & Hendricks
73 Paterson Street
New Brunswick, NJ 08901

Allison Colsey Eck, DAG
NJ Department of Law & Public Safety
Division of Law
Richard J. Hughes Justice Complex
P.O. Box 112
Trenton, NJ 08625-0112

Dear Counsel:

Upon review of the Motion to Dismiss submitted by the respondent in the matter entitled *Board of Education of the City of New Brunswick, Middlesex County v. New Jersey State Department of Education,* Agency Dkt. No. 184-5/04, I have determined, for the reasons set forth below, to grant respondent's motion and dismiss the appeal in this matter.

In its petition filed on May 20, 2004, petitioner seeks "expedited" review of respondent's January 20, 2004 decision "denying adequate funding for the District to provide required and needed items for the pre-school program in the District" in violation of the *Abbott* mandates. (Petition of Appeal at 2) Petitioner asserts that "[t]he January 20 decision contravenes the Supreme Court's directives in the *Abbott* decisions, is unauthorized by law, and violates the Department's own regulations." (*Id.* at 3) The issues raised on appeal include, *inter alia*, petitioner's assertions that adequate funding has been denied for fringe benefits for teacher and teacher assistants, for support staff benefits, for space costs, for salaries for administrato and staff, for maintenance, and for food service costs. (*Id.* at 2) Petitioner also claims th respondent improperly classified space costs as "indirect costs." (*Ibid.*) Petitioner acknowledg that it is filing the appeal outside of the time limitations specified by the Supreme Court and forth in the regulations, but states that it is doing so because it has no other recourse in that District has received no answer from respondent to the efforts of the Hispanic Direc Association (HDA) to resolve these issues. (*Id.* at 4-5)

Respondent filed a Motion to Dismiss in Lieu of Answer on June 1, 2004. In its motion, respondent submits that it notified petitioner by letter of January 15, 2004 of its approval of petitioner's Preschool Operational Plan for three- and four-year-old children in the amount of $12,953,198 for the 2004-05 school year. (Motion to Dismiss at 3) Subsequently, due to a clerical error concerning per pupil cost, a revised letter that did not change the total amount of the approved budget was sent on January 20, 2004. (*Ibid.*) Respondent submits that the Supreme Court's June 23, 2003 Order, *Abbott v. Burke*, 177 *N.J.* 578 (2003), "states that districts 'shall have thirty days from the date of the Department's determination to file an appeal with the Office of Administrative Law,'" and that the Supreme Court's use of the term "shall" indicates a mandatory directive limiting the period for appeals. (*Id.* at 4) In that the petition in this matter was filed May 19, 2004, beyond the thirty-day limitation, respondent concludes that the petition in this matter should be dismissed as untimely, pursuant to *Abbott, supra.* (*Ibid.*)

Moreover, respondent argues that, assuming *arguendo* that petitioner is not bound by the provisions of *Abbott, supra*, the within petition is also time-barred by *N.J.A.C.* 6A:3-1.3(d), which requires petitioner to file its petition within 90 days of the determination rendered on January 20, 2004. (*Id.* at 5-6) Respondent further points out that the 90-day limitation has been strictly construed by the Commissioner and upheld by the Supreme Court. (*Id.* at 6) Additionally, respondent claims that petitioner has failed to demonstrate any compelling reason for the delay in filing its petition or to raise any constitutional issues, averring that petitioner has broadly claimed that it has been deprived of sufficient funding to implement its preschool program, but has not identified any specific financial deficiency nor any particular program, service or position which has, or will be, harmed by respondent's determination. (*Id.* at 6-7) Respondent contends that the sole reason offered by petitioner for the delay is that the HDA had a meeting with representatives of the Governor's Office with respect to provider budgets and was not satisfied with the response. (*Id.* at 7) Respondent argues that the mere fact that the HDA had a meeting with the Governor's representatives does not explain or provide any excuse for the delay in filing its petition, nor has there been any showing as to how that meeting is related to the District's 2004-05 budget or the January 20, 2004 decision. (*Id.* at 7-8)

By letter of June 3, 2004, the Director of the Bureau of Controversies and Disputes set forth a briefing schedule for petitioner's response to the Motion to Dismiss and respondent's reply thereto. In its response filed on June 28, 2004, petitioner states that it does not dispute the facts as set forth by respondent in its motion to dismiss, nor does it dispute the timelines for filing provided in the Administrative Code. (Petitioner's Response at 1) Instead, petitioner clarifies that the entire Early Childhood Budget is not on appeal, but rather, the very narrow issue of the funding provisions that apply to the Puerto Rican Action Board (PRAB), an early childhood provider for the District,[1] which claims that it is unable to provide quality *Abbott* preschool as required by *Abbott* decisions. (*Ibid.*) Referring to a memorandum by the HDA summarizing a meeting on April 16, 2004 attended by the HDA of New Jersey, the leadership of the Department of Human Services, the Office of Early Childhood (sic), the Governor's Office, the Attorney General's Office and the Office of the Treasury (sic), petitioner points out that PRAB[2] met with respondent and other representatives on April 16, 2004 in an attempt to resolve

[1] Petitioner is approved to contract with fourteen providers at a total of seventeen sites in 2004-05. (Petition of Appeal, Exhibit A at 5 (page 7))

[2] Petitioner does not provide an explanation of the relationship between the Hispanic Directors' Association of New Jersey and PRAB.

its funding issue, but that it did not receive any response whatsoever from its presentation. (*Id.* at 2) Following PRAB's unsuccessful effort to resolve the issue on April 16, 2004, petitioner states, the New Brunswick School District authorized an appeal on the limited issue of the provisions which apply to PRAB. (*Ibid.*)

Citing *Abbott v. Burke*, 153 *N.J.* 480, 526-27 and *Abbott v. Burke*, 170 *N.J.* 537, 592-93, petitioner argues that, while it does not dispute that it has not complied with the time limits imposed under the Administrative Code, "it is in direct compliance with *Abbott* decisions and the issue of adequate funding is always a reason for appeal to the Department of Education and the Administrative Law Courts." (*Id.* at 2) Moreover, with respect to the relaxation of the deadline, petitioner notes that in the June 7, 2004 *Abbott* decision, the Court noted that the Department of Education sought relaxation of the deadline to enable non-certified preschool teachers to seek a waiver of the certification mandate for up to two years. (*Id.* at 3)

In reply, respondent reiterates its argument that the within petition is untimely filed pursuant to both the process for expedited review of preschool plans established by the Supreme Court and the regulatory 90-day time frame established for the filing of petitions before the Commissioner. (Reply at 1) Additionally, respondent claims that petitioner's more narrowly crafted issue on appeal, as set forth in its response to the motion to dismiss, does not present any evidence or information which warrants relaxing of the regulatory or Court-ordered time limitations. (*Id.* at 1-2) Respondent further claims that, although the *Abbott* litigations demonstrate that disputes concerning school funding in the *Abbott* districts would arise, none of the Court's decisions has invalidated the regulatory time limitations set forth at *N.J.A.C.* 6A:3-1.3(d). (*Id.* at 2)

Moreover, respondent avers that PRAB has not yet entered into a contract with petitioner for the 2004-05 school year and points out that PRAB is free to negotiate its terms with petitioner and either enter into an agreement or not enter into an agreement. (*Id.* at 3) If PRAB wishes to file a petition on its own behalf, respondent reasons, it is free to do so, subject to the regulatory requirements of *N.J.A.C.* 6A:3-1.3(d). (*Ibid.*) Respondent also takes issue with petitioner's claim that it did not respond to the HAD's concerns expressed at the meeting held on April 16, 2004, claiming that it did so by letter of May 20, 2004.[3] (*Ibid.*) Additionally, since PRAB has not entered into a contract with petitioner, respondent asserts, there is no justiciable controversy arising between aggrieved parties since neither party has any existing duties or obligations toward the other. (*Id.* at 4)

Upon a thorough review of the parties' submissions, I have determined to grant respondent's motion to dismiss the within petition. In so concluding, I note that petitioner does not dispute that its petition was not filed within the expedited 30-day time frame established for appeals of determinations with respect to Preschool Operational Plans set forth in the June 24, 2003 Order of the Supreme Court; nor even, assuming *arguendo* that petitioner was not limited to the provisions of the June 23, 2004 Order, within the 90-day time frame for the filing of a Petition of Appeal for the Commissioner's consideration set forth at *N.J.A.C.* 6A:3-1.3(d).

With respect to petitioner's claim that the issue of adequate funding is always a reason for appeal, it is noted that the Supreme Court's June 23, 2003 Order does not authorize the Commissioner to grant extensions to the Court-established time constraints with respect to

[3] Although respondent indicates that the May 20, 2004 letter is attached to its reply, no attachment was provided.

appeals of a District's approved Preschool Operational Plan, nor have any of the Court's *Abbott* decisions invalidated the regulatory time limitations set forth at *N.J.A.C.* 6A:3-1.3(d). Assuming *arguendo* that such appeals may be filed subject to the time limitation in *N.J.A.C.* 6A:3-1.3(d), numerous decisions concerning the 90-day time limitation have been litigated and the Courts have consistently held that the rule is mandatory. *See Nissman v. Bd. of Educ. of the Twp. of Long Beach Island,* 272 *N.J. Super.* 373, 380 (App. Div.*), cert. denied* 137 *N.J.* 315 (1994*)*; *Wynne v. Tillery, Camden County Superintendent of Schools,* 96 *N.J.A.R.*2d (EDU) 995; *Conklin, supra*; *Portee v. Newark Board of Education,* 94 *N.J.A.R.*2d (EDU) 381. As stated by the Supreme Court in *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 *N.J.* 572, 558 (1993), attempts to resolve a claim through negotiation do not negate the fact of receipt of adequate notice, nor do they toll the running of the time limitations. (*Kaprow, supra* at 558)

Moreover, I do not find that the factual circumstances set forth in petitioner's pleadings constitute grounds for relaxation of the 90-day rule. Petitioner has provided no explanation as to why it was unable to file its petition in a timely manner beyond its claim that its petition was a last resort after an entity that is not party to this action, the HAD, failed to negotiate additional funding for one of petitioner's preschool providers, PRAB. Notwithstanding that this is an *Abbott* district, no constitutional issues are involved in this funding dispute that involves only one of the District's many preschool providers, nor does the matter present issues of significant public interest beyond the parties. On the contrary, I determine, as did the Commissioner in *LeMee v. Board of Education of the Village of Ridgewood,* 1990 *S.L.D.* 663, 673, that the greater public interest herein lies with the enforcement of the 90-day rule.

Accordingly, for the reasons set forth above, respondent's Motion to Dismiss the Petition as untimely filed is hereby granted. Given the determination herein, it is unnecessary to consider the issue of justiciability raised by respondent. [4]

Sincerely,

Dwight Pfennig
Acting Commissioner

Mailed August 31, 2004

DP/GH/MKD/SF
c: County Superintendent

[4] This Decision on Motion may be appealed to the State Board of Education, pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*,

361-04

AGENCY DKT. NO. 266-7/04

IN THE MATTER OF DINO PETTINELLI,	:	
ALPHA BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
WARREN COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission") finding that Alpha Board of Education member Dino Pettinelli violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act (Act), and recommending a penalty of censure, have been reviewed. Upon issuance of the decision of the Commission, Mr. Pettinelli was provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration.

Comments filed by counsel on behalf of Mr. Pettinelli state that he does not agree with the Commission's finding that he "violated *N.J.S.A.* 18A:12-24(c), when he was present for two executive session meetings where his brother's appointment as a teaching staff member was discussed and when he made two comments during one of the executive session meetings; i.e. correcting a misstatement as to his brother's years of employment as a teacher and mentioning the possibility of reference for one of the teacher candidates in the Parsippany School District." (Comments at 1-2) In this regard, Mr. Pettinelli avers that the record demonstrates that there was no knowing or intentional violation of the Act in that he was never advised that he could not be present in executive session.

Additionally, Mr. Pettinelli claims that he was specifically told by the Board President and the Chief School Administrator, who informed the Board that they had consulted with the Board attorney, that he could be present in executive session. (*Id.* at 2) Moreover, Mr. Pettinelli claims that he never ignored any legal advice from the Board attorney in that there

was never any legal advice provided on the issue of his presence in the executive session. (*Ibid.*) Mr. Pettinelli further asserts that he was unaware that his attendance in the executive sessions would cause a legal conflict and that a review of the wording of *N.J.S.A.* 18A:12-24(c) would not have made him aware of the potential for such conflict since he did not stand to benefit in any respect from his presence in executive session. (*Id.* at 3)

With respect to the penalty recommended by the Commission, Mr. Pettinelli argues that any violation by him must be considered both inadvertent and technical, and that imposing a penalty greater than a reprimand would be unfair and unwarranted. (*Id.* at 6) In support thereof, Mr. Pettinelli points to numerous instances where the penalty of reprimand has been imposed in matters he claims involved much more severe and obvious violations of the School Ethics Act, such as, *inter alia*: 1*) In the Matter of Matilda Touw*, 97 *N.J.A.R.*2d (EDU) 343, where a Board member was reprimanded for *voting* on her son's reappointment as school custodian; 2) *In the Matter of Wayne Wurtz*, 96 *N.J.A.R.*2d (EDU) 843, where a Board member was reprimanded for *voting* on his wife's appointment as a classroom aide; 3) *In the Matter of Sheri Scozzaro*, decided by the Commissioner January 21, 1998, where a Board member was reprimanded for *voting* for her daughter's appointment as a substitute; 4) *In the Matter of Patricia Haines*, decided by the Commissioner November 27, 2000, where a Board member was reprimanded for *voting* on a resolution authorizing the sale of bonds on behalf of the Board by her employer; 5) *In the Matter of James Carpenter*, decided by the Commissioner February 1, 2002, where a Board member was reprimanded for *voting* to retain the bank by whom he was employed as the Board's financial institution; 6) *In the Matter of Katherine Mallette*, decided by the Commissioner, February 9, 1999, where a Board member was reprimanded for *actively participating* in all closed session and public-session discussion of the Board's purchase of her brother-in-law's property at two separate board meetings; 7) *In the Matter of Harrison,* 96 *N.J.A.R.*2d (EDU) 553, where a Board member was reprimanded for

voting on a contract extension for a construction project for which his company was a subcontractor; and 8) *Dilzer v. Sweet*, 96 *N.J.A.R.*2d (EDU) 132, where a Board's Vice-President was reprimanded for *soliciting* signatures from Board employees for a nominating petition for another board candidate. (*Id.* at 3-5, emphasis in text)

Mr. Pettinelli contends that, unlike the cases cited above, he did not participate in negotiations when he had a known conflict, did not vote for a family member or relative, did not use his position to obtain a benefit for anyone and did not actively participate in any Board action that would benefit himself or his brother. (*Id.* at 5) Mr. Pettinelli points out that he abstained from the vote on the amendment to the Board's nepotism policy, that he abstained from any vote on the position of the instrumental music teacher and that he abstained from any vote on his brother's appointment. (*Ibid.*) Thus, Mr. Pettinelli concludes, his conduct was far less severe than the conduct in the cases he has cited wherein the board member received the penalty of reprimand. (*Ibid.*) Accordingly, Mr. Pettinelli urges the Commissioner to impose a penalty no greater than a reprimand in this matter. (*Id.* at 6)

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record and of the penalties assessed in cases where similar violations of the School Ethics Act have occurred, the Commissioner concludes that the recommended penalty of censure is disproportionately severe in the present instance. In so concluding, the Commissioner emphasizes that, while Mr. Pettinelli's violations of the Act are

serious infractions, it is essential that the sanction imposed is consistent with prior determinations.

A review of sanctions imposed for similar violations of the Act reveals that, in instances where a Board member has received a penalty of censure for his/her actions, the violations were more egregious than those found herein. In this regard, it is noted that, in its analysis the Commission found the within matter analogous to *In the Matter of James Russo and Thomas Scarano*, decided by the Commissioner April 16, 1998 and *In the Matter of Michael Kilmurray*, decided by the Commissioner April 15, 1998, wherein sanctions of censure were imposed. However, upon review of the particulars of these matters, the Commissioner finds that *Russo* and *Kilmurray* involved infractions of a more severe nature. In *Russo,* two Board members, one who had a sister and the other a fiancé and brother who were members of the teacher's bargaining unit, violated the Act when they served as the only two members of a board negotiations team that not only negotiated a contract with the teacher's bargaining unit, but also voted on the collective bargaining agreement. In *Kilmurray*, the board member was found to have violated the Act by: 1) interjecting himself into deliberations on the proposed appointment of his sister-in-law in closed session; 2) commenting that his sister-in-law and another candidate were both good candidates; and 3) making and supporting the motion to re-vote on the appointment of his sister-in-law when the original motion failed.

Additionally, other matters where a sanction of censure has been imposed include: 1) *In the Matter of William Gunning,* decided by the Commissioner July 29, 1994, where the board member was censured for voting on the superintendent's salary increase when his wife was the superintendent's confidential secretary; 2) *In the Matter of Mark Connolly,* decided by the Commissioner June 23, 1997, where the board member was censured for sitting in on the personnel committee's discussion of his wife's appointment as a teacher and asking a fellow board member to facilitate a re-vote; and 3) *In the Matter of Famularo,* decided by the

Commissioner March 16, 1998, where the board member was censured for participating in public and executive session discussions and voting in favor of a town councilperson for whom he had been a campaign manager, for the position of principal.[1]

Accordingly, upon an extensive review of the above matters provided by Mr. Pettinelli wherein the penalty of reprimand was imposed, and an independent review of instances wherein the penalty of censure has been imposed, the Commissioner concludes that a reprimand is the appropriate penalty in this matter for the reasons explicated above.

Accordingly, IT IS hereby ORDERED that Dino Pettinelli be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/8/04

Date of Mailing: 9/8/04

[1] In *Scannella v. Scudillo,* 95 *N.J.A.R.*2d (EDU) 190, *rev'd and remanded* State Board at 195, decided by the Commissioner *on remand*, 97 *N.J.A.R.*2d (EDU) 617, the board member was censured for casting the deciding vote for her son-in-law as superintendent and for selling gloves to district employees. However, at the time when the penalty for violation was determined, Ms. Scudillo was no longer a member of the Board, so that the penalties of suspension or removal from office were no longer possibilities.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
DINO PETTINELLI	:	**Docket No. C01-04**
ALPHA BOARD OF EDUCATION	:	
WARREN COUNTY	:	**DECISION**

PROCEDURAL HISTORY

Complainant, Alpha Education Association, filed a complaint against the Alpha Board of Education (Board) on February 2, 2004 alleging violations of N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(h). On March 4, 2004, in response to correspondence from the Commission, complainant amended that complaint to indicate that the complaint was filed by Laurie Ritz on behalf of the Alpha Education Association and to specifically name the Board members alleged to have violated the Act. The complainant alleges that the Board members violated N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(h) when they amended the board policy regarding nepotism, and then they voted to hire a Board member's brother for a combined position of technology coordinator/instrumental music teacher. Robert J. Merryman, Esq., attorney for the Board, filed an answer on March 5, 2004 on behalf of Michael Jenkins, Alfonso Marino, Larry Marino, Robert Melick, Dino Pettinelli, and Judith Wieland denying any violation of the School Ethics Act.

The School Ethics Commission advised the parties that it would discuss this matter at its meeting of March 23, 2004. The complainant did not appear. The respondents did not appear, but were represented by Mr. Merryman who testified before the Commission. The Commission also heard testimony from Dr. Sandra Moore who was the Superintendent of the Alpha School District at the time the allegations took place. The Commission requested additional executive Board minutes and upon a review of those minutes and based upon Dr. Moore's testimony, the Commission requested the testimony of Dino Pettinelli to determine a possible violation of N.J.S.A. 18A:12-24(c).

At its May 25, 2004 meeting, the Commission heard testimony from Dino Pettinelli. At its public meeting on May 25, 2004, the Commission voted to find no probable cause to credit the allegations that Mr. Jenkins, Mr. Alfonso Marino, Mr. Larry Marino, Mr. Melick, Mr. Dino Pettinelli and Mrs. Wieland violated N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(h). However, the Commission voted to find probable cause that Dino Pettinelli violated N.J.S.A. 18A:12-24(c). The reasons for this decision were wet forth in a probable cause decision dated July 14, 2004.

The Commission found that the material facts were not in dispute with respect to the issue upon which it found probable cause and, therefore, the Commission advised Mr. Merryman that it would decide the matter on the basis of written submissions. Mr. Merryman was invited to provide a written submission to the Commission within 30

days of the date of the probable cause decision and set forth why the Commission should not find Dino Pettinelli in violation of N.J.S.A. 18A:12-24(c) for being present during an executive session meeting on July 24, 2003 when the hiring of his brother, L. Pettinelli, as a technology coordinator/instrumental music teacher was discussed, and for being present and twice participating in a discussion during an executive session meeting on August 11, 2003 regarding the hiring of his brother. He was also told that his written submission should include the respondent's position on an appropriate sanction should the Commission determine that the Act was violated. Mr. Merryman submitted a timely response on July 14, 2004 arguing that, since Dino Pettinelli did not benefit from his limited participation in the executive sessions, he should not be found in violation of N.J.S.A. 18A:12-24(c).

FACTS

The Commission was able to discern the following facts based on the pleadings, documents submitted, testimony and Mr. Merryman's submission in response to the probable cause determination.[1]

Since January 9, 1986 the board had a nepotism policy in place. Policy #4112.8 provides in pertinent part, "The Board of Education, in order to avoid both the reality and the appearance of conflict of interest in employment, will not appoint any member of the immediate family of a board member, nor of an administrator, to any employment position in this district, and directs that no person who is a member of the immediate family of a board member or administrator shall be placed in nomination for any vacant position." The board also had a bylaw pertaining to board member conflict of interest. Bylaw #9270 provides in pertinent part, "No spouse, sibling, parent or descendent of a service board member shall be considered for any paid employment in the district."

At a May 8, 2003 special meeting, the Alpha Board of Education voted unanimously to accept the resignation of J. R. as a math teacher. At that same meeting, upon the recommendation of the chief school administrator, a motion made by Mr. Jenkins to re-appoint E.C. as part-time instrumental music teacher failed with all voting "nay." The failure of this motion created an opening for a music teacher. Dino Pettinelli testified that he participated in Board discussions regarding the re-appointment of E.C. In May 2003, the Board suggested to Dr. Moore that the technology coordinator, E.K., be reassigned to teach math even though he was not certified to teach math. This reassignment created an opening for a technology coordinator.

At the June 26, 2003 regular meeting, the teacher hiring process was discussed by the Board and Dr. Moore. In that discussion, the past hiring process was reviewed by Dr. Moore who explained that it was her job to interview, check references and choose the top three candidates. Dr. Moore emphasized that she wanted to pick the best qualified candidate, adding that two of the candidates were relatives of Board members.

[1] The Commission recognizes that Mr. Merryman's submission sets forth that certain facts were disputed. Although the Commission finds these disputed facts to be immaterial to the disposition of this case, they have been incorporated herein.

She noted that the Board attorney advised that choosing these candidates would violate the ethics law.

On July 8, 2003, L.M. was interviewed for the position of technology coordinator. In Dr. Moore's comments in the Applicant Record she noted that L. M. had one year of experience, that she can troubleshoot, has a strong technology background and doesn't need to give a 60-day notice. On July 22, 2003, Dino Pettinelli's brother was interviewed for the position of technology coordinator/instrumental music teacher. In Dr. Moore's comments in the Applicant Record, she noted that he had an excellent background and is an excellent candidate. She also noted her concerns about the cost to hire him, the 60-day notice he would have to give and the problems with the ethics law.

At the July 24, 2003 executive session, the Board discussed the technology position. Dino Pettinelli was present throughout the entire executive session. He testified that he was aware that his brother was one of the applicants for the position and that the position would be discussed at the July 24, 2003 executive session. While he was not sure that his brother would be on the agenda, he assumed that his brother would be on the agenda. He also testified that he was advised by Dr. Moore not to participate in the discussions regarding his brother.

During the July 24, 2003 executive session, Dr. Moore advised that she was recommending L.M. for the position and indicated that she had interviewed Dino Pettinelli's brother who, she noted, was very competent, knew music, had 23 years experience and is an MA-30. To assist in the executive session discussion, the Board was presented with a memorandum from Dr. Moore discussing her concerns regarding the proposed recommendation of L. Pettinelli for the position of technology/instrumental teacher and a letter from the Board attorney also setting forth his concerns with the hiring of a brother of a Board member. Information from the New Jersey School Boards Association (NJSBA) related to the Act was also presented to the Board. Both Dr. Moore and the Board attorney's correspondence indicated their concern that the Board had a formal nepotism policy which prohibited them from hiring a brother of a Board member. Dr. Moore's memorandum also expresses her concern with combining the technology and music positions into one position. Her memorandum also raised her fiscal concerns with hiring L. Pettinelli due to his level on the guide. The Board discussed changing the nepotism policy and the fact that L. Pettinelli could teach both technology and music. The Board asked Dr. Moore whether she would recommend L. Pettinelli if the policy was changed. Dr. Moore stated that she would recommend L.M., but if it was voted down and if the Board were to change the policy, she would recommend L. Pettinelli.

During the public session meeting after the executive session on July 24, 2003, a motion was made to hire L.M. as the technology coordinator. The motion failed for lack of a second. The Board directed Dr. Moore to continue to look for another candidate and offer another recommendation. Dr. Moore testified that she could not recommend a Board member's brother because of the nepotism policy. During this public session, the Board discussed changes to the existing policy and bylaw on nepotism. After appropriate motions, the Board voted to amend both the policy and bylaw related to nepotism to add,

at the end, the following phrase: "...to secure any advantage or gain to any Board member, and that any related Board member will abstain from discussion and vote on such employment." Dino Pettinelli abstained from both votes and Board members Ms. Ortiz and Mrs. Robledo voted "nay." Mr. Melick was not present at the July 24, 2003 Board meeting.

At the August 11, 2003 meeting, the Board went into executive session for two-and-a-half hours, during which time the Board only discussed filling the open technology and music position. Dino Pettinelli was again present throughout the entire executive session. He testified that, at the outset, he asked Dr. Moore if he should stay in the executive session meeting. Dr. Moore responded that he could stay. He also testified that there was no Board attorney available for that executive session.

During the August 11, 2003 executive session, the Board discussed the fact that some relatives of Board members had been hired in the past. Dr. Moore said that those hirings occurred prior to the adoption of the School Ethics Act. During a discussion regarding L. Pettinelli's step on the guide, Dr. Moore made a statement about the number of years L. Pettinelli had worked as a teacher. Dino Pettinelli stated that the number of years was wrong. Ms. Robledo stated that Dino Pettinelli should not participate in the discussion. Dr. Moore discussed the credentials of both Ms. Matto for the position of technology coordinator and another candidate for the instrumental music position. Dino Pettinelli testified that, during a discussion of whether Dr. Moore had checked the references for the candidate for the instrumental music position, he commented that Dr. Moore should check with school officials in Parsippany because it was his understanding that the candidate had taught in Parsippany. Dr. Moore noted that, at that time, she could not recommend the other candidate under discussion, but she would recommend another technology teacher.

Also during the discussion, Dr. Moore expressed her concern with L. Pettinelli's placement on the guide because in the next year he would be off the guide and the highest paid teacher. A Board member asked Dr. Moore where she stood on the recommendation of L. Pettinelli and she responded that she had concerns with what it would do to the contract. There was a discussion of the salary amount and the need for L. Pettinelli to give a 60 day notice, which would require the hiring of a substitute. The Board asked Dr. Moore what she planned to do and she said that she would recommend L.M. for the technology teacher position. Board member, Mr. Jenkins stated that the Board did not ask the prior technology coordinator to take the math class because of L. Pettinelli and that he was not a factor in that decision.

In the public meeting, after the executive session, a motion was made and seconded to hire L.M. as technology coordinator. The motion failed on a roll call vote with Dino Pettinelli abstaining, Mr. Melick, Mr. Larry Marino, Mrs. Wieland, Mr. Jenkins and Mr. Alfonso Marino voting "nay" and Ms. Ortiz, Ms. Rhody and Mrs. Robledo voting "aye." Given the rejection of the first candidate for the technology position, Dr. Moore recommended Larry Pettinelli as technology coordinator/instrumental music teacher. A motion was made and seconded for approval

of Dr. Moore's recommendation and the motion was approved on a roll call vote with all voting "aye," except for Ms. Ortiz, Ms. Rhody and Mrs. Robledo who voted "nay," and Dino Pettinelli who abstained.

At the August 21, 2003 Board meeting, the August 11, 2003 motion to hire L. Pettinelli was amended to include "on an emergent basis" after an appropriate motion with all voting "aye" except for Dino Pettinelli who abstained.

ANALYSIS

The Commission found probable cause that Dino Pettinelli violated N.J.S.A. 18A:12-24(c) of the Act when, as a member of the Board, he attended the July 24, 2003 executive session when the hiring of his brother, L. Pettinelli, as a technology coordinator/instrumental music teacher was discussed and when he attended and participated in discussions during the August 11, 2003 executive session. In his written submission is response to the probable cause finding, Mr. Merryman noted that the Commission found probable cause of a violation solely on the issue that the Commission itself raised. The Commission agrees that its finding of probable cause was solely on the issue it raised regarding a violation of N.J.S.A. 18A:12-24(c). N.J.S.A. 18A:12-28(b) provides the Commission with the authority to conduct investigations. It was after such an investigation into this complaint that the Commission determined that it would also consider whether Dino Pettinelli violated N.J.S.A. 18A:12-24(c). It is well within the Commission's authority to make such a determination.

N.J.S.A. 18A:12-24(c) provides:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, 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 or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

Subsection (c) looks to whether a school official has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity of judgment. Additionally, the subsection looks to whether he has a personal involvement that might create some benefit to him. As the Commission stated in Advisory Opinion A23-94, the Commission is not constrained to recognize conflicts of interest only when a matter affects a board member's immediate family member. The Commission has found conflicts of interest under subsection (c) where a board member negotiates a sibling's contract when the sibling is in the local bargaining unit. See I/M/O James Russo and Thomas Scarano, C12-97 (January 27, 1998). Further, the Commission noted in SEC v. Michael Kilmurray, C12-94 (January 27, 1998) that "when a school official has a conflict

of interest of which the public is aware, and that school official goes behind closed doors when that item is discussed, the situation creates a justifiable impression among the public that their trust is being violated." In Kilmurray, the Commission noted that the public may believe that a board member that sits in on a private session discussion regarding his sister-in-law is actively participating in the discussion behind closed doors, that the board member will tell his relative what was said, or at the least, that the other board members will be inhibited in their discussion of the matter because of his presence.

In the present case, Dino Pettinelli was present during and participated in two executive session discussions related to the hiring of his sibling. The August 11, 2003 executive session lasted for two and half hours and was solely devoted to the hiring of his brother. Not only was Dino Pettinelli present for those executive session discussions, but in the two and half hour long discussion he participated in the discussions on two occasions. On the first occasion, he corrected the Superintendent regarding his brother's number of years of employment as a teacher. On the second occasion, he commented about another candidate that was being discussed in relation to the hiring of his brother. In its probable cause decision, the Commission noted that there appears to be a personal involvement related to the hiring of a brother that could create a benefit to Dino Pettinelli in the personal satisfaction of ensuring that a sibling obtains employment. The Commission also noted that being present for two executive session discussions and participating in those discussions appears to create a justifiable impression among the public that their trust is being violated as set forth in N.J.S.A. 18A:12-22(a).

In his written submission in response to the finding of probable cause, Mr. Merryman argues that in its probable cause decision, the Commission failed to recognize the amendment to N.J.S.A. 18A:12-24(c). Mr. Merryman noted that the amendment changed the circumstances in which a board member has a conflict due to a "personal involvement." He argues that under the amended statute that it is not enough that the "personal involvement" might be expected to impair objectivity; there must be an actual benefit to the board member or the board member's immediate family. He noted that in passing the amendment, the Legislature made it clear that it wanted to avoid the potential for arbitrary application of this section of the Act since "it is the School Ethics Commission which initially determines on a case by case basis what personal involvement might reasonably impair the objectivity of a school official and no guidelines have been established by the Commission as a reference point for school officials." Assembly Committee Statement to Assembly No. 2635 (November 16, 1998).

Mr. Merryman further argues that in its probable cause decision, the Commission devised a potentially arbitrary benefit whereby "personal satisfaction" is now a "benefit" for purposes of the Act. He maintains that such a subjective standard is contrary to the intent of the Legislature when it amended the Act and could result in countless violations of the Act by school officials. He maintains that there must be a direct and measurable benefit before a violation of N.J.S.A. 18A:12-24(c) can be found.

In *Advisory Opinion A16-00* (December 1, 2000) the Commission advised that a board member would violate N.J.S.A. 18A:12-24(c) if he were to participate in

negotiations or vote on a contract with the local education association when his brother held a position in the maintenance department and is a member of the local education association of the district where he serves as a board member. In A16-00, the Commission analyzed the impact of the amendment to N.J.S.A. 18A:12-24(c) and found "...that the benefit set forth in the amendment need not be financial, otherwise, the "personal involvement" provision of N.J.S.A. 18A:12-24(c) would be redundant. The Commission considers an involvement to be personal whenever a school official has a relationship that the public may perceive as being predominant to the best interest of the district. Therefore, a benefit can be something of intrinsic value, but no monetary worth." Id. page 2. The Commission noted that the amended language to N.J.S.A. 18A:12-24(c) changed the standard from a "reasonable expectation" that a school official cannot be objective to a requirement that the involvement constitute "a benefit" to the school official. The Commission finds that there is a benefit of intrinsic value in the personal satisfaction that a board member receives in ensuring that a sibling obtains employment.

The Commission does not agree with Mr. Merryman's argument that this is a subjective standard especially when N.J.S.A. 18A:12-24(c) is read in conjunction with N.J.S.A. 18A:12-22(a), which provides:

> In our representative form of government it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators 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.

When a board member sits in on a private discussion regarding a relative behind closed doors, it creates a justifiable impression among the public that the public trust is being violated. This is even more evident when a board member, in a closed executive session, makes comments during discussions related to the hiring of a relative. Dino Pettinelli's comments were directly related to the hiring of his brother. This is exactly the type of conduct that board members must avoid in order to comply with the provisions of the Act.

Mr. Merryman argues that Dino Pettinelli did not actively participate in any board action that would benefit his brother since he abstained from the votes on the amendments to the nepotism policy and on the vote to hire his brother. He further notes that there is no evidence that Dino Pettinelli lobbied on behalf of his brother or coerced or pressured the board to hire his brother. While the Commission agrees with these facts as noted by Mr. Merryman, it is enough for Dino Pettinelli to sit on a closed executive session discussion related to the hiring of his brother and then to comment on the hiring of his brother in another closed executive session to create a justifiable impression among the public that the public trust is being violated.

Mr. Merryman also argues that the comments made by Dino Pettinelli were two innocuous comments that were limited to facts within his own knowledge that addressed tangential issues. Mr. Merryman cites the Commission's decision in Brooks v. Cecchino, C19-99 (March 28, 2000). However, the Brooks decision can be distinguished from the present case. In C19-99, the Commission found no violation of the Act when a board member, who was conflicted out of collective bargaining due to his wife's employment and membership in the bargaining unit, commented on the union's concerns with the ratification process during an executive session discussion. The Commission found those comments to be innocuous, but those comments did not involve negotiations since the board had signed a memorandum of agreement. Furthermore, the meeting during which the comments were made concerned the budget and the comments were made in terms of the budget and did not involve the terms of the contract. In the present case, the comments were made during a two and half hour executive session discussion devoted solely to the open technology coordinator and instrumental music positions for which the board was considering hiring Dino Pettinelli's brother. The comments related specifically to his brother's length of service as a teacher and to the references of another candidate that the board was discussing for the instrumental music position. The Commission finds that these comments are not innocuous comments, but are directly related to the hiring of his brother.

Finally, Mr. Merryman notes that Dino Pettinelli was never advised that he could not be present in executive session and was specifically told by Dr. Moore that he could be present. The Commission notes that this does not excuse Dino Pettinelli from his responsibilities under the Act. However, the Commission will take this into account in its penalty determination.

DECISION

For the reasons discussed above, the Commission finds that Dino Pettinelli violated N.J.S.A. 18A:12-24(c) when he was present for an executive session meeting on July 24, 2003 when the hiring of his brother as a technology coordinator/instrumental music teacher was discussed, and when he was present for and twice participated in a discussion during an executive session meeting on August 11, 2003 regarding the hiring of his brother. The Commission notes that Dr. Moore told Dino Pettinelli that he could sit in on the August 11, 2004 executive session; however, since he twice participated in that executive session, the Commission recommends that the Commissioner of Education impose a penalty of censure.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was mailed to the parties, Mr. Merryman may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission

Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C Garbarini 6/9/12

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C01-04

Whereas, the School Ethics Commission has considered the pleadings and the response filed by the parties and the documents submitted in support thereof; and

Whereas, at its meeting of July 27, 2004 the Commission found that Dino Pettinelli violated N.J.S.A. 18A:12-24(c) of the Act and recommended that the Commissioner of Education impose a sanction of censure; and

Whereas, at its meeting of July 27, 2004, the Commission reviewed a draft decision prepared by its staff and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on July 27, 2004.

Lisa James-Beavers
Executive Director

[PCG/LJB/MET/ethics/decisions/C01-04

#363-04

363-04

OAL DKT. NO. EDU 3982-04
AGENCY DKT. NO. 29-1/04

PATRICK M. AIELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,[1]	:	DECISION
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.

Upon careful and independent review, the Commissioner adopts the Initial Decision in this matter for the reasons set forth therein. Accordingly, summary decision is granted to respondent and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/8/04

Date of Mailing: 9/9/04

[1] The Initial Decision incorrectly identified the respondent in this matter as the State Board of Education.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 3982-04
AGENCY DKT. NO. 29-1/04

PATRICK M. AIELLO,
Petitioner
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION,
STATE BOARD OF EDUCATION,
Respondent.

Patrick M. Aiello, petitioner, *pro se*

Michael C. Walters, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General, State of New Jersey, attorney)

BEFORE **STEPHEN G. WEISS**, ALJ:

PROCEDURAL HISTORY

The matter was transmitted by the Department of Education to the Office of Administrative Law (OAL) on May 3, 2004 as a contested case at the request of the petitioner, Patrick M. Aiello, who maintained that the determination of the State Board of Examiners to reject his "alternate route" application for an instructional certificate was erroneous and should be reversed.

Following receipt of the file the matter was scheduled for a plenary hearing in January 2005. However, on July 15, 2004, the respondent State Board of Examiners filed a motion for summary decision with a supporting brief and attached exhibits. No reply memorandum, brief, certification or affidavit was filed by Aiello in response to the motion for summary decision. The following constitutes my initial decision granting the motion.

DISCUSSION

The essential facts necessary to determine this case are not in dispute. In a letter dated November 6, 2002 petitioner wrote to the Essex County Superintendent of Schools and attached his application for an instructional certificate noting that it was through the "alternate route" process. In that letter Aiello noted that he has passed the National Boards in Basic Sciences and in Clinical Sciences, Parts One and Two and holds a current license as a chiropractor in this State. The application was rejected by the Office of Licensing and Academic Credentials on the basis that Aiello had not attained the required overall cumulate grade point average (GPA) of at least 2.50 at the completion of a baccalaureate degree program. Aiello then appealed to the State Board of Examiners and attached documentation wherein he calculated his cumulative GPA for the total of his undergraduate course work to be 2.65. The calculation was reached by including all of his undergraduate work at Stockton State College (95 credits), two courses at Middlesex County College and course work he completed at the National College of Chiropractic for his Bachelor of Science degree.

On September 25, 2003 the State Board of Examiners denied Aiello's application, finding that he had failed to attain a GPA of 2.5 or higher from either a baccalaureate degree program, a graduate degree program, or a State approved post-baccalaureate program. In particular, the GPA from Stockton College was rejected because he did not graduate from that institution, and his two GPAs from the National College of Chiropractic were below 2.5. Noting that the State Board of Examiners does not combine GPAs from different colleges to create a new GPA and that the grade point requirement was established by regulation, the Board advised Aiello it would not waive the requirement.

Thereafter, in October 2003, Aiello appealed to the Commissioner of Education from the State Board of Examiners' decision arguing that: (a) he has demonstrated an

ability to do course work higher than 2.5 as shown, in particular, by his 2.93 GPA for 95 credits from Stockton; (b) during seven years in various colleges between 1984 and 1991 he earned 300 credits, culminating not only in a B.S. degree in Human Biology, but also in a Doctor of Chiropractic degree; (c) he has successfully passed National Boards in Basic and Clinical Sciences; (d) he has successfully passed the New Jersey State Board of Chiropractic Examination and has been practicing that profession since 1992; (e) he has been active in various community organizations.

As noted, no reply memorandum, brief, certification or affidavit was filed by Aiello in response to the motion for summary decision. The case law with respect to the grant or denial of such a motion is well settled. Absent a reasonable dispute with respect to any genuine issue of material fact, it should be granted. *N.J.A.C.* 1:1-12.5(b); *Contini v. Board of Ed. of Newark*, 286 *N.J. Super.* 106 (App. Div. 1995).

Thus, since it is undisputed that to obtain an instructional certificate an applicant who graduated before September 1, 2004 must have achieved a GPA of at least 2.5 when a GPA of 4.0 equals an "A" from a baccalaureate degree program, higher degree program, or a State approved post-baccalaureate program, and Aiello has failed to meet those criteria, his appeal must be rejected. *See N.J.A.C.* 6A:9-8.1(a)2. Although Aiello has asked that the GPAs at Stockton, Middlesex County and the National College of Chiropractic be cumulated in the calculation of his overall GPA, this is not permitted. *See also, N.J.A.C.* 6A:9-17.16(b). There being no material issues of fact reasonably in dispute, the motion is **GRANTED** and the petition **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 (45) 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 (13) 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, 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 6, 2004
DATE

STEPHEN G. WEISS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

August 6, 2004
DATE

Mailed to Parties:

AUG - 9 2004
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

\mvh

364-04

OAL DKT. NO. EDU. 1830-98
AGENCY DKT. NO. 52-97

IN THE MATTER OF THE DISQUALIFICATION	:	COMMISSIONER OF EDUCATION
FROM SCHOOL EMPLOYMENT OF R.J.B.	:	DECISION
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon full and independent review of the record, the Commissioner concurs with the Administrative Law Judge (ALJ) that summary decision is appropriately granted to respondent on the issue of whether a conviction for possession of drug paraphernalia, pursuant to *N.J.A.C.* 2C:36-2, is an offense which disqualifies petitioner from employment as a school bus driver, pursuant to *N.J.S.*A 18A:39-19 (as in effect at the time of petitioner's appeal), since this question was conclusively resolved in the affirmative by the Appellate Division on June 12, 2000 in *In the Matter of the Disqualification from School Employment of J.W.,* A-5481-98T, *cert. den.* 165 *N.J.* 602. The Commissioner further agrees with the ALJ that petitioner's claim of rehabilitation is dismissed as abandoned because of his failure to respond to communications or appear at scheduled hearings.

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein. This matter is hereby transmitted to the State Board of Education which has retained jurisdiction.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/9/04

Date of Mailing: 9/9/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT NO. EDU 1830-98
AGENCY DKT NO. 52-97

IN THE MATTER OF DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF RJB IN THE STATE OF NEW JERSEY

RJB, petitioner, *pro se*

Kathleen Asher, Deputy Attorney General for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: June 30, 2004 Decided: July 27, 2004

BEFORE **JEFFREY A. GERSON**, ALJ

Background

RJB was disqualified from employment as a bus driver after The Office of Criminal History conducted a criminal history check which revealed he had been convicted of possession of drug paraphernalia in February 1997. He had been initially charged on May 31, 1996 with possession of CDS, which was subsequently amended on February 4, 1997 to possession of narcotic paraphernalia for which he was sentenced to a one year probation, fifty hours of community service, $50 payment to the Violent Crime Compensation Board, $500 to DEDR, a $50 lab fee and a six month suspension of his driver's license.

Petitioner appealed his disqualification to the Commissioner of Education presenting evidence to attempt to demonstrate his rehabilitation. The accuracy of the conviction was not contested and the Assistant Commissioner of Education upheld the disqualification and concluded that the Petitioner had not demonstrated by clear and convincing evidence his rehabilitation.

RJB appealed that determination to the State Board of Education. In a decision dated September 3, 1997 the Board reversed the determination of the Assistant Commissioner and found that a conviction for possession of drug paraphernalia is not a disqualifying offense under the statute.

The Commissioner filed a motion to participate in the matter for the purposes of seeking reconsideration/clarification of the state board's September 3, 1997 decision. The board granted the Commissioner's request to participate and on February 4, 1998 the board remanded the matter back to the Commissioner with directions that he transmit it to the Office of Administrative Law for initial determination. The matter was referred to the Office of Administrative Law on or about February 26, 1998.

Subsequently, a motion for Summary decision was filed by the Attorney General and forwarded to RJB.

After several unsuccessful attempts to contact RJB to allow him an opportunity to respond to the motion for Summary decision, the matter was listed for a hearing in September 2000. The hearing was adjourned at the request of the Attorney General's office which was able to contact RJB's wife who had consented.

While the matter was pending, an Appellate Division decision of June 12, 2000 in the matter of the disqualification from school employment of JW was decided. The issue of whether a school employee should be disqualified from employment if convicted or has pled guilty to possession of drug paraphernalia was confronted on all fours. JW clearly was clearly dispositive of the question of whether or not a conviction for paraphernalia was disqualifying. It was.

However, the issue of RJB's rehabilitation still needed to be addressed.

Several attempts by both the Attorney General's office and the Office of Administrative Law over a period in excess of two years were unsuccessful in getting any response from RJB.

RJB's failure to respond to any communications and failure to appear at any previously scheduled hearings renders the matter of his rehabilitation moot.

Thus, the application for summary decision with respect to the issue of whether or not the possession of drug paraphernalia is a disqualifying offense is granted based on the dispositive matter of "The disqualification from school employment of JW Appellate Division A-5481-98T3." The question of RJB's rehabilitation is dismissed without prejudice as an abandonment. It is ordered that RJB is disqualified from employment as a school bus driver pursuant to *N.J.S.A.* 18A:39-19.1.

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 (45) 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 (13) 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, 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.

7/27/04
DATE

JEFFREY A. GERSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 29 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

/rlr

366-04

366-04E

OAL DKT. NO. EDU. 6799-04
AGENCY DKT. NO. 288-8/04

E.B. and T.C. on behalf of minor child, E.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included the audiotape of the hearing conducted at the Office of Administrative Law and the Order of the Administrative Law Judge (ALJ), have been reviewed.

Upon such review, the Commissioner concurs with the ALJ, for the reasons well stated in his Initial Decision, that the within application must be denied as petitioners have not satisfied the standards necessary for the granting of extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), most specifically, they have not demonstrated that they have a reasonable likelihood of success on the merits of the underlying controversy.

Accordingly, the Order of the ALJ denying emergent relief is hereby adopted. In the event that petitioners desire to pursue their claim, this matter shall proceed to plenary hearing on its merits; otherwise, it shall proceed as necessary to bring it to closure.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/04

Date of Mailing: 9/14/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
MOTION FOR
EMERGENT RELIEF
OAL DKT. NO. EDU 6799-04
AGENCY DKT. NO. 288-8/04

Ed.B. & T.C. obo E.B.,
Petitioners,
v.
TOWNSHIP OF PENNSAUKEN
BOARD OF EDUCATION,
Respondent.

Ed.B. & T.C., parents of **E.B.**, pro se, for petitioners

Karl N. McConnell, Esq., for respondent Board of Education

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioners Ed.B. and T.C., parents of E.B., claim that respondent Township of Pennsauken Board of Education (BOE) has mistakenly determined that E.B. should be retained and that she should repeat the first grade. Petitioners request emergent relief, i.e., an order requiring the BOE to amend its records to show that E.B. should advance to the second grade. The BOE points out that E.B's teacher found, and standardized testing shows, that she should be

retained, so that it acted properly and the BOE submits that petitioners have not shown that the relief claimed should be granted. The BOE also points out that petitioners have withdrawn E.B. from its school system.

PROCEDURAL HISTORY

On or about August 17, 2004, petitioners submitted a letter and petition to the Department of Education (P-1, P-2) and, on August 18, 2004, the Department responded, identifying deficiencies in their papers and notifying them of requirements for processing the matter (P-3.) N.J.S.A. 18A:6-9. On or about August 25, 2004, petitioners Ed.B. and T.C. submitted another letter and petition with exhibits. (P-4, P-5, P-6, P-7, P-8.) The Department then transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on August 30, 2004 and scheduled for a hearing on September 3, 2004. N.J.S.A. 52:14B-2(b). On September 3, 2004, the motion for emergent relief was heard in the OAL, Trenton.

FINDINGS OF FACT

Ed.B. and T.C. are the parents of E.B., born April 4, 1997. They reside in the BOE's district and, on August 8, 2002, registered E.B. for school. R-2.

During the 2002-03 school year, E.B., was in the BOE's kindergarten. During that year, some of E.B.'s grades fell and, on the progress report for the year, her teacher D. Tyler's comments included the following: "As we have discussed, [E.B.] will need lots of practice this summer, if she is to succeed in first grade. You must work with her every day in reading, phonics and writing. She must blend sounds together to sound out words to read successfully." R-3. See also R-1.

During the 2003-04 school year, E.B. was a first grade student in the BOE's Delair Elementary School and her teacher was Charlotte Szczepanski, a teacher of many years experience and who made and maintained detailed records. Early in 2003-04 school year, E.B. appeared to be progressing satisfactorily, but by the third marking period, Ms. Szczepanski notified E.B.'s parents that she found her progress to be unsatisfactory.

E.B.'s 2003-04 school year progress report shows the following: During the first marking period, her grades were satisfactory, but her teacher found weaknesses in "Language Arts" in the following categories: "Recognizes appropriate vocabulary" and "Reads fluently" and in "Mathematics": "Subtraction." R-4. See also P-6, R-6. During the second marking period, her grades were satisfactory, but her teacher found weaknesses in "Language Arts" in the following categories: "Recognizes appropriate vocabulary," "Reads fluently" and "Uses word decoding strategies." R-4. See also P-6, R-6. During the third marking period, "Language Arts" grade was unsatisfactory and her teacher found weaknesses in "Language Arts" in the following categories: "Comprehends a story," "Recognizes appropriate vocabulary," "Reads fluently" and "Uses word decoding strategies." R-4. See also P-6, R-6. During the fourth marking period, her "Language Arts" grade was again unsatisfactory and her teacher found weaknesses in "Language Arts" in the following categories: "Comprehends a story," "Recognizes appropriate vocabulary," "Reads fluently," "Uses word decoding strategies," "Writes a complete sentence," and "Chooses to write independently." R-4. See also P-6, R-6.

On February 26 and March 1, 2004, Ms. Szczepanski met with T.C. and advised her that E.B. appeared to be significantly behind her grade and month in reading and that it was becoming increasingly apparent that she was not progressing appropriately and they agreed that Ms. Szczepanski would send weekly reading reports and provide E.B. with individual and extra help during the day. R-1. On March 17, 2004, Ms. Szczepanski met with T.C. and requested permission to take E.B. to the School Resources Committee (SRC) to create a plan for E.B., as a regular education student having difficulties. T.C. met with the SRC and, in April 2004 in the morning before class, Ms. Szczepanski began to provide E.B. with one-to-one support, tutoring and extra readers. Ms. Szczepanski found that E.B. did not make satisfactory progress and recommended evaluation of E.B., but T.C. refused to consent to evaluation. R-1. See also N.J.A.C. 6A:14-3.4. During the 2003-04 school year's third and fourth marking periods, in the teacher comment form, Ms. Szczepanski wrote that, despite hard work and being very eager to please, E.B.'s reading skills had not reached the level of achievement expected and that she could not read and comprehend on grade level. R-5. See also R-6.

On April 26, 2004, i.e., at the end first grade, E.B. took the McGraw-Hill Terra Nova standardized test, which showed her to have the following grade equivalents: Reading 1.4, Language 2.0, Mathematics 0.9, Science 2.4, Social Studies 1.1, and Total Score: 1.4. R-7.

Ms. Szczepanski recommended that E.B. be retained and repeat first grade during the 2004-05 school year and the school system notified petitioners of its determination that E.B. should be retained. R-4, R-8.

T.C. represents that she was surprised by the determination and she appealed to Jean Costello, Ed.D., the BOE's Assistant Superintendent. In July 2004, Dr. Costello offered the BOE's summer program for E.B. and suggested that, upon completion of that program, the issue of retention or advancement could be revisited, but T.C. rejected the suggestion. R-1.

During the summer of 2004, petitioners retained Eusheka Bartley, Youth Development Director of the Boys & Girls Club of Camden County, to tutor E.B. Ms. Bartley has written that she worked with E.B. in "phonics and reading comprehension in our SES program" and that, "As long as [E.B.] continues her tutoring in the summer, . . . she will be capable of doing the work and should be placed in the 2nd grade." P-8. However, Ms. Bartley's letter does not describe her qualifications for such an opinion and, during the hearing, petitioner could not say whether Ms. Bartley had any education, certification or other qualifications in the area of reading or a related subject.

By letter dated July 30, 2004, Curt Wrzeszczynski, Delair Elementary School Principal, wrote to T.C. confirming that on August 24, 2004, at the BOE's Central School, an assessment of E.B.'s academic skills would be performed (as a way to determine whether she should progress to the second grade.) The assessor would be from another school without prior knowledge of E.B. R-9. However, T.C. represented during the hearing that she had no confidence in the BOE's school system and she did not allow E.B. to participate in the assessment. P-1, P-5.

The petitioners allege that retaining E.B. would harm her self-esteem and adversely affect her future and, on August 19, 2004, i.e., before the above-described scheduled assessment could take place, Ed.B. withdrew E.B. from the BOE's school system. R-10. The petitioner request an

order requiring the BOE to amend its records to show that E.B. should be in second grade for purposes of her placement in another school.

The BOE's policy requires that to enter or re-enter its school system, the student must undergo an academic assessment to determine the appropriate placement. R-1.

During the hearing, I notified the petitioners that they should place E.B. in an appropriate school soon to avoid a truancy charge and that they should consult an attorney.

CONCLUSIONS OF LAW

New Jersey's Constitution states that the Legislature shall provide for a system of public schools for the instruction of all children in the State between the ages of 5 and 18 years and the Legislature has complied with this requirement authorizing local boards of education to operate their respective school districts. N.J. Const. Art. VIII, § 4, ¶ 1; N.J.S.A. 18A:11-1.

Public entities and public officials are presumed to have acted lawfully and in good faith and, consistent with this principle, it is well established that when a local board of education acts within its discretionary powers, its act will not be upset unless the claimant shows it to be patently arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Bd. Of Educ., 60 N.J. Super. 288, 292-92 (App. Div. 1960) (citations omitted.)

To succeed in a motion for a temporary restraint and/or interlocutory injunction, the movant must show, among other things, that, when the case is fully heard, it will probably prevail in its claim and that, if the relief is not granted, it will suffer immediate and irreparable harm, i.e., that money damages would not be adequate compensation. See, e.g., N.J.A.C. 1:1-12.6; R. 4:52-1; Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982).

I do not see that the petitioners have met their burden relative to the allegation that when the case is fully heard they will probably prevail. To the contrary, it appears that the BOE and its professionals have acted reasonably and in the interests of the child.

ORDER

Consistent with the above, I **DENY** the motion for emergent relief.

The parties may serve discovery requests and a plenary hearing date will be set.

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 (45) 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 (45) 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 7, 2004

DATE

JOHN R. TASSINI, ALJ

mph

EXHIBITS

For Petitioners:

P-1 Letter from petitioners, undated/submitted August 17, 2004

P-2 Petition, dated August 17, 2004

P-3 Letter from Department of Education, August 18, 2004

P-4 Petition, dated August 25, 2004

P-5 Letter from petitioners, undated/submitted August 25, 2004

P-6 Reports of grades, 1st through 4th Marking Periods

P-7 Teacher Comment Form, November 2003, February 2004, April 2004

P-8 Letter from Boys & Girls Club of Camden County (Eusheka Bartley), undated

For Respondent:

R-1 Certification by Szczepanski, Costello and Chapman

R-2 Registration Form & Pupil Enrollment Card, August 8, 2002

R-3 Progress Report, Kindergarten, 2002-03 School Year

R-4 Progress Report, Grade 1, 2003-04 School Year

R-5 Teacher Comment Form, February 1, 2004

R-6 Daily Journal Writing, October 2003 to June 2004

R-7 McGraw-Hill Terra Nova Individual Profile Report for E.B., April 26, 2004

R-8 Letter/notice of retention from BOE/Delair Elementary School, June 2004

R-9 Letter/notice of assessment from BOE/Delair Elementary School, July 30, 2004

R-10 Student Transfer Card, given to parent August 19, 2004

#367-04

367-04

OAL DKT. NO. EDU 9526-03
AGENCY DKT. NO. 353-9/03

KATHERINE MUELLER,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.[1]

Upon careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ).[2] [3] Accordingly, the within Petition of Appeal is dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 9/15/04

Date of Mailing: 9/15/04

[1] In her exceptions, petitioner indicates that a copy of the sound recording of the OAL hearing would be forthcoming. The Commissioner must caution, however, that parties challenging an ALJ's findings of fact are required to provide him with those portions of the official transcript relevant to the exceptions filed. *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987) An unofficial copy of the sound recording of OAL proceedings may not be substituted for the required transcript, and will not be considered if so submitted.

[2] As indicated in the Initial Decision, *N.J.A.C.* 6:11-6.2(a)6, the regulation in effect at the time the reassignment was made, has been replaced by *N.J.A.C.* 6A:9-9.2(b)2, which provides that the elementary endorsement authorizes the holder to "[t]each reading, writing, arithmetic, spelling, for basic skills purposes only, in grades 6 through 12." *N.J.A.C.* 6A:9-9.2(b)2iii.

[3] Petitioner's application for emergent relief was opened before the Commissioner of Education on September 29, 2003, transmitted to the OAL, and a hearing was conducted on October 15, 2003. By recommended Order dated November 12, 2003, the ALJ denied petitioner's Motion for Emergent Relief. (Initial Decision at 2) The recommended Order, however, does not appear to have been forwarded to the Commissioner for review, in accordance with *N.J.A.C.* 1:1-12.6(i).

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9526-03
AGENCY DKT. NO. 353-9/03

KATHERINE MUELLER,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK BERGEN COUNTY,
Respondent.

Christina C. Lilore, Esq., appearing for Petitioner

Jeffrey R. Merlino, Esq., appearing for Respondent
(Lindabury, McCormick & Estabrook, attorneys)

Record Closed: June 21, 2004 Decided: August 2, 2004

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner, a tenured teacher in the Waldwick school district, asserts the Board has assigned her to a position for which she is not properly certified or qualified, in addition to violating her seniority procedural rights.

The matter was filed as an application for emergent relief and a hearing was held; on November 12, 2003, I entered an order denying the application. The matter was then scheduled for plenary hearing which took place on May 21, 2004. The parties submitted written summations; therefore, the record closed on June 21, 2004.

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact, which are essentially undisputed, in this matter.

1. Petitioner, Katherine Mueller, is a tenured teacher with six years experience teaching elementary school in Respondent's, Waldwick Board of Education, school district.

2. Petitioner is certified for Elementary School Education, K-8.

3. Between 2001 to 2003, Petitioner was assigned to first and second grade teaching positions within the district.

4. In March, 2003, Petitioner's teaching certificate was revoked due to a conviction on criminal charges concerning "inappropriate student touching."

5. In June, 2003, Petitioner filed a civil action alleging, *inter alia,* she had suffered harassment, discrimination and defamation in connection with incidents leading to the filing of criminal charges against her.

6. On June 24, 2003, the conviction was reversed and Petitioner was restored to her position with full benefits attendant thereto from the date of the revocation of her certificate.

7. Respondent did restore Petitioner to her position as an elementary school teacher with complete restoration of all rights and salary from the date of revocation.

8. Respondent, through its Superintendent of Schools, Dr. John Szabo, informed Petitioner he would recommend to the board she be assigned to teach basic skills at the Waldwick Junior-Senior High School at the meeting to be held on August 11, 2003.

9. Petitioner's assignment as a Basic Skills Teacher was approved and Petitioner was so notified by letter dated August 12, 2003.

DISCUSSION AND CONCLUSIONS

The primary issue raised by this petition is whether Petitioner was properly assigned, within the constraints of her elementary school certification, to teach Basic Skills in the secondary schools. In addition, Petitioner asserts, in making the assignment, Respondent violated her "seniority procedural" rights.

In an Appellate Division case, the court held a board of education has certain managerial prerogatives, among which is the assignment and/or transfer of staff within the scope of certification and absent disciplinary reasons or bad faith. *Rice v. Union County Regional High School Board of Education,* 155 *N.J. Super.* 64 (App. Div. 1977).

Accordingly, the first issue to be determined is whether the transfer and reassignment was within the scope of certification; the second is whether either disciplinary reasons or bad faith were motivating factors.

In this case, Petitioner was transferred from her previous assignment to teach second grade in the elementary school to the junior senior high school, and assigned to teach "Basic Skills." The regulation defining the elementary education certificate provides, in pertinent part, in addition to serving as an elementary school teacher in

grades nursery through eight in all public schools, a holder of this certificate is authorized to teach the common branch subjects such as reading, writing, arithmetic, and spelling in the secondary school. *N.J.A.C.* 6:11-6.2(a)6.[1]

It is undisputed in this case, Petitioner is a holder of an elementary education certificate and, therefore, is authorized to teach certain common branch subjects such as reading, writing, arithmetic, and spelling in the secondary school. Although exhaustive research has failed to disclose a formal definition of the term "basic skills," the term has been used to refer to skills in reading and math on the second grade level. *Cf. S.A. a minor child by his parents, L.A. and A.A. v. Monroe Township Board of Education*, OAL Dkt. No. 331-00; *A.R. v. Dumont Board of Education,* OAL Dkt. No. EDS 3701-98. In S.A., the basic skills program is described as being specifically designed to provide remedial instruction to students in math and language areas. Albeit both aforementioned cases deal with basic skills in the elementary school, although no specific case on point could found, the concept is, apparently, the same in the secondary school, *i.e.,* the basic skills program in the secondary school is designed to provide remedial instruction to students in math and the language areas. I do so **FIND.**

The specific language of the regulation in effect at the time this matter arose provides:

> "Teachers with elementary endorsements are authorized to teach the common branch subjects *such as reading, writing, arithmetic, and spelling in the secondary school.*" *Id.* (Emphasis supplied).

Clearly, the language of the regulation permits a broader range of common branch subjects than those specified in the regulation to be taught in the secondary school by holders of an elementary endorsement. It is, however, equally clear that teachers of specific subjects in the secondary school must hold an endorsement to teach in that subject area.

[1] This regulation was in effect at the time during which this matter arose; it has been repealed effective January 20, 2004 and replaced with *N.J.A.C.* 6A: 9.9.2(b)2.

Petitioner testified at first she thought she would be teaching basic arithmetic; her perception of that changed when she went around to each of her students' teachers and collected textbooks and work books. She found that she had to teach herself each evening in preparation for the following day. Petitioner carried a huge assortment of textbooks and workbooks into the hearing and testified these were the materials from which her lesson plans were to be drawn. There is, however, no specific detail in the record regarding what she actually did teach. The record is devoid of any specific information, such as lesson plans, class rosters, tests which may have been given, handouts she may have used, about what she actually did teach. The direct link between the subjects she believed she would have to teach and those she actually taught was never made. Her testimony with regard to the number of hours of preparation required, without more, has little bearing on the issue of whether she was teaching subjects outside of those for which she had authorization. Furthermore, it is not clear from the record before me whether her reaction to the assignment colored her perception of the assignment. Petitioner was clearly overwhelmed by the assignment; however, because she was overwhelmed does not necessarily mean that she was assigned outside the scope of her certification.

Accordingly, I **FIND** Petitioner has failed to sustain the burden of proving she was assigned outside the scope of her certification.

There is nothing in the record to indicate the transfer and assignment were made for disciplinary reasons, and, although Petitioner alludes to bad faith, without more, the mere fact that the assignment took place after the reinstatement is not enough to rise to the level of bad faith. Accordingly, I further **FIND** Petitioner has failed to sustain the burden of proving bad faith.

Finally, with regard to the issue of whether Petitioner was entitled to a "Rice" letter, I note the board specifically adopted the language of the court order by which restoration to "public office as Elementary School Teacher with all the rights,

was ordered and so notified Petitioner by letter dated July 18, 2003. Her rights, therefore, were restored. It must also be noted that Respondent provided Petitioner notice of the intention to present her assignment at the board meeting of August 11, 2003. The notice is dated August 1. Accordingly, I **FIND** Petitioner had notice of the change in her assignment as well as of the meeting at which it was to be considered. Moreover, as noted above, the board enjoys the managerial prerogative of assigning and or transferring its personnel. Based on the findings above, I further **FIND** Respondent had no obligation to provide Petitioner with a "Rice" letter.

Accordingly, I **CONCLUDE** this petition should be dismissed with prejudice.

ORDER

I hereby **ORDER** this petition 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 (45) 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 (13) 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, 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 2, 2004
DATE

Maria M. LaFiandra
MARIA MANCINI LA FIANDRA, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

August 3, 2004
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG - 3 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Exhibits

P-1 Judgment of Acquittal and Order, June 24, 2003

P-2 Letter – Mr. Szabo to Ms. Mueller, July 18, 2003

P-3 Letter – Mr. Szabo to Ms. Mueller, August 1, 2003

P-4 Letter – Mr. Szabo to Ms. Mueller, August 12, 2003

P-5 Letter – Mr. Kelly to Whom It May Concern, September 2, 2003

P-6 Memo – Mr. Szabo to All Professional Staff re: Vacancy, August 27, 2003

P-7 Certificate – Issued August 1998

D-1 Schedule of Ms. Mueller

374-04

#374-04

OAL DKT. NO. EDU 6944-04
AGENCY DKT. NO. 303-9/04

M.M.L., ON BEHALF OF MINOR CHILD, C.L.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The record of this interim matter, including the recommended Order of the Administrative Law Judge (ALJ) and the audiotape of proceedings and at the Office of Administrative Law, has been reviewed.

Upon such review, the Commissioner fully concurs with the ALJ that petitioner herein has not met the standard for grant of emergent relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and N.J.A.C. 6A:3-1.6. In particular, the Commissioner concurs that petitioner has not demonstrated a likelihood of success on the merits of the appeal.

Accordingly, the Order of the ALJ denying the requested relief is adopted for the reasons expressed therein, and this matter shall proceed to hearing as directed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/16/04

Date of Mailing: 9/16/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
MOTION FOR
EMERGENT RELIEF
OAL DKT. NO. EDU 6944-04
AGENCY DKT. NO. 303-9/04

M.M.L. obo C.L.,
Petitioners,
v.
WALL TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Michael I. Inzelbuch, Esq., for petitioners

Douglas J. Kovats, Esq., for respondent (Kenney, Gross, Kovats, Campbell & Pruchnik, attorneys)

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

This case concerns charges that a student possessed beer in violation of the school board's policies and the dismissal of the student from extra-curricular activities.

Respondent Wall Township Board of Education (BOE) adopted policies to prevent and deal with students' possession, use and abuse of controlled dangerous substances (CDS) and alcohol. Consistent with these policies, etc., the BOE's "Anti-Substance Use and Student Conduct Agreement, Extracurricular Activity Involvement Form" states that a violation of its conditions by misconduct, including possession of alcohol, "will result" in "dismissal" from school activities for a 12-week period and "permanent dismissal" from the National Honor Society (NHS.) P-1B. Petitioners C.L., a senior in the BOE's high school, and M.M.L., his mother, signed the anti-abuse agreement. Shortly thereafter, the Wall Township police charged C.L. with operation of a motor vehicle while in possession of beer in the district and the BOE suspended C.L. from participation in school activities and permanently dismissed him from membership in the NHS. Petitioners contend, because C.L. was not in possession of the beer during a school activity and/or on school property, the BOE's actions exceed its own policies and violate relevant laws. The BOE submits that its policies are consistent with public policy and relevant law, points out that petitioners have not denied that C.L. was in possession of the beer, and submits that petitioners have failed to meet their burden for granting of the motion.

This order addresses petitioners' motion for emergent relief, i.e., an order vacating the dismissal of petitioner C.L. from extracurricular activities, so that he can play in this evening's football game. The BOE opposes the motion.

PROCEDURAL HISTORY

On or about September 7, 2004, petitioners submitted a verified petition, notice of motion for emergent relief, letter brief, and exhibits to the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on September 9, 2004 and scheduled for a hearing on September 10, 2004. N.J.S.A. 52:14B-2(b). On September 9, 2004, the BOE submitted its answer and papers in opposition to the motion. On September 10, 2004, parties submitted additional exhibits and the parties argued the motion in the OAL, Trenton.

FINDINGS OF FACT

During the 2002-03 school year a committee of the BOE's coaches, counselors and administrators performed a thorough review and critique of BOE policies, regulations, and procedures to prevent and deal with students' possession, use and abuse of CDS and alcohol and recommended the policies; a BOE Policy Committee reviewed and accepted the policies, etc.; the BOE's attorney reviewed the policies; during two BOE meetings the policies were publicly discussed; and the BOE then adopted them. P-L. See P-1C, P-1D, P-1E, R-1.

In 2001, consistent with the recommendation of the BOE's Policy Committee, the BOE adopted an "Anti-Substance Use and Student Conduct Agreement Extracurricular Activity Involvement Form," which stated that a violation of any of its conditions by misconduct including possession of alcohol, "will result" in "dismissal" from school activities for a 12-week period and "permanent dismissal" from the NHS. P-1B, R-1(2). And, on March 9, 2004, again with the recommendation of the BOE's Policy Committee, the BOE adopted a revised version of the "Anti-Substance Use" agreement. R-4, R-5, R-6, R-7, R-8. The revised "Anti-Substance Use" agreement stated:

> I, _____, wish to participate in extra-curricular club/activity/athletic team for the Wall Township School District. I voluntarily agree to abide by the following conditions of my participation in any and all activities, clubs and/or athletics for the above-referenced school year.
>
> 1. My participation is a privilege. As such the administration has the right to revoke this privilege and terminate my participation if I do not conduct myself in an acceptable manner.
> 2. I am a representative of the Wall Township Board of Education. I understand that standards for my behavior must be kept high. Because extra-curricular activities are a reflection of our school program, my fellow participants and I must always conduct ourselves in an appropriate manner.
> 3. I will challenge myself to be the best I can be through my participation on this activity. I therefore agree not to engage in any substance use *at all.* This includes my conduct on or off school property, during our outside of school hours.
> 4. I also understand and accept that 'substance abuse' includes, but is not limited to:
>
> 5. Use or possession of a controlled dangerous substance and/or 'Jimson Weed'

6. Use or possession of alcoholic beverages
7. Smoking and/or tobacco use
8. Unlawful possession, or use of any substance prohibited by law

9. I understand that my use of any of the above substances poses a threat to the safety of myself, other players and other students.
10. I also agree to conduct myself in an appropriate and acceptable manner according to the laws of this state, and any other rules and requirements of my school as a member of an interscholastic team and/or extracurricular and intramural activity.

I understand that a violation of any of these conditions will result in my dismissal from any activity for a 12-week period, commencing with the date of notification of charges being filed and/or the completion of an administrative investigation (permanent dismissal from NHS), and in my loss of any activity leadership position for the school year in question. This 12-week period may carry over from one school year to the next and is exclusive of the time frame from the last day of school to the first official NJSIAA fall practice date.

The 12-week period of dismissal may be reduced to a 6-week period of dismissal if the student and parents agree that the student participate in the following program: During the 6-week period of dismissal, the student must attend weekly counseling sessions and perform a minimum of 20 hours of approved and documented community service. Failure to complete the 6-week program and/or an unexcused absence from counseling and/or failure to perform the 20 hours of approved and documented community service shall result in reinstatement of the original 12-week suspension. Upon successful completion of the above criteria, the student will be permitted participation in activities during the second 6-week period, as long as biweekly counseling sessions are continued during that period. Second and subsequent violations will result in full 12-week dismissals as described in paragraph one above.

WE ACKNOWLEDGE THAT WE HAVE READ AND UNDERSTAND THIS DOCUMENT AND AGREE TO BE BOUND BY ITS TERMS.

[P-1B, emphasis added]

James F. Habel, Ed.D., served as principal of the BOE's high school from 1997 to 2000 and is the BOE's Superintendent of Schools. Dr. Habel is familiar with the BOE's policies, etc., the "Anti-Substance Use" agreement and the school system's practices in that regard and has found that the policies and agreement have acted as a significant deterrent to students' possession, use and abuse of CDS and alcohol. Dr. Habel has certified that the BOE's coaches and persons responsible for overseeing the school system's athletic and extra-curricular activities reviewed the "Anti-Substance Use" agreement with students and notified them of the

repercussions for violation of the relevant policies. Consequently, the BOE's students were well aware of the BOE's policies related to possession and use of CDS and alcohol and the repercussions for violation of the policies. R-1.

On June 8, 2004, petitioners C.L., born April 17, 1987 and a junior in the BOE's high school, and M.M.L., his mother, read, understood, agreed to and signed the "Anti-Substance Use" agreement. P-1B. (They had also signed a copy on August 12, 2003. P-F.)

The Wall Township police, by letter dated June 24, 2004, reported to the school system that they had charged C.L. with possession of alcohol while operating a motor vehicle. R-1(3). Petitioners have represented that C.L. was driving his parents' motor vehicle and that a twelve-pack of beer was in the back seat and not opened. P-1. See also N.J.S.A. 2A:4A-60(c)(3), N.J.A.C. 6:29-10.1, and the Uniform State Memorandum of Agreement Between Education and Law Enforcement Officials, providing for law enforcement officials' disclosure of information to school officials. P-1G.

In a letter to C.L.'s parents dated June 30, 2004, Gary P. Azzolini, Assistant Principal of the BOE's high school, wrote the following: The Wall Township Police Department had information showing that C.L. possessed alcohol. This constituted a violation of the petitioners' "Anti-Substance Use" agreement. Consequently, C.L. was ineligible from school extra-curricular activities for up to 12 weeks. If C.L. attended weekly counseling sessions and performed a minimum of 20 hours of community service, upon completion of the service and conditioned on continued participation in the counseling, the period of ineligibility could be reduced to six weeks. P-1A.

On June 30th and several times in July 2004, E.L., C.L.'s father (who is a local school administrator) and BOE administrators, including Superintendent Habel, Stephen Genco, Principal of the high school, and Mr. Azzolini discussed the above-described charges and their repercussions. E.L. requested that the BOE administrators consider changes in the NJSIAA season structure and that the BOE consider amending or rescinding its policy. E.L. requested a meeting with the BOE and the BOE administrators instructed him to submit his concerns in writing to Dr. Habel and that Dr. Habel would review them and submit them to the appropriate

BOE committee. The administrators researched prior practice and adjusted the effective date of C.L.'s ineligibility to August 1, 2004 and E.L. thanked the administrators for researching that history. P-J. Mr. Azzolini discussed the charges with C.L.'s parents and E.L. contended that the Wall Township police had no authority to report the violation to the school system; but, at no time did either parent deny that C.L. possessed the beer. R-3.

In a letter to Mr. Genco dated July 19, 2004, E.L. wrote that, during a telephone conversation, Mr. Genco had represented the following: Assuming that C.L. fulfilled his counseling and community service requirements, his exclusion from participation in extracurricular activities would be modified to take effect on August 1, 2004, instead of August 16, 2004. C.L.'s counseling component has been modified to require at least one meeting with school district personnel. C.L.'s community service requirement remained at 20 hours. Upon C.L.'s return to school in September 2004, the NHS advisor would notify him of his permanent removal from the NHS. E.L. also wrote that he requested a meeting with the BOE to address what he believed were fairness and equity issues relative to application of penalties. P-H.

In a letter to E.L. dated July 22, 2004, Mr. Genco wrote the following: E.L.'s July 19, 2004 letter was (merely) his "interpretation" of their conversations. There was no penalty revision. Rather, the BOE's policy allows first time offenders the option to lessen their suspensions by six weeks conditioned upon the student attending weekly counseling and performing a minimum of 20 hours of approved community service with documentation. Policy states that the time frame was to begin August 16, 2004, but since August 1st had been used as the official start date for the fall sports season, in the interest of consistency, he (Mr. Genco) recommended that C.L.'s suspension begin August 1, 2004. E.L. had requested use of a private counselor at the family's expense and he (Mr. Genco) agreed, conditioned on a meeting among C.L., his parent and the BOE's counselor and the parent's consent to the BOE's counselor to contact the private counselor. BOE policy provided for permanent dismissal from the NHS and, consistent with the school system's practice for all students, when the school year began, the NHS would notify C.L. of that dismissal. Finally, E.L. should first notify the BOE's superintendent of his concerns and, based on past practice, if he was not satisfied, he could then request a remedy from the appropriate BOE committee. P-I.

In a letter to the BOE dated July 25, 2004, E.L. wrote that C.L. had a highly commendable record in the BOE's school system with no detention, etc. He alluded to the nature of adolescence that affected C.L. and described C.L.'s possession of the beer as a "lapse of judgment" and wrote that he had grounded C.L. for one month and that C.L. had lost social use of the automobile for an extended period. He recounted his and M.M.L.'s past support of the school system and alluded to NJSIAA rules and their repercussions on the school system's sports schedule. He requested an opportunity to discuss penalties imposed on C.L. and noted that he and M.M.L. were available to discuss the matter with the BOE at its July 27, 2004 meeting. P-K.

In a letter to E.L. dated July 27, 2004, Dr. Habel wrote the following: E.L. had requested that he (Dr. Habel) approach the BOE and request that it rescind or amend its "Anti-Substance Use" agreement. However, during the 2002-03 school year a committee of the BOE's coaches, counselors and administrators had performed a thorough review and critique of the policies and recommended them; a BOE Policy Committee had reviewed and accepted the policies; the BOE's attorney had reviewed the policies; during two BOE meetings the policies were publicly discussed; and the BOE then adopted them. Consequently, he (Dr. Habel) did not support any change in the policies, etc. As he (Dr. Habel) had explained to E.L. previously, E.L. could appeal for a change in the BOE's policies and appeal from the discipline imposed on C.L. and, consistent with protocol, he should submit his concerns to the superintendent and, if not satisfied, request a remedy from the appropriate BOE committee. On July 27, 2004, he (Dr. Habel) had received E.L.'s letter requesting a meeting with the BOE's Policy Committee and, since that Committee was not scheduled to meet until late September, in the interest of expediting the matter, he (Dr. Habel) had placed the appeal on the Committee's July 27, 2004 agenda. P-L.

On July 27, 2004, the BOE's Policy Committee considered E.L.'s request. The Committee considered the BOE's concern about CDS use and underage drinking and the BOE's determination to address these issues. The Committee considered the school system's mission of instructing children that they have options and choices in difficult situations, and that their choices have consequences. The Committee decided to maintain the BOE's policies, etc. By letter dated July 29, 2004, Dr. Habel notified E.L. of the Committee's action and that he could call to discuss the matter. P-M.

By letter to Mr. Genco dated August 23, 2004, E.L. submitted C.L.'s Community Service Log, and represented that it showed that C.L. had satisfied that requirement. He also submitted records from Michael L. Nover, Ph.D., a psychologist. P-O.

By letter to Dr. Habel dated August 24, 2004, petitioners' attorney set forth the petitioners' contentions and claims. For example, he contended that the "Anti-Substance Use" agreement was required without notice to parents and that, despite its statements, was not truly voluntary. P-N.

Dr. Habel has certified that school system records show that C.L. has not participated in the 6 practices required by the NJSIAA regulations for eligibility in the high school's football game scheduled for this evening; but that if C.L. demonstrates compliance with requirements, including NJSIAA regulations, he could participate in the September 18, 2004 football game. R-1. However, students are notified that only students who satisfy high standards of scholarship, leadership, service and character are eligible for membership in the NHS and, in each instance of violation of the "Anti-Substance Use" agreement, the student is removed from the NHS. R-2.

By letter dated September 8, 2004, the BOE's advisor to the NHS "with the deepest regret" notified C.L.'s parents that, because of his violation of the BOE's substance abuse policy, he was dismissed from the NHS. P-A.

CONCLUSIONS OF LAW

New Jersey's Constitution states that the Legislature shall provide for a system of public schools for the instruction of all children in the State between the ages of 5 and 18 years and the Legislature has complied with this requirement authorizing local school boards to operate their respective school districts. N.J. Const. Art. VIII, § 4, ¶ 1; N.J.S.A. 18A:11-1.

Boards of education have broad authority in operation of their school systems. For example, a school board may make, amend and repeal rules for the government and management of its school system and "[p]erform all acts and do all things, consistent with law and the rules of

the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." N.J.S.A. 18A:11-1(d).

The Legislature has noted that students' possession, use and abuse of substances, including alcohol, can adversely affect the individual, family and society and has directed the Commissioner of Education to establish programs to assist public school systems in preventing and dealing with students' possession, etc., of such substances. N.J.S.A. 18A:40A-1 to –21.

Participation in a public school's extracurricular activities is a privilege conditioned upon good conduct. Membership in the NHS is intended only for those who are models of good conduct. Here the BOE provided to petitioners written notice of its policies and that a student's possession of alcohol would result in temporary dismissal from school activities and permanent dismissal from the NHS and petitioners gave written acknowledgment that they read, understood and agreed to that policy. Shortly thereafter, the police reported that, in the BOE's district, C.L. violated the BOE policy by his possession of alcohol in a motor vehicle. The petitioners have not denied that C.L. is guilty of the charge. The Monmouth County Prosecutor's Office has represented that, instead of formally processing the charge on the Superior Court's juvenile calendar, initially it will be processed by the Juvenile Conference Committee, which may result in dismissal of the charge or later formal prosecution. See R. 5:25-1. Petitioners do not allege that they have, e.g., demanded a trial to obtain dismissal of the charge, they only disingenuously point out that he has not been convicted of it. (Also, there is no allegation, e.g., that C.L. is a member of a protected class and that he is the victim of invidious discrimination.)

Public entities and public officials are presumed to have acted lawfully and in good faith and, consistent with this principle, it is well established that when a local board of education acts within its broad discretionary powers, its act will not be upset unless the claimant shows it to be patently arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 292-92 (App. Div. 1960) (citations omitted.)

Where public school officials have reasonable cause to believe that a student's activities, even though not during school hours and not on school premises present a danger to himself or others or to school property, they may impose discipline, subject to due process rights. R.R. v.

Bd. of Ed., Shore Reg. H.S., 109 N.J. Super. 337, 347 (Law Div. 1970). That due process is provided here.

As the Legislature has recognized, possession of alcohol, especially by minors operating motor vehicles constitutes a potential for great harm to the minor and to the innocent public.

School age children have a right to public school education. However, participation in a public school's extra-curricular activities is a privilege, not rights and, consistent with this principle, the Commissioner of Education has held that a student's ineligibility and resulting inability to participate in an extra-curricular activity, i.e., a prom does not result in irreparable harm. W.L.B. and K.B. obo W.M.B. et al. v. Bd. of Educ. of Woodbury, 96 N.J.A.R. 2d (EDU) 695 (1996), citing Hynes v. Bd. of Educ. of Southern Reg'l, EDU 2897-96, Comm'r, April 26, 1996.

To succeed in a motion for a temporary restraint and/or interlocutory injunction, the movant must show, among other things: (1) that the parties' rights and duties are settled and clear; (2) that material facts are not in dispute; (3) that, when the case is fully heard, he will probably prevail in his claim; and (4) that, if the relief is not granted, he will suffer immediate and irreparable harm, i.e., that money damages would not be adequate compensation, and that, if the relief is granted, the opposing party will not suffer undue harm. See, e.g., N.J.A.C. 1:1-12.6; R. 4:52-1; Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982).

The petitioners have not shown that when the case is fully heard they will probably prevail and they have not shown that they will suffer irreparable harm if the emergent relief is denied. On the other hand, rescinding the BOE's actions will adversely affect discipline and order in the school system and will send the wrong message to C.L. and others who may know of this case. Consequently, petitioners' motion must be denied.

ORDER

Consistent with the above, I **DENY** the motion for emergent relief.

The parties may serve discovery requests and a plenary hearing date will be set.

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 (45) 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 (45) 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 10, 2004

DATE

JOHN R. TASSINI, ALJ

mph

EXHIBITS

For Petitioners:

P-1 Verified Petition, September 7, 2004

P-1A Letter from BOE Assistant Principal to parent, June 30, 2004

P-1B Anti-Substance Use and Student Contract Agreement, Extra-Curricular Activity Involvement Form, signed by petitioners June 8, 2004

P-1C BOE Regulation: Substance Abuse Procedures

P-1D BOE Policy: Substance Abuse Procedures

P-1E Intramural Competition: Interscholastic Competition

P-1F Request for Public Records, July 2, 2004; Letter from BOE, July 12, 2004

P-1G A Uniform State Memorandum of Agreement Between Education and Law Enforcement Officials, July 23, 1999

P-1H Letter from E.L., July 19, 2004

P-1I Letter from BOE Principal, July 22, 2004

P-1J Letter from E.L., July 22, 2004

P-1K Letter from E.L., July 25, 2004

P-1L Letter from BOE Superintendent, July 27, 2004

P-1M Letter from BOE Superintendent, July 29, 2004

P-1N Letter from petitioners' attorney, August 24, 2004; Authorization, August 20, 2004; mail records, August 26, 2004

P-1O Letter from E.L., August 23, 2004; Community Service Log, July-August 2004; Consent for Disclosure of Patient Records, July 1, 2004

P-A Letter from BOE Advisor to NHS, September 8, 2004

P-B BOE Regulation Substance Abuse Procedures

P-C BOE High School Student Handbook, 2004-05, pages 1, 12 et seq.

P-D Anti-Substance Use and Student Contract Agreement, Extra-Curricular Activity Involvement Form (unsigned)

P-E BOE Policy Intramural Competition: Interscholastic Competition

P-F Anti-Substance Use and Student Contract Agreement, Extra-Curricular Activity Involvement Form, signed by petitioners August 12, 2003

P-G BOE Policy(?) Possession of or Consumption of Alcoholic Beverages by Minor, etc.

For Respondent:

R-1 Certification of Habel

R-1(1) Policy: School Discipline

R-1(2) Student Handbook, p. 33 NHS

R-1(3) Letter from Wall Township Police Department, June 24, 2004

R-1(4) same as P-1L

R-1(5) same as P-1M

R-2 Certification of Genco

R-2(1) same as P-1I

R-3 Certification of Azzolini

R-4 Agenda of BOE's Policy Committee Meeting, February 26, 2004

R-5 BOE Policy Committee Report, March 2, 2004

R-6 Anti-Substance Use and Student Contract Agreement, Extra-Curricular Activity Involvement Form (form), Revised June 2001

R-7 Anti-Substance Use and Student Contract Agreement, Extra-Curricular Activity Involvement Form (form), Proposed Revision 2004

R-8 Meeting Minutes BOE Regular Meeting March 9, 2004

R-9 Agenda, BOE Policy Committee meeting July 27, 2004

R-10 BOE Policy Committee Report, July 27, 2004

#375-04

375-04

OAL DKT. NO. EDU 6584-03
AGENCY DKT. NO. 279-8/03

CATHI SMITH,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN, CAMDEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner fully concurs with the Administrative Law Judge (ALJ) that, although the respondent Board of Education (Board) did not act in bad faith, its decision to reduce petitioner's position to 4/5, rather than maintain her at full-time status while reducing the position of a less senior teaching staff member to 3/5, was not made for educational reasons shown to have been sufficiently compelling to take precedence over petitioner's tenure rights.

Accordingly, for the reasons well expressed therein, the Initial Decision of the OAL, directing the Board to compensate petitioner for the period of her improper reduction as set forth by the ALJ, is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/17/04
Date of Mailing: 9/17/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06584-03S
AGENCY DKT. NO. 279-8/03

CATHI SMITH,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN, CAMDEN COUNTY,
Respondent.

Keith Waldman, Esq., for petitioner (Selikoff & Cohen, attorneys)
Joseph F. Betley, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: July 30, 2004 Decided: August 6, 2004

BEFORE **JEFF S. MASIN**, ALJ:

Petitioner Cathi Smith ("Smith") filed a petition with the Commissioner of Education, seeking to overturn a decision made by the respondent school board ("Board") that resulted in a reduction in her assigned work hours and a concomitant reduction in her pay and benefits. She claims that this change was made in derogation of her rights as a tenured employee of the Board. The Board denies the allegation.

The petition was filed with the Commissioner on August 3, 2003. An answer was filed on August 22, 2003. The Commissioner transferred the dispute to the Office of Administrative Law as a contested case on September 18, 2003. On November 13, 2003, Judge Richard F. Wells, then assigned to the matter, held a telephone conference that led to the issuance of an Interlocutory Order, dated November 14, 2003, that directed that the Board notice Jane Vernamonti Davidson (or any other such person) who might be impacted by a ruling that favored

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Ms. Smith, that she (they) had a right to seek intervention or participation in the matter as her (their) rights might be substantially, specifically and directly affected. Ms. Davidson was so notified and declined to move for intervention or participation, although she ultimately testified in the case. Subsequently, on April 19, 2004, Judge Wells issued another Interlocutory Order, directing that the Board provide "full and complete, good faith answers to petitioner's Supplemental Interrogatories" by April 23, 2004.

After the reassignment of the case to this judge, a hearing was conducted on May 10, 2004. The attorneys then filed briefs and closing arguments and the record closed on July 30, 2004.

Ms. Smith is a speech/language specialist who has been employed with the Board for twenty-seven years. This case arises because the Board determined in the Spring of 2003 that it would reduce the petitioner's work week from five to four days, while at the same time giving another then full-time speech/language specialist, Jane Vernamonti Davidson, four workdays a week. Thus each was working a 4/5's workweek. As stipulated by the parties, Ms. Smith has greater seniority than does Ms. Davidson. Ms. Smith contends that the Board was required by her senior status to have her work a full week, while Ms. Davidson would work a 3/5's workweek. As Ms. Smith has since been restored to a five day work week, this dispute is limited to a claim for compensation for lost work time and associated benefits for the time period between the start of the school year in September 2003 and January 1, 2004.

Ms. Smith received a formal notice of Reduction In Force ("RIF") in the spring of 2003. She testified that she was first advised of the coming RIF at a Child Study Team ("CST") meeting by her supervisor, who told all present that they would face a reduction in their work hours. The Board voted to approve the RIF on May 13, 2003. Ms. Smith testified that she was told by Howard "Bud" Paynter, then the Superintendent of Schools, now retired, that the reason for the RIF was budgetary. He also told her that as she and Ms. Davidson were speech/language specialists and as there was a large demand for such services within school systems, it was felt that they were more easily able to find another part-time position to make up for the lost work within the Berlin Township district. This discussion took place in the hallway outside of Paynter's office, in the presence of a "visibly upset" CST. He also said that the Board did not

want to reduce Ms. Davidson's benefits, although Smith testified that Ms. Davidson was already receiving 3/5's benefits. After the filing of her contested case, Ms. Smith reviewed an answer to a supplemental interrogatory proffered by her attorney during discovery, provided by the current Superintendent, Brian Betze. This answer related reasons relied upon by the Board for the reduction of her work week. These were "concerns of work load distribution, flexibility of scheduling, delivery of services and allowing a more efficient expansion of services for any new referrals for speech/language." According to Ms. Smith, Mr. Paynter did not relate any of these reasons to her at the time the RIF occurred.

Ms. Smith acknowledged that as a result of the dissolution of the Lower Camden County School District, 7th and 8th grade students who formerly attended school in the regional district returned to Berlin Township schools. In addition, a regular education pre-kindergarten was added.

Jane Vernamonti Davidson testified on behalf of Ms. Smith. She had been notified in February 2003 by Mr. Jackson, the supervisor of special services, that her work time was to be reduced as of September 1, 2003. She "quite vivid[ly]" recalled the hallway discussion as having occurred on February 28, as that was the day she was leaving school to get her divorce. The CST members were told that "it's going to get worse," due to less State funding and the condition of the economy.

Ms. Davidson explained that she performs all of her own scheduling for the speech/language services that she provides. Mr. Jackson is responsible for staffing decisions. She agreed with Ms. Smith regarding the reasons expressed to her for the RIF at the time that it occurred and the lack of any discussion of the reasons later asserted in the Board's answer to the supplemental interrogatory. Further, prior to the RIF no one asked her about the impact that any change in the schedules of the speech/language specialists might have upon educational issues relating to the services that they provide.

Howard Paynter, who served as superintendent for the District for seven years prior to his retirement, testified to the changes that had occurred within the District as a result of the dissolution of the Lower Camden Regional School District. Berlin Township now has two

schools. John F. Kennedy houses a pre-kindergarten and regular education students up through the fourth grade. Eisenhower houses students from fifth through the eighth grade. These schools are located approximately 200 yards apart. Prior to the dissolution, JFK housed kindergarten through third grade, with no preschool, and Eisenhower housed grades four through six. Mrs. Smith then served full time and was located within Kennedy; Ms. Davidson served at Eisenhower on a part-time basis. While he did not recall that there was any interaction between the two, there could have been if there was an overload, and he acknowledged on cross-examination that the specialists did their own scheduling and there could well have been some shuttling between the schools. When the State mandated the creation of a preschool program and the 7th and 8th graders returned to the district post-dissolution, the district built two additional rooms at JFK in 2001-2002. There was then a need to add speech/language personnel. Ms. Davidson became a full-time employee, as did all members of the CST, and Ms. Smith worked five days a week at JFK. However, in 2003-2004, State aid to the District was frozen and there were significant increases in tuition as a sending-receiving district to the Pine Hill High School District. Significant cuts in personnel were therefore necessitated. This resulted in a determination that reductions would be necessary in CST and Speech/Language personnel. He recommended that there be two four-day-a-week speech/language specialists. Other options were considered. Mr. Jackson was consulted as to his recommendations as to how best to utilize the speech/language specialists if they were kept on a five-day, three-day basis, as Ms. Smith had seniority over Ms. Davidson. The priority was providing necessary services to students. Jackson recommended that it was better that the personnel be utilized on a four-day, four-day basis. The rationale for this choice was to provide flexibility in scheduling, a circumstance that Paynter had himself considered and believed important. This was important, given the importance of speech and language services in the pre-school program and the need to be able to respond to the fluid nature of the Township community, which resulted in the frequent enrollment of new students and thus a need to be able to provide for better access for these new students to these services. The pre-school activities were occurring at the same time as were the K-4 classes.

The decision as to how to proceed with the RIF was discussed at administrative meetings and the recommendation was then sent to the Board. There was not a lot of discussion about the speech/language issue at the Board level. However, the seniority issue was noted and discussed

with Board counsel. The option of a full-time and a three-fifths employee was noted, but it was the view of both Jackson and Paynter that this would restrict scheduling.

Paynter recalled that he had met one-on-one with Smith in his office, probably on May 16th. He explained to her that the decision to go with a four-fifths arrangement was "not personal." It was being implemented for reasons of scheduling, in order to provide the best service to the students of the District. The reasons stated in the Supplemental Answer accurately reflect the rationale. He denied that he would have discussed this issue in a general discussion in the hallway, as asserted by Smith and Davidson. He acknowledged that for eleven years the District had utilized the full-time/three-fifth's arrangement. He could not say whether the flexibility consideration would be affected if the two specialists were both off on the same day. He also acknowledged that it might be better for some students requiring speech/language services to have said services on a five-day-a-week basis.

Asked whether he had examined the schedules of the two specialists before the recommendation was conveyed to the Board, Paynter indicated that he had not, but said that Jackson told him that he had requested Smith's schedule from her and had "eventually got it." Smith never complained about time constraints affecting her ability to provide services to students and to incoming students. But the concern that Paynter and Jackson had was that she could have difficulty with providing necessary services, including testing of new students and meeting with parents, if she were full time and Davidson worked three days a week. Having the two specialists each work four days a week was felt to allow more flexibility.

Jane Davidson, who holds a Masters degree in Speech Pathology and has twenty-eight years of experience in the field of speech and language, testified in rebuttal that even though the pre-school was technically under her docket, she and Mrs. Smith had always shared pre-school children. She worked at both JFK and Eisenhower every day. She does her own scheduling, consulting as necessary with Smith and Jackson. She and Smith utilized "very innovative" therapy that required two persons to work with a child and some of the students required five-day-a-week services. This year two students in pre-school receive such services every day. In order to fit this into a four-day-a-week work schedule, it is necessary to double-up one day, providing instruction twice on one day. As she is not at work all day Smith sees them one day.

Cathi Smith testified that she did have a one-on-one meeting with Paynter. He listened and apologized for the loss of work time, but educational reasons for the action were not presented. Indeed, in this meeting Paynter spoke of the likelihood of a further reduction to three days a week, and Jackson independently mentioned this to her as well. No discussion ever occurred regarding the division of labor. In fact, Smith tests three times as many children as does Davidson, as about 90% of the time older children are no longer in need of therapy. Reevaluations involve much less work than do initial evaluations. Overall, Smith has twice the number of students as does Davidson. She denied that flexibility was promoted by the change in work schedules that resulted from the RIF. The four/four schedule, while affording the same eight days of work a week, was harder to utilize appropriately than was the five/three schedule. Under the present schedule, no one is even present one day a week. Scheduling has been "twice as hard this year." There is no case management time available. Previously, there was "most of a day" available for this function, but now there is one half-period bi-monthly. Testing must be conducted within ninety days and the first meeting must occur within twenty days. The impact of the schedule change in light of these requirements was never discussed with her before the RIF was announced. Had they been, she and Davidson probably could have shown that the change to four/four was not going to work.

Mr. Paynter testified that he did not discuss the RIF decision in advance with either teacher and discussions about the matter were "abstract," focusing on budget and Full Time Equivalent ("FTE") considerations. No individuals were specifically discussed, but it was known that members of the CST would be subject to a RIF. After the decision to change the schedule was made, there was no discussion with the two teachers about the impact, but Mr. Jackson's suggestions were taken "seriously." The time frame did not allow for discussions with the teachers as to the change to be made.

Discussion

A Board of Education facing economic difficulties has substantial discretion in how to meet such exigencies. It can, if required, reduce the number of teaching staff members where, in its judgment, it is advisable to do so for reasons of economy. *N.J.S.A.* 18A:28-9. The

Commissioner of Education is loath to interfere with and to second-guess a local board that acts to meet an economic challenge. Yet, such discretion is by no means absolute. The Board cannot act out of bad faith, and when it deals with tenured teachers, respect for the tenure rights of such employees cannot be completely abandoned in the face of budgetary issues.

"While the Board is vested with extensive management power to employ, promote, transfer and dismiss, it must exercise that power within the constraints imposed by the tenure law. Regardless of scheduling inconveniences, the Board cannot simply replace tenured with non-tenured teachers. To hold otherwise would render meaningless the protections afforded by the tenure system. Given the unpleasant choice between eliminating a tenured teacher or reducing the work hours of a non tenured teachers, it is the latter who must suffer." *Prysianzny v. Sayreville Board of Education*, OAL DKT. EDU 2722-79 (Mar. 19, 1980), *aff'd* Commissioner of Education (May 5, 1980) (citations omitted).

Thus, at least to some degree, the Commissioner will intervene where a board has improperly acted to the detriment of tenure rights. As the Commissioner has held, where a board seeks to act in a manner that does not accommodate the tenure rights of a teacher, the board must demonstrate that it had compelling educational reasons for so acting. *Taxman v. Piscataway Township Board of Education*, 93 *N.J.A.R.* 2d (Dept. of Education) 189, 195. And an aspect of such rights is that a tenured teacher with seniority over another tenured teacher may be entitled to preferences that are similar to those that the tenured teacher would enjoy *vis a vis* a non-tenured teacher.

In this case, prior to the RIF, the district provided speech and language services through Ms. Smith and Ms. Davidson for a total of ten working days a week. After the RIF that number was reduced to eight. The district chose to give each of the teachers four days work, rather than give the more senior Smith a full five days a week and give the remaining three days to Davidson. Thus, as the board acted to abolish all of the existing full-time speech/language positions, it treated Smith and Davidson equally, as each was reduced to teaching 4/5's schedules. The question posed is whether in making this choice the district acted within its discretionary rights or whether it was instead obliged to favor the more senior tenured employee over the less senior tenured employee. In order to determine this issue, it is necessary to review

an extended history of case law that attempts to define the obligations of boards and the role of the Commissioner in cases of this sort.

The Board puts substantial reliance in the series of decisions issued in *Klinger v. Cranbury Township Board of Education*, 190 *N.J. Super.* 354 (App. Div. 1982). The Appellate Division's decision emphasized the board's discretion and cited the comment of the State Board in its decision in the case that that discretionary action "may not be disturbed by the Commissioner or the Courts" in the absence of bad faith or an abuse of discretion. The court noted that as the board had terminated its full-time physical education program and replaced it with a 3 ½ day program taught by two 7/10-time teachers and the petitioner had received no better treatment than anyone without tenure, Klinger "had no legitimate compliant." In its decision the State Board overturned the Commissioner's holding, ruling that the board's action was well within its discretion. The State Board noted that "We also deem it appropriate to repeat here the oft-quoted principle that 'The public schools were not created, nor are they supported, for the benefit of the teachers therein [but instead for]. . . for the benefit of the pupils and the resulting benefit to their parents and the community at large.' *Smith v. Board of Education of Paramus*, 1968 *S.L.D.* 62, 67."

While *Klinger* might be considered to govern the issues in this case, its treatment since its announcement in 1982 must be considered before that conclusion is reached. Indeed, the wording of the State Board's decision is interesting, for in its reference to the protected nature of the Board's discretionary action, it noted, "The tenure and seniority rights of an incumbent cannot prevail against the authority of the board when exercised in good faith and *with some rational basis*." (Italics added). *Klinger*, 1982 *S.L.D.* 1520, 1521 (State Board). Yet, by the time the Commissioner issued a decision in *Taxman v. Piscataway Township Board of Education*, 93 *N.J.A.R.* 2d (Dept. of Education) 189, the Commissioner noted, in a case where the petitioner had been subject to a reduction in force and had been offered a part-time position and sought to force the board to aggregate part-time positions given to non tenured teachers in order to provide her with full time employment, the "Board knew or should have known that if it was shown the petitioner was qualified to teach the positions, she would be entitled to them *unless the Board could demonstrate a compelling educational reason* to defeat her tenure rights." *Id.* at 195 (Italics added). The Commissioner added, "tenured teacher has employment rights

which must be given the utmost deference except where it can be demonstrated that the board would have to stand on its head to honor those rights." *Id.* Thus, in the clash between the policy of deferring to the broad discretion granted to a board to deal with changes necessitated by economic or educational considerations and the policy of upholding the statutory tenure rights of teachers, the Commissioner's 1993 decision in *Taxman* seems to have clearly come down in favor of very strong protection of tenure rights, even as against the board's discretion, unless the board acted not only in good faith, but also because of "compelling" educational reasons, a far cry from the State Board's requirement that the board act "with some rational basis."

Over the years since *Klinger* was decided, there has been a tendency to limit that case to its facts and to therefore downgrade its significance. Thus, in *Bartz v. Green Brook Board of Education,* 1986 *S.L.D.* 1486, *aff'd* 87 *S.L.D.* 2520, the Administrative Law Judge distinguished *Klinger* because in that case the Cranbury Board of Education had for years utilized dual instruction in its physical education program and had physical education classes that were taught at the same time. In *Bartz,* the board abolished full time home economics positions and created two part time positions. Bartz objected to the reduction of her full time position and the fact that a teacher with less seniority in the subject matter in which Bartz was certified had been given a part of the duties that Bartz would have if she had received a full-time position. The judge concluded that Bartz was entitled to a full-time position. "Where it would cause no disruption of the educational process, a board must assign the more senior of two teachers to the equivalent of a full-time position in a category when full-time positions in the category are abolished."

In *Miles v. Watchung Board of Education,* 84 *S.L.D.* 1058, a tenured, full-time vocal music teacher complained when the board abolished the full-time position and created a 4/5 position. A less senior, non-tenured teacher was also full-time and also received a 4/5 position. The superintendent testified that changes in pupil populations and staff needs necessitated the action. He had recommended that the board cut the vocal music staff to one person, to be shared between the district's two schools. He pointed to some difficulty in scheduling that would occur if a full-time position were restored, but he noted that the school principals agreed that there would be "no great difficulty with the arrangement." The judge, determining that the testimony about scheduling difficulties was "unconvincing," held that the "board was obligated to assign a full-time schedule of vocal music to a most senior teacher, particularly over a non tenured

teacher," citing *Prysianzny, supra.* Thus, while the board had posited educationally based reasons concerning the scheduling of classes as a reason for rejecting the petitioner's request, the decision went beyond mere acceptance of the purported reasons and concluded that they had not been sufficiently proven to justify denying the petitioner's tenure rights.

In *Laufenberg v. Ramapo Indian Hills Regional Board of Education*, 91 *S.L.D.* 2447, the petitioner was a full-time English teacher who was reduced in a RIF to a part-time position as a supplemental teacher. Several non-tenured or less senior teachers were employed in the same role. The petitioner sought to compel the board to give him a full-time position. The judge determined that the "Board must establish it made a good faith attempt to acknowledge the tenure rights of the affected employee." If the Board did not have a "*sound educational policy . . .* retaining full-time teacher and reducing or eliminating the positions of non-tenured teachers allows the board to achieve its goals without impairing the purposes underlying the tenure provisions of the school laws," citing *Miller v. Board of Education of Township of Mendham*, OAL DKT. NO.EDU 5029-81 (April 2, 1982), Commissioner of Education (May 17, 1982), *rev'd*, State Board of Education (February 3, 1983). (Italics added).

In *Polo v. Bergen County Vocational Schools Board of Education*, 92 *N.J.A.R.* 2d (Dept. of Education) 230, *aff'd and modified,* State Bd. of Ed., 92 *N.J.A.R.* 2d (Dept. of Education) 459, the petitioner's position was reduced to a 3/7 position. Another teacher with the same seniority received a full-time position and a third teacher with less seniority also was given a 3/7 position. The administrative law judge considered the question of whether the board had to rearrange the schedule so as to provide Polo with a 6/7 position, thus leaving Boles, the less senior teacher, with no position. The judge, noting that the board's good faith had been stipulated, found that the board had presented "valid educationally-based reasons" for scheduling two part-time teachers at different locations in the afternoon rather than retaining a second full-time position. The board had acted in the face of declining enrollment and concerns about the appropriateness of the curriculum, which had resulted in a decision to reduce its carpentry offerings. He concluded that the "legitimate needs of the district" supported the board's action. Distinguishing *Bartz, supra.*, and *Miles, supra.*, he affirmed the board's action, noting, "Ordinarily, the Commissioner will not try to second-guess such an administrative judgment call unless the supposed educational advantages are found to be sham or nonexistent."

In *Woodbine Education Association and Paula Harris v. Board of Education of the Borough of Woodbine*, EDU 6686-98, Initial Decision, (July 10, 2000), <http://lawlibrary.rutgers.edu/oal/html/initial/edu6686-98_1.html>, *adopted*, Comm'r. (August 18, 2000), <http://lawlibrary.rutgers.edu/oal/final/edu6686-98.pdf>, the Commissioner summed up the result of the case law development from the time of *Klinger*. "The Commissioner also wishes to stress that where there does exist an obligation to aggregate assignments, such obligation is a general principle of law, *not* an absolute one." *Id.* at 53. Quoting from the Commissioner's statement in *Taxman,* he emphasized, "compelling educational reason" could "defeat . . . tenure rights." *Ibid.*

Thus, the question here is whether this board, which, by its decision to reduce both of its speech/language teachers from full time to 4/5s positions, did not give to the more senior teacher the benefit of a full-time position while reducing the less senior Ms. Davidson to a 3/5 position, had "compelling educational reasons" to support its action. Based upon the evidence presented, I am constrained to **CONCLUDE** that it did not. It must be noted that the testimony in support of the decision was presented by the former superintendent, and Mr. Jackson, the supervisor of special services, did not testify. Mr. Jackson appears to have played a significant role in determining the course to be recommended to the board. Yet, he did not come forth to offer his analysis. Former Superintendent Paynter's testimony was at best vague, speculative and certainly did not present a "compelling" case for the need to have two 4/5 teachers, as opposed to a full-time and a 3/5 teacher. The concerns expressed about the need for flexibility to address the prospect of fluid enrollment and the need to adjust to the change in the district wrought by the breakup of the regional district were stated in the most general terms, without much evidence to support any conclusion that the issues had been studied or reviewed in any significant manner. There is little in the record to suggest that these considerations were of such "compelling" concern as to allow the board to dismiss the tenure rights of the more senior employee. Giving the board the benefit of the reasons identified in its answer to interrogatories, I still **FIND** that the proofs presented at hearing fall far short of reaching the significant level of concern demanded by *Taxman*. As the Commissioner noted in *Harris*, there is no one, hard and fast, mandatory rule regarding the need to aggregate, but as he re-emphasized therein in quoting *Taxman*, the deference due to a board in respect to its discretionary determination as to how to carry out a RIF

is far from the nearly "hands off" policy that often applies in respect to the Commissioner's review of other discretionary actions of boards of education. The need to protect the legislative mandates protecting tenured teachers requires that the Commissioner and State Board give a heightened review to discretionary actions that impact tenured personnel. Here, I **CONCLUDE** that the petitioner has demonstrated that the board failed to do so, and that in the context of this case, the board acted arbitrarily.

ORDER

I **CONCLUDE** that, while the board acted in good faith, it's action improperly interfered with Ms. Smith's protected rights. As such, it is hereby **ORDERED** that she shall be made whole for any salary or benefits of which she was deprived by the board's action for the period from the start of the 2003-2004 school term until she was restored to full-time status on January 1, 2004. To the extent that the law requires any mitigation of damages, the parties shall adjust the amount of money and benefits accordingly.

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 (45) 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 (13) 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, 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 6, 2004
DATE

JEFF S. MASIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

August 9, 2004
DATE

Mailed to Parties:

AUG 12 2004
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

P-1 Certification for Cathi L. Lafferty as Speech Correctionist

P-2 Standard Certification for Cathi L. Lafferty as Speech Language Specialist

FOR THE RESPONDENT:

R-1 Berlin Township's answers to Supplemental Interrogatory 1 and certification by Superintendent of Schools, Brian J. Betze

3/7-04

#377-04

OAL DKT. NO. EDU 11457-2003
AGENCY DKT. NO. 399-11/03

IN THE MATTER OF THE TENURE HEARING :
OF GRACE GIGLIO, STATE-OPERATED :
SCHOOL DISTRICT OF THE CITY OF :
PATERSON, PASSAIC COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Although the District initially filed exceptions and respondent filed a reply thereto, by letter dated September 10, 2004, the District withdrew its exceptions. Consequently, neither submission was considered by the Commissioner when rendering this decision.

Upon careful and independent review of the record, the Commissioner agrees with the Administrative Law Judge (ALJ) that the within credibility determinations are critical to the ultimate findings in this matter. (Initial Decision at 81) The Commissioner also recognizes that the ALJ's credibility determinations are entitled to deference. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility. *In the Matter of Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div.) *certif. denied*, 121 *N.J.* 615 (1989)." *In the Matter of the Tenure Hearing of Frank Roberts*, 96 *N.J.A.R.* 2d (EDU) 549, 550. The Appellate Division has affirmed this principle, underscoring that "[u]nder existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor based judgments." *Whasun Lee v. Board of Education of the Township of Holmdel*, Docket No. A-5978-98T2, decided by the New Jersey Superior Court, Appellate Division, August 7, 2000, slip op. at 14. Indeed, the Commissioner

> *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. (emphasis added) *N.J.S.A.* 52:14B-10(c).

Here, upon review of the record, which included transcripts of the 27 hearing days at the OAL, all exhibits, and post-hearing briefs, the Commissioner acknowledges the ALJ's meticulous examination of the evidence; he is satisfied that his recitation of testimony is both accurate and thorough, and that he carefully measured conflicts, inconsistencies and potential biases in deciding which testimony to credit. *See In the Matter of the Tenure Hearing of Frank Roberts, School District of the City of Trenton, Mercer County*, 94 *N.J.A.R.*2d (EDU) 284, 294, *aff'd* 95 *N.J.A.R.*2d (EDU) 349, *aff'd* App. Div. 96 *N.J.A.R.*2d (EDU) 549. Each of the ALJ's factual findings and legal conclusions is consistent with those credibility determinations, and is supported by sufficient, competent and credible evidence in the record. Therefore, such findings and conclusions must not be disturbed.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.[1] The District is ordered to immediately reinstate respondent to her former position as principal and compensate her for lost salary, emoluments and increments. To the extent that the record in this matter suggests a need for further investigation and remedial action, the Commissioner directs that the State Superintendent undertake such steps as may be warranted.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/17/04

Date of Mailing: 9/17/04

[1] In so doing, the Commissioner finds it unnecessary to reach to the ALJ's dicta at page 143 of the Initial Decision concerning the technical violations of test security procedures, and implications for same, that were *not* a part of the within tenure charges.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11457-2003
AGENCY DKT. NO. 399-11/03

IN THE MATTER OF THE TENURE HEARING OF GRACE GIGLIO, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

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Marc H. Zitomer, Esq., (Schwartz, Simon, Edelstein Celso & Kessler, attorneys), **Gregory G. Johnson**, Esq., and **Nestor Gusman, Jr.,** Esq., for petitioner,

Maureen S. Binetti and **Kirsten S. Branigan**, Esq., for respondent (Wilentz Goldman & Spitzer, attorneys)

Record Closed: June 28, 2004 Decided: August 9, 2004

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE

This matter involves tenure charges of conduct unbecoming an employee certified by the State-operated Public School District of Paterson (the District or petitioner) against, the petitioner, Grace Giglio (Giglio or respondent) a tenured principal at School No. 16 (School 16), pursuant to the Tenured Employees Hearing Law, *N.J.S.A.* 18A:6-10, *et seq.*

PROCEDURAL HISTORY

On or about October 3, 2003, following an investigation by the Passaic County Superintendent of Schools and the Office of Compliance Investigations of the New Jersey Department of Education, the Assistant Superintendent of Schools for the District filed tenure charges against Giglio (*J-1*). The charges of conduct unbecoming an employee and gross misconduct are as follows:

CHARGE ONE: During the 2002-2003 school year, and in particular May 2003, the respondent engaged in a pattern of unprofessional conduct resulting in test security breaches at School No. 16 on the New Jersey Assessment of Skills and Knowledge (NJ ASK) state-wide tests. On or about May 14, 2003, the respondent held a meeting with staff about the NJ ASK test scheduled on May 20-23. At this meeting, the respondent directed certain staff to identify students perceived as "disruptive" or "easily frustrated" for the purposes of labeling them as "504" students entitled to special accommodations. The respondent knew that no students assigned to School No. 16 were in fact designated as "504" students.

CHARGE TWO: During the 2002-2003 school year, and in particular May 2003, the respondent engaged in a pattern of unprofessional conduct resulting in test security breaches on the NJ ASK state-wide tests. On or about May 20-23, 2003, during the administration of the NJ ASK test to 3rd and 4th grade students, the respondent directed that certain 4th grade students, approximate[ly] 10, be treated like "504" students and removed from their regular classes, and assigned to Carla Propersi'[s] classroom for testing. The respondent knew that no students assigned to School No.16 were in fact "504" entitled to special accommodations.

CHARGE THREE: During the 2002-2003 school year in May 2003, the respondent committed test security breaches on the NJ ASK tests by granting students extra time on the test. On or about May 23, 2003, during the administration of the NJ

ASK test to 4th grade students, the respondent directed Test Coordinator Felix Gil and teacher Arlene Weil to allow the ten 4th grade students:

1) Extra time to complete the math portion of the test contrary to testing procedures; and
2) To "review" and "correct" their responses on the "Language Arts" section of the test previously completed on May 21st. Students were given approximately 15 minutes extra time on the test.

The respondent knew that no students assigned to School No. 16 were in fact "504" entitled to special accommodations. The respondent's conduct constitutes gross misconduct.

CHARGE FOUR: During the 2002-2003 school year, and in particular May 2003, the respondent engaged in a pattern of unprofessional conduct resulting in test security breaches on the NJ ASK state-wide tests. On or about May 23, 2003, the last day of the NJ ASK 4th grade test, the respondent gave teacher Arlene Weil a list of students who "had not written enough on their essays." Ms. Weil was directed to allow [an] additional 4th grade students to "re-review" and "correct" their responses on the "Language Arts" section of the test completed on May 21st. The respondent's conduct constitutes gross misconduct.

CHARGE FIVE: The respondent engaged in a pattern of unprofessional conduct involving student K.O.[1] On May 20, 2003, the NJ ASK test was given to 3rd grade students. The respondent directed Teacher Melissa Moscato to exclude student K.O. from taking the NJ ASK test by marking her absent and removing her from class before giving the test. Teacher Moscato complied with the respondent's directive and removed K.O. from class [W]hereupon K.O. was sent to the principal's office, school nurse and to the security officer Graciela Todaro.

CHARGE SIX: In reference to Charge Five, the respondent directed classroom teacher Melissa Moscato to change her attendance records by marking

[1] When referring to any student, initials rather than a full name are used for the purpose of privacy.

student K.O. late to school in order to cover-up K.O.'s exclusion from the test. The respondent also directed Teacher Moscato not to mention K.O. when questioned by investigators. Teacher Moscato complied with respondent's directives. Also, the respondent then directed school secretary Lily Ruiz to change K.O.'s recorded absences for May 20-22, 2003 to tardies of 9:10 a.m., 9:20 a.m. and 9:40 a.m., respectively. Student K.O. was neither late nor absent on the test dates. The respondent's conduct constitutes gross misconduct.

CHARGE SEVEN: The respondent engaged in a pattern of unprofessional conduct involving the investigation conducted by the Department of Education. On about May/June 2003, the respondent encouraged staff members to give false and misleading information to investigators. Also, the respondent interfered with the investigation by questioning staff members about statements given to investigators. The respondent attempted to intimidate staff and threatened staff at School 16. The respondent's conduct constitutes gross misconduct.

The charges were accompanied by a supporting Statement of Evidence Under Oath and timely served upon Giglio under letter of October 3, 2003 from the Co-General Counsel to the Paterson Public Schools (*J-1*). In that letter Giglio was advised that pursuant to *N.J.S.A.* 18A:6-11 and implementing regulations of the State Board of Education, *N.J.A.C.* 6:24-5.1 *et seq.*, she had the right to file within 15 days a sworn Statement in Opposition to the Charges, together with a Statement of Evidence under oath. Giglio thereafter filed a written statement of position under oath, dated October19, 2004.

On October 31, 2003 Dr. Edwin Duroy, State District Superintendent for the Paterson Public School District executed a Certification of Determination of Tenure Charges and Suspension of Employee Without Pay adopted by the Paterson School District wherein, pursuant to *N.J.S.A.* 18A:7A-35, the State District Superintendent found that probable cause existed to justify Certification of Charges against Giglio for conduct consisting of seven separate instances of conduct unbecoming which, if true,

are sufficient to warrant the dismissal of Giglio as a tenured principle, demotion or a reduction in her salary.

By letter dated November 3, 2003, the District filed the tenure charges, statement of evidence, certification of determination of tenure charges and resolution directing suspension without pay and proof of service of charges and resolution with the Commissioner of the Department of Education. Respondent was suspended without pay for 120 days pursuant to law. On or about November 20, 2003, an answer was filed on behalf of respondent. Thereafter, the Director of the Bureau of Controversies and Appeals of the New Jersey Department of Education, on December 5, 2003, 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 for determination as a contested case.

The parties conducted and completed discovery in accordance with *N.J.A.C.* 1:6B-10.1. Pursuant to *N.J.A.C.* 1:6B-10.1(d), I granted respondent's motion to take certain limited depositions. In accordance with *N.J.A.C.* 1:6B-9.1, the hearing commenced on March 10, 2004 within 30 days of the completion of discovery and continued through May 12, 2004. On May 25, 2004, Gregory Johnson, Esq., withdrew as attorney for petitioner and was superseded by Marc H. Zitomer, Esq., of Schwartz Simon Edelstein Celso & Kessler, LLP. Since the parties ordered transcripts of the proceedings, the time in which to file post-hearing briefs was extended to June 28, 2004 in accordance with *N.J.A.C.* 1:6B-14.2. Briefs were received from each party on June 28, 2004, at which time the record closed.

PRELIMINARY FINDINGS OF UNCONTESTED FACTS

Since the following is uncontested, I **FIND** it to constitute **FACTS** of this case.

1. School 16 is a two-floor building in excess of 100 years old, which accommodates approximately 300 students, 90 percent of whom are Hispanic, in grades one through four, under woefully overcrowded conditions. In addition to overcrowding in

most classrooms, certain student activities are conducted in the hallways, and certain staff members are relegated to desks under stairwells because of a lack of dedicated office space. The library consists of but several shelves in School 16's main office.

2. The following staff members, relevant to these proceedings, held positions at School 16 in May of 2003: Principal Grace Giglio, whose office was located on the first floor; Security Guard Graciela Todaro whose desk was located inside the front door on the first floor; Custodian Edwardo Gonzalez; Secretary Lily Ruiz located in the main office; Technology Coordinator Arleen Weil whose desk was in the teachers' "lounge" on the second floor. Test Coordinator Felix Gil whose desk was under the front stairs on the first floor; Facilitator Alice Filippelli located in the main office; Art Teacher Patricia Fusaro; Physical Education Teacher Eric Potts; Media Specialist/Librarian Patricia Harvey who was located in the main office; Guidance Counselor Jane Buccolo located under the back stairs; Resource (Special Education) Teacher Denise McPherson located in the main office; Accelerated Program Teacher (APT) Michael Paciga; Grade 1 teacher Linda LeProtto located on the first floor; Grade 1 Tutor Denise Generals; Grade 2 Teacher Carla Propersi located on the second floor; Grade 3 Teacher Beatrice Loftus located on the second floor; Grade 3 Teacher Melissa Moscato located on the second floor; Grade 3 Teacher Emma Ordonez; Bilingual Grade 3 Teacher Raul Quispe located on the second floor; Grade 4 Teacher Elmas Aliu located on the second floor; Grade 4 Teacher Geraldine Aquart located on the second floor; Bilingual Teacher Grade 4 Ana Martinez (Santos) located on the second floor, and Registered Nurse Joyce Hennessey located in the nurse's office on the first floor.

3. Principal Giglio has spent her entire teaching career, commencing in 1979, in the Paterson School District. She taught a self-contained 8th grade class at School No. 10 for 14 years most of which were under the supervision of School No. 10 Principal George Hirschberg. In 1993 Giglio was promoted to test coordinator at School No. 10 where her duties included preparing students and staff for standardized tests by teaching test-taking strategies, training staff and directing the administration of the

tests and overseeing their security. She is a New Jersey registered holistic scorer, which means she is qualified to score writing samples on standardized tests. During her tenure as test coordinator at School No. 10 no one ever claimed any impropriety regarding her conduct. In 1998 the District promoted Giglio to Vice Principal at school No. 10 upon the recommendation of Hirschberg. As Vice Principal she supervised the daily operations of grades 5 through 8 and acted as disciplinarian. In August 2000 the District promoted Giglio to Principal of School 16. Prior to the filing of the instant charges, Giglio's record as a teacher, test coordinator, vice principal and principal was unblemished.

4. In the year prior to Giglio's arrival at School 16, its principal had died and four or five interim principals had administered the school for the remainder of the year. Morale was low, staff infighting had been occurring, staff development and training was non-existent and student test scores were low. Weil, who had been a test coordinator trained by Giglio at School No. 10, accompanied Giglio to School 16 where, initially, she became both its technology coordinator and test coordinator. When Gil also joined Giglio from School No. 10, he became School 16's test coordinator, and Weil's sole responsibility became that of technology coordinator.

5. Since her arrival at School 16, Giglio instituted many initiatives which included a revision of the faculty handbook and the implementation of extended day programs providing computer classes; homework assistance; Boy and Girl Scouts; classes to expand skills in math and language arts; library supplements to encourage reading, writing and group discussion with book authors; and Elementary School Proficiency Assessment test (ESPA) preparation using material from several publications, and a daily pre school program for homework assistance. Additional initiatives included the AWS weathernet where math, science, geography and technology are combined for charting yearly weather data; a poetry anthologies/published authors project; "wee deliver" which provides a vehicle for students to use writing skills applied to real life experiences; "Feeling Good Mileage Club" to promote fitness while learning to set and achieve goals; "I Love to Read Bookworm Club;" a math and jazz program which fosters greater appreciation and understanding of the art of jazz while

addressing the math principles involved in music; curriculum mapping to allow quick access to all courses being taught thereby enabling teachers to identify gaps and overlap in classes; a 9/11 commemoration; presidential physical fitness awards; fire safety contest; "Say No To Drugs" program; School 16 bell band; African-American Month celebration; sponsorship of a midget league baseball team; and an intra-school quiz bowl.

6. With regard to School 16's standardized testing results preceding Giglio's arrival, the pass rate on the Elementary School Proficiency Assessment (ESPA) test for 4th graders in 2000 was 32.6 percent for language arts; 23.2 percent for math and 53.5 for science. The pass rate in language arts rose to 87.9 percent in 2001 and 100 percent in 2002. The pass rate in math rose to 91.2 percent in 2001 and 97.6 percent in 2002. The pass rate in science rose to 93.8 percent in 2001, and subsequently that component was eliminated from ESPA. Although a 3rd grade test was not administered in 2000, the pass rates for language arts in 2001 and 2002 were 68.7 and 67.9 percent respectively and for math were 76.4 and 85.7 percent respectively. Part of the basis for the marked increase in scores was a recentering of the grading.

7. In 2003 School 16 was nominated as a Title I Most Distinguished School. The Award is based on most consistent improvement of test scores and the evaluation of a site team from the Department of Education. Once nominated, Giglio had Harvey prepare answers to five required questions using the application previously submitted for the Star School Award. School 16 was one of only two in New Jersey to win the Title I Award, which was presented in a ceremony in Cherry Hill on May 20, 2003 (*R-94*).

8. On May 20 and 21, 2003 the School's 3rd and 4th graders participated in the language arts portion of a new statewide standardized test known as New Jersey Assessment of Skills and Knowledge (NJ ASK). On May 22 the 3rd and 4th graders participated in the math portion of NJ ASK, and on May 23 only the 4th graders participated in the math section. The test participants came from Aliu and Aquart's

4th grade classes, Moscato and Loftus' 3rd grade classes, and Quispe and Martinez' bilingual 3rd and 4th grade classes. NJ ASK was produced under a 32 million dollar contract between the State of New Jersey and Educational Testing Service (ETS) as a replacement for ESPA.

9. Makeup dates for the NJ ASK, which would have been during the week of May 26, were placed on hold by the State Department of Education because of the commencement of an investigation on May 27, 2003 into alleged testing irregularities at School 16 on the NJ ASK (*R-66, R-67*).

10. The NJ ASK was developed pursuant to the federal No Child Left Behind Act of 2001 as well as State law to make assessments linked to the core curriculum content standards. It was to establish levels of proficiency and benchmark skills that children should be achieving. Because it was new, the 2003 NJ ASK examination was treated as a field test where schools and districts would not be accountable for the results. Additionally, if a student was not in the District for a full school year, he would nevertheless take the test, but his scores would not be included in the school's overall test performance. The Consolidated State Application Accountability Workbook in effect as of May 7, 2003 provides as follows: "New Jersey will not include in the accountability system the results of any student enrolled less than one full academic year in a school for school accountability, or in a district for district accountability (*R-42*).

11. Prior to the administration of standardized testing, the District submits information to the testing contractor, in this case ETS, which produces pre-identification labels for the students, which include demographic information. The labels also code a special education or 504 [see below] designation. They are to be affixed to each test booklet. Because the process of affixing the labels is so time consuming, the State permitted school test coordinators to affix the labels on May 19, the day before testing commenced. However, they were not permitted to affix the labels before May 19. School 16 was provided with labels (*P-66*). Traditionally, the preprinted labels arrive with errors on certain ones. It is the responsibility of the school's test

coordinator to check the labels for accuracy and change any inaccuracies by gridding the correct information on the test booklet. For instance, an improper 504 designation would be corrected on the gridding. Certain blank labels with unique bar codes, which were not preprinted, were provided for use for students who were new to the District subsequent to the submission of data to ETS. The packet of labels had eight such handwritten labels added by test coordinator Gil including one for student K.O. who had been enrolled at School 16 just a few weeks before the testing commenced. The schools are supposed to receive their test materials two weeks prior to the commencement of testing. However, because of massive delivery problems, test coordinator Gil was not able to pick up the materials for School 16 until the afternoon of Friday, May 16.

12. On each of the four test days, ten students (the small group) were removed from Aliu's 4th grade class and Aquart's 4th grade class each morning by test coordinator Gil and brought to the classroom of Propersi where they were tested. On May 20 Harvey was the examiner and Propersi the proctor for the small group. Weil was the examiner and Propersi the proctor of the small group on May 21 and 22, and Weil was the examiner and Buccolo the proctor of the small group on May 23.

13. Each section of the language arts and math portions of the test had a finite administration time limit, and the examiner in each room was charged with keeping track of the time and informing the students of the time throughout the test.

14. The administration manual for NJ ASK (*P-8*) set forth circumstances for test accommodations and modifications for students with disabilities who were required to be tested in a separate location from general education students. Special education students were to be tested using accommodations/modifications specified in the students' Individualized Education Programs (IEPs). Also students who had a disability and were eligible under Section 504 of the Rehabilitation Act of 1973 were to be tested using accommodations/medications that were specified in the student's 504 plan. The accommodations for special education and 504 students could be the provision of extra time on the test if appropriate (*P-8, App. A*). Finally, Limited

English Proficient (LEP) students were to be tested with an accommodation of additional time up to 150% of the administration times indicated. Also, The test was to be administered to all regular education 3rd grade and 4th grade students in public schools in New Jersey.

15. The process for qualifying a student as 504 is as follows: If a behavioral problem, special need or disability is observed by a teacher or parent, an Intervention and Referral Service (I & RS) team in the school makes an evaluation, and it may determine to identify or classify the student as 504 thereby entitling the student to special accommodations. If the I & RS team deems that the student would fall under 504, that student would not take a standardized test with other students. The parent needs to sign off on an I & RS team recommendation. The principal refers the 504 determination to Roy L. Migliorino, the Section 504 coordinator for the District which finally approves a student for 504 Accommodation Identification by issuing a form (*P-65*). A principal does not have the authority to add students for special accommodations if they were not 504, special education or bilingual. Special accommodation examples include extended time on tests, using a scribe or computer or taking the test away from other students. (*P-8, App. A*).

16. Student K.O. was enrolled at School 16 just a few weeks prior to the May testing. A representative of the Division of Youth and Family Services (DYFS) brought her to the School as she had been assigned to a foster parent in Paterson. The DYFS worker had no records from K.O.'s prior schools to provide to the School but advised that she had been in the third grade even though she was between eleven and twelve years of age, she had been abused and molested, and had resided in several group homes. K.O.'s records from her previous schools had not arrived before the commencement of testing on May 20. She had been in at least three other school districts in the same year. She was much bigger and more developed and mature than the other 3rd graders and talked about boyfriends. K.O. was defiant and did not get along with other students. She could barely read or write. Although, the DYFS worker indicated her primary language as English when she registered her, when some of K.O.'s records finally arrived after the NJ ASK testing, they indicated that

she was bilingual and receiving English as a Second Language (ESL) instruction. She abused and mutilated herself by cutting, biting and scratching and frequently was sent to the nurse. K.O was not tested on NJ ASK during the week of May 19, 2003.

17. A faculty committee planned a moving up ceremony, which was held on June 10. 2004 for 4th graders who would be leaving for another school the following school year. A part of the ceremony included a surprise presentation to the 4th grade teachers of anagrams prepared by the students using the letters in the name of each teacher. They were affixed to large letters held up by students while other students read the anagrams. The students prepared the anagram assignments in bluebooks over several days by being removed in small groups from their classrooms for short periods by facilitator Filippelli without informing the teachers as to the true reason for the removals in order to preserve the surprise.

18. As a result of an anonymous telephone call to the State Department of Education on May 23, 2003 claiming test irregularities at School 16, on May 27 Roseanne Hiatt Harris, language arts literacy coordinator for the Office of Evaluation and Assessment of the State Department of Education and Dianne Witt of the Passaic County Board of Education commenced an investigation at School 16. School staff was also required to meet with County Superintendent of Schools Dr. Maria Nucettelli. They subsequently met with Investigators Yvonne Tierney and Barrie Borman of the Department of Education, Office of Compliance.

SUMMARY OF TESTIMONY AND EVIDENCE

(A) PETITIONER'S WITNESES:

(1) ARLENE FISHER GOURLEY

Gourley was a test coordinator in the Office of Evaluation and Assessment for the Department of Education. Her duties included assisting in the creation of the

Test Administration Manual (*P-8*) that deals with all aspects of the NJ ASK from receipt of the tests by district test coordinators to the return of the tests to the contractor. She oversaw test security for all aspects of testing in grades 3, 4, 8 and 11.

All 3rd and 4th graders were to be tested in language arts and math by NJ ASK unless exempted in accordance with the No Child Left Behind law. In 2003 the test was administered the week of May 19 with makeup tests scheduled for May 27 through 30. The language arts portion consisted of a series of reading passages with multiple choice answers as well as open-ended answers and expanded writing tasks. The math portion consisted of multiple-choice questions and some open-ended questions. All special education students are required to take the test unless exempt by virtue of their individual education programs (IEP). For test preparation, if the District pre-identifies a student as 504, a special label is created for him. If the school has not identified a student as 504, it can grid this status at testing time and override a label.

Gourley authored more than 90 percent of the NJ ASK Test Administration Manual since most of it was the same as the 11th grade test manual she previously had authored. The tests are supposed to be secure. Therefore, a completed section should not be given to a student a second time. Each school designates a test coordinator who is in charge of fulfilling the requirements set forth in the manual. Each test booklet has a unique seven-digit number. The test coordinator receives one label for each student for language arts, one for math and an extra label in case a booklet is defective. Each booklet has a bar code. The test booklets are consumable which means that the student writes the answers directly into the booklet. Upon completion of the testing week, the test coordinator returns the booklets to the district test coordinator who returns them to ETS, the contractor. During the testing week, only the test coordinator is permitted to handle the booklets until the examiner gets them. He is to secure the test in a locked location accessible to only him and the principal (*P-8, p.35*) or to individuals whose access has been authorized by the test coordinator (*P-8, p.11*). No more than two people should

have access to this area. After testing each day, the booklets are returned to the coordinator never to be distributed again. It depends on the school as to how much of a role the school principal plays in the testing process. Prior to testing the school test coordinator inventories all materials received to insure that the school has received what the district was supposed to give it. He must make sure labels are affixed to the booklets. He has the day-to-day responsibility to disseminate, retrieve and secure test materials, verify the account, arrange for retesting and direct examiners, proctors and hall monitors. At the end of each testing day, he puts the booklets in numeric sequence, registers each booklet on the security sheet and secures them after accounting for them. Non-secure items are destroyed or returned to the teachers. The coordinator must be in the building walking around and monitoring the test administration each day. He maintains a School Security Checklist (*P-8, App. J*) to record when examiners pick up and return booklets and what numbered booklets he or she is handling. *Appendix C* is an irregularity report to record such occurrences such as a fire drill, fight, illness, timing problem or a defective or missing test booklet. The form is placed in the appropriate test booklet and returned to the contractor for quality control purposes.

Only certified teachers are allowed to be examiners. The examiner is responsible for picking up the booklets each day, and he or she is responsible for their security while in his or her possession. They have students fill out the front of the booklets, they read instructions, hand out the booklets, prevent cheating, handle illnesses, retrieve the booklets at the end of testing, put the booklets in sequence and return them to the test coordinator. Proctors should be assigned to rooms with more than 25 students to hand out non-secure items such as pencils and scratch paper, answer student questions, walk around the room and tend to ill students. Proctors may not handle the secure test booklets (*P-8, pp.36-37*) even if they are certified teachers and have been trained with the test examiners. A proctor for less than 25 students is recommended, but not required where younger children are involved.

The test materials are supposed to be delivered to the district coordinator two to three weeks prior to the test commencement date. They are then distributed to each school either by truck or, more often, the school test coordinator comes to a central location to acquire the materials.

Although, tests should be administered in the students' own classrooms when possible, students should not be crowded together (*P-8, p.38*). If there is overcrowding there is no problem with removing some children and testing them in a small class so long as it is done before testing starts. If the test coordinator knows the day before the commencement of testing that there is an overcrowded class, he should find an alternate location and another examiner even if the numeric sequencing has already been completed on the booklets and the security check list. Students should never be carrying their own test booklets.

If a child has not been in the district for a full academic year, a special code is put on that student's test booklet, and he is nevertheless tested. Although, Gourley testified that students are to be tested under all circumstances absent an IEP to the contrary, and makeup tests are for those who are absent, she conceded that, if a student's first language is Spanish entitling him or her to extra test time and the records from the previous school or schools have not arrived at the time of testing, the test may be given on the makeup week. There is nothing in the manual that requires testing, "no matter what."

(2) ROSEANNE HIATT HARRIS

Harris was the language arts literacy coordinator for the Office of Evaluation and Assessment, Department of Education and the State acting test coordinator for NJ ASK in 2003. In such a position, she was fully familiar with the 2003 NJ ASK test and the security procedures established for it. The color of the booklet covers for both the language arts sections and the math sections were the same—ivory. Districts would submit reporting and security issues to her regarding NJ ASK. For testing an examiner has to be a state certified teacher, and a proctor is not permitted

to handle test documents because a proctor does not have to be state certified. Therefore, Gil's printed NJ ASK 2003 Administration Procedures (*R-2, p.6*) were in error where it instructed the proctor to count and sign for the test booklets on the security checklist. Additionally, the District or test coordinator was supposed to provide training to anyone involved in testing.

As a result of her visit to the School on May 27, she prepared a report based on discussions with Harvey who identified herself as the anonymous caller. Harvey never told her that certain test participants were not trained. That anonymous caller had alleged three improprieties by the principal consisting of removing test booklets from school premises, changing student answers on multiple choice questions and returning test booklets to students so they could extend or otherwise revise their responses to the open-ended questions. Harvey confirmed to Harris that each of those three improprieties had occurred during the 2003 testing. Harris reviewed some test booklets but found no evidence that multiple choice questions had been changed. Although Harris did not appear to judge Harvey's credibility but rather just gathered facts to take back to her boss, Harris indicated that there was something awkward about Harvey who exhibited nervous mannerisms.

On the test security checklist (*P-7*), there were some irregularities in the times entered for obtaining and returning some booklets because they were inconsistent with the amount of time allotted for the test on that particular day. She acknowledged that the handwritten label for K.O. would suggest that no one was trying to hide the fact that she was in School 16.

(3) ARLEEN WEIL

Weil has been employed by the Paterson school district for 33 years. She had taught several grades at School No. 10 where she had become friends with Giglio. When Giglio was promoted to vice principal at School No. 10, Weil replaced her and was trained by her as test coordinator. As such she was in charge of testing for the entire 1200 student school. Besides being professional colleagues, she and Giglio

were social friends while at School No. 10. As technology coordinator at the School, Weil ordered and checked supplies and prepared report cards, narratives, action forms and reports.

Due to a family illness, Weil was absent from School 16 from May 12, through May 20, 2003. Because of her absence she had not received the specific NJ ASK training. However, she had assisted Gil in 2002 in administering the ESPA test and she had attended two statewide and two district-wide training sessions. She had much experience in administering standardized tests since she had replaced Giglio as test coordinator at School No. 10 and had even trained Gil when he assumed that position at School. There were no differences between ESPA and NJ ASK regarding security breaches or technical requirements.

Upon her return to work on May 21, at the 7:15 morning breakfast party held to excite the children about testing, Giglio approached Weil and informed her that she would be the NJ ASK examiner for approximately 10 4th grade students using Propersi's 2nd grade classroom on the second floor. Gil would bring the students and test materials to her. When she entered Propersi's room around 9 a.m., she found an empty box with a label on top marked "NJ ASK Grade 4 Mrs. Harvey 504 Accom" (*P-21*), which led her to believe the students were supposed to receive 504 accommodations. Weil recalled that, in past years, students had been pulled out of classrooms and put into small groups because of overcrowding or being bilingual. Weil found the marking on the box to be suspicious because she had not been given any instructions by either Gil or Giglio on accommodations for these students.

She administered the test to the small group that day, with Propersi as the proctor, starting at approximately 9:20 a.m. to 9:30 a.m., after Gil brought the students and the language arts test booklets to the room. The test that day was 100 minutes long (*P-6, p.2*). Upon completion of the testing that day, Weil brought the test booklets to Gil at his testing desk outside Giglio's office while Propersi returned the students to their regular classrooms with Aquart and Aliu before lunch. Because Gil had brought the booklets in the morning, Weil did not sign out any of the booklets

on the test security checklist (*P-7A*) except for the one she used to read a poem to the students as part of the test.

Weil was again the examiner for the small group on May 22 with Propersi as the proctor for the first day of the math part, which was 62 minutes (*P-6, p.2*). Gil brought the students that day along with the box with booklets and calculators. As on May 21, at the conclusion of the test, Weil boxed up the materials and returned them to Gil while Propersi returned the students to class.

Weil arrived at the School around 7:15 a.m. on May 23, which was to be the last day of testing for 4th graders on the math portion of NJ ASK. An early 1:00 p.m. dismissal was scheduled due to the Memorial Day weekend. As she entered the School, Giglio stopped her in the hallway by the stairs and said, "I don't know if you were aware of it, but some of the students that your were testing were 504's, and were not given enough time to complete their language arts, so when you finish your math tests today, I want them to work on their language arts." Weil subsequently testified that the statement was as follows: "...since I was not here, I probably wasn't aware that those students were 504's, and 504's need to have extra time, so therefore, the students didn't have time to complete their language arts, and she would be giving me those booklets back so that they could complete some of their open ended questions." Although, she had seen "504" on the testing box Gil gave her, she did not give extra time on May 21 and May 22 because she had not been instructed anything about 504's. From previous testing years, Weil knew what 504 students were and that they needed special accommodations.

She entered Propersi's class around 9:00 a.m. on May 23 and found Guidance Counselor Buccolo there as the proctor rather than Propersi who had proctored on the previous days. She asked Buccolo if any of the students were 504 because she recognized one of the students on the roster for the small group (*P-30*) as gifted and talented. Although, she referred to a list, she did not recall seeing the roster for the small group (*P-30*) on any of her testing days. Buccolo told her that School 16 did not have any 504 students as far as she knew. Gil accompanied the small group of

students into Propersi's room, as he carried the test booklets in a box. Weil gave the small group students the regular 52 minutes for the math test starting at around 9:15 a.m. to 9:20 a.m. She kept track of the time as part of her duties as examiner. After the 52 minutes expired, she gave them approximately 15 minutes of extra time. In response to the question whether anyone told her to give the extra 15 minutes, Weil testified that Giglio did in the morning when they were discussing the 504's, and Giglio said that they needed extra time because they were 504. On cross examination, Weil testified that she did not know if Giglio had specifically told her to give the students extra time on math. She just said they were 504. Then she testified that Giglio never specifically mentioned math but she (Weil) took it upon herself to give the students extra time on math.[2] When Gil had arrived with the students around 9:10 a.m., he reminded her not to forget they were 504's and to give them additional time. On cross-examination she testified that, when Gil came in with the language arts booklets during the math test, he said, "remember extra time for math." Finally, she testified that she could not remember who said what and when and that she was really confused. She did not recall how she arrived at 15 minutes, but it was used to see if the students needed to fill in anything else because they were allowed to go back to the previous day's math.

As the students were completing the math test, Gil brought in another box containing language arts booklets. She and Buccolo collected the math booklets and handed out the language arts booklets from another box Gil had brought. Weil told the students that the booklets were for them to complete some of the areas on the open ended questions, because that is what Giglio had told her. She said, "May be you wanted to add something to your open ended questions." This instruction was given to all the students while they were still testing in math. Not all the students finished their math at the same time. She collected the math booklets from those who finished early and gave them their language arts booklets. Weil allocated

[2] At the conclusion of the presentation of respondent's case, the undersigned granted petitioner's motion to dismiss as to that part of Charge Three which alleged that Giglio directed Weil to allow ten 4th grade students extra time to complete the math portion of the testing contrary to testing procedures. The only evidence related to this charge was Weil's own testimony that Giglio never directed her to give extra time for math to the ten students but took it upon herself to do so. There was no other evidence to support this part of the charge. Accordingly, the evidence, together with the legitimate inferences there from, did not support a judgment on this part of Charge Three. See, *Dolson v. Anastasia,* 55 *N.J.*2, 5-6 (1969).

approximately 15 to 20 minutes to the language arts. The testing ended between 10:30 a.m. and 11:00 a.m. When the math was finished, Gil removed the math booklets from the room. On cross-examination, Weil testified that she brought both the math and language arts booklets downstairs to Gil. Also on cross-examination, Weil acknowledged that Gil could not have removed the math booklets from the room because he brought the language arts booklets to the room while the math test was still in progress. When language arts was finished, Buccolo returned the small group students to their classes and Weil took the booklets downstairs to Gil but did not sign the security roster (*P-7A*).

After returning the language arts booklets, Weil went to her desk in the teachers' lounge when the security guard Todaro informed her that Giglio wanted to see her around 11:15 a.m., which was during the first lunch on this half day. Giglio gave Weil a handwritten list of six 4th grade students (*P-46*) while she was on the phone with Buccolo and told her that she wanted these students to be retested on the language arts and to give them more time because they had not finished their open ended questions. At the time Giglio orally added one name to the list she had prepared. On cross-examination, Weil could not explain why the notes of County Investigator Diane Mosely-Whitt indicated that Weil told her that she (Weil) wrote the names of J.N. and I.L. on the list after Giglio had orally added them. She testified that it was untrue that she wrote the two names to the list. Those two names do not appear on the list (*P-46*). Giglio had called Buccolo to come and assist in this test. Weil gave the list to Buccolo who went to retrieve the students while she went to get the pencils. These students were not among those tested in the small group on any of the other days of testing. Gil arrived with test booklets, and he also brought in two or three more students around 11:15 a.m. to 11:20 a.m. Weil testified that it was an oversight that she did not mention in her interview with Mosely-Whitt or in her written statement that Gil had brought in additional students to join the second small group. Buccolo arrived with her group of students at 11:30 a.m. When Gil walked in with his group of students and booklets he said, "I'm probably going to go to hell for this," and he appeared to be visibly upset. He also said that he would distribute the booklets because he knew the students. Gil was in and out of the room during this

extra testing period, which lasted about 15 minutes. Either Gil or Weil collected the booklets, and the students walked to their classrooms themselves. She did not remember if she or Gil walked the test booklets down to Gil's testing desk.[3]

After the students from the second small group left, Weil returned to her desk in the teacher's lounge. Harvey had saved her a piece of pizza. Harvey asked Weil why she had been back in Propersi's room because she had seen her back there when she came looking for her. The two of them always eat the second lunch together, which, on that half day, would have been from 11:25 a.m. to 12:05 p.m. Weil and Harvey then had a discussion where Weil disclosed all that had happened that day and indicated she felt real uncomfortable about what happened, that she had done something illegal that she should not have and she was interested in doing something about it. She knew that she was not allowed to retest students who had completed booklets, but had done so because she was intimidated by Giglio and afraid not to follow her instructions. She decided to report the incident to the Department of Education. Weil told Harvey she was not sure she had the courage to make the call, and Harvey offered to accompany her. When Weil arrived home after school was dismissed on the half day, she called Harvey to say she decided to telephone the Department of Education. Therefore, they met at a phone booth in Haledon in the afternoon of May 23 half way between their respective homes. When Weil began to dial the number around 2:15 p.m., she began to cry, so Harvey finished dialing and Harvey spoke. Because Weil was crying she did not recall what Harvey said. Their plan was to make the call anonymously and not let anyone know until the investigation was under way. That is why she did not use her home or cell phones.

Weil's intent in reporting the occurrences of May 23 "...was to clear my conscience and make me feel better because after all the years that I've spent in the district and everything I've done, I couldn't believe that I allowed myself to do that. And I knew that I couldn't go home and sleep with myself at night knowing that I did that." Weil described Harvey's motive as simply supporting Weil as a friend.

[3] On cross-examination Weil indicated that Gil returned the language arts booklets for the second small group.

On May 28, Weil met with County Board of Education Investigator Diane Mosely-Whitt in the School nurse's office, but did not want to speak to her on School property because she was afraid of Giglio. Consequently, Mosely-Whitt telephoned Weil at home whereupon Weil told her the whole story as she recalled it. Dr. Nuccetelli, Superintendent of Passaic County Schools also called her at home and wanted to meet with her. Weil then decided she should have representation from her union, the NJEA. Giglio informed Weil of the appointment with Nuccetelli, and Giglio coached her by reminding her that no tests were released; no other tests were given out; no extra time was given; the kids brought up were for the moving up party; "stick to the story, the plan that we had, and everything's gonna be all right, and to remember that when talking to the investigators. Weil had told Giglio before her meeting with Nuccetelli that she was not going to sign a statement and Giglio told her that she should sign a statement because it would otherwise look like she was guilty. Weil secretly tape recorded the conversation with Giglio on the day she went to see Nuccetelli and the day after (*P-49, 50, 51 and 52*) because she was afraid of Giglio and felt the need to protect herself because of the severity of the charges of testing improprieties. However, Giglio did not threaten Weil in either of those conversations because Giglio thought Weil was still on her side at that time and was unaware that Weil had initiated the anonymous call. There was nothing on the tape where Giglio said she cheated, although Weil had hoped to get such a statement on her tape.

The transcript of the conversation between Weil and Giglio on June 12 (*P-72*) is at variance with Weil's testimony of that conversation in several respects. Much of the conversation was inaudible, and therefore it was difficult to understand the context of some of the statements. After an inaudible part, Giglio refers to Buccolo who had returned from Nuccetelli's office.

Giglio: She must be nervous no, she couldn't even hardly tell me, I said, "What happened?" She goes, "No, it went pretty well."

Weil: Tell me exactly she said.

Giglio: She said she only gave math that day, after the math she went and picked up (inaudible) pick up some kids, she didn't say by whom, she brought them to you, she said—I don't know why because remember she's not on the committee, so he just asked her to pick up kids or because I asked you to start right after the test, to pick up the kids for the surprise for the fourth graders, and that's it, that's all she said. "They asked you to write something down," she says, "Yeah, they're asking everybody to write their statements down." She wrote that down, so don't stray from that; "yes, you were brought kids by Jane because you were the committee chair for the party"—because that's what I told them—just so it's working out, I mean, that's exactly what I told them. I said, "yeah—I didn't know who picked the kids up." She did pick the kids up because she says that.

Weil: (inaudible)

Giglio: Teachers don't remember (inaudible) picking kids up for anything because there was only a few minutes (inaudible) it wasn't more than five or ten minutes because I told them what we were doing and how we were going to do it and what they wanted to do for it, and we decided—that was our deciding meeting of what the surprise was going to be. That's it.

(At this point the conversation was inaudible.)

Much of the tape of the Giglio Weil conversation on June 13 was inaudible. Giglio was apparently describing her interview and said she told the interviewer that her statement would be that all proper test procedures were followed during every day of testing.

Giglio: I want details. I said, "And you will have details and I will write this for you but if you want details I need time to write the details." So she says, "I prefer you do it now." And I said, "And that's the statement I will write, 'I followed all proper

(inaudible) were followed, '"right (inaudible). The biggest allegations that the kids had the books. I said, "In no way did the kids have the books." That person did not believe them, they were in my office.... But you know what (inaudible) I really do. (inaudible) all the stuff that (inaudible) and all the stuff she (inaudible) try to help (inaudible). and I don't care if you believe me or not, you have to believe me because I'm going down too. (inaudible) I'm not going down, you get it. (inaudible), and you know what, you need to wise up, sharpen up, find out who your real friends are cause its not them, its not them (inaudible) personal, whatever.

Giglio: Do you want to do it, you don't want to do it, I mean you don't have to go in, but are you going to submit.

Weil: I'm going to—I'm going to—yes.

Giglio: Yes, do not, do not submit unless we okay, (inaudible), let me see it first, okay. Let us see it, I'll let you see mine so that we're all on the same page. (inaudible)

During the investigation following Weil's anonymous call to the Department of Education, Weil had prepared for her a written statement, which she signed (*P-19*). It was prepared by Mary Hammer, who was an attorney for her union.

Regarding the relationship between Giglio and Weil, they had been social as well as professional friends at School No. 10, even to the extent of vacationing together and Giglio attending social activities at Weil's home. Weil has been a realtor for over 20 years and has assisted Giglio in looking for a home at various times. Sometimes, after a weekend, Giglio would ask Weil to look up a house for her where she had seen an ad, and Weil would access it on line at School 16. The last real estate effort for Giglio was in November 2002 involving a search for a house for Giglio's brother. Giglio had given Weil a deposit check for the house but the bid was not accepted. She testified that in 2002 and 2003 she went on real estate sites while at work approximately 30 times for Giglio. Although Weil had been a travel agent in the

past as well, she denied that she still engaged in travel agent activities in 2002 or 2003 or accessed travel agency sites on line while at work.

While at School No. 10, Giglio prepared Weil's evaluations, which were always satisfactory to outstanding. Gil maintained School 16's web site rather than Weil. Since Gil was computer savvy, he helped Weil learn the use of computers while she trained him to be a test coordinator. In January 2003 Giglio, because she felt Weil was not doing her job, provided her with a job description consisting of 15 job responsibilities for technology coordinator (*P-43*). Weil received from Giglio a Tenure Classroom Teacher Evaluation Report dated April 9, 2003 in which she was recommended for her increment and the retention of her employment (*P-42*). Of the specific evaluation criteria, Weil received an "outstanding" rating in seven areas and a "satisfactory" rating in the other areas including "knowledge of subject matter," "planning," "skill in adapting material to class needs," and "problem solving." As of April 2003, Giglio had put nothing in writing to reflect that any of Weil's work was unsatisfactory. Weil denied that Giglio had told her why her evaluation had gone down or that she had to spend less time at School on personal matters and personal use of the Internet.

When presented with a list of temporary internet files from her School-assigned laptop computer indicating access to many internet sites unrelated to school matters (*R-24*), initially Weil denied this list was from her computer because she recognized very few sites.[4] Weil then indicated that she was not responsible for accessing those sites and suggested that other teachers may have used her computer in 2002 and 2003 because her desk was in the teacher's lounge and her computer did not have a password. Although all classrooms had computers, only half of them were connected to the Internet. As to Internet hits to real estate sites, Weil claimed that even though the relationship between Giglio and her went downhill after November 2002, she nevertheless continued to look for real estate for Giglio about 15 times in 2003 when Giglio would so request. Her only work time access to real estate sites

[4] The printout of temporary Internet sites from Weil's computer was obtained because Giglio, as principal of School 16 was required to maintain custody of all of the School's laptop computers during the summer of 2003.

was for Giglio and that ended in May 2003. However, the temporary Internet file records indicate access to real estate sites as late as May 30, June 23 and June 25, 2003. She denied accessing travel sites in 2003 as well as most of the sites indicated in *R-24*. More specifically, she denied accessing a site for wedding pictures at 1:10 p.m. on June 2, 2003. When shown the photographs from this site, she conceded that her daughter was in the photographs, and she admitted that she had indeed accessed several hundred of these wedding pictures during working time.

Around the time of her April 2003 evaluation, Giglio also informed Weil that, as a result of budget problems for the following year, she might have to eliminate one position at the School by combining the test coordinator position held by Gil with the technology position held by Weil. Weil denied that Giglio told her that, since Gil was already performing many of the technology duties in Weil's job description, it was Weil's rather than Gil's position that was likely to be cut.[5] However, Weil admitted that Gil had been performing as much as 30 percent of the technology coordinator duties even though he was the testing coordinator. She primarily prepared reports on the computer. He assisted her in monitoring the local area network including Internet access. Gil maintained the School's website. He helped her coordinate the operation and use of all computer, audiovisual, and related equipment, including networks at each assigned facility.

Weil described her relationship with Giglio in April 2003 as okay, but it could have been better. It had started to go downhill after December 2002. In February 2003 Giglio had brought Filippelli from School No. 10 to her School to be facilitator, a position for which Weil had applied. Weil had had disagreements with Filippelli when they had been together at School No. 10. Weil described her relationship with Giglio in May 2003 as still having some feeling for each other and not being enemies even though Giglio threatened and intimidated her.

[5] As a result of the charges against Giglio, Gil was transferred from the School and Weil remained as both testing and technology coordinator.

Weil described the relationship between Harvey and Giglio as a poor one. Giglio had complained to Weil that Harvey was not doing her work and should be working more with the children. On May 20, Giglio had summoned Weil to witness her handing Harvey an envelope, which turned out to be a written disciplinary warning. Weil and Harvey discussed the warning that day, and Harvey was very upset. Weil also described the relationship between Giglio and Harvey as being a bad one as a result of their time together at School No. 10. Harvey had been transferred to the School as librarian or media specialist just before Giglio arrived and not at Giglio's request as had been the case with Weil's and Gil's transfers. Harvey and Giglio were enemies at the time of the May 2003 testing. In March 2003 Giglio had informed Harvey that she was going to lose her media specialist position at the School for the following year and would instead become the facilitator switching positions with Filippelli. Harvey was very upset over this anticipated change. Weil knew that Harvey was also upset during the week of May 19, 2003 that Giglio had not invited her to a ceremony in Cherry Hill where the School was awarded the title of best Title I school in the State of New Jersey the application for which Harvey had prepared. Harvey had not informed her that Giglio had written her up over an altercation arising out of the ceremony attendance. Harvey and Weil had become good friends, and they ate lunch together every day and socialized away from school.

In anticipation of cross-examination because of pre-hearing discovery demands by Giglio, Weil testified regarding her efforts to obtain a $1400 reimbursement from the District for tuition for each of two courses she had taken at Caldwell College for the fall 2002-2003, semester toward her supervisor's certification. The District's policy is to reimburse teachers for certain continuing education courses only if a grade of "A" or "B" is earned. The teacher must submit a report card to the District. Because she did not have the special code to receive her grades on line, Weil had asked a Caldwell College representative to fax the report card to the School. According to Weil, since the fax machine was in Giglio's office, Giglio brought the paper with the grades on it to her some time in January 2003 and commented that one of the grades was C+ in a course entitled General Principles of Staff and

Supervision. Gil came up to her and said, "You know I know how to change the grades, and I've done several things like this for Ms. Giglio before." Giglio then asked if Weil wanted the grade changed. Although she initially said "no," she finally agreed after Giglio and Gil pushed her and intimidated her to do it. Gil altered the grade on the computer but not in her presence. She believed he did it at home. Although, she was the technology coordinator at School 16, she did not know how to alter a document on a computer or use a scanner. Weil also figured out what her grade point average would have been with the second "A" and had Gil alter that part of the report card as well and gave that information to Gil. There was a scanner at the School by Gil's desk. Weil then submitted a fraudulent report card to the District in support of her request for reimbursement which falsely showed two "A" grades rather than an "A" and a "C+ and also showed a false grade point average (*P-26 and R-18*).[6] As a result, she was paid $876 for a course for which she was not entitled to reimbursement. She was not required to have Giglio, as principal, sign off on the reimbursement request submitted to the District. On cross-examination, she added that she paid Gil $100 in cash for his help the week after he made the alteration and before she was actually reimbursed. Subsequently, she realized it was the wrong thing to do, but she was afraid to do anything to correct these actions. Although she knew she was wrong, she nevertheless cashed the reimbursement check, which she subsequently received. To assuage her guilt, when she took another course in which she received an "A," she did not seek reimbursement because she felt guilty. She was unaware that the District had run out of reimbursement money so that no one was reimbursed for courses taken in the spring semester of 2003. Weil did not disclose the grade change to the District until February 2004 when she realized the issue would be raised in this proceeding. She claimed she finally reported this act because her conscience would not let her sleep. She admitted that she cheated and stole money from the District and paid it back in February 2004. As far as she knew, the District does not intend to punish her.

[6] The unaltered transcript from Caldwell College shows grades of A and C+ (*R-20*).

(4) PATRICIA HARVEY

Harvey had started with the District as a kindergarten teacher at School No. 10. Upon obtaining certification as a library media specialist, she transferred to School 16 shortly before Giglio became the principal there in September 2000. She had had a serious problem with Giglio and Filippelli at School No. 10 in the spring of 2000 regarding an election for teacher of the year and her perception that Giglio and Filippelli had inappropriately rifled through her desk looking for election material. Harvey had filed a complaint against Giglio and Filippelli with the principal of School No. 10. When Harvey learned that Giglio would become the principal of the School, she unsuccessfully tried to transfer to another school.

Upon her arrival at the School, the library was virtually non-existent. Although her 2000-2001 and 2001-2002 evaluations were satisfactory, Harvey was always disappointed and felt she deserved higher ratings. There were several disagreements between Giglio and Harvey. Giglio had been telling her that she needed to do more in her job, she was not friendly with the children, and the teachers did not like her. In December 2002, Harvey became uncomfortable when she learned that Filippelli was transferring to School 16 as facilitator.

Giglio's comments on Harvey's March 2003 evaluation included the following: "The use of technology to create multi-media projects was not evidenced. Prior recommendations to enhance the media center through the development of in-service activities to date have not been implemented. Giglio's evaluation indicated that Harvey would become a teacher/facilitator effective 9/1/03. Harvey then knew of Giglio's attempt to designate Filippelli as the librarian in a switch of positions. Harvey added her comments to the evaluation that "I do not agree with the ratings and comments. I reserve the right to submit a statement of rebuttal. It is my belief that I am a tenured library media specialist. I want to continue in the position of library media specialist for the 2003-2004 school year." Harvey went to Assistant Superintendent Stepherson to complain and find out if she was tenured in the librarian position. In order to buy some time while she pursued her rights through

the union and Stepherson, Harvey informed Giglio that she would take the facilitator's position for the next year. However, she did not want to be facilitator and indicated otherwise only in order to alleviate what she considered to be a hostile relationship between Giglio and her. On May 13, 2003 she signed a statement prepared by Giglio whereby she agreed to a transfer from librarian to facilitator at the School (*R-59*), which was copied to Stepherson. However, shortly thereafter she had discussions with District personnel about transferring to Academies as a librarian. Finally, when Harvey gave her written statement about the testing irregularities to investigators (*P-27*), she attached a handwritten addendum to it indicating her desire to remain as librarian at the School rather than transfer to the Academies if Giglio were no longer at School 16. She also explained that she was hurt that Giglio had replaced her as librarian with her (Giglio's) close friend Filippelli.

On Tuesday May 20, 2003 Harvey was examiner for the NJ ASK test for a small group of ten to twelve 4th grade students in Propersi's room although she had received no training. Although she acknowledged signing a document indicating her attendance at NJ ASK training on May 14 (*R-55*), she claimed that Gil just told her to sign it and not attend because she had already been trained in prior years. She had been trained the previous month for testing on PASS for 1st and 2nd graders, served as a proctor and was unaware of any differences in test security. Although her signature appears on a PASS training list (*R-56*), she could not recall if she actually attended. Originally, she had been designated to be the proctor in Aliu's room for NJ ASK. The week before testing Gil had told Harvey she would be testing a small group they were going to consider 504. However, she was given no instruction as to how to treat the students in the small group. The year before she had also examined a small group of about eight 4th graders but did not recall whether the reason for the small group was overcrowding. After learning of her assignment, she had asked guidance counselor Buccolo if the school had 504 students, and she answered in the negative. On May 20, 2003 Harvey found in Propersi's room an empty box which was labeled "NJ ASK Grade 4 Mrs. Harvey 504 Accom." She told her proctor Propersi, just before Gil brought the students into the room, that she

knew they were not 504 students and that they were not going to give them extra time even though the box said 504 accommodations.

Gil arrived with the students, who were carrying their test booklets. She did not sign the security checklist (*7A*) after the completion of the testing in the small group on May 21. She did not recall the names of the students in the small group except that one of them, T.D., was a designated gifted and talented student.

After the testing was over for that day, Harvey approached Giglio and told her she knew Giglio was going to Cherry Hill that day to pick up an award for most distinguished school in the state. Harvey said, in a slow and normal tone, that she was hurt that Giglio had not invited her to attend since she had written the application, much of it on her own time, which led to the award. Giglio commenced yelling at Harvey in her office saying that she had a lot of nerve ruining her day and that she would have to think about this now all the way down to Cherry Hill and that she was sick and tired of walking around on eggshells with her. When Harvey walked out of the office, Giglio followed her down the hallway yelling at her with a raised voice while Harvey made no response. Harvey recalls that, at that time, Aquart, the replacement principal for that day, Cathy Blank, secretary Ruiz and Propersi were in the hallway too.

The next morning, May 21, Giglio informed Harvey that she no longer needed her to be an examiner for the NJ ASK and instead assigned her to go room to room on the first floor to service Propersi's 2nd grade students who had been dispersed among other classes during the testing so that Propersi's room would be available for the small group of 4th graders. Although she testified that she observed a 3rd grader, K.O., in LeProtto's 2nd grade class that day around 8:30, Harvey's written statement (*P-64*) indicated that she saw K.O. in LeProtto's class at about 9:00 a.m. Although Harvey testified that LeProtto told her that K.O. had just been delivered there, this conversation was not mentioned in Harvey's written statement (*P-64*). Similarly, she testified that she asked K.O. why she was there but did not mention that conversation in her statement.

On May 22 Giglio called Gil and Weil, who were union representatives, into her office to witness her giving a memo (*P-61 and P-63*) to Harvey entitled "Conduct Unbecoming a Professional Staff Member. The memo set forth in part as follows: "On May 20, 2003 a conference was held at your request. You expressed your dismay and anger toward me for not requesting your presence during a School 16 recognition conference as you felt this recognition belonged to you. Your intonation during this conference was disrespectful and will not be accepted or tolerated. The display of conduct unbecoming a teacher relates adversely to the best interests of our children, staff and community." According to Harvey, she said nothing while Giglio yelled at her, there was no profanity used and Giglio was hostile toward her. Harvey declined Giglio's demand that she sign it until she had a chance to read it over and write a rebuttal as she was shocked, upset and humiliated. Harvey called Assistant Superintendent Stepherson who said not to worry about it and that she would make sure it did not go into Harvey's file. As she left the building on May 23, Harvey submitted a rebuttal to Giglio where she denied the accusations; contended that the insinuations that she need to acquire professional attributes and improve her oral communication skills were insulting, demeaning and unfounded; and that she felt that "...this only serves to intensify the hostility you have shown toward me" (*P-62*).

On either May 22 or May 23, Filippelli was testing special education students in Harvey's library area. Harvey was on the other side of the wall and could hear what was going on. Filippelli appeared to be giving the students one answer and helping them with the rulers. Harvey left the area because this activity made her feel uncomfortable. Harvey's written statement (*P-64*) indicated that her observation of Filippelli helping with math answers occurred on Wednesday May 21 rather than May 22 or 23. She testified that her statement was incorrect and that the correct day was Friday May 23 because there was no math testing on Wednesday. She attributed the error in the written statement to the stress she was experiencing at that time.

Since May 23 was an early dismissal day at 1:00 p.m., lunches were earlier than usual. Since she and Weil always eat lunch together, she called Weil by telephone but received no answer. She waited a while for Weil by Weil's desk in the teacher's lounge when she overheard Aliu say to Propersi, "Now I know why you were pulled out of proctoring in Mrs. Weil's class, because evidently the fourth graders didn't do good on their language arts, and they're going to be given time to redo them." Harvey then walked down the hallway and looked into Propersi's room and observed that Weil was still testing students with language arts booklets. She knew they were language arts booklets because, when she looked into the classroom she could see passages, and there was also a different color on the booklet from the math booklets. Her best recollection was that the booklets she saw when she peered into Propersi's room were in the blue or purple family. She also observed Buccolo in the room. Harvey mouthed to Weil, "What are you doing?" and Weil shrugged her shoulders. Although she testified that she did not recognize any of the students in the room as those whom she had tested on Tuesday, the notes of her interview with Superintendent Nuccetelli on June 12, 2003 indicated that she recognized one or two students as being the same as on Tuesday. She testified that if she had told this to Nuccetelli, it was not so.

Harvey returned to Weil's desk in the teacher's lounge to wait for her. When Weil arrived Harvey offered her a half slice of pizza, but Weil said she was too upset to eat. She told Harvey that Giglio had instructed her that the students taking the math portion were to be given a little more time as a 504 accommodation, and language arts books would be returned to fix up some answers and add some things that they might not have finished in the beginning of the week. Weil also told Harvey that, when she thought she was done, Giglio called her to her office and told her a second group was coming back to do some language arts answers over. She knew Weil was upset because she was involuntarily involved in this breach of test security. Although Harvey had not given any 504 accommodations on May 20 when she was an examiner in Propersi's room, both she and Weil were concerned for their welfare because it seemed a lot of people knew what was going on, and they did not want to get into trouble. The dispute with Giglio on May 20 over the Cherry Hill trip did not

play a part in Harvey's anger over the May 23 situation because she had been told the memo was not going in her personnel file, and she knew that she would be transferring to the Small Academy High School for the next year. Harvey suggested that they make a phone call to the Department of Education to protect themselves.

They left school and went to their respective homes on May 23. Weil telephoned Harvey and they agreed to meet at a pay phone in Haledon to call the Department of Education. Weil dialed the number and then began to cry, so Harvey took the phone and spoke to several people who transferred the call. Finally, she reached a recording and left a message that she was calling to report that there was cheating going on with the NJ ASK examination in Paterson, New Jersey at School 16. She did not remember leaving her name. They called from a payphone because they did not want a record of the call to be on their cell phones for fear of repercussions from the District, Giglio or anybody.

Harvey met with Dr. Stepherson in March 2003 to request a transfer out of School 16 into a safer environment because of the relationship between Giglio and her. Harvey claimed that the hostility had increased causing her to be put on medication. Around August 2003 when Superintendent Duroy informed Harvey that Giglio would not be returning to School16, she asked to remain at the School. Duroy believed it would be better if she went to the academy.

(5) CARLA PROPERSI

2nd Grade Teacher Propersi proctored the NJ ASK in her second floor classroom on Tuesday May 20 with Harvey as examiner and on Wednesday May 21 and Thursday May 22 with Weil as examiner. In order to make this room available for 4th grade testing, Propersi's 2nd grade students were split each day, including May 23 among several first floor classrooms. Giglio had told her prior to the May 19 week of testing that she would be with 504 students in her room as a proctor for the test. She recalled that Giglio so informed her well before the actual commencement of testing because she had to prepare packets of work for her students who were going

to be sent to the first floor. On those three days she observed a testing box in her room which had "504"marked on it.

On Tuesday Gil escorted 10 students into the room who were carrying their booklets. Only the pencils were in the box. She did not recall if the students or Gil carried the booklets on Wednesday and Thursday when Gil brought the students to the room. She observed nothing unusual or improper during the three days she proctored, and the 10 students in her classroom were given no extra time to complete the test on any of those days. She did not know if the 10 students had been placed in her room because of overcrowding in the 4th grade classrooms. She recalled one of the 10 students who spoke Bengali and did not speak English. He might have tried to take the test but could not have done very well. Although she received no specific training on proctoring, she attended an after school staff meeting where the specifications for the test were discussed. She had also been trained for other tests where the security procedures were about the same as for NJ ASK. Propersi did not proctor in her classroom on Friday May 23. Instead, Giglio instructed her to service her students in the downstairs classrooms, which she did by rotating from room to room where they were located. During or right after the first lunch around 11:15 a.m, on Friday Security Guard Todaro told her to return her students to her classroom as the testing was over. When she saw Giglio in the hall around 11:20 a.m., Giglio told her that testing was not over and that she should go to lunch. When she returned her students to her classroom around 12:00 noon, the classroom was empty.

On May 23 Aliu asked Propersi in the teachers' room if she was finished testing, and when she told Aliu she had not tested that day, Aliu replied that she knew why because Giglio had said that Aliu's students in that small room were not doing well. This statement was made in the presence of Moscato, Ordonez, Loftus and possibly two or three other staff.

While in the teachers' room on May 23, Propersi asked Moscato why K.O. had not been tested since she had seen K.O. in LeProtto's room when she had picked

up her students earlier in the week. Moscato told Propersi that Giglio had told her to mark Moscato absent and not tell anyone. Although Propersi gave three written statements to investigators regarding her conversation with Moscato, she never mentioned that Moscato told her that Giglio told her not to tell anyone they were not testing K.O. and did not know why she failed to mention this.

(6) ANA SANTOS MARTINEZ

Martinez was a 3rd and 4th grade bilingual teacher responsible for teaching reading, language arts, social studies and English as a Second Language (ESL). She was the examiner for her students for the NJ ASK, and her duties included giving instructions in English and Spanish, keeping track of time and handing out pencils. She received training during 3rd grade level focus group meetings. At a focus meeting Giglio told the teachers if they had any students who needed extra time because they had problems, they could be referred and taken out of the room. The term "504 students" was discussed during the focus meeting but she does not recall an explanation of the term because she had had a 504 student before with a hearing impairment.

On Friday May 23 her 3rd grade students were not tested and were instead dispersed to other classes. Her 4th grade students were given an additional 26 minutes over the scheduled 52 minutes for math that day because, as bi-lingual students, they were entitled to extra time. After her class had finished testing, Giglio had walked by the class around 11:00 after Martinez' 3rd graders had returned and said that testing was over and that the children could make noise whereupon the children cheered. Propersi's classroom, which is separated from hers by a sliding wall, was empty when this statement was made. She then observed Gil pass by with a group of students between 15 and 20 minutes after Giglio's comment. A short time later, Gil put half his body into Santos' room through the sliding wall from Propersi's room and said to keep it down because they were still testing. She responded that Giglio said the testing was over and Gil said it was not. She observed that the previously empty Propersi room now had students in it who were

testing. She observed open test booklets which were white. The children seemed to be working in the booklets but she could not recall if they were writing because she only had a quick look. This occurred during the first lunch on May 23, which was earlier than usual because that Friday was a half-day session.

Martinez learned that her 4th graders were working on a surprise tribute for her because some had told her. The tribute was an acrostic using words starting with each letter of each 4th grade teacher's name. Just after the Memorial Day break from May 23 to May 26, Filippelli began removing her 4th graders from class a few at a time to work on the tributes but Filippelli always told Santos it was just to work on something.

(7) MELISSA MOSCATO

Moscato taught a 3rd grade class in 2002-03, which, in May 2003, included K.O. Moscato was then a second year teacher who had been recommended by Giglio for reappointment for the following school year. Approximately one week prior to the commencement of the NJ ASK testing on May 20 2003, Moscato had been speaking to Giglio about concerns she had with K.O. regarding her size, her behavior, her foster home status, her lack of reading and writing skills, and whether she belonged in the 3rd grade. Although Moscato's students were eight or nine years old, K.O. was at least eleven or twelve. Giglio told her not to worry about K.O. because she would be marked absent but not to say anything about it. She also told Moscato that she would be getting K.O.'s records. Moscato assumed that K.O. would take the makeup test, which she believed was scheduled for week following the regular testing although she and Giglio never specifically talked about a makeup.

Giglio told Moscato to mark K.O. absent on the three days 3rd graders were tested, but did not tell her why. On May 20 K.O. was in the room when she took attendance but she marked K.O. absent on the homeroom attendance sheet, which is picked up each week from the main office (*P-11*). A "1" is marked next to a student's name on the sheet when he or she is absent and a "2" denotes tardiness.

Moscato was sure that K.O. was not late on May 20. There is nothing next to K.O.'s name for May 19 because she was present and on time. Although, K.O. was in school when Moscato took attendance on May 21 and May 22, she placed a "1" next to her name for those days denoting absence. The marking of K.O. as absent on those three days was not accurate because K.O. had been in school. (Moscato's written statement (*P-9*) was more equivocal in that she stated, "However, I don't think she was late. [K.O.] 's usually on time to school.") She testified however that she knew K.O. was not late. On May 20 Giglio escorted K.O. from the room before testing, and on May 21 and 22 either Gil or Giglio removed K.O. from the room. She did not see K.O. inappropriately dressed on any of the days of testing. Ordonez, her proctor, had asked Moscato why K.O. was not tested, and she replied that Giglio had told her to mark her absent. Just after the testing for the week was over, Moscato had a brief discussion with Giglio in the hall where Giglio told her that she had marked K.O. absent in the wrong place; that it should have been marked on the test roster rather than the homeroom attendance roster, and she should have been marked late. Moscato acknowledged that she had not marked K.O. absent on the test roster.

For the three days of 3rd grade NJ ASK testing, Moscato was the examiner in her room, and Ordonez was the proctor. She had received training from Gil at a faculty meeting where he had reviewed test procedures including the direction that proctors should sign for the test booklets from Gil during testing. At a faculty meeting Giglio had told the staff that if anyone felt a student would benefit from extra time on the test because of behavior or focusing to let her know. Giglio never used the term 504, and Moscato did not even know what the term meant. She did not put the training information in her written statement but mentioned it to State investigator Tierney. Although student J.F. was not classified as 504, she told Giglio that he could benefit from more time because of a focusing problem. She had previously generated paperwork to the Pupil Assistance Committee (PAC) [I&RS], recommending that J.F. be tested by a child study team because J.F. needed more attention than other children and needed to be near a teacher. He had a behavior problem and had difficulty staying on task. J.F. was not tested with her class but

was removed each day by Gil with A.R. and I.S. who were special education students with I.E.P.s. tested each day by Filippelli. When he left each day, he had his test booklet with him although A.R. and I.S. did not have theirs. She did not recall a discussion with Gil about testing J.F. in her room.

When Moscato returned to School after a two-week absence in early June due to a family emergency, State investigators Tierney and Borman questioned her about testing in her class. Before this meeting Giglio had advised her to tell them that all students were "present" and she did nothing wrong. She assumed Giglio had meant for her not to mention K.O. although she conceded that Giglio never so instructed her. She told the investigators that 24 students had been "tested" even though that statement was false. She then approached Giglio and explained she was nervous because she told Tierney 24 students had been tested when, in fact, only 23 had been tested. Giglio replied that it would be all right because they were going to change K.O.'s records to show she was late and gave an excuse for each date. Since it was known that the investigators would be returning, Giglio said to just tell them K.O. had been late; that she had been at the nurse's office and had been inappropriately dressed. On June 17 Moscato told Tierney that K.O. had been late. On June 22 or June 23 Moscato was again questioned by Tierney and informed that she could be charged with misconduct whereupon she began to cry and told Tierney that Giglio had told her to mark K.O. absent. She thought she had done something wrong because she had marked K.O. absent on the test. In fact, Moscato had marked K.O. absent on the homeroom roster rather than the test roster. Moscato thereafter prepared two written statements for Tierney (*P-9 and P-10*). On cross-examination Moscato acknowledged that Giglio never told her in exact terms not to mention K.O. to the investigators. She assumed Giglio meant she should not talk about K.O. because she told her to tell the investigators that all students had been present. She understood that Giglio did not want her to tell the investigators that K.O. had been absent. Moscato learned that K.O.'s records had finally arrived after testing was over and that she was in fact bilingual and should not have been tested with the regular students. Before May 20 Giglio had not discussed a makeup testing date for K.O.

(8) BEATRICE LOFTUS

Loftus has taught 3rd grade at the School for eight years. In May 2003 she attended a weekly focus meeting of just 3rd grade teachers where NJ ASK was discussed. She recalled Giglio mentioning at the meeting that teachers should make a list of students who might be disruptive or might benefit from extra time, and they would be taken from the class and 504'd. The rest of the discussion was about following test procedures in the booklet. Loftus knew that one cannot just simply designate a student as 504 and that such status cannot be achieved in one week. Loftus did not believe there was anything improper with putting a disruptive student in a special class. 504 students get special accommodations, which do not necessarily include more time. Moscato had mentioned to her that, during the NJ ASK testing, Giglio had instructed her to mark K.O. absent for the test and then later in the week to mark her late. In her testimony Loftus reiterated that Moscato had told her that Giglio instructed her to mark K.O. absent for the test and not for the day. There is a form aside from the homeroom attendance forms for test examiners to record that a child was absent on the test so that one knows a makeup test will be necessary. Loftus recalled that Moscato was interviewed by an investigator the day after Memorial Day and that, at this first interview, she told the investigator she was told to mark K.O. late. At a subsequent interview, after Loftus advised her to tell the truth, she told the interviewer that K.O. was neither late nor absent on the days of testing.

On May 23, Loftus observed Gil walking with a group of 4th graders who had legal size papers in their hands, which she could not identify.

(9) LILY RUIZ

As secretary for the school, Ruiz is responsible for registering students and recording attendance for staff and students on a daily basis. Student attendance is collected from each teacher each day and the data in entered into a computer. On

May 20, 21, and 22 Moscato had marked student K.O. "absent on the class attendance roster which is denoted by the number "1." Either during the testing week of May 19 or the following week, Giglio advised Ruiz that, although student K.O. had been marked absent by Moscato, the student was, in fact, late. Giglio told Ruiz that she had advised Moscato to mark K.O. absent on the NJ ASK test roster and not the attendance sheets. At Giglio's direction Ruiz changed the records to reflect that K.O. had been late rather than absent on those three days. Ruiz had no reason to believe that the change was improper because Giglio had a reputation for being truthful in the work environment. Although a teacher or the security guard normally informs her that a student is late, neither the guard nor Moscato notified her that K.O. was late on those days. However there are possible circumstances where a late student goes to class without notification to Ruiz. Ruiz also recalled placing a call to K.O.'s foster mother because K.O. was inappropriately dressed on a day in May but does not recall the specific date. She never observed Giglio treating anyone unfairly in front of her.

(10) GRACIALA TODARO

Todaro was the security guard at School 16 since 2001. Her post is at a desk in the hallway inside the front door of the School. She signs in visitors to the School and directs them. She also patrols the School. From September through May her reporting time was 7:15 a.m. Any student reporting to the School is considered late after 8:35 a.m. and is given a late pass by Todaro but late passes were not issued during the May testing. Instead, late students were sent to the principal's office. She did not see K.O. before her rounds on May 20, the first day of testing. However, she had to attend to a situation that morning where a student had a Tourette's Syndrome outburst, so she did not observe whether K.O. was late. She knew that K.O. came in late on May 21, the second day of testing because she found her at the guard's desk when she returned from her rounds one day after 9:00 a.m. Because it was a testing day, rather than issue her a late slip and send her to class, she walked K.O. into Giglio's office and informed her that she had found K.O. late. Todaro saw K.O. at the student breakfast party around 7:35 a.m., on May 22, the third day of testing,

but she was sent to call her foster mother and obtain a change of clothes because she had arrived at the School inappropriately dressed in a belly shirt. She waited in the nurse's office until her foster mother arrived later around 9:30.

On July 23, 2003, during the summer recess, Todaro filed an incident report (*R-38*). She reported that she observed Weil in the street talking on a cell phone and pacing up and down the street. Todaro locked the front door to the School and went to lunch. When she returned she learned that Weil and Harvey had gained admittance to the building and had custodian Juan Matta unlock the main office door. She noticed that the library door located off of the main office, which had been open, was now closed. It was reported that Weil and Harvey left with some papers after peeking into the locked principal's office and entering the nurse's office (*R-39*). Todaro also filed an incident report on August 14, 2003. She observed Harvey in the main office opening a locked cabinet with a key. Memos from Giglio and Superintendent Dr. Duroy, issued earlier in the summer, had directed all teachers to turn in their keys and to bring home personal belongings. Harvey removed some papers from the cabinet, locked it, and left.

(11) EMMA ORDONEZ

In May 2003 Ordonez was a class reduction teacher whose duties included pulling students out of overcrowded 3rd grade and 4th grade classes for special instruction. During the NJ ASK she was a proctor in Moscato's 3rd grade class. She observed K.O. in Moscato's class on May 21, the first day of testing before the testing began. She also observed Giglio speaking to Moscato while K.O. was in the classroom and then Giglio escorting K.O. from the room. She asked Moscato what had been said and she replied that Giglio wanted K.O. marked absent. She personally saw K.O. in her seat before the second day of testing. K.O. left before testing but she does not recall who took her out. On the third day of testing, K.O. was also present in class. On cross-examination Ordonez admitted that she did not recall anything specifically about the days of NJ ASK testing. She did not recall what assignment she had on Friday or even whether it was a half day.

(12) DR. EMMAJEAN M. STEPHERSON

Stepherson is the District's Assistant Superintendent for a cluster of ten kindergarten through 4th grade schools including the School. She supervises the principals and evaluates teachers, and directs curriculum, instruction, and personnel.

If a student is being disruptive or has already been identified as 504, bilingual, or special education, it would be appropriate for a principal to exclude a student from a standardized test. A student should not be arbitrarily removed. However, a disruptive student may be removed and tested in a smaller classroom or by himself or put next to the examiner even if there is no 504 accommodation.

She learned in 2003 of a breakdown in the relationship between Giglio and Weil. Also, the District had asked the principals to find ways to reduce staffing if the budget was not approved. In the case of Giglio's School, she was directed to eliminate one staff position, and Weil's position was targeted as Giglio suggested combining the positions of test coordinator and technology coordinator. (*See R-65 and R-66*). Giglio's April 4, 2003 proposal to realize a 5% budget reduction by abolishing the position of technology coordinator). That caused a breakdown in the relationship. Ultimately, by July 1, 2003, the District determined that the budget constraints did not require the elimination of the position. However, the contingency plan had been required months earlier.

Stepherson received a copy of the disciplinary memo issued by Giglio to Harvey on May 22 and discussed it with Harvey on the telephone. She told Harvey it was a type of memo that would go in her school file as opposed to the Central Office file. In Stepherson's view such a memo would not go into a staff member's personnel file unless the principal asked that it be so filed.

(13) ELMAS ALIU

Aliu was called as a rebuttal witness by the District at the conclusion of Giglio's case. Curiously, the District did not call her to testify in support of its case in chief. Aliu was a 4th grade teacher in 2002-2003. On May 14, 2003 she attended one of the short morning grade-level focus meetings conducted by Gil. Gil, Giglio, and Aquart were there. Filippelli occasionally attended focus meetings if she had a topic. She believed she wrote everyone down who attended the May 14 meeting, but she did not write down Filippelli (*P-29*). She wrote notes of the meeting on the back of the sign-in form. On May 14, they were talking about NJ ASK preparation because the School was to be tested the next week. Her notes (*P-29)* say, "list- 504 students, -PAC, -disruptive, -easily frustrated, ASAP> Mr. Gil." "PAC" (I&RS) was the process by which students with special problems are referred by their teacher and are evaluated by a study team for learning disabilities. Prior to the May testing, she had referred more than one student to the PAC committee. Although she was not sure she had referred S.L. to the PAC committee, she did have problems. She was disruptive. The adjectives she wrote on her *P-29* notes described S.L. She did not remember if she asked about 504 students or was told. As to the words "disruptive" and "easily frustrated" she was not sure who used the words. On cross-examination she testified that she was not sure these words were used, "but ...it must have struck me, so I wrote it down." Those were the words for the types of students she was supposed to choose as a list of 504 students. She did not remember specifically discussing S.L. at the May 14 meeting when talking about potential 504 students. They were told to give Gil a list of four to five students who fit that category as soon as possible.[7] She testified that she believed she submitted the list by the end of the week of May 14. However, in her deposition, she testified that she submitted the list "within a week." She then agreed on cross-examination that she could have submitted the list on Monday May 19. Security procedures for NJ ASK were also discussed. She added to her notes, "Prior to testing, I gave a list of 4-5 names that would fit the above classification for 504 to Mr. Gil (in his mailbox.)" (*R-29A*). She signed this addition "Elmas Aliu 6-25-03" and added her telephone number for the benefit of the State investigators.

[7] See discussion of Motion to Dismiss.

Aliu agreed that her class and Aquart's class were very overcrowded in 2003. The previous year some of her students had been taken out during testing and tested in a small group.

On cross-examination Aliu could not remember why the May 14 focus meeting was in the morning but recalled that there may have been a one-half day session with an in service meeting in the afternoon. No one at the morning meeting indicated that children should be designated 504 students even if they were not official 504s. She assumed she would give four or five names and that they would be verified some how to see if they fit under 504 since she thought those students would fit the 504 category. She did not write down on her notes that she was supposed to give four or five names, and instead testified, "I'm not even sure right now." No one at the meeting told her that students placed on her list were going to get more time on the test or special accommodations. No one told her that this list was for anything other than testing in a small room. Aliu verified that she had referred five students for PAC or I & RS evaluation as of April 23 (*R-3*). She also verified that only S.L. was both referred to PAC and placed on the list she gave to Gil for testing in a small group. Five of the six students she placed on her small group list were never referred to PAC by her as potential problem students. The ones she placed on her list were ones she thought were frustrated or might disrupt the class.

Aliu did not ever indicate to Propersi that she knew why Propersi was no longer proctoring on May 23 because Giglio had told her that the children from her class had not done well on the test.

(14) CATHY BLANK

Blank testified as a rebuttal witness. She was the substitute principal at the School on May 20 when Giglio and Gil left the School to attend an award ceremony in Cherry Hill. She denied that she handled any test booklets that day or was given any by any teacher or that Giglio gave her any instructions regarding the handling of test

booklets. She did however recall that Giglio informed her that special education student testing would be continuing in the afternoon. She did not remember whether she received a phone call from Giglio that day but it was possible. She did not sign *R-80* which was the security checklist for the afternoon for special education students who had unlimited time to complete their tests. The initials "K.B" were not placed on *R-80* by her and do not accurately reflect her initials since she spells "Cathy" with a "C".

(B) RESPONDENT'S WITNESSES

(1) LINDA LEPROTTO

Leprotto was a first grade teacher at School 16 in 2003 and had taught there prior to Giglio's arrival. She described Giglio as firm but professional and fair, very organized, very structured, thorough and demanding. She expected assignments to be completed. She was very good with the children, and the children loved her. LeProtto characterized Harvey's relationship with Giglio as an uncomfortable one. When Harvey arrived she told LeProtto that it was her misfortune to get stuck in the same school with Giglio since something had happened between them at School No. 10. Harvey complained about Giglio for a three-year period, exhibited a strong dislike for her, and on many occasions said she hated her. She described the relationship between Weil and Giglio as a good one in the beginning, but Weil became unhappy. She observed Weil and Harvey becoming very close friends and eating lunch together every day.

LeProtto was trained as an emergency examiner or proctor for NJ ASK for 2003. No one ever said anything about designating children 504 students so they could get more time.

On one of the days of testing she was attending the breakfast program for the children along with Harvey. Harvey was very angry that Giglio was going to some sort of awards ceremony, and Harvey believed she should have been invited because she had done all the work. Harvey indicated that she had had a confrontation with Giglio, and, as a result she would not let her proctor that day. Harvey spoke loudly of this

situation for all within hearing distance. Harvey said there would be a payback and that "paybacks are a bitch." The investigators never asked her any questions about Harvey's relationship with Giglio.

During the NJ ASK testing, some of Propersi's students were squeezed into her classroom of 1st graders each morning around 9:00 a.m. Harvey was never in her room on any of those testing days between 8:30 a.m. and 9:00 a.m., or at any other time during those testing days. K.O. was brought into her classroom by Giglio on all three days of 3rd grade testing. She was certain K.O. was brought in after 9:15 a.m., because it occurred on two days when LeProtto was conducting her daily silent reading between 9:15 a.m. and 9:25 a.m., and there was no place for K.O. to sit. Because some of Propersi's students were in the room creating a crowded situation, LeProtto had K.O. sit in her seat. On the last day of 3rd grade testing (May 22), K.O. came in even later than during silent reading. The State investigators presented LeProtto with a statement to sign indicating that K.O. was brought in each day around 9:00. She refused to sign the statement because she had been very specific in her interviews regarding the time reference because of the silent reading.

(2) MICHAEL PACIGA

Paciga has been an acceleration teacher at School 16 for six or seven years. In 2002-2003 he worked in collaboration with the regular classroom teacher with specific 3rd and 4th graders who had identified deficiencies. He preceded Giglio in the School. He described Giglio as an excellent leader who created many programs to improve test scores. Every week Giglio went into the 4th grade classrooms to teach math.

Paciga had been examiner and proctor on various tests prior to 2003. He was trained for NJ ASK in 2003 through various faculty and grade-level meetings including on May 14, 2003 (*R-55*) when he trained with the other specialists rather than the classroom teachers and later in the day with the full faculty in an in-service meeting. Giglio spoke about 504 students in response to a question someone asked as to what a

504 student might be. She asked for a list from teachers who had 504 students, but she did not say anything improper on this topic.

Paciga served as a proctor in Aliu's 4th grade class. He picked up the booklets each day at approximately 9:00 a.m., brought them in a box to the room, and distributed pencils while Aliu distributed the test booklets from the box. Each morning McPherson picked up the special education students from Aliu's room. The classrooms in the 4th grade were extremely small, and there was an overcrowded situation. Therefore, four or five children were picked up by Gil each day to alleviate the crowded situation. Just before Paciga picked up the booklets on the first test day, Aliu had informed him that the reason for removing these students was due to the overcrowding situation. The routine was for Aliu to distribute the booklets to all the students including the students who would be removed. When Gil arrived Aliu would pick up the booklets from these students and Gil would put them in a box. When the testing concluded each day in Aliu's room, she would collect the booklets, place them in a box, and Paciga would return them downstairs to Gil. Gil and he would count the booklets and put them in alphabetical order. The booklets from the five removed students were already waiting at Gil's testing desk in the hallway on the first floor when Paciga arrived with those of the rest of Aliu's class each day of the testing. On Friday May 23 Paciga returned Aliu's booklets to Gil at 10:45 a.m., at which time he signed the security checklist (*P-7A, p.13*). He signed again at 10:50 a.m., because it took five minutes to go through the booklets putting them in order. For his entire teaching career, proctors always picked up and return the test booklets from the testing coordinator.

On Thursday May 22 when Paciga had concluded his testing responsibilities, he resumed his regularly scheduled assignment, which was to work with Moscato's 3rd grade class. When he arrived her testing sign was still up. He later noticed that K.O. was not in her room. He remembered this because K.O. stood out in the room because she was much larger than the other students. He noticed K.O. after lunch in the room and asked Moscato where K.O. had been, and Moscato replied that she was late.

On Friday May 23, Paciga set up a table in the hall for his baseball fundraiser around 11:30 a.m. Two students who had been assisting him all week again helped him set up. One was I.O. from Aquart's class. There was no one in Propersi's room at the time.

(3) GERALDINE AQUART

Aquart taught 4th grade at the School for about five years including a period prior to Giglio's arrival. Upon Giglio's arrival she instituted a lot of programs such as after school homework assistance and writing contests. She was a hands-on person. She would enter the classroom and fire math questions at the students. She coordinated the specialty teachers such as in art, music and gym with core subjects being addressed such as decimal points. She initiated a book reading program with the New Jersey Nets. Many of the programs helped the students to be alert and think quickly. Aquart observed a progression of improvement in standardized test scores, which she attributed to all of the programs initiated by Giglio and the increase in parental and community involvement with the School. Aquart's class size went from 18 to 26 to 30 because more parents were requesting that their children attend School 16.

Aquart receiving training for NJ ASK at two or three meetings including one on May 14, 2003 in which Aliu, Gil and Giglio were in attendance at which she signed an attendance sheet (*R-55*). This was a grade level focus meeting for the two 4th grade teachers. At the meeting Giglio and Gil asked if they had any 504 students who had been previously classified and, if so to give them a list. At that point Aliu asked what was a 504, and Giglio explained those were students who needed to be accommodated. Aquart had no 504 students so it did not affect her, although she did have one special education student, A.V.

When she gives a test, Aquart tries to separate the students so they cannot cheat or copy. She approached Giglio on May 19, the day before NJ ASK testing was to commence, to complain that the overcrowding was absurd with 30 children. She asked if a couple of students could be removed from the room so that the desks could

be spaced better. Giglio looked into it and agreed to remove some students. Aquart randomly chose the children who would have been closest to the classroom door to remove as she was setting up the desks for testing in her room. She made a list of four students for Gil and Giglio and added another student later. To her knowledge none of the students she chose had difficulties on the test or needed special consideration. The fifth student she chose was N.U. who spoke neither English nor Spanish, but Bengali. Aquart did not want him to feel badly while seeing other students writing or to feel isolated.

Generals was her proctor. Each morning Generals went down to collect the booklets and pencils. Aquart distributed test booklets to everyone in the class, and then Gil appeared to escort out the five students she had selected for removal. Aquart put their booklets in a box for Gil.

On the first day of testing when the booklets arrived in Aquart's classroom, student M.C., who had Tourette's Syndrome, had an outburst where she became very loud and her body shook. Aquart asked a hall monitor to remove M.C., and either Giglio or Gil removed her.

Her five removed students returned to her classroom on May 20 just after she had finished testing those remaining in the classroom. Gil kept the booklets for the five. The same procedure was following during the subsequent three days of testing. May 23 was a half-day. After the math test was completed just before the first lunch, Aquart had her students exercise to release tension. About 10 minutes before the second lunch, Buccolo came and asked for a few of her students. They were gone for about five or ten minutes. She did not know at the time why this group of children was removed. On other occasions after the last testing day, Filippelli pulled other students out of her room. Aquart learned that the students who had been removed from her room on several occasions had been working on a tribute for her for the moving up party using the letters of her name. She understood that Gil, Giglio and Filippelli were involved in the tribute aspect of the moving up party.

(4) KATHLEEN HENNESSY

Hennessy had been a school nurse for 16 years, the last 4 of which have been at School 16. Her duties included attendance at PAC meetings (now known as I & RS) to comment on health issues of students identified by a teacher as having problems. The meetings would include the teacher, school nurse, the principal and the child study team. In the latter half of the 2002-2003 school year, child study teams ceased to attend the monthly I&RS meetings, but guidance counselor Buccolo would attend. After the District's child study team ceased to attend the meetings, it seemed resistant to accepting 504 recommendations.

K.O. arrived at the School about two weeks before the NJ ASK testing in May 2003. A DYFS representative who was not her caseworker and did not have her records presented her to the School. The initial information on K.O. was that some horrific things had happened to her in her home before being placed in foster care in Paterson. In those few weeks before testing, K.O. was constantly in Hennessy's office, and it was Hennessy's opinion that she needed intensive psychiatric treatment. K.O. often came to her office on her own and on other occasions was sent. K.O. would also visit Guidance Counselor Buccolo. She had no interest in school and spoke of hurting herself. One day she mutilated herself with a scissor, and on another occasion bit and sucked her arm to leave red marks. The day before the start of the NJ ASK testing, K.O. was in Hennessy's office, and they were talking about the test when K.O. said, "You don't think I'm taking that rah, rah test, do you?" Prior to testing she had informed Giglio that K.O. was a very needy student who had to be watched.

At the beginning of the first day of testing on May 20 shortly after 9:00 a.m., Giglio brought M.C. to Hennessy because of a Tourette's Syndrome outburst and asked her to evaluate M.C. as to whether she could take the test or instead take a makeup. K.O. was in Hennessy's office at this time. They were both present in the nurse's office after the test booklets had been distributed because Gil was no longer at his desk outside the nurse's office. Giglio removed K.O. from the office because she was making fun of M.C. When M.C. said she wanted to take the test, Giglio arranged to

have her tested in Hennessy's office, which the nurse then vacated. Fusaro thereafter tested M.C. in the nurse's office each day of testing.

On Wednesday May 21, the second day of testing, Hennessy was by Gil's testing desk at a time when the tests had already been distributed to the classrooms when security guard Todaro brought K.O. to her for an assessment around 9:10 a.m. Testing had already started so K.O. could not go upstairs. M.C. was already in Hennessy's office testing that day.

On Thursday May 22, the third day of testing, Hennessy arrived at School a little late because she had stopped at another school. When she signed at around 9:30, someone, she believes Secretary Ruiz, had asked if she had seen K.O. because K.O. had been dressed inappropriately. Hennessy later saw K.O. enter the School through the front door dressed appropriately. Todaro brought K.O. to Hennessy. Hennessy kept computer logs of student visits. During testing she had to wait to make her entries until M.C. was done testing in the nurse's office rather than just after each visit, which was her regular practice. When State investigator Tierney questioned her about times she saw K.O., she produced the log for the investigators, which showed K.O. visiting her at 9:05 a.m. on May 20, 9:20 on May 21, and 10:10 a.m. on May 22 (*P-32, p.6*). Hennessy testified that Tierney initially did not want to accept the log because it was inconsistent with a scenario Tierney already had in her head, and she kept trying to convince Hennessy to alter her recollections. Although Hennessy signed the bottom of the copy of the log she gave Tierney, someone else wrote on the log "The times entered and the times left are not necessarily accurate since information was entered in the system after ..." She told Tierney she did not see K.O. before 9:00 a.m. on any of the days.

(5) FELIX GIL

Gil started teaching in the District at a bilingual teacher at School No. 10 in 1992. He taught several grades and then behavior modification in an alternative program for behavior-problem children for two years. When Giglio became principal at School 16,

she asked Gil to accompany her as an acceleration teacher but shortly thereafter designated him as School 16's test coordinator. As test coordinator his duties included assessment of all student-standardized tests and direction of the District's testing in the School. Throughout the year he would work with students in small groups. In 2001-2002, he still focused on small groups and added a math master problem of the day program, which incorporated literacy, social studies, math and English into the core curriculum content standards.

In 2002-2003 in addition to the above test coordinator and small group duties, although Weil was the technology coordinator, he ended up in charge of many technology functions. Gil was responsible for maintaining and troubleshooting the computers and performing technical work such as updating School 16's website because he was more proficient than Weil. He helped install the wireless Internet system in School 16 and would set up new computers when they arrived. Since Weil did not produce a newsletter at the School, Gil instead collected articles from each class each month and published a bilingual newsletter. Although Weil initially set up the School's website, Gil assumed its quarterly maintenance since Weil never updated it. He, rather than Weil, set up the PowerPoint presentations for meetings even though that was a technology coordinator function. He maintained the cameras and information for the Weathernet, which was connected to News 4 New York. He was also designated by Giglio to be School 16's photographer.

As test coordinator Gil would train teachers in analyzing data and administering tests; review tests with them; demonstrate how to go over problems, pull children out of class to work on particular problems, and coordinate testing materials and areas. Test preparation included knowing new trends in education and getting the students ready for the tests such as writing open-ended problems. He helped develop, with Giglio, before and after school tutoring programs; a Saturday computer program testing strategies in language arts and math; a self-esteem improving baseball program; a pen pal writing program; a bookworm reading club; a mileage club combining exercise with math; the Quiz Bowl, a chess team and a jazz-math ensemble all with the aim of helping students do better in general and specifically on the exams.

Since Weil was a test coordinator at School No. 10, she taught Gil many of his duties and, in 2001 and 2002, went to State and District training sessions with him. She showed him how to grid books and coordinate examiners and proctors. Dr. Mary Kildowe conducted the District training on issues related to security, gridding and packing materials. While at School No. 10 where Hirschberg was principal, proctors always picked up and returned the test materials. Gil followed that practice at School 16. He was never trained to do otherwise. While at School 16, Gil's understanding was that he could use proctors to pick up and return tests so long as they were also certified teachers. Gil trained teachers on the testing procedures during grade focus meetings and distributed materials from the District. He tried to train every teacher in School 16.

He described Giglio as understanding to the teachers, receptive to their ideas and accessible, but she was also strict and held her teachers accountable. He never observed her yelling at anyone. He knew that some people did not like Giglio's way of doing things because uncompleted assignments resulted in memos.

For the 2002 ESPA test administered to only the 4th grades, there were five testing groups—Aquart, Aliu, bilingual students, special education students and a small alleviation group. The small alleviation group consisted of students pulled from Aliu's class due to its large size because she did not have many special education students. Harvey tested them in the media room. During 2001 and 2002 there were also some 504 students pulled out for testing with special accommodations. One needed an oversized book due to a vision problem in 2001.

Prior to the NJ ASK test, Gil established training sessions periodically throughout the year, and everyone on staff was supposed to attend. He would show the teachers different types of testing materials from the District and would explain how to implement the materials in the classroom. For instance, test procedures were discussed at a May 5 full faculty meeting. The sign-in sheet (*R-77*) shows Harvey in attendance. Although Weil did not sign in, she was present at this meeting (*R-78).*

On May 14 Gil conducted formal training. It was a half-day school session during which Gil conducted four 20-minute meetings with the specialists and the teachers by grade between 9:25 a.m. and 10:45 a.m. This training included everyone whether or not they were intended to be examiners or proctors. Filippelli, Giglio and Gil attended all of these short sessions. At the 4th grade session Aliu had asked what a 504 was, and Giglio tried to explain what kind of students they were as possibly disruptive or easily frustrated and what the procedure was for having a student classified as 504. These meetings were reflected in a sign-in sheet (*R-55*). Harvey definitely attended a session on May 14, and he did not permit Harvey to skip the 2003 training because she had been trained before. The full faculty attended an in-service meeting that afternoon where NJ ASK was also discussed. Harvey's signature again appears on the sign-in sheet (*R-78*). The staff received packets of materials related to the testing on May 14 (*R-79*) setting forth administration procedure, examiner, proctor and back-up assignments, and the day-by-day test schedule with time limits for language arts and math for the 3rd and 4th grades. The procedures handout prepared by Gil, which indicates that proctors will count and sign for the booklets on the security checklist, was submitted to District Test Coordinator Kildowe prior to May 14. Gil did not receive the Test Administration Manuals prepared by the State (*P-8*) until after his final training meetings.

Giglio and Gil thought there would be 504 students for testing because the paperwork was in progress for 4th grade students S.L and T.A., which they anticipated being completed before May 20. Therefore, they needed to designate and reserve a separate room and assign an examiner for the anticipated 504 students. On May 13 Gil created a template in the computer system for 504's as well as for each class and for special education for roster purposes and left the names blank. Templates were put in all fields for the test. The 504 template was highlighted with a "Y" designation. Because of the possibility of 504 students, Gil revised his examiner/proctor list as set forth on *page 4 of R-79* to add Harvey and Propersi as a 4th grade examiner and proctor (*R-72*).

At 1:30 p.m. on Friday May 16, Gil went to the District's central office to pick up School 16's testing materials. He was delayed there because of a missing resource sheet from ETS and did not return to the School with the materials until 2:55 p.m., which was near the end of the school day. As Gil was unable to stay after school that day, the first time he was able to review the testing materials was during the morning of Monday May 19. Although he had asked Aliu, Aquart and the 3rd grade teachers to notify him if they had any 504 students, he had received no such lists. On the afternoon of May 16, he asked Aliu if she had heard anything about S.L.'s 504 designation, and she said she had not.

On Monday morning Gil began to put the label data he had received on Friday and the booklet numbers into the rosters he had previously set up with templates. He placed labels (*P-66*) onto the test booklets, which contained designated numbers. Once a label is affixed to a numbered booklet, it cannot be removed, so the booklet becomes that of the student whose label is affixed. When Gil starting inputting the label information into his rosters, he discovered over 20 mistakes including students mislabeled as 504 by ETS based on data submitted to it by the District's testing department (*See P-66A*). May 19 was chaotic because of the mislabeling problem, an expected proctor (Reyes) had a heart attack, and an expected examiner (Weil) was absent due to a family problem. Gil had no one to help him and became stressed for time since the testing was scheduled to commence the next day. He approached Buccolo that day, who confirmed that the students whom ETS had labeled as 504 were not in that category. She also advised that the paperwork for S.L. and T.A. had not been completed. Gil advised Giglio that the paperwork had not been completed and that, therefore, the 4th grade classes would have more students than anticipated. Since they had previously alleviated overcrowding in previous years by creating a small group in a separate room; and since they no longer needed the room which had been designated for the anticipated 504 students; and since Harvey and Propersi had already been assigned to that room; and since Propersi had already prepared other work for her class to perform in other classrooms, they decided to use Harvey and Propersi and the pre-designated 504 room to alleviate overcrowding in Aquart's and Aliu's classes.

Gil and Giglio approached the two teachers on the afternoon of May 19 and asked for lists of students for the small class to alleviate crowding in their classes. Aliu gave five names and Aquart gave four. Gil denied that Aliu had given him a list of students on May 14. By the time the small group to alleviate overcrowding was consummated, labels had already been put on the booklets for the Aliu and Aquart classes, and the rosters had already been set up. The document bearing the footer "Harvey 504 Accommodation" (*P-30*) was not an official roster but rather an in-house document Gil had created on the computer so that teachers would know who was in their class for testing. It was never prepared for ETS. Gil simply put the small group into the template he had earlier prepared when he expected that there would be a 504 group. He never changed the template to eliminate the 504 category, and that is why nine names appear on *P-30*. He also never changed the label on the box used in Propersi's room for the small group. Gil realized his mistake later in the week and claimed that there was no time to make such changes since conditions were "crazy." If either or both of the proposed 504 students or others had been approved, they would have been tested in Propersi's room. Prior to discovering that there were no 504 students, there was no plan for a small group to alleviate overcrowding.

Gil anticipated having one week to make sure that all information on the testing was coded properly before he had to return it to ETS. However, when investigators arrived at the School on May 27, he was directed to cease any additional work on the testing data or giving makeup examinations.

Because of the creation of the small class as late as May 19, and since the labels had already been affixed to the booklets, the newly constituted small class could not have had test booklets in sequential order. When Paciga signed out booklets for Aliu's class and Generals for Aquart's class on the official security checklist (*P-7A*) on each day of the testing, they had to sign for the entire class. Since the booklets for the small group were not in sequential order, on Friday May 23 Gil noted them in the security checklist by affixing dots to the left of the security number for each student in the small group for language arts and math (*P-7 and 7A*). Additional dots were affixed where a booklet was distributed for teacher use. Gil also noted that on pages 5 and 6 for 3rd

grade math and pages 11 and 12 for 4th grade math he wrote the wrong date. It should have been May 22 rather than May 21.

On Tuesday May 20 Gil removed the booklets from the test security closet in the hallway of the first floor and took them to the desk outside Giglio's office and waited for the proctors to pick them up. When the proctor arrived, Gil would go to the box for that class, count out the booklets and have the proctor sign the security checklist. This occurred around 9:00. Gil then went upstairs and removed the small group first from Aquart's room and then from Aliu's room. He had with him the box, which indicated "Harvey 504 Accom" which contained the booklets, test roster and pencils. Although student N.U. was not on Aquart's removal list, it was decided to test him with the small group, because he did not speak English. He carried the box and walked the group to Propersi's room and left the students with Harvey and Propersi. He then went to Moscato's room and picked up her special education students A.R. and I.S. and delivered them to Filippelli. He did not remove anyone else from Moscato's class and did not see K.O. at that time. On May 20, after he had removed the above students, he was called to Aquart's room where M.C. was having a Tourette's Syndrome episode and had to be removed to the nurse's office where Gil arranged for Fusaro, a backup examiner, to examine M.C. During the rest of the testing period that day, Gil would peek into the testing rooms to make sure everything was okay. At the end of testing he waited at the testing desk for the materials to be returned to him. Propersi returned the small group booklets just before Paciga and Generals returned the booklets from Aquart's and Aliu's classes. Gil recorded the return times. After testing was finished for all but the special education students on May 20, Gil left the School with Giglio to attend the Star School presentation in Cherry Hill. He understood that Filippelli had given Acting Principal Blank the special education test booklets to be locked up.

Gil followed the same procedures each day. On the math test days of May 22 and May 23 he had the small group students carry manila scrap paper with them but never had them carry their test booklets. On Wednesday Weil replaced Harvey as the examiner in Propersi's room at Giglio's direction, and she returned the booklets at the end of each test period. On Friday Buccolo replaced Propersi as proctor in Propersi's

room because 3rd grade testing had ended, so Buccolo was not needed for testing there and Propersi would then be available to administer to her dispersed students. Unlike Propersi, Buccolo, as guidance counselor did not have her own class to cover. Each day, the booklets from Propersi's room were returned to Gil before Paciga and Generals returned theirs. Gil recalled this from his memory rather than from *P-7A* since Weil did not sign in the small group books on May 23. On May 21 and May 22 Gil continued to remove the special education students from Moscato's classroom after he distributed the tests. He did not see K.O. in her classroom on either of those days. On each of the testing days, because the special education students received unlimited time to complete their tests, they were not finished before lunch so Gil secured the tests during lunch and signed them back out after lunch. He prepared a special document (*R-80*) for the second sign out and sign in for the special education students.

On Friday May 23 Gil never entered the small group classroom during testing. He absolutely never instructed anyone to give those students more time on their math nor did he re-release any language arts books to Weil so the students could improve their work. He had no discussion that day with Weil or Buccolo while testing was in progress. He never said to Weil that day, "I'm going to go to hell for this."

Prior to the week of testing, Giglio, Filippelli, Weil and Gil had discussed the planned tributes to the 4th grade teachers by their students. While Weil was away on her family emergency before the test week, Giglio, Filippelli and Gil had another discussion where they had agreed to commence the tribute preparation on May 23 after testing concluded. This time was chosen because May 23 was a half-day, the children would be tired after testing, and this would be a fun project. After testing was completed on May 23, Gil understood that Giglio had given Weil a list of students to retrieve from Aliu and Aquart's class. Giglio instructed Gil to get the tribute books from Filippelli's closet, which were blue booklets usually used for tests throughout the year in which the children were to write. He carried the booklets to Propersi's room where the small group testing had occurred. Weil was there with six students. When he arrived Weil said that she had to leave and did so. Gil then distributed the bluebooks to the students and Filippelli joined him in the room where he remained for about five minutes. He left

the room as Filippelli was directing the tribute project. He did not have a conversation with Martinez that morning. However, while he was with the tribute students, the custodian tried to slide the door open between Martinez' room and Propersi's room whereupon Gil said, "Don't do that. We're not ready."

On the afternoon of May 14, Gil, Giglio and Filippelli met with the father of 3rd grade student J.F. on the playground. He was requesting special education or an accommodation of special seating near a teacher for his son because he was rambunctious and had received a special accommodation at his previous school. Gil then prepared a document to initiate the 504 process and left it in guidance counselor Buccolo's mailbox since she was not in that day. Gil never heard about the 504 effort again from Buccolo or anyone else. On the May 21, the second day of testing, J.F.'s 3rd grade teacher Moscato approached Gil and asked if he would remove J.F. from the room because he had been acting up. Gil said he had received no paperwork to authorize this. When Moscato began to cry, Gil said he would speak to Giglio. He never removed J.F. from the room and never inquired what happened to J.F.

In February 2003 his relationship with Weil had become somewhat rocky, but they remained civil toward each other. Prior to the arrival of a state assessment team, Weil was supposed to get certain materials ready. Since she did not perform her assignment, Giglio asked Gil and her to stay after school to complete it, but Weil would not stay. Gil ended up doing all of her work, and he told her he was upset. Nevertheless, he still considered Weil a friend in May. During the investigation Weil was telling him not to say certain things to the investigators like her not signing out books leading him to believe she was worried she had done something wrong. Gil thought the investigation concerned allowing proctors to sign out books or his walking the books to the small group, but he never learned at that time that the allegations were more serious. It was not until August that he realized that the allegations were for cheating and that he had been implicated. He believed Weil had manipulated him.

Gil knew that Weil had taken college courses in the fall of 2002. Around January 2003 Weil was speaking with Giglio and Gil and had complained that she had received

a "C" grade on her report card. Giglio thought it was funny and said something like "suck it up and don't be a baby." A few days later he observed Weil on his computer scanning her report card. His computer was the only one in School 16 with a scanner. He knew that she was capable of operating a scanner because he had observed her using one in the past. He asked her what was she doing, and she replied that it was nothing. He did not suspect wrongdoing at that time. In early June he overheard a conversation where Filippelli had said that she had not received tuition reimbursement because the District had run out of money for that benefit. Weil was present and said that she had been reimbursed for her two fall courses. This surprised Gil because he knew that there should have been no reimbursement for a "C" grade since it had happened to him once. Gil said nothing at that time to anyone because he thought Weil was still his friend. However, in August he disclosed to Giglio for the first time what he had observed regarding the scanner and the surprising comment she had made in June about reimbursement. He denied ever assisting Weil to alter her report card.

(6) JANE BUCCOLO

Buccolo appeared under subpoena from respondent. She had been the guidance counselor at School16 for two and one-half years following a term as guidance counselor at School No. 10. For the first three days of the NJ ASK testing, Buccolo was a proctor in Loftus' 3rd grade class. (There was no 3rd grade testing on May 23). On May 23 Giglio instructed her to proctor in Propersi's room where Weil was the examiner. To her knowledge, nothing unusual occurred that day. As guidance counselor she was aware that giving extra time on a test to students who were not 504 or special education students would be irregular, as would the return to students of tests, which had already been completed. However, she observed no such irregularities in Propersi's room that day. She was aware only of math testing that day. Gil might have come into the classroom during the math testing but she did not recall and was not sure. At no time did Weil or she return to students test booklets from another day. She never saw language arts test booklets on May 23. She had no discussion with Weil that day about giving students more time on the test, and she did not recall discussing with Weil whether the students in that room were 504. No one, including Giglio, Gil and Weil,

instructed her that day to give students more than the scheduled time for the math test or to return language arts booklets. Buccolo knew that none of the students in that room were 504. At the conclusion of the math test on May 23, the students returned to their regular classrooms. She did not return the booklets that day as she had on the days she had proctored for Loftus.

After the conclusion of the math test, Weil gave Buccolo a list of eight to twelve 4th grade students to pick up from their classes and escort them to Propersi's room. When she arrived with the students, Weil took the list from her, and Buccolo left. Buccolo did not participate in any testing of these students.

As guidance counselor, she was responsible for keeping track of 504 students. Before the start of NJ ASK, Gil had asked her if there were any 504 students, and she responded in the negative. S.L., a 4th grader was in the process of being designated as 504, but the process had not yet been completed as the parent had not yet provided certain medical documentation. The agenda for the I & RS meeting of April 23, 2003 listed S.L. as an ongoing matter and J.F. as a new consideration. She was trying to obtain records for J.F. just prior to testing, but the process for him had not been completed.

(7) ALICE FILIPPELLI

In 2003 Filippelli was the facilitator in School 16. Her duties included developing and implementing a comprehensive, long-range whole school implementation plan; being available to and supportive of students, parents, teachers, staff and administration as part of the implementation of the plan and building consensus within the school; developing strategies and systems to improve classroom practices; informing staff of various availabilities of resources, and providing in-class coaching to classroom teachers engaged in the implementation of innovative methods and strategies.

In March 2003 Giglio made a decision for the following school year to have Filippelli and Harvey swap the positions of facilitator and librarian. Filippelli had recently

received her librarian certification, and she had successfully completed several projects that Harvey should have undertaken as librarian. Filippelli had observed Harvey with the children and found that Harvey lacked enthusiasm and never made the children feel welcome in the library. Harvey was resentful of Filippelli because of the attention given to the wish list she had prepared. Harvey yelled at her and said she should never have been given the facilitator's position at School 16 and that it should have gone to Weil.

On May 20 Filippelli was slated to accompany Giglio and Gil to Cherry Hill where the School was to receive an outstanding school award, but could not attend because she was testing special education students who had unlimited time on the test lasting into the afternoon. During second lunch that day, as Filippelli was emerging from the nurse's office she heard Harvey loudly screaming, "How dare you take Gil and Filippelli to the ceremony when I was responsible for filling out the application." Giglio was calm and told Harvey she had thought she would not be in that day because her daughter had been hurt. Giglio did not raise her voice and did not follow Harvey down the hall. A little later Filippelli came into Harvey's library, and Harvey pointed her finger at Filippelli and yelled at her in front of others that she had lied to Giglio about Filippelli not informing her of a telephone call that Harvey had taken which was intended for Filippelli. Filippelli was upset enough over this confrontation to write a memo to Giglio (*R-60*).

Filippelli was in charge of and participated in the preparation for the part of the 4th grade moving up party at the end of the 2003 school year which involved having 4th grade students, as a surprise, prepare tributes of anagrams using the letters of each 4th grade teacher's name. Each student was assigned a letter from the teacher's name and told to write words starting with that letter which described the teacher. They had the students write their ideas in bluebooks usually used for tests so that they would feel that the assignment was important. Although Filippelli had retained the two boxes of bluebooks, during the summer of 2003, someone rifled through her work area and took one of the boxes with some of the 80 bluebooks. Approximately 50 bluebooks remained in Filippelli's work area. At a meeting of Giglio, Gil and Filippelli (Weil was absent) the week before May testing, Giglio suggested that, since Friday May 23 would be a half day and the students would be spent from testing, it would be a good idea to

start some of the 4th graders on the tributes in order to get them to focus and concentrate on the project.

As a facilitator Filippelli was trained for the NJ ASK test even though she had administered exams for over 16 years. On May 14 she attended all of the grade focus meetings where Gil explained the test and distributed packets of materials. In the afternoon, the full faculty met, and the materials in the packet were discussed. She remembered either Gil or Giglio asking the teachers for a list of 504 and special education students so that accommodations could be made. At no time did either Gil or Giglio talk about giving students more time on the test or to suggest that teachers designate students as 504 who might have trouble on the test.

Filippelli was responsible for testing the three 3rd grade special education students. She did not test 3rd grade student J.F. with this group. McPherson tested the special education 4th grade students.

On the first day of testing, May 20, Giglio entered the library shortly after Filippelli had distributed the test booklets to her special education students and informed her that she would have to join McPherson in her testing room because the library was needed to test M.C. who had been making loud noises during a Tourette's Syndrome outburst. Her children could still hear M.C. and were laughing, so she complained to Giglio. She did not hear the noise after that. Filippelli tested in the library on May 21 and 22. The special education students were entitled to unlimited test time. Therefore, she would break for lunch each day and finish the testing after the other students had finished eating. During lunch she would sign the booklets for both her and McPherson back in to Gil and sign them out again after lunch on a form adapted by Gil (*R-80).*

Since 3rd graders were not tested on May 23, Filippelli took three of McPherson's special education 4th graders for testing. She absolutely never gave any answers to any of the special education students, and the investigators never asked her that question. On May 23 the special education 4th graders who were close to finishing at lunchtime stayed with McPherson while Filippelli took those who would need time after lunch

around 11:20 and left them in the lunch line. Because it was a short day, McPherson retained all of the booklets for her 4th graders since some were finished for the day and the others would be returning after the shortened lunch. Filippelli saw Giglio at that time and asked her if the 4th graders were working on the moving up ceremony tributes as they had planned. When Giglio told her Gil was in Propersi's room with the students, Filippelli went to the room and observed Gil handing the students bluebooks. Weil was not present. He told the children that Filippelli would tell them what to do with the bluebooks, and he left for lunch. This first group of students had been selected by Giglio to be the leaders of the tribute presentation. Filippelli explained to the students the project for the moving up party and that they should explain it to the other students when they returned to their classes and that it should be kept a secret from the teachers.

Before dismissal on May 23, Filippelli was in the School office when she overheard Giglio ask Moscato why she had marked K.O. absent on the attendance sheet since she had intended for Moscato to mark her absent on the test roster. She then told Moscato that she would have Lily [secretary Ruiz] mark K.O. late. Moscato did not respond. Sometime during the testing week, Giglio informed Filippelli that she would be administering a makeup test the following week to K.O. because the School had not received K.O.'s records before the regular testing commenced. Giglio chose Filippelli for this assignment because she got along with K.O.

Almost every day after May 23, Filippelli removed several students from a 4th grade class to work on the tribute for 10 to 15 minutes. Sometimes Gil helped her. At the moving up ceremony around June 10, Filippelli was surprised to discover that some students had prepared an anagram for her during lunch periods, and she was presented with it along with the presentations to Aliu, Aquart, Quispe, Santos and Paciga. A surprise anagram was also prepared for, and was supposed to be presented to, Giglio at the ceremony. Weil, as chairperson of the moving up ceremony was supposed to make the presentation to Giglio but never did so. Filippelli had maintained lists of the 4th grade students so she could track what letter she had assigned to which students (*R-31*). Although most of the 4th grade students participated in the anagram preparation,

certain students were chosen to read the anagrams and hold up the letters. Filippelli maintained these lists (*R-88*). (*See, R-87*, photographs of children holding up letters). I.O. was the reader for Paciga, and he was one of the leaders chosen to work on the project on May 23 because he was active on Paciga's baseball team. J.Q., a reader for Aquart's presentation was in Propersi's room on May 23. J.N., also in the room on May 23, was scheduled to be a reader but never got to perform. I.L. was a reader for Aliu. Some of the leaders picked to be in the room on May 23 ended up not being readers because they were too shy. Filippelli produced bluebooks with anagrams prepared by R.M, I.L, G.D., and J.E., all of whom were in the second group in Propersi's room on May 23 (*R-89*). The bluebooks for the other second group of May 23 students were among those removed during the summer of 2003 from Filippelli's work area.

In late May or early June Filippelli had asked Weil if she had been reimbursed by the District for fall college courses she had taken, because Filippelli had not received her reimbursement. Weil responded that she had been reimbursed for her two courses. Gil was present during this conversation. Because of the depletion of the tuition reimbursement account, teachers were not reimbursed by the District for college courses taken during the spring semester of 2003 and they were so informed by the District (*R-90*).

(8) GRACE GIGLIO

Prior to becoming a vice principal at School No. 10, Giglio had been the test coordinator. She followed an understanding that only certified teachers could be proctors, and, if certified, the proctors could pick up and return test booklets to a test coordinator. She had always followed this procedure and had never been informed that it was an unacceptable procedure until May 27, 2003 at which time Harris told her such a use of proctors was not really a problem so long as they were certified teachers.

The year before her promotion to principal while still at School No. 10, Giglio had a problem with Harvey over a teacher of the year election. One of Harvey's students had not been picked up at the end of the school day, and Harvey had left. Principal

Hirschberg asked Giglio to check Harvey's room for a telephone number, which she found. The next day Harvey accused Giglio and Filippelli of ransacking her desk for the purpose of rigging the ballots for the teachers' election, which Harvey was in charge of running. Harvey complained to Principal Hirschberg who dismissed her complaint. She and Harvey did not speak again after that incident. Harvey was reassigned to School 16 as librarian before Giglio's promotion. When she learned that Giglio would be running School 16, Harvey requested a transfer. However, Harvey stayed, and Giglio described their subsequent relationship at School 16 as professional.

After initiating many programs at the School after her arrival, the morale of both the staff and the children improved. Students won many awards. She was strict with her staff since she had high standards and demanded that all staff pull their weight. This caused some animosity. Although she and Weil had been good friends for many years, Giglio believed that Weil was not fulfilling many of her responsibilities as technical coordinator. She reassigned the website responsibilities to Gil even though Weil had been trained on how to maintain it. Gil ended up doing many of the technology coordinator responsibilities because Weil was struggling with the technology. Around November of 2002 some staff members were complaining about others not working very hard. At that time she directed Weil to spend less time on the Internet and more time in the classrooms with students. Weil was resentful. This continued to be a concern of Giglio's. However, she did not reflect this concern in Weil's reviews at first. Late in 2002 Giglio tried to gently prod Weil to improve her performance. In November of 2002, the School's facilitator had been promoted. Although Weil applied for the position, Giglio gave the position to Filippelli with whom she had worked at School No. 10. A facilitator is the glue of a school who makes sure the school's program is followed. When Weil submitted her resume (*R-21*) to the District's personnel office for the position of facilitator, she inaccurately asserted that she had been the computer lab instructor at School No. 10, a facilitator there and that she had developed and maintained a website.

In January 2003, Weil had a discussion with Giglio where she expressed her unhappiness about not being appointed facilitator, and claimed she should have been

given the position because of their friendship. Giglio gave her another copy of the technical coordinator's job description (*P-43*), and she said she would work with the facilitator and librarian on technology-related projects. However, Gil, rather than Weil, continued to perform most of the technology coordinator duties even though that was not his position. Giglio suggested that Weil take some computer courses and again to stop using the Internet for personal use while at work. On March 21, 2003 Giglio sent Weil a memorandum stating as follows: "Please access websites intended for school business only (no travel, real estate etc.)" (*R-92*). Since Weil's work area was in the faculty lounge room, other staff could see her computer screen and the websites she was accessing on her computer, and complaints by the staff continued into February and March 2003. In February a team came to the School to perform an overall assessment evaluation. When Weil ignored her responsibility to update the School's presentation book of accomplishments, the text for which Giglio had prepared, Giglio and Gil remained at the School late into the night to complete the book (*R-93*). Weil declined to stay because she said she had a previous engagement.

In February District Superintendent Duroy directed school principals to prepare contingency budgets with abolished staff positions to accommodate anticipated budget cuts of 5, 10 or 15 percent. Under each of the three scenarios, Giglio was recommending that the technology coordinator position be abolished (*R-68*). In March Giglio informed Weil that her technology coordinator position would be abolished if the budget cuts became a reality, and those responsibilities would be combined with those of the test coordinator. She offered Weil the 1st grade tutoring position rather than a return to a classroom, which Giglio knew Weil did not want. Giglio again discussed this decision with Weil during her evaluation of April 9. When Weil expressed her unhappiness about the prospect of losing her title, Giglio told her she could then request a transfer. Weil eventually indicated she would accept the small group tutoring position.

Weil had learned that Giglio's brother had been brutally mugged in the fall of 2002 and that Giglio was looking for a home for him. Weil informed her that she had been looking through real estate material and thought she had found a place for her brother. They looked at a place together in the last week of October but it did not work

out. A deposit was tendered but not accepted. In January and February of 2003 Giglio was using A.J. Caley, and not Weil, as a realtor.

After Gil was informed in August 2003 he was being transferred because of the charges of test cheating, Gil reminded Giglio of a conversation with Weil in January 2003. Weil was upset that she had gotten a "C" on her report card from courses she was taking. Giglio told her that a "C" is still a passing grade and still counts toward her certification. The next day Weil came to Giglio and said the professor had made a mistake and changed the grade to "A." Giglio called her a big baby. Giglio never received a fax of any of Weil's grades in her office and never suggested that the grade could be changed. At the end of May 2003 Giglio overheard a conversation involving Weil in the hallway over the fact that the District had run out of tuition reimbursement money for the second semester. Weil said she had been reimbursed for two courses. Giglio did not think anything of the conversation at the time. In August after Gil asked Giglio to recall the January conversation, he told her that he had seen Weil in January scanning her report card into the computer and suggested she was changing her grade. After the instant charges were filed against Giglio and she knew Weil had initiated the allegations, she asked her attorney to look into the issue of whether the report card was changed.

In 2002 Giglio also had a concern about Harvey's performance as librarian. Although she had strengths in writing, she was not kid oriented and did not instill a love of learning or an enthusiasm. Giglio expressed this concern to Harvey. One time when grant money was available for library upgrades, Giglio asked Harvey for a wish list, and Harvey replied that she had no wish list. When Filippelli arrived as facilitator in December 2002 she was completing her librarian certification. Filippelli instead prepared a library wish list, which resulted in School 16 receiving more books, a $13,000 automated system and approval for a trailer to house the library. Some children reported to Giglio that Harvey, upon learning of the trailer, told them that she was happy about the trailer because she would never have to step into the building again. In January Giglio met with Harvey and complained to her about her lack of effort on the wish list, the comment about the trailer and her demeanor with the children. In

March for the "Read Across America" day, Filippelli went into the community to secure readers even though Harvey was the librarian. By March Giglio had decided that, for the next school year, Harvey and Filippelli should switch positions because Filippelli was more student oriented, and Harvey was proficient at preparing grant applications. When Giglio informed Harvey of her decision, Harvey became very angry and indicated that she would fight the decision through her union claiming she had tenure in her position. Although Harvey complained about Giglio's March 7, 2003 evaluation of her (*R-57*) where she indicated that Harvey would become the facilitator in 2003-2004 after marking her good in many categories but only fair in many others, she indicated that she wanted to remain as librarian but was amenable to becoming facilitator. This acknowledgement was made only after Giglio told her that the only way she would remain at the School was as facilitator. On May 13, Harvey signed a memorandum, which was sent to Stepherson and the personnel office where she agreed to the transfer from librarian to facilitator (*R-59*). Giglio would have been happy if Harvey had chosen to transfer and would not have blocked it. Although Harvey showed no emotion when she signed the memorandum, Giglio heard from other staff that Harvey was bad-mouthing her.

After testing was completed on May 20 and as Giglio was preparing to leave for Cherry Hill for the Title I Most Distinguished School Award, Harvey came into Giglio's office and indicated she was very angry because Giglio had not invited her to the Cherry Hill ceremony even though, "I wrote the application for that and won this award for you." Her intonations were high, she was yelling and pointing her finger. Giglio replied that the award was a collaborative effort and felt that, if anyone should have gone with her, it would have been the 4th grade teachers. Giglio apologized and said that if she really wanted to go she should have asked. Giglio did not yell back at Harvey, and did not follow her. Although no one else was in the office, the door was open. The next morning Giglio learned that, after she left for Cherry Hill, Harvey had vocalized her anger, and a teacher told her to calm down. She also learned she had yelled at Filippelli. Filippelli wrote Giglio a memo about the argument with Harvey. On Wednesday May 21 Harvey was still angry and vocalizing what had happened. Giglio felt Harvey needed to calm down rather than examine children that day. Since Weil had

just returned to school from tending to her ill father, Giglio asked Weil to test the children Harvey had tested on May 20. Giglio gave her a test packet and asked her if she had any questions. Weil said, "No, same test, different name." Giglio was bothered by Harvey's conduct which included stirring up the staff particularly during testing week. Consequently, Giglio issued a disciplinary memo to her on May 22 (*P-63*) a copy of which she forwarded to Assistant Superintendent Stepherson with the expectation that it would be placed in Harvey's disciplinary file. However, this memo did not end up in Harvey's file. This was the first time Giglio had issued a memo of this type. On May 23, Harvey handed Giglio the second page of the memo with her rebuttal as she was walking out the door at the end of the day.

NJ ASK testing was discussed at every faculty meeting including the May 5 meeting at which Harvey was in attendance (*R-77*). Weil did not sign the attendance sheet. Test security procedures were discussed as a general overview since Gil did not yet have packets of written materials to distribute. Gil also held a test procedure meeting on the morning of May 14, which was conducted in 20-minute segments during regularly scheduled grade level focus meetings for each grade. Gil, Giglio and Filippelli attended all of the segments. Staff members signed an attendance sheet for these meetings (*R-55*). Harvey attended the 9:25 session. Weil and Buccolo were absent that day. Loftus, Ordonez, Moscato, Santos, and Quispe attended the 3rd grade session, and 4th grade teachers Aquart and Aliu attended the last focus meeting that day. In addition to the morning focus meetings, an in-service meeting for the entire faculty was conducted in the afternoon (*R-78*). Harvey signed in and also attended this meeting where Gil discussed NJ ASK test specifications. Test procedures, which were discussed in the morning, were re-emphasized.

Special education and 504 students were discussed in the 3rd and 4th grade morning focus meetings. Giglio had asked teachers to inform Gil who their special education and 504 students were so he could make the proper accommodations for the test. Space was very limited in the School and each 504 might need a different accommodation. Therefore, she and Gil needed to know the number of 504's. Giglio did not receive any lists as a result of that inquiry. After Giglio requested the list at the

4th grade focus meeting, Aliu asked her what a 504 was. At none of these meetings did either Giglio or Gil indicate that teachers should designate non-504 students as 504 for the purpose of the test in order to give them more time. (*P-29* was Aliu's notes of the 4th grade focus meeting on May 14. It included an unofficial sign-in sheet, which did not contain Filippelli's signature even though she was present.) No one at that meeting indicated that the teachers should designate as 504 children who were PAC (I&RS) or easily frustrated. When Aliu asked what was a 504, Giglio pointed out by way of example a student in her class, S.L. who had gone through the PAC referral process for a 504 accommodation. This process involved a series of I&RS or PAC reviews, the filling out of a referral form and the development of an action plan. Aliu had referred S.L. to the I & RS because her mother had insisted that S.L. had Attention Deficit Hyperactivity Deficiency. S.L.'s paperwork for 504 designation had been completed but it apparently lacked her mother's signature, which Giglio did not know at the time. When she made the 504 inquiry of her teachers, she did not then know whether the process for some of the 504 candidates had been completed. Student T.A. also had a 504 designation pending. Aliu submitted no list to Giglio before Monday May 19. *Exhibit R-3* consists of agendas and minutes from various I & RS meetings in 2002-2003 where various students were referred by their teacher to be evaluated for possible 504 status. S.L. was listed as a possible 504 at the November 2, 2002, January 23, 2003 and April 24, 2003 meetings. As of April 24, 2003, Aliu had five students under review by I & RS, at her request, for possible 504 designation, and Aquart had two. Aliu's students were H.A., D.H., S.L., S.R. and D.G. Aquart had I.O. and C.T. on the list. Martinez had T.A. and Moscato, in 3rd grade, had J.F. (*R-3*). The referral means that these students are in the process of being evaluated for 504 status, which does not occur until the process is completed.

A week before the testing Giglio had informed Propersi that she would need her room for extra space for testing and that her children, who were not scheduled for testing, would be split among other non-testing classes. She instructed Propersi to prepare packets of work for her students to do in the other classes during testing.

Gil's appointment to pick up the test booklets from the Central Office of the District was for 1:30 on May 16. He returned with the materials close to 3:00. As of May 16 he had no confirmed information about 504 students. In prior years, the test booklets and labels were obtained about two weeks prior to the test. In 2003, Gil had only one working day, Monday, May 19, to work on the actual rosters. In 2002 the 504's had been predesignated, and were known. That year only grade 4 was tested. When Gil began to affix the testing labels to the books on May 19, he noticed that there were 19 students marked 504 on the labels. He spent the morning trying to straighten out the rosters as to which students were and were not 504. This included speaking with Guidance Counselor Buccolo who informed him that there were no 504's because the process had not been completed. Therefore, Propersi's room, which had been reserved for anticipated 504 students, no longer had to be used for that purpose. If there had been 504's with different accommodation needs, Giglio and Gil had planned to use partitions in Propersi's room.

Since Propersi's room was now available as of May 19, Gil and Giglio decided to use that room to alleviate overcrowding in Aliu's and Aquart's room by removing some students from each class particularly since Aquart had approached them about her concern with overcrowding in her room during the upcoming testing. Gil and Giglio walked to each 4th grade teacher and informed her that, since there were no 504 students, they were requesting a list of at least five children from each teacher to alleviate overcrowding. As a result of this directive, Aliu produced a list of students on Monday May 19 and not at the end of the prior week as Aliu had recalled. Giglio concluded that, when Aliu added for the investigators to her notes of the May 14 focus meeting that she had submitted a list that would fit the above classification for 504's to Mr. Gil, (*P-29A*), she was confused with the list she submitted on May 19 to alleviate the overcrowding. Giglio drew this conclusion because, except for S.L., the other students removed from Aliu's class could not have fit a 504 classification because they were not among the group that Aliu had previously submitted to I & RS for 504 consideration. (*R-3*). Four of the five students on Aliu's alleviation list were never in I&RS status or found in the minutes of any of the I&RS meetings. Also, neither of the two Aquart students on the April 24 I & RS agenda were on her alleviation list of May 19.

P-68, page 5 is a list of the students in the first small group in Propersi's room on May 23. M.U. was also in that small group although not on the list. On the first day of testing Aquart requested that Gil take M.U. to the small group for testing because he spoke no English, only Bengali, and would be sitting for hours with the large class with nothing to do and would be embarrassed.

The students from Aliu's class who were tested with the small group, as reflected in *P-68, page 5*, were T.D., D.L., S.L., M.P., and F.S. Aquart's students were K.G, Y.G., F.R., O.S. Except for S.L., none of the students in the small group had been part of the I & RS process for possible 504 designation. On May 23 Giglio had prepared a list of students to work on the tributes in Propersi's room at the conclusion of testing that day (*R-99*). Of the eight students on that list, only I.O. had ever been listed in any I&RS agenda (*R-3*), and he had been removed from consideration for 504 status on April 24.

Prior to the administration of the 2003 NJ ASK test, Giglio had access to and had reviewed the prior standardized SSPA test scores from 2002 of 3rd grade students in the School who had taken the 2003 test as 4th graders (*R-100*). That test recorded several categories of results including advanced proficient, proficient and partially proficient. Many of the small group students had done well the previous year. For instance, four of five students selected by Aliu for the small group passed the language arts test in 2002 (*R-101*). Many 4th grade students who were not selected for the small group performed with less proficiency than those who were chosen.

In addition to having to ready the test materials on May 19 and resolve the 504 issue that day, School administrators had to address the situation of teacher Reyes' heart attack that day.

On Tuesday May 20, Giglio attended the pre-test breakfast party with the children from 7:15 a.m. to 8:00 a.m. She did not see K.O. there. Giglio then made her daily rounds to each classroom at approximately 8:30 a.m. Upon completion of the rounds, the security guard handed her a letter from M.C.'s mother informing her of a

Tourette's Syndrome episode during the night but that M.C. nevertheless wanted to take the test. As soon as the announcement was made at 8:55 a.m. for proctors to pick up their test booklets that day, Giglio was summoned upstairs because M.C. was having an episode in Aquart's class. She tried to calm her down by taking her to the small group in Propersi's room but M.C. was getting worse. She then took M.C. to the library but her noises were disturbing the special education students being tested nearby. As Giglio was bringing M.C. to the library, she saw K.O. at the security desk around 9:10, and told K.O. to go see the nurse. She knew it was after 9:00 because the test booklets had already been distributed at 9:00. Giglio then took M.C. to the nurse's office, and K.O. was there. She summoned hall monitor Fusaro to test M.C. and had the nurse sit at the test desk. Since M.C. was now in the nurse's office, Giglio took K.O. to LeProtto's class around 9:15 a.m. She asked K.O. why she was late, since Giglio had seen her at the security guard's desk, to which K.O. replied, "I ain't taking no test."

Giglio believed that K.O. had special needs when she arrived at the school but lacked records from her previous schools to support her concerns. She expected those records within a week of the testing but had not received the records by the time testing commenced on May 20. Her teacher, Moscato, had expressed concern to Giglio about K.O.'s academic abilities and emotional state. Prior to the commencement of testing, Giglio instructed Moscato that, in the event they did not test her, to mark K.O. absent for the test on the test roster. She told Moscato that, if K.O. were entitled to a special accommodation, she would be able to do that during makeup week. Since Giglio did not have K.O.'s records on the testing week, and since she believed she had special needs, Giglio decided not to test her that week. She had decided that, if she did not receive the records by the end of the testing week, she would have K.O. tested during the makeup-testing week as a regular student. She had already decided that either Fusaro or Filippelli would test K.O. during the makeup week since K.O. related well to each of them. When Giglio finally received some records on May 27 indicating that that K.O. was a Limited English Proficient student entitled to the accommodation of time and one-half for the test, the investigation had begun, and the School was forbidden from administering makeup tests.

Before Giglio left for Cherry Hill after testing was completed for the regular students on May 20, she instructed interim principal Blank to make sure the tests for the special education students were locked up before she left. She called Blank from the road later that afternoon to ask if there were any problems with the building and if she had locked up the test booklets for the special education students who were still testing when she and Gil left. Her cell phone bill for that day reflected an afternoon call to School 16. Giglio had left her office door locked. Blank was supposed to lock up the special education tests in either Filippelli's desk or McPherson's desk. Blank made sure they were locked up.

On Tuesday May 21, during the breakfast party, Giglio had a discussion with Gil who said Moscato was having a problem with student J.F. and asked if he could be tested out of the room. Giglio spoke with Moscato and told her she had no place to put J.F. for separate testing. J.F. in fact stayed in Moscato's room during each day of testing.

Giglio did not see K.O. at the breakfast party that day or at any time before 9:00. Guard Todaro brought K.O. to Giglio around 9:20 a.m. and said she was late. Giglio had the nurse assess her and then brought her to LeProtto's room. K.O. was at the breakfast party on May 22 inappropriately dressed in a belly shirt. Since Giglio would not permit her to remain in school so attired, she had Secretary Ruiz telephone her foster mother. Her foster mother arrived, took K.O. home to change her clothes and returned her to the School around 9:30 a.m. whereupon she was placed in LeProtto's class during testing. Giglio believed that K.O. was late on each of the three days of 3rd grade testing.

At the end of testing each year Giglio reviews daily class attendance rosters filled out by the teachers to determine how many makeup tests she needs to administer. On Friday May 23 Giglio reviewed the attendance rosters in the office around noon. She discovered that bilingual student L.B had been absent on May 23 and also that Moscato had marked K.O. absent for May 20, 21, and 22. Giglio asked Moscato why she had marked K.O. absent, and Moscato replied that she thought that is what Giglio had told

her to do. Giglio answered that she had misunderstood and that she was supposed to mark her absent on the test roster, not the attendance roster. Giglio told Moscato that she would change K.O.'s attendance for those days to "late." Giglio was certain this conversation occurred on May 23 because Secretary Ruiz' routine was to file away the week's attendance sheets at the end of each Friday. At the same time on Friday as Giglio spoke with Moscato, she spoke with Ruiz as to why K.O. was not marked late on those days. Although Giglio did not recall the precise time K.O. came in each day, she attempted to estimate the times and checked with the nurse who keeps records of visits to her office. Giglio did not leave K.O.'s attendance records marked "absent" for the three days because she was late rather than absent. When the attendance sheet corrections were made on Friday, Giglio had already determined that K.O. would be tested starting Wednesday May 28 with a makeup test whether or not K.O.'s records had yet arrived. Giglio had never failed to test a student in the past. When she had been a test coordinator she even tested students at bedsides or on home instruction. After the testing was completed and K.O.'s report card record arrived indicating her bilingual status, Giglio told Moscato that K.O. would have been entitled to time and one half had she been tested. Had she been tested as a regular student, her results would have been voided because of her bilingual status. Because of the subsequent investigation, Giglio and Gil were instructed not to proceed with makeup tests. Giglio never removed K.O. from Moscato's class in order to exclude her from testing, and she never told Moscato or anyone else to send K.O. out of her class to exclude her from testing. She had decided however, not to test K.O. during the regular testing week and would not have done so regardless of whether or not K.O. was late each day. Giglio informed the first set of County investigators on June 5 of her intention to test K.O. in a makeup along with a bilingual student, which was before the issue of any allegation as to K.O. was raised by the State investigators later in June (*P-1, page 13)*.

Moscato was absent from the School from about June 4 to June 16 because of a family problem. As soon as she returned she was questioned by State investigators. That day Moscato came to Giglio and asked what would happen if someone lied to the State investigators. Moscato said that when asked how many students were present she told them "24." Giglio reminded her that 24 students were present but that only 23

were tested. The next day Moscato was again going to be interviewed by the State investigators, and she appeared nervous. She felt she was in trouble for marking K.O. absent on the attendance roster. Giglio told her that she was not in trouble and had done nothing wrong and that she (Giglio) had corrected the attendance sheet. At all times Giglio encouraged Moscato to tell the truth and she never told Moscato not to mention K.O. to the investigators.

On the morning of May 23 Giglio told Weil that she was replacing Propersi with Buccolo as proctor so Propersi could service her class and that, if testing were done early, they were going to begin preparing the surprise tributes for the 4th grade teachers. Giglio had no discussion with Weil about giving the children extra time on the test, about returning language arts booklets or about the small group being 504s. She had no impression during the testing period that the students were not doing well. At no time did Giglio look at the test booklets. She did speak to Aliu in the hallway that day, and Aliu said she thought the testing was going well.

Giglio next saw Weil on May 23 when she was returning her test booklets to Gil around 10:40 a.m. She asked Weil into her office to discuss the tribute and what students would be chosen to be the leaders. *R-99* is the handwritten list of eight students Giglio wrote in Weil's presence to be the tribute leaders. The leaders were to be students who had not won honors or been selected during the year for other events. R.M., J.Q., G.D., J.E. and S.M. were all very shy and had not won any of the poetic achievement awards and were not published in the newspaper even though they were good students. Giglio had taught math to 4th graders during the year, and all of the eight were proficient students. She chose I.O. to honor Paciga because he was on the midget baseball team, which Paciga coached. I.O. had been rated advanced proficient and proficient on the previous test. She chose J.N. because she had been selected to participate in a February African-American History Month presentation, but her father had not allowed her to attend. This was to be the makeup. Giglio chose I.L. because her mother was the home-school community liaison, and Giglio wanted her to give the special presentation to the parents. The arrows for J.N. and I.L. were because Giglio dropped them from the initial list when she decided they would do special tributes and

not be involved in the group tribute to the teachers. She copied the list she had written and gave the copy to Weil, and then, as Weil was leaving, she changed her mind and verbally told Weil to include J.N. and I.L. That is why the list produced by Weil (*P-46*) had six names on it while Giglio's had eight. On the moving up night ceremony, the scheduled presenters from the original list of eight included J.N., J.Q., I.O. S.M., G.D., I.L. (*R-88*). Several of the boys ended up not assuming a leadership role at the ceremony because of shyness. As Weil left the office with the list shortly after 11:00 a.m., Giglio told her Gil would be up shortly with bluebooks. Gil went to Propersi's room around 11:15 a.m. Giglio encountered Filippelli walking upstairs and had her join Gil in the small group room. Thereafter, Giglio observed Filippelli in the small group room. Around 11:30 Giglio saw Paciga with I.O. conducting his daily sale in the hallway to raise money to purchase equipment for the baseball team.

Giglio never interfered with either the County or State investigation. She never told any staff member what to say to the investigators and encouraged everyone to tell the truth. She never threatened anyone. Each morning during the investigations Weil asked Giglio if she heard anything from the State. On June 12 Giglio informed Weil that Dr. Nuccetelli wanted to see her at 1:00 p.m. Weil seemed strange and was pacing. She told Weil she believed that the charges had been made by Harvey regarding the tribute list. She did not then know that Weil in fact had initiated the investigation. Weil said she was scared and asked if Giglio could refresh her memory. Giglio told her not to be scared and asked if she had given extra time, and she replied that she had not. Giglio said extra time was one of the allegations and only the person giving the test could give extra time. Giglio did not know the charge of the re-release of the language arts booklets at that time. She then told Weil she had nothing to worry about. Giglio indicated she had spoken to Buccolo who had already been interviewed who said she did nothing wrong but felt uncomfortable about writing out a statement. Buccolo said she told the investigators she had picked up the kids after the testing and brought them to Weil and went about her business. When she told Weil not to stray from what Buccolo said she told Dr. Nuccetelli, she was referring to the fact that Buccolo rather than Weil had picked up the second group of children, which everyone agrees was true. Giglio also told Weil her booklets had been down before the other two classes so she

could not have given extra time. In this June 12 conversation, since Giglio did not know that Weil was one of the anonymous callers, she thought she was protecting Weil because she claimed to believe she was the subject of the investigation. Most of the above conversation was missing from the surreptitious enhanced tape recording made of a conversation between Weil and Giglio on June 12 (*P-22 and P-51*) and occurred after Giglio, on the tape, said, "Come on in, Mrs. Weil."[8] There was another conversation on June 12 when Weil returned from the interview with Dr. Nuccetelli. Weil threw two blank pieces of paper on Giglio's desk and said that was her statement. She seemed upset and said she had no friends. Gil walked in at that point, and she started to cry and Gil told her, "We're your friends," and Gil and Giglio hugged her. Giglio reminded her that she did nothing wrong and there was no cheating.

When Giglio was interviewed by Dr. Nuccetelli on June 12, she learned for the first time that there was also an allegation of re-releasing the language arts booklets.

Giglio had another conversation with Weil on June 13 (which was also surreptitiously recorded by Weil) (*P-23 and P-52*). Since Giglio knew Weil appeared upset from the previous day, she told her she gave Dr. Nuccetelli the same blank paper statement Weil claimed she had. At that point Giglio still did not know what was going on. She had called a lawyer and told him that she told Dr. Nuccetelli that nothing had been done improperly, and the lawyer said she had cooperated fully and that Dr. Nuccetelli should not have asked for a statement. He also said she should not be reluctant to give a written statement because, at that point, Giglio was led to believe that the only concern about her conduct was that the test booklets for a time had been locked in her office rather than the test closet, which, at worst, would be a technical violation. Also, at that time, Giglio believed that Harvey and Eric Potts were behind this. Potts had requested a hearing around testing time because of the non-renewal of his contract for the next year, and she also knew that his girlfriend, Propersi, was angry about this. That was the reference on the tape to "this bitch" and "find out who your

[8] The undersigned listened to the tapes and reviewed an official transcript, which was made in the course of the proceedings. This official transcript was made from the tapes, which were enhanced in a police laboratory. The official transcripts are separate from one's Weil made herself. There was a gap in the tape between the time when Giglio said, "come on in" and Weil made an inaudible comment and then the word "lunch."

real friends are because it is not them." On June 13 Giglio believed that Weil was a target rather than an accuser. In her conversation with Weil, Giglio said she had gone to her lawyer and Weil said she was doing the same. Since Giglio's lawyer had told her to write a statement in bullet points, she thought Weil should do the same. That is why she told Weil that she would be happy to show her the statement she was going to write because Giglio was not implicating Weil. Giglio did not encourage Weil to say anything that was untrue in either the June 12 or June 13 conversations.

CREDIBILITY AND FACTUAL ANALYSIS

The undersigned heard the testimony of 32 witnesses over the course of 27 days of hearing. The testimony of certain witnesses was credible while that of others was plainly incredible. Some of the testimony from some of the witnesses was internally inconsistent or inconsistent with that of other witnesses. The testimony of some witnesses, who appeared to be truthful but unreliable, was inconsistent with that of other witnesses who appeared to be equally truthful. In view of the vast amount of varying testimony from so many witnesses, not all of the inconsistencies can be reconciled. However, after careful analysis, none of the remaining inconsistencies had any dispositive impact on any credibility determinations. Although certain witnesses appeared to be sincerely trying to recall relevant events or statements, in the final analysis, their testimony is overborne by the credible testimony of other witnesses, which, on balance, the undersigned deems to be more probable under all of the circumstances. Based on those credibility determinations, which I deem critical for making the ultimate findings in this matter, I am firmly persuaded that the findings of fact, which follow, are supported by credible testimony and evidence.

The choice of accepting or rejecting the witness' 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 fact finder is expected to base credibility decisions on common sense, which is also referred to as intuition or experience. *Barnes v. United States*, 412 *U.S.* 837, 93 *S. Ct.* 2357, 37 *L. Ed.* 2d 380 (1973). 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. *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, 521-522 (1950). *See D'Amato by McPherson v. D'Amato*, 305 *N.J. Super.* 109, 115 (App. Div. 1997). 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), *certif. den.* 10 *N.J.* 316 (1952) (citation omitted).

(a) Giglio

As indicated above, credibility determinations should factor in the concept of common sense also referred to as intuition or experience. *Barnes v. United States, supra.* The undersigned deems this factor to be a very significant consideration in his determination. In this case a scheme to cheat orchestrated by Giglio to enhance School 16's test scores plainly makes no sense.

The notion of involvement in or the direction of School staff by Giglio to engage in conduct, which was tantamount to cheating on NJ ASK is inconsistent with the unrebutted history of Giglio's unblemished teaching career of 25 years all in the City of Paterson. The plethora of academic and non-academic initiatives instituted by Giglio suggests a fastidious regimen geared to improve test scores by constant training and preparation rather than gimmicks or cheating. The desire or need to cheat simply makes no sense in the context of Giglio's long-term efforts to maximize test scores through educational training. It makes no sense when measured against her previous

remarkable achievements with her students and the recognition she and School 16 had already received as one of the top Title I schools in New Jersey.

Nevertheless, Giglio's record of achievements would hardly qualify as an adequate excuse if she had indeed purposely orchestrated a scheme to inappropriately enhance the overall test scores of School 16 by allowing some of her students extra time to complete their tests or an opportunity to add to already completed portions in May 2003 or by failing to test a student because she was likely to perform poorly. There is some testimony and even documentation, which, if believed or interpreted in a certain way, could be construed to support the charges against Giglio.

However, in the final analysis, when all of the credible evidence and testimony is considered, the allegation of an improper scheme to cheat on the NJ ASK test to enhance School 16's overall performance simply and factually makes no sense. If Giglio intended to target certain students for extra time or assistance on the tests, logic would suggest that she would have selected the specific students herself rather than leave that task to teachers Aliu and Aquart. This is particularly so, since Giglio had the test results of each student for the previous year and certainly knew which students were having problems and were being referred to I & RS. Moreover, if Giglio's motive was to select students for the small group about whose performance she was worried, she could have tested the students herself without involving an examiner and proctor. An analysis of the test performances of all of the 4th graders (*R-101*) demonstrates that the majority of students selected for the small group were not School 16's poorest test performers from the previous year. Only one student chosen by Aliu had been selected for review at an I & RS meeting. One other had been selected for I & RS review but had been removed from consideration before May 2003. In any event both of them had passed both the language arts and math test portions in 2001-2002. Of the three remaining Aliu selections for the small group, one had passed both sections and the other two had passed one portion of the test in the prior year. Significantly, three students not selected by Aliu for the small group failed both portions of the test in the prior year and four others had failed one portion. None of the four students selected by Aquart for the small room had been referred to I & RS for review, whereas the two of

her students involved in the I & RS process were not selected. In the prior year's testing, only one of the four selections had failed both sections, two had failed one portion and the fourth had not been in the school the previous year so no test results were available. Of the students not selected by Aquart, two had failed both sections and eight had failed one section the previous year. For reasons set forth in Gil's testimony, the names of the small group students appeared on a template created by Gil as a test roster, which indicated a 504 designation and which he did not have an opportunity to correct before the testing material was confiscated. Since this document was for in-house purposes and was not required by the NJ ASK instructions, it is implausible that it would have been used at all no less in such a way as to support a scheme to cheat by treating non 504 students as if they were 504 students entitled to special accommodations. In a similar vein, it is even more unlikely that Gil would have highlighted the names of the small group students with dots on the school security checklist (*P-7*) (an official document that would be returned to testing officials) and thereby drawn attention to them if there was a plan to treat those students in an improper manner.

If Giglio's design were to give the first group of students more time on their tests in order to achieve higher scores, it simply makes no sense that she would have directed the extra time only on the last of the four days of testing. If the plan were to give certain students extra time by falsely designating them as 504's and the box marked "504 accommodations" and the 504 roster were created to support this plan, the students would have benefited from extra time on each of the four days. Moreover, it is incredible that she would have chosen Harvey of all people to be the examiner in a "cheat" room since she had major professional issues with Harvey at the time.

The eight particular students selected by Giglio for the second group to appear in Propersi's room on May 23 were more consistent with Giglio's contention that they were chosen to work on tributes for the 4th grade teachers rather than Weil's contention that they were chosen because they needed more work on the language arts portion of the NJ ASK test. Only one of the eight had ever been discussed at an I & RS meeting, and he had been removed from consideration by the committee on April 23, 2003.

Moreover, he had passed both sections of the 2002-2003 test. Their prior test statistics demonstrate that, of the seven students who had taken a test at School 16 the previous year, four were proficient in at least one section and three were proficient in both sections. 16 students not selected by Giglio for the second group had lower or comparable previous scores including five who had failed both sections. The selections of the particular students for the first and second small groups as well as the non-selection of other 4th grade students makes no sense and therefore does not support the theory that they were chosen because they were likely to benefit from extra time on the tests.

Additionally, it makes no sense that Giglio would have told Martinez' class that they could make noise around 11:00 on May 23 because testing was over if her plan was to have the second group retested in language arts.

The reasons offered for not testing K.O. were plausible ones. In contrast, the absence of similar treatment of other students likely to adversely affect the School's overall performance undermines the allegation that the K.O. situation was part of Giglio's scheme to cheat. M.C. was tested despite the advent of a Tourette's Syndrome episode due to her nervousness. Arguably, she would have benefited from a makeup test. Propersi verified that M.U. was tested despite speaking neither English nor Spanish. Giglio did not need to hide K.O. to improve School 16's test scores since the 2003 NJ ASK was merely a field test, which did not count. Moreover, her score would not have been counted in any event since she was in School 16 less than a year. Most significantly, if Giglio had intended to not test K.O. at all or to cover up the fact that she was not tested, she would not have permitted Gil to create a handwritten label for K.O. (*P-66*). She never was even on the list sent from ETS. Her label certainly was not created as part of a coverup because K.O.'s handwritten and numbered label appeared in the middle several handwritten and numbered labels.

One evaluating Giglio's credibility must consider the usual argument and concern that her testimony would be naturally suspect as self-serving in that she is defending the retention of her job. I have carefully considered this possibility and reject it as a basis to

discredit Giglio. I do so, in part, because, based on my observations of Giglio as a witness, this consideration is outweighed by her demeanor, her consistency, her clarity and her sincerity in presenting her testimony, all of which leads me to determine that her testimony was honest, believable and credible. Her recall of facts was specific, detailed, consistent, and, in my view, not contrived. However, an even more compelling basis to credit the testimony of Giglio is an abundance of documentary evidence as well as other credible testimony, which supports her defense of the charges and her explanation as to what occurred during the NJ ASK testing.

(b) Gil

I also find the important testimony of Gil to be credible. It was detailed, specific and unwavering under cross-examination. He was not evasive in admitting errors he made as test coordinator during testing. Although clearly a friend and supporter of Giglio, he is still an employee of the District upon whom his job security depends. He testified compellingly against the interests of the District's case despite having been forcibly transferred from School16 and stripped of his title of test coordinator. Petitioner questioned Gil's credibility by contending, according to the *P-1* County investigation report, that the first time he was interviewed, he said that there were 504 students. However, the interview notes attached to *P-1* reflect that Gil indicated just the opposite--that there were no 504 students. According to the *P-1* report, Rose Ann Harris conducted Gil's first interview. Not only are there no notes of this interview, but Harris, (who did not participate in the preparation of *P-1*) testified for an entire day and said nothing to corroborate this claim. Under such circumstances, I decline to give any weight to the uncorroborated representation in *P-1*.

(c) Filippelli

Similarly, Filippelli, admittedly an old friend of Giglio's from School 10, testified consistently with Giglio's explanations for her actions despite having been involuntarily transferred by respondent after the investigation and potentially subject to additional discipline by respondent. I deem her to be credible.

(d) Weil

One of the critical credibility determinations is that of Weil. Except for Charges Five and Six involving the testing of K.O., she is the initial and primary link in a chain of testimony by other witnesses. If her link fails then inferences that might be drawn from other testimony are compromised. With regard to the events of May 23, her testimony is in direct conflict with that of Giglio, Gil and Filippelli as well as that of Buccolo and several other witnesses.

An employee facing disciplinary action often faces the dilemma and difficulty of convincing a fact finder that her conceivably self-serving testimony should be believed over that of a supposedly neutral witness who appears to be truthful and has no motive to be untruthful or to fabricate a story. Such is not the case here. Not only did Weil's testimony fail to hang together or appear truthful in its own right, ample proof of Weil's personal bias against Giglio was abundantly evident.

Although she refused to so admit, it is plausible to conclude that Weil was upset that Giglio had bypassed her and had chosen Filippelli to transfer from School No. 10 to fill the vacant facilitator's position at School 16. In fact, during an argument with Filippelli, Weil's close friend Harvey had complained that Filippelli never should have been brought to School 16 since Weil had deserved the facilitator's position. This suggests that Weil had expressed her unhappiness to Harvey. According to Giglio, Weil had, in January 2003, expressed her unhappiness that she had not been given the position. Also, in view of her difficulties in performing many of the duties of the technology coordinator, her disappointment in being bypassed for the alternate non-classroom position she sought would reasonably have been heightened.

There is no doubt that Weil was upset over criticisms Giglio had been directing at her regarding her performance as technology coordinator and her use of her school computer for personal use. Certain memoranda (*R-92*) support Giglio's testimony that she had chastised Weil for personal use of the computer and had suggested she

receive more technology training. She was warned not to access travel agency and real estate sites. Gil frequently was called upon to perform technology services Weil could not or would not do. Giglio had issued a job description to her in an effort emphasize her technology duties. On one occasion, Giglio and Gil remained at school to update the website Weil was responsible for maintaining. Although Weil received a good evaluation from Giglio on her April 9, 2003 report (*P-42*), she acknowledged that prior evaluations had been better. She received a satisfactory rather than outstanding grade for "knowledge of the subject matter."

At the time of her 2003 evaluation, Giglio advised Weil of her intention to eliminate her technology coordinator position due to pending District-wide budget constraints. Giglio told her she intended to combine the technology coordinator and test coordinator positions and offer her a 1st grade tutor position. Although Weil admitted that Giglio told her at their evaluation meeting only that some undesignated positions had to be eliminated rather than hers specifically, respondent witness Dr. Stepherson confirmed that she had already been informed by Giglio that the technology coordinator position would be eliminated under a 5%, 10% or 15% budget reduction. (*See R-65* submitted to Dr. Stepherson on April 4, 2003). This proposal was in response to a request by Superintendent Duroy to abolish staff positions in the event of possible budget problems. The documented proposed elimination of this position is consistent with Giglio's testimony that she told Weil on April 9 that her decision was based on the fact that Gil was already performing much of her job of maintaining School 16's computer system, performing technical work and maintaining the school's website. Dr. Stepherson further confirmed that she spoke to Weil about this issue.

The loss of the facilitator's position, as well as the job criticisms and the proposed abolition of her technology coordinator position, significantly occurring in close proximity to the May NJ ASK test, provide convincing support for a determination that Weil's testimony was tainted and driven by a bias against Giglio. Undoubtedly, interest, motive, bias or prejudice may affect the credibility of a witness, and I so find regarding Weil. *State v. Salimone, supra.*

Weil (with the assistance of Harvey[9]) initiated the anonymous telephone call to the Department of Education immediately on May 23, because of her expressed extreme distress over what she perceived to be testing improprieties. This quickly triggered the investigation ultimately leading to the charges against Giglio. She demonstrated a personal mission to support her charges by photographing the test box used in Propersi's room, surreptitiously tape recording several conversations and making unauthorized visits to School 16 during the summer of 2003 before the charges were preferred. Weil testified that she made written notes to keep track of what she did each day of testing which she used to make her written statement. Under these circumstances Weil's recollection of the events of May 23 should have been precise, fresh and detailed. It was not. Except for repetition of facts recited in her written statement, her testimony as to the rest of May 23 was vague, confusing and inconsistent.

As indicated in the summary of testimony, Weil intended to make the anonymous call to the Department of education to advise of "testing improprieties," but, because she started crying, Harvey completed the call. Although she denied that the call indicated Giglio did anything wrong, she testified that she did not hear anything said by Harvey because she was crying. It is implausible that Weil never asked Harvey what she had said since she was the one who had witnessed the alleged improprieties. She testified inconsistently by, on the one hand believing Harvey did not use the word "principal" during the call, and, on the other hand denying hearing any of Harvey's conversation because of the crying. Although she claimed that she did not know what Harvey said on the telephone, in contradiction, she testified that she did not think Harvey mentioned in the call that the principal had taken test booklets home or had changed answers.

Weil's testimony regarding the extra time allegedly given to the first group of students on May 23 was not only inconsistent but was also surprisingly imprecise considering she was the initiator of the charges. At one point in her testimony, Weil stated that Giglio stopped her in the hallway on the Morning of May 23 and advised her

[9] It is undisputed that Harvey and Weil had become close friends at School 16 since occupying desks adjacent to one another during their first year there and thereafter eating lunch together almost every day. They also socialized and vacationed together.

that some of the students she had been testing were "504 students" who were not given enough time to finish their language arts tests and instructed that she give the language arts tests back to the students after they finished the math portion[10]. In her written statement (*P-19*), she indicated that Giglio told her "...the students that I have been testing had not finished working on some of their open ended questions in Language Arts." "She indicated to me ... that these students were 504 students and needed to be given extra time as their accommodations." At one point she testified that Giglio told her to give an extra 15 minutes on the language arts section and that they were given 15 minutes. She later testified that students got about 15 minutes but there was no time frame and as each finished the math section both she and Buccolo collected the books and then gave their language arts books out. (Buccolo denied ever doing this.) Her representation that they got "about" 15 minutes is suspect because all facets of the test were timed with the time remaining for each section posted on the blackboard. She also testified that the language arts test was handed out when the students were "done with math." She contradicted whether the language arts books were handed out after all of the math books were collected or on a case-by-case basis as each student finished. She testified in contradiction to previous testimony that, although she was keeping track of time, it was flexible because they were not given a specific amount of time to give to the students.

Although not previously mentioned to the investigators, Weil's written statement (*P-19*) stated that "When the students arrived with Mr. Gil they were given the second part of their math test with extra time to complete their test." The written statement failed to claim that Gil or Giglio ever told her to provide extra time for math. However, Weil testified that she gave an extra 15 minutes for math because Giglio specifically told her to do that. She also testified that, when Gil came into the room, he told her not to forget to give extra time on math as he was giving her the language arts books. On cross-examination she again changed her story by stating that, based upon Giglio telling her that the 504 students needed more time on language arts, she "assumed" that the additional time applied to math as well. On cross-examination she did not recall

[10] Had Giglio made this statement, which she denied, it is implausible that Giglio would have told her "some" rather than "all" the students in the small group were 504 students.

that she had testified on direct-examination that Giglio and Gil had directed her to give additional time for math; then she indicated she may have been confused when she said Giglio instructed her about math; then she said she did know whether she inferred or was told the math instruction but somehow knew the students needed extra time on math as well as language arts. Her claim that she gave 15 minutes extra for math was also not believable when measured against the credible testimony of Aliu's proctor, Paciga, who indicated that the tests of Aliu's five removed students were already at the testing desk each day, including May 23, when he returned the tests from Aliu's class. Paciga was sure of this because he had to put in order all the Aliu tests including those from her removed students.

Weil claimed she asked Gil and Buccolo whether any of the students were 504 students. Buccolo did not confirm this conversation, and Gil denied having such a discussion with Weil on May 23 or any other testing day. Despite the importance placed upon this statement of Weil, she could not recall whether she had the conversation during the first or second group of testing on May 23.

Weil testified that Gil brought the language arts books in a box when the students were finishing with math, and she and Buccolo distributed the language arts books. Buccolo testified that she did not give any test booklets back to the students and denied that she saw any language arts books in Propersi's room on May 23. Gil denied bringing language arts books into the classroom on May 23 or that he ever indicated that students should go back to their language arts books. Weil could not recall if Gil entered the room during the regular math or the extra time math, and in fact suggested that Gil came to the room twice.

Weil's testimony that, when Gil brought the language arts books, he took the math books with him, is contradicted by her testimony that he entered the room while she was still math testing. It is also contradictory to her written statement (*P-31*) that Gil showed up with the other box during the math testing. She then testified that, when the language arts testing was finished, she must have brought both sets of books back to Gil. She then changed that testimony to say that she did not know if she brought the math books down to Gil but knew she returned the language arts books.

She was not certain whether Buccolo brought the first group of students back to class when their testing was finished or whether students from the first and second groups returned to their regular classes on their own.

Regarding the second group of students, Weil, in her statement, (*P-19*) indicated that, upon returning to her desk after returning the test books of the first group of students, the security guard informed her that Giglio wanted to see her. When she arrived, Giglio was on the phone with Buccolo. She handed her a written list of six students she wanted her to pick up from Aliu and Aquart's classes to work on their open ended questions. She gave Buccolo the list of the students to pick up. Gil brought the test books into the room and said, "I'm probably going to go to hell for this." Gil denied making this statement, and Buccolo never confirmed that Gil had made the comment. As she started to distribute the books, Gil took them from her and said he knew the students so he would distribute them. Weil instructed the students to look over the language arts test again and see if they would like to add anything to their open ended questions. The students looked through their booklets briefly. Some added statements to their open ended questions while many did not. During this time Buccolo and she were present all of the time while Gil came in and out of the room. During the testing Harvey looked into the room wondering why Weil was still testing, and Weil just made a face so Harvey continued walking. When the test was completed, Gil took the books, the students went back to class and Buccolo and she left. Except that Buccolo was given the list of students and picked them up, neither Buccolo nor Gil support Weil's story about what the second group did in Propersi's room. Although Weil testified that Harvey did not peek her head in the door but was approximately 7½ feet from the doorway, Harvey testified that she peeked her head in the door when Weil made her face. Weil did not confirm Harvey's claim that she mouthed the words, "what are you doing."

Although not included in her statement, Weil testified that Gil was in Giglio's office when she received the list. Her testimony then changed that Gil was not in the office but on the way there. She testified that while she was talking to Giglio, Gil was

digging through a box, which she assumed contained the language arts books. She then testified maybe he was not getting the books, and she did not actually see him pull the books out of the box. This information was absent from her statement (*P-19*). Although her statement indicated a list of six students, she testified that Giglio may have added one name while they were in the office. Investigator Whitt's notes indicated that Weil told her Giglio verbally added two names that Weil wrote on the paper. (Interview notes attached to *P-1*). When questioned about the version of the story she told Whitt, Weil indicated she thought she had written the two names down but could not recall why she told Whitt she had written the two additional names. The list handed to Weil (*R-46*) only has six names written on it.

Another inconsistency regarding the second group was Weil's testimony that Gil brought in two or three more students when he brought the books into Propersi's class. This claim was neither in her statement nor any of the interview notes. Although her statement indicated she told the students to add more to the open ended questions, she testified that she told the students to change anything they wanted in the language arts books. She later testified she did not recall making this statement at the hearing. Weil was vague in her recollection of what happened after the students left or if Gil was present when they left or if she or Gil brought the booklets downstairs. She did not recall Gil make a comment through the sliding door to Martinez about testing still going on in contradiction to a claim by Martinez that Gil made such a statement. Additionally, Weil tried to stretch the timeline to fit Harvey's story. She testified that she was testing the second group at the beginning of the second lunch around 11:25 a.m. and was finished about 12:00. Harvey testified that Weil returned after noon and told the investigators it was between 12:15 and 12:30 p.m. Weil testified that the first group was done testing at 10:45 a.m. Todaro approached her in her office five to ten minutes later to see Giglio, and it took five to 10 minutes to get her instructions. If she gave the second group about 15 minutes to work on their language arts test as she claimed, she would not have been in Propersi's room after 11:25 or 11:30 p.m. This is inconsistent with claims that she returned to her desk and spoke with Harvey between 12:00 and 12:30 p.m. Additionally, Paciga testified that I.O, one of the students in the second group, was helping him set up in the hallway for a baseball sale by 11:25 a.m.

After May 23 Weil photographed the box marked "504 accommodations" because it supported her story of the cheating. She testified that the designation on the box which was in Propersi's room on the three days she tested was suspicious because she was given no instructions about 504 accommodations or extra time until May 23. It is therefore puzzling why she never asked Giglio or Gil about accommodations for the small group on May 21 or 22.

Weil claimed that the second group did not work on the tributes for the moving up ceremony on May 23 and that, as chair of the moving up committee, she would have known if any activities were planned on May 23. However, she acknowledged that Filippelli was in charge of the tribute preparation portion of the ceremony. She also admitted that, between May 23 and June 10, there were only ten school days in which to sneak 80 students out during prep periods for the surprise project of writing out adjectives to describe their teachers.

Weil's testimony was inconsistent with regard to her knowledge that Giglio had issued a disciplinary memorandum to Harvey on May 22. She initially claimed that she had no knowledge of the subject of the memorandum, and Harvey did not tell her of the problems she had with Giglio during the testing week until the week of the investigation. However, she subsequently said that it could have been during the testing week that Harvey told her she was upset about not being invited to the Cherry Hill awards ceremony. She also conceded that she had been present on May 22 when Giglio handed Harvey a sealed envelope which was the disciplinary memorandum, that Harvey was upset about it and that her earlier contradictory testimony had been wrong. Weil contended she had forgotten about this because the disciplinary memorandum had been retracted.

Weil led investigators to believe she had not received training on NJ ASK in 2003. However, she had been a test coordinator in the past and had attended local and statewide training. She had trained Gil. She was present at a May 5 meeting where Gil

discussed test procedures. Additionally, Giglio gave her a training packet upon assigning her as a test examiner on May 21.

Neither the tape recordings of conversations between Weil and Giglio surreptitiously made by Weil on June 12 and June 13, 2003 nor Weil's testimony support the charges of threats, intimidation and encouraging false and misleading information. The first recording was made just prior to Weil's interview by Dr. Nuccetelli and the second between 7:45 and 8:00 a.m. while on breakfast duty. Curiously, she did not tape a conversation with Giglio following her interview with Dr. Nuccetelli on June 12 because she claimed the tape was full. The tape submitted into evidence was not in fact full. Weil changed her testimony to say that she did not think of turning the tape over and she did not want to tape over anything. She also testified that she did not think that conversation was important to her. The tape recordings were substantially unreliable because parts of the conversations were inaudible even after an attempted enhancement by the State Police, particularly where Weil was speaking. There was also a missing portion of the June 12 conversation to which Giglio testified. Much of Weil's testimony as to what was said during these conversations was either not on the tapes or inconsistent with the tapes.

When put into context, the tapes do not support a claim of coercion or cover up by Giglio. At that point in the investigation, Giglio was concerned that Weil had done something wrong and that Weil was being targeted. Accordingly, she was trying to elicit from Weil what had happened. Giglio did not then know that Weil had caused the investigation. She also believed there had been some technical violations during the testing. The suggestion of seeking counsel and making sure everybody's statements were accurate do not support any wrongdoing. It is routine for attorneys to question or prepare witnesses in an effort to have testimony of multiple witnesses be corroborative. This does not mean that the attorney is attempting to fabricate a story. For instance, Giglio originally thought that Weil had gathered the second group of students from the Aliu and Aquart classrooms because that was the instruction Giglio had given her. When she learned from speaking to Buccolo that she had gotten those students, it would be logical that she would advise Weil to be consistent with that story if it were

true. Nowhere on the tapes, is there any directive from Giglio that sets forth a particular story for Weil to follow or an instruction that she not be truthful.

When Giglio said on the tape, "don't stray from that," she was clearly referring to Buccolo's statement to her that she, and not Weil, had gathered the second group of students on May 23. Weil's claim in her testimony that Giglio told her to stick to the story, not only was contrary to what is on the tape of the June 12 conversation, but suggested a scheme of fabrication of all that occurred on May 23, which clearly was not the case. Absent a determination that Giglio's testimony as to the testing week activities was untrue or that she directed Weil to change a version of events she had given to Giglio, I draw no adverse inference from Giglio's suggestion on June 13 to Weil that they review each other's statements in order to be on the same page. The record is devoid of any evidence that any investigator instructed Giglio that she could not speak to her staff regarding the investigation. In fact, investigators used Giglio as the vehicle to locate people to whom they wanted to speak and to bring them to the investigators.

In the context of other determinations, I do not consider the following statement on the June 13 tape to constitute an act of intimidation of Weil: "I am not going down," and "you need to wise up, sharpen up, find out who your friends are cause its not them." When that statement was made, Giglio had no idea that Weil had initiated the investigation or that Weil was disagreeing with what Giglio believed occurred during the testing week. She believed that Harvey was behind the charges. Simply put, an expression of anger against someone does not constitute a threat against someone else. Under these circumstances Giglio's statement did not constitute a threat against Weil even if Weil, armed with the secret of her involvement with bringing the charges, felt it was threatening. In any event, it is doubtful that Weil would have been intimidated by Giglio since they had known each other for over 30 years even though their relationship had cooled.

The undersigned is firmly convinced that Weil was wholly untruthful when trying to explain the record of many non-school related Internet site hits stored on her school

computer. This testimony followed her denial that Giglio had had a legitimate basis to criticize her work regarding work time access to Internet sites for personal use or had in fact so criticized her. Her lack of candor undermines her claim that she had no bias against Giglio because of her contention that criticisms of her work were not made. After denying use of the computer for personal use, she was surprised when confronted with the computer records that showed otherwise and appeared desperate to explain the inconsistency by suggesting that other staff members had access to her computer, which was in the teacher's lounge.

After denying that she performed travel agent services, she had to reverse herself and concede that she did visit travel sites.

Giglio credibly testified that Weil's efforts to find a house for Giglio's brother in October 2003 ended with a failed bid on or about November 1, 2003. Thereafter, Giglio had retained another realtor. It is incredible that Weil would have continued to access real estate sites on behalf of Giglio after their relationship admittedly declined after November 2003, and it is beyond doubt that she would not have performed this service for Giglio on May 30, June 23 and June 25, 2003 after she had made the anonymous call against Giglio. (*See, R-24*).

Any semblance of credibility regarding access to non school-related sites disappeared with her claim that some other staff member, rather than she, must have accessed a website concerning a wedding. The computer records showed that 500 wedding pictures were viewed. When shown the photographs, many of which included Weil's daughter who was a bridesmaid at the wedding, Weil had no choice but to admit that she did indeed view that website from her school computer.

These revelations raise grave concerns regarding Weil's overall credibility in this case since they create doubt not only about her general habit for honesty but specifically about her honesty regarding issues related to this case—namely her denial that any bias against Giglio existed over criticism of Weil's computer use or that such bias influenced the claims she made against Giglio.

Beyond the above reasons for deeming incredible Weil's testimony as it related to the charges against Giglio, the undersigned's determination of her lack of credibility is sealed after weighing Weil's stated reason for initiating the anonymous telephone call to the Department of Education on May 23 against her explanation for the alteration of her Caldwell College report card as well as her behavior after even what she claimed was the sequence of events related to the report card alteration. Weil's contention that Giglio and Gil pushed and intimidated her to change her Caldwell College grade from a "C+" to an "A" so she could obtain tuition reimbursement from the District (emphatically denied by both Giglio and Gil) is devoid of any ring of believability. Weil had no explanation as to why Giglio would participate in such a fraud particularly since their relationship had been deteriorating in January 2003. Giglio had no responsibility for signing off on Weil's paperwork for tuition reimbursement. It is inconceivable that either Giglio or Gil would have risked the consequences of indulging in a fraud for which they would receive no benefit. Weil only raised this issue on her direct examination because she knew that Giglio's counsel had obtained related information during the discovery phase of this proceeding and not because, as she claimed, her conscience would not let her sleep. She only reported the impropriety to the District in February 2004 although it occurred more than one year earlier. Her claim that she atoned for her guilt by not seeking reimbursement for a subsequent course where she received a better grade is likewise unbelievable. Filippelli's testimony, that the District had run out of tuition reimbursement money for the spring semester of 2003, is corroborated by a letter to that affect by respondent's Assistant Superintendent of Curriculum and Instruction (R-90).

Gil's explanation of his awareness of Weil's actions is more plausible and persuasive. Weil had expressed her distress at a meeting with Giglio and Gil that she had received a grade of "C". Giglio told her not to be a baby. Gil later observed her using the School 16 scanner at his desk with her report card on her screen. He did not suspect any impropriety until the end of the school year when he overheard a conversation between Weil and Filippelli where Weil had indicated that she had been reimbursed for her first semester courses at Caldwell College. I am not persuaded by

the introduction of the facsimile from Caldwell College of the grades, which appears to have been transmitted to School 16, that Weil's version of these events is more credible than that of Gil and Giglio. Aside from the fact that suspicions have been raised as to whether the font of the transmission information at the top of this document (*P-79*) was that used in the School 16 fax machine in January 2003 located in Giglio's office, there is no certainty that Weil could not have secured this document without Giglio's knowledge even if it were sent by Caldwell College to School 16 at Weil's request as she contended.

Even if one were to believe Weil's story that she participated in the grade alteration fraud and obtained $879.00 to which she was not entitled only because of the encouragement of Giglio and Gil, Weil admitted that it was a mistake for her to lie and steal. Although she acknowledged that her conduct was wrong at the time, she testified that she was afraid to say anything after the fact. She never felt compelled or morally bound to report this serious offense to the District until she realized that it would be revealed in this proceeding over one year later. This posture is so overwhelmingly contradictory to her stated reason for reporting the alleged cheating on the NJ ASK test in May 2003, which "...was to clear my conscience and make me feel better because after all these years and I've spent in the district and everything I've done, I could not believe that I allowed myself to do that. And I knew that I couldn't go home and sleep with myself at night knowing that I did that". As her purported motive for reporting the alleged testing improprieties is so profoundly undermined, the more convincing motive to report Giglio was her animosity toward Giglio. In view of this bias, as well as the many inconsistencies in Weil's testimony, the undersigned cannot credit her testimony. I am not persuaded otherwise by petitioner's argument that Weil should be credited because she was incriminating herself when she initiated the anonymous call to the Department of Education reporting testing improprieties in which she allegedly participated. All of her testimony and investigatory statements demonstrated that she was acting, not as a confessor, but as a would-be whistleblower who claimed that her participation in the alleged improprieties was only because of coercion or intimidation by a superior.

(e) Buccolo

Buccolo appeared, not as a witness for petitioner, but rather under subpoena from respondent Giglio, which she was reluctant to accept. She continues to work at School 16 under the direction of the District. Her recollection of the events of May 23 was in some instances vague. However, she was clear that she observed nothing unusual on May 23. Although I draw a negative inference from Weil's lack of clarity due to the nature of her involvement in initiating the charges of test impropriety, I draw the opposite inference from Buccolo's lack of clarity. If she observed nothing unusual on May 23, it is logical that she would not recall specific statements, time frames, the names of students for whom she was proctoring or seemingly insignificant events. She candidly admitted that she could not recall the answers to certain questions. Interestingly, State Investigator Tierney commented in her summary that she was unable to determine if Buccolo was absent minded or playing dumb but nevertheless did not change her story even when pressed by the investigators about the significance and seriousness of the allegations (*P-5*). Both despite and because of her lack of clarity and based on my observations of her during her testimony, I deem her to be a credible witness. She was not coached in her testimony. Although she lacked detail in her answers, she was neither being intentionally evasive nor playing dumb.

Significantly, Buccolo was certain as to critical facts, which contradict allegations of Weil. She knew that it would be irregular to give extra test time to students who were not 504 or special education. She was only aware of math testing on May 23, and at no time did anyone return to students test booklets from another day's testing. She never saw language arts books on May 23 and never had a discussion with Weil that day about giving students more time on the test. Although she picked up students that day from a list after math testing, she left after delivering them to Weil and did not participate in any testing of them.

(f) Harvey

Despite Harvey's claim that neither her testimony nor her assistance to Weil in reporting the alleged testing improprieties were motivated by a disdain for Giglio, substantial credible evidence was presented of a longstanding loathing of Giglio exacerbated by certain events in close proximity to the May NJ ASK testing. Harvey admitted that she had had a serious problem with Giglio at School 10 and had tried to transfer from School 16 when she learned that Giglio would be the principal there. Harvey was disappointed with the ratings Giglio gave her on her evaluations as librarian. She was unhappy that her enemy at School 10, Filippelli was transferring to School 16 in December 2002. In March 2003, Harvey became angry that Giglio had decided to make Filippelli the librarian for the following school year and designate her to assume Filippelli's facilitator position. She argued to Dr. Stepherson that she could not be transferred from what she considered to be a tenured position.

Most significantly in terms of timing, Harvey admitted being angry that Giglio had not invited her to the Cherry Hill awards ceremony on May 20 despite her work on the application for the award. This led to a confrontation in Giglio's office that day. Although Harvey and Giglio accused only the other of screaming and being unprofessional, Giglio's recitation of this incident was the more credible. Filippelli had filed a memorandum about Harvey's continuing explosive behavior after Giglio had left for Cherry Hill (*R-60*). This document was prepared on May 20 before the testing allegations and the ensuing investigation and therefore would not have been a self-serving document contrived to undermine Harvey's credibility in the face of her participation in initiating the charges. Additionally Aquart credibly testified that she observed Harvey screaming at Filippelli. LeProtto credibly testified that Harvey angrily and loudly described the confrontation she had had with Giglio and that Harvey said there would be a payback and that "paybacks are a bitch." (LeProtto also testified that, over time, Harvey had told her on several occasions that she hated Giglio). Although Harvey claimed Aquart, Blank, Ruiz and Propersi were in the hallway when Giglio allegedly followed her down the hallway screaming at her, none of them confirmed such activity by Giglio. On May 22 Giglio issued a disciplinary memorandum to Harvey

claiming that her behavior regarding the awards ceremony was unprofessional. Harvey admitted that she was shocked and humiliated to receive the memorandum but that she became unconcerned about it after discussions with Dr. Stepherson led her to believe that the memorandum would not become part of her disciplinary file. Harvey's claim that her allegations against Giglio were not fabricated out of anger against her is overborne by the compelling evidence to the contrary of the confrontation surrounding the awards ceremony; Harvey's subsequent behavior; the issuance of the disciplinary memorandum one day before Harvey's anonymous call, and the submission of Harvey's rebuttal to the memorandum hours before the anonymous call.

Harvey's contention that her motive in suggesting to Weil that they call the State Department of Education in order to protect themselves does not have a ring of truth to it. Harvey had not participated in the alleged May 23 activities. Moreover, if the motive was to protect themselves, it would have made more sense to disclose their names rather than remain anonymous. The more believable motive for Harvey's actions was her extreme anger over Giglio's recent treatment of her.

Harvey's testimony, written statement and statements to investigators were replete with inconsistencies and contradictions. According to the May 28, 2003 memo of Rosanne Harris of the Office of Evaluation and Assessment (*R*-2), an anonymous telephone call to the Director of Evaluation and Assessment provided allegations of testing irregularities at School 16 whereby the principal had removed test booklets from school premises; had changed student answers to multiple-choice questions, and returned test booklets to students so they could extend or otherwise revise their responses to the open-ended questions. However, Harvey, the anonymous caller denied making these specific charges. Although she initially testified that she did not recall using the word "principal", she subsequently indicated that she may have used that word. Harvey told Harris that Giglio had informed examiners and proctors that if children were confused, they can "guide or help them". Harvey testified that she may have reported that Giglio had done something wrong in this regard. However, this allegation was never investigated, supported or made part of the tenure charges thereby suggesting a fabrication by Harvey.

Harvey testified that, on May 20 when she saw the box marked "504 accom", she told proctor Propersi that she knew the students were not 504 and she would not give them extra time. Propersi never corroborated this statement. Moreover, no one ever claimed Harvey had been directed to give more time.

According to Harris [and supported by her May 28 memorandum (*R-2*)], Harvey told her that, on day three (May 22), the first day of math, several children were pulled out of their regular classroom setting to work on the language arts assessment in the afternoon. The children were told that their responses to the language arts open-ended items were not long enough and they should go back and extend them. She further told Harris that again, on day four (May 23) following the regular test administration, several students were pulled out from their regular classroom setting to work on the language arts assessment in the afternoon. Again, the children were told that their responses to the language arts questions were not long enough, and they should go back and extend them. Harvey also reported to Harris that the examiner that day had a list of these students written by the principal. Harvey testified that she could not recall telling Harris about pulling students out on May 22 to extend language arts answers. This information raises significant questions as to Harvey's credibility. As with Weil since Harvey was an initiator of the allegations against Giglio right at the time of the alleged improprieties, her testimony and recollection of the events should be very consistent and precise. To the contrary, claims of language arts testing on May 22 as well as claims of language arts testing in the afternoon of May 23 were wholly at odds with Weil's story. Harvey had to change her story at the hearing in an effort to square it with Weil's scenario since the tenure charges do not claim an impropriety during an afternoon or on May 22.

In her written statement (*P-27*) Harvey indicated that, at about 11:25 on May 23, she overheard Aliu tell Propersi that the reason Propersi was no longer proctoring was because Giglio had gone to Aliu and told her that her students had not done well on the

language arts portion of the test and would be given back the tests. [11] Harvey indicated that she then walked across the hall through Martinez' classroom and saw children back in Propersi's room with language arts booklets. (Martinez denied that Harvey walked through her classroom on May 23). Harvey was sure the students did not have math books because she saw them reading passages, she saw no math figures[12], and recognized the color of the booklets as being the same as the ones she had used for language arts on May 20 (*P-27*). Her statement also indicated that Weil and Buccolo were in the room. Harvey made eye contact with Weil. When she raised her eyebrows in question, Weil shrugged her shoulders and closed her eyes. Dr. Nuccetelli's June 12, 2003 interview notes regarding Harvey (*R-62*) indicated that Harvey told her that, at about 11:25 a.m., she went to find Weil and observed her in Propersi's room testing about 10 students, and that she recognized one to two kids as being the same ones from Tuesday (when Harvey had been the examiner in Propersi's room). She testified that she did not recall telling Dr. Nuccetelli she recognized some of the students and asserted that she in fact had not recognized any of the students. This raises another significant inconsistency since Weil's story was that the students Harvey allegedly observed was the second group from the list Giglio had prepared. These students were all different from Weil's earlier group, which was the same group Harvey had tested on Tuesday. Harvey could not have recognized any of these students if her story was to be in harmony with that of Weil.

Additionally, although absent from Harvey's written statement, her testimony added that she mouthed the words "what are you doing". Harvey testified that she knew the booklets she observed in Propersi's room were language arts because their color

[11] Propersi also testified that Aliu told her in the teacher's room that she knew why she (Propersi) was not testing on May 23 because Giglio had said that Aliu's students in that small room were not doing well. However, petitioner's own witness, Aliu, denied that she ever made such a statement in the teacher's room. Also, although Propersi testified that Moscato, Ordonez, and Loftus were present in the teacher's room, none of them testified of this conversation. Also no one has suggested why Propersi would be removed because students were not testing well. Giglio's explanation of returning Propersi to her students because of Buccolo's availability makes more sense. In her testimony Harvey elaborated on the quote from her statement to add that Aliu said that Giglio indicated the students were going to be given extra time to redo the test. Propersi did not describe the statement this way. In view of the contradictions of petitioner's own witnesses, the undersigned is unable to gleam a ring of truth from this alleged statement. Additionally, the attribution of the statement to Giglio, which she denied making, would be double hearsay. Although hearsay testimony is acceptable in an administrative proceeding, it is considered only if supported by a residuum of other credible evidence which is lacking here.

[12] Petitioner witness Gourley testified that the math open-ended section provides for questions in narrative form.

was in the same blue or purple family as were the language arts books she had used on Tuesday. Also, the math and language arts booklets were different colors according to her. In fact, as verified by respondent witnesses Harris and Gourley, the math and language arts booklets were the same color of ivory or cream. Significantly, the booklets Gil and Filippelli allegedly used on May 23 for the tribute preparation were blue. The actual blue-covered tribute booklets were introduced at the hearing (*R-89*).

Harvey's May 23 timeline was inconsistent. She told the State investigators that Weil did not appear for lunch until 12:15 to 12:30 p.m. (*R-48 and R-5*). She testified that she heard Aliu's alleged comment to Propersi around 11:35 and then walked to Propersi's room and observed Weil still testing. She then waited about 10 minutes at Weil's desk until Weil returned. Harvey later changed her timeline to indicate that Weil returned to her desk around noon. Her timeline also conflicted with the credible testimony of Paciga who indicated that, at 11:30 a.m., student I.O., who had been with the tribute group of students, was with him setting up for a baseball team sale in the hallway.

Harvey's allegations against Filippelli were contradictory and therefore incredible. She had alleged to Harris that she overheard a teacher, whom she later identified as Filippelli, telling students the answers to a math problem (*R-2*). In her written statement (*P-27*), Harvey indicated that on Wednesday, when the first lunch began, she heard Filippelli giving answers. She was sure they were math answers because she heard measurements, rulers and inches. When she realized during her testimony that there was no math testing on Wednesday, she testified variously that she did not recall what day she heard the answers given, that it was Friday, and that it was Thursday or Friday. She finally testified that she made an error on her statement as to the day because she was very stressed. This contention is suspect since this statement was the product of discussions with a union attorney she had visited. It is not surprising that this allegation of Harvey's did not become part of the tenure charges since her failure to identify a day where this event could have possibly occurred imperiled her overall credibility.

Harvey testified that, on the one day she tested with Propersi, she told her that, "we're not going to give these children any more time, even though the box says 504."

However, this statement does not appear in her written statement, and she does not recall if she mentioned this conversation to the investigators. Moreover, Propersi never testified to this conversation. Although not in her statement or in investigator notes, Harvey testified that the week before testing Gil told her that she would be testing a small group that would be considered 504. This statement, if actually made by Gil, would be critical information in support of the tenure charges. It is inconceivable that Harvey would mention it for the first time at the hearing. She then recanted this testimony on cross-examination by saying that she could not recall with certainty that Gil had made this statement.

In support of the propostion that K.O. was not late during testing as Giglio claimed, Harvey claimed that she saw K.O. in LeProtto's class on May 21 between 8:30 and 9:00 a.m. and mouthed the words to LeProtto. "What's she doing here?" She claimed that LeProtto replied, "I don't know." However, LeProtto, who testified clearly and specifically and credibly, absolutely denied that Harvey ever worked with her students during testing or popped her head in that day. Although Moscato testified that she never told Harvey that she had marked K.O. absent and sent her downstairs, the notes of the State investigators indicated that Harvey told them that Moscato marked K.O. absent and sent her downstairs. Harvey did not recall telling this to the investigators. Although Harvey claimed that she was not trained for NJ ASK, she signed in for the training sessions of May 5 and May 14 (*R-55 and R-77*). Her claim that Gil had excused her from the training because she had participated in testing before is improbable since most of the staff at School 16 had participated in testing before, yet they, nevertheless, participated in the NJ ASK training.

The plethora of inconsistencies in Harvey's testimony as well as in her pre-hearing statements cannot be excused, explained or ignored particularly coming from a witness who was a primary motivator in the initiation of the claims of testing improprieties and who therefore is expected to have a crisp recollection of the events in issue. The undersigned is convinced, upon an analysis of all of the evidence, that Harvey was motivated to fabricate charges against Giglio because of a long term loathing for her that was exacerbated by the recent attempt to have her reassigned from

her librarian position and the issuance of a disciplinary memorandum during the week of testing. Harvey's anger during the week of testing was evident from the testimony of credible witnesses, most persuasively that of LeProtto. Harvey's eagerness to give the investigators a stream of specious information both from her own alleged observations as well as allegedly gleaned second hand from others, suggests a determined campaign with Weil to get Giglio in trouble in any way possible. Her initial claims of observing Giglio removing test booklets from her trunk, changing multiple choice questions and telling staff to guide students in their answers were never given any credence by the investigators and never became part of the tenure charges. In view of her proven bias against Giglio and her many inconsistencies and contradictions, and after carefully observing the demeanor of Harvey as a witness, the undersigned is drawn to the determination that Harvey's testimony did not come from the mouth of a credible witness. Her testimony simply did not hang together with the other evidence.

Weil and Harvey were disgruntled employees who seized upon the opportunity of the presence of a box and in-house test roster that suggested a situation which other credible evidence demonstrated was not so.

(g) Martinez

Martinez' testimony suggested that the second small group in Propersi's room on May 23 was being tested rather than preparing tributes. She claimed that Giglio walked by her class around 11:00 and said that testing was over and the children could make noise.[13] About 20 minutes later, Gil stuck half his body through the sliding door between her room and Propersi's and said keep it down because they were still testing. She told Gil that testing was over, and he said it was not. Gil denied having a conversation with Martinez that morning. However, he testified that, while he was with the second small group at the beginning of tribute project, the custodian tried to slide the door open between Martinez' and Propersi's room whereupon he said, "don't do that. We're not ready."

[13] It makes no sense that Giglio would have made that statement to Martinez if she were planning to continue testing the second group of students in Propersi's room by returning their language arts books to them

In Martinez' June 5 interview with Mosely-Whitt (*P-1*) and June 12 interview with Dr. Nuccetelli (*P-17*), did not indicate any testing irregularities, although it was unclear whether she was informed of the allegations at that time. Her June 25 statement first mentioned the alleged comment by Gil (*P-18*) but indicated nothing about a dialogue between her and Gil. Her testimony expanded for the first time upon her statement to include the alleged dialogue with Gil; the claim that Giglio made her comment around 11:00 a.m. about testing being over (her time frame for the Giglio comment even changed to 10:40 to 10:45 a.m.), and that she peeked in the room after Gil's comment and saw students whom she believed were testing. Martinez also added beyond her statement that, after Giglio's announcement, she looked into Propersi's room to ask a question, and it was empty. That supports the testimony of both Gil and Paciga that Weil's test books had been returned to the testing desk before Paciga signed his in at 10:50. This testimony contradicted Weil's claim of giving extra time on the math and returning the language arts to the first small group on May 23 and contradicted Harvey's time line as well.

Although Martinez claimed she saw students testing with white booklets (contrary to Harvey's testimony), she admitted that she peeked in for only 5 seconds; was over 21 feet away; saw only Weil (contrary to Weil's testimony that Buccolo was in the room with her with the second small group), and did not recall the way the children were facing or whether they were writing. Even the blue books used for the tributes would appear white if opened since the interior pages were white.

Her credibility is suspect since her testimony contained so much relevant or important information that she never bothered to put in her written statement after meeting with four investigators. Her contention that she told everything to the State investigators is incredible since they prepared her written statement (*P-18*), and the additional information did not even appear in the notes of the State investigators (*P-5 and P-31*). The undersigned found Martinez' demeanor as a witness troublesome. She testified that she saw Harvey after her meeting with Dr. Nuccetelli, at which time she had not reported any irregularities, and, because Harvey thought she appeared

nervous, said, "if you know anything, come forward because 'the truth sets you free.'" This testimony did not have a ring of truth to it because Martinez indicated that she had not verbalized or displayed mannerisms of nervousness in front of Harvey. On balance, the undersigned deems the recollection of the Gil as to the second small group activity to be more credible.

(h) Aliu and Aquart

Petitioner, in Charge One, alleged that on or about May 14, 2003 Giglio held a staff meeting related to NJ ASK where she directed certain staff to identify students perceived as "disruptive" or "easily frustrated" for the purpose of labeling them as 504 students entitled to special accommodations even though she knew that no students at School 16 were in fact designated as 504 students. Aliu's notes of a May 14 focus meeting for just 4th grade teachers (*P-29*) indicated "list- 504 students, -PAC, -disruptive, -easily frustrated". However, curiously, petitioner never called Aliu to testify in its case-in-chief to support Charge One. Instead, petitioner only called her as a rebuttal witness regarding other matters. Absent any testimony from Aliu during the presentation of petitioner's case, the undersigned granted respondent's motion to dismiss as to Charge One under the standard set forth in *Dolson v. Anastasia, supra* over petitioner's objection that three third grade teachers Moscato, Loftus and Martinez testified of statements made at a different 3rd grade focus meeting. The undersigned determined that Charge One arose from the report of Ray Montgomery, Director Office of Compliance Investigation (*P-2*), which indicated as follows:

> On or about Wednesday, May 14, 2003, two fourth grade teachers were requested by the school principal, Grace Giglio, to provide a small list of students from their class, about 5 students each, to the test coordinator. These students were to be "504" students and when one teacher questioned what this meant, the principal explained that the students were to be selected based on behavioral or learning disabilities who might benefit from being tested in a small group environment. [emphasis supplied].

The first finding in the *P-2* Report was that Giglio directed two fourth grade teachers to identify certain students as Section 504 students for the purpose of giving

them additional test time. The words "disruptive" and "easily frustrated" came only from Aliu's notes and not from the testimony of others. The charges themselves (*J-1*) have attached to them a Statement of Evidence Under Oath with attached documents relied upon to support the Charges. There was no statement by Loftus or Martinez attached. Although there was an attached statement by Moscato, it was silent as to any comment made by Giglio at any staff meeting. Since there was no doubt that Charge One related to an allegation that could only have derived from a meeting with 4th grade teachers and since respondent chose not to call Aliu as a witness in support of that Charge, the undersigned granted the motion to dismiss as to Charge One. It is significant that Charge One refers to "a meeting with staff" on May 14 and that meeting could only have been the 4th grade meeting. Therefore, any testimony by three witnesses who had not attended that meeting could not support allegations of what occurred at that meeting.

Regardless of the dismissal of Charge One at the conclusion of the presentation of petitioner's case-in-chief for the reasons set forth above, the ultimate testimony of all the witnesses who recalled discussions at both focus meetings is so inconsistent that a specific finding that Giglio made improper statements in these meetings to support Charge One cannot be made in any event.

According to Giglio, 504 students were discussed at the 3rd and 4th grade focus meetings on May 14. Because there were still some students in the approval process for 504 status before the commencement of the test, she asked teachers to inform Gil who their special education and 504 students were so proper accommodations could be made because of space limitations. At neither of these meetings did she or Gil ask teachers to designate non-504 students as 504 for the purpose of giving them more time on the test or to designate as 504 children who in the PAC (I&RS) process or easily frustrated. At the 4th grade meeting when Aliu asked her what was a 504 student, Giglio mentioned S.L. as an example of what a 504 student might be since she was in the approval pipeline.

Filippelli claimed to have attended the May 14 focus group meetings and remembered either Gil or Giglio asking the teachers for a list of 504 and special

education students so that accommodations could be made. Neither Gil nor Giglio talked about giving students more time on the test or suggested that teachers designate students who might have trouble on the test.

Gil recalled that, at the 4th grade focus meeting on May 14, Aliu had asked Giglio what was a 504 student, and Giglio tried to explain what kind of students they were as possibly disruptive or easily frustrated and what the procedures were to have a student classified as 504. At that time Gil thought there might be some 504 students by test time since some were in the approval process.

Paciga attended the focus meeting on May 14 for specialists as opposed to classroom teachers. He recalled Giglio speaking about 504 students in response to a question someone asked as to what a 504 student might be. Giglio responded that they were students who needed special accommodations. She asked for list from teachers who had 504 students, but she did not say anything improper on this subject.

At the 4th grade focus meeting of May 14, Aquart recalled that Giglio and Gil asked if they had any 504 students who had previously been classified and, if so, to give them a list. At that point Aliu asked what was a 504 and Giglio explained those were students who needed to be accommodated.

Aliu, who, as indicated above, was called only as a rebuttal witness by respondent, testified that she took notes at the May 14 meeting and wrote "list- 504 students, PAC, -disruptive, -easily frustrated, ASAP> Mr. Gil." She did not remember if she asked about 504 students or was told. As to the words "disruptive" and "easily frustrated," she was not sure who used the words and was not sure these words were used. She believed those words struck her because she wrote them down and they were words for the type of students she was supposed to list. She did not remember specifically discussing S.L. She did not recall anyone saying at the meeting that students should be designated 504 students even if they were not official 504's.

Moscoto never mentioned a 3rd grade focus meeting in any of her statements to investigators. However, she testified for the first time that Giglio had told the staff that if anyone felt a student would benefit from extra time on the test because of behavior or focusing to let her know. Giglio never used the term 504, and Moscato did not even know what the term meant.

Loftus, who also attended the 3rd grade focus meeting, never gave a statement to investigators. Although Moscato was sure Giglio never used the term "504", Loftus recalled Giglio mentioning at the meeting that teachers should make a list of students who might be disruptive or benefit from extra time, and they would be taken from class and 504'd.

Martinez attended the 3rd grade focus meeting and recalled that Giglio said that, if they had any 504 students, they could be placed in a room, and they could be labeled as 504. It was not explained what 504 students were. She did not raise this issue to any of the investigators. Her testimony conflicted with Moscato's in that she claims the term 504 was used and conflicts with Loftus' testimony that 504 was described as students who were disruptive or could benefit from extra time.

As indicated above, the various statements of petitioner's witnesses are too internally inconsistent to provide a credible basis for finding that the discussions at the focus meetings were other than as Giglio contended. Not only was Giglio's version supported by Gil and Filippelli, admitted friends of Giglio, but by Paciga and Aquart as well, who exhibited no particular alliance to Giglio and were still employed by petitioner at the time they testified. Giglio's testimony that no improper instructions were given to teachers in the pre-testing meetings is more probable under the circumstances discussed above regarding Giglio's credibility; namely, that the students actually selected for the first small group by Aliu and Aquart were not those likely to benefit from or need special accommodations such as extra time to complete the test.

The best evidence that Aliu was not instructed to select students who might benefit from more time or who might be disruptive or easily frustrated is that, for the

most part, she did not select those types of students for the small group. Moreover, as indicated in the discussion of Giglio's credibility, Aliu failed to select several students who might have fit those categories even though Aliu herself had referred them to the I & RS Committee.

Although Aliu recalled giving Gil a list of four to five students by the end of the week prior to testing, Gil denied this and instead contended that Aliu did not give him the list until May 19, the day before testing commenced. This point is important because, Giglio and Gil contended that the lists submitted by Aliu and Aquart were not for disruptive students or ones who needed more time but rather to alleviate overcrowding in the 4th grade classes, which became possible when it became apparent on May 19 that none of the anticipated 504 students had been approved by the District and the classroom reserved for that purpose would be available. In her deposition Aliu did not say she submitted the list at the end of the week before testing but rather within a week of the May 14 focus meeting. She knew she prepared the list before the testing started on May 20. Finally she testified that she may have left the list on Monday, May 19, which would be consistent with the testimony of Giglio and Gil. Aquart's recollection was more precise. She complained to Giglio and Gil about the certain overcrowding in her class for the upcoming test on Monday, May 19. She was sure of that date because she set up for the May 20 test the day before. When she was asked for a small list of students to be tested in a small group, she randomly chose students whose desks were closest to the door and not because any of them were likely to benefit from any special accommodations. As previously indicated, the students actually chosen by both Aquart and Aliu suggested random selection rather than the targeting of particular students who had been identified through the I&RS process as potential problems or whose previous poor test performances were particularly poor. Additionally, Aliu's proctor, Paciga, credibly testified that, on the first testing day, Aliu told him that the four or five students were being removed to alleviate overcrowding. Accordingly, the undersigned deems Aquart's testimony as to the purpose, method and timing of the small group selection as more plausible.

(i) Moscato

Moscato's testimony in some respects was consistent with that of Giglio. Where their testimony conflicted, Moscato's testimony was overborne by that of other credible witnesses.

The undersigned has no doubt that Moscato became upset because she truly thought she was giving false information to investigators to protect Giglio and that she admittedly changed her story to the investigators in order to protect her employment. However, the evidence indicated that Giglio never instructed Moscato to lie or directed a cover up.

Giglio testified that she believed K.O. was a special needs student but, in view of her recent transfer to the school, lacked records to support her concerns. Prior to the commencement of testing, Giglio had instructed Moscato that, in the event they did not test her, to mark K.O. absent for the test on the test roster and, if K.O. were entitled to a special accommodation, she would be able to do that during the make-up week. Giglio admitted that she had decided not to test K.O. during the test week in the absence of her records. The issue then becomes whether Giglio, through Moscato, attempted to cover up the failure to test K.O. because Giglio believed she had done something wrong. Moscato did not mark K.O. absent on the test roster as instructed by Giglio but instead marked her absent on the regular classroom attendance sheet. Moscato testified that it was her "understanding" that Giglio meant to mark K.O. absent on the attendance roster, and she marked nothing on the test roster. However, she admitted that she learned that, if one did not test a student, the student should be marked absent on the test roster. Moscato recalled Giglio stopping her in the hall and telling her that she had marked K.O. absent in the wrong place and that she was supposed to mark her absent on the testing roster, not the attendance sheet but that there was no problem because K.O. would be marked late. Although Moscato claimed that this discussion occurred the week after testing rather than on May 23 as Giglio claimed, other evidence contradicted Moscato. Giglio and Filippelli were both certain this discussion occurred

on May 23. Petitioner's witness Loftus confirmed that Moscato informed her during the testing week that Giglio told her K.O. should have been marked late instead of absent. School Secretary Ruiz, a petitioner witness, recalled one conversation with Giglio where she told Ruiz to change the "absent" notations for K.O. to "late." She could not recall if the discussion occurred at the end of the testing week or the following week but could not deny that it was at the end of the test week. The timing of this discussion is important because, if it occurred at the end of the testing week prior to the commencement of any investigation, the change of the attendance sheet would not support the claim of a cover up. Significantly, petitioner witness Loftus acknowledged that there was a form aside from the homeroom attendance forms for test examiners to record that a child was absent on the test so that one knows a makeup test will be necessary. Since Giglio's original statement about marking K.O. absent on the test roster occurred before the investigation, Loftus' testimony in this regard supports Giglio's position that she intended to test K.O. during the makeup week and was not trying to execute a cover up. Under the above circumstances, I am firmly convinced that Giglio's and Filippelli's recollections that this conversation occurred on May 23 are the more accurate ones.

Moscato's claim that K.O. was removed from her room each day and was not late on any of the days was overborne by more credible evidence. She contended that K.O. was in her room on the mornings of May 20, 21 and 22 when she took attendance and testified that she was not late. Her written statement (*P-9*) however was more equivocal in that she indicated, "I don't think she was late." As previously indicated, Moscato initially told investigators that all students were present for all days of testing. She then told investigators that K.O. was late during the three days of testing. When she decided to tell a different story to investigators on June 20 she indicated she did not know the whereabouts of K.O. during testing and only saw her after testing. Her final version set forth in her typewritten June 24 statement (*P-10*) was that, on every day of testing, all students, including K.O., were present in the class.

Although not mentioned in her statements or to the investigators, Moscato testified that Giglio picked up K.O. from her class on Tuesday May 20 before testing

commenced. Her statement mentioned only that four students including K.O. had been removed. She then contradicted herself by indicating either Gil or Giglio removed K.O., and then finally indicated she did not know who removed her but she recalled both Gil and Giglio were at her door the first day. She believed Giglio removed K.O. on the second day and did not recall who removed her on the third day. Aside from Giglio's denial that she removed K.O. from Moscato's class on any given day, the accuracy of Moscato's testimony on this point is very questionable because of the testimony of two other witnesses whose credibility the undersigned has no basis to dispute. Giglio testified that, at 8:55 a.m. when the announcement was made for proctors to pick up the test booklets for the day, she was summoned to Aquart's class because M.C. was having a Tourette's Syndrome episode. Giglio removed her from the room and tried to calm her down by taking her to the small group room. She then took her downstairs to the library at around 9:10 a.m., at which time, according to her testimony, she saw K.O. by the security guard's desk. Aquart credibly testified that either Gil or Giglio removed M.C. from her room just as testing was about to begin. It could not have been Gil since, not only did he deny removing her, but Moscato testified that Gil removed the special education students from her class at the beginning of testing. School nurse Hennessy, whom I also deemed credible, testified that, shortly after 9:00 a.m. on May 20, Giglio brought M.C. to her because of the Tourette's episode. K.O. was in Hennessy's office when Giglio arrived with M.C. as Hennessy recalled K.O. making fun of M.C.[14] I am persuaded by the credible testimony that Giglio did not remove K.O. from Moscato's room on the first day of testing as Moscato claimed because she was occupied at that time with M.C. The school security checklist for School 16 indicates that Ordonez picked up the test booklets for Moscato's class at 9:00 a.m. on May 20, which suggests that testing must have commenced after 9:00 a.m.

Moscato's testimony was problematic with regard to her claims of K.O.'s location during testing. In her first written statement (*P-9A*) of June where she admitted that she had not previously been truthful to the investigators, Moscato indicated that she did not know the whereabouts of K.O. during testing. However, during her testimony, she

[14] The undersigned found Hennessy to be completely credible in the way she testified. She was not an old friend of Giglio's as were some other witnesses and presented no basis to conclude that she was telling anything but the truth.

admitted that she lied to the investigators even in her statement of confession because she indeed knew that K.O. had been in LeProtto's classroom on the testing days. She testified that she lied on June 20 because, even though she was trying to tell the truth, she was still trying to protect Giglio.

Regarding the issue of whether Giglio had a basis to reasonably conclude that K.O. was late on the days of testing, Moscato denied that she saw K.O. in a belly shirt on May 22. This position contradicted Giglio's claim that she considered K.O. late on May 22 because she was sent home to change into proper attire. Moscato's testimony was contradicted not only by that of Giglio and Hennessy, whom the undersigned has credited, but also by petitioner's own witnesses guard Todaro and secretary Ruiz. Accordingly, I deem the testimony of Moscato regarding K.O.'s lateness on this day to be overborne by other more credible evidence. In contradiction of Moscato's claim that K.O. was in her seat every day on time, petitioner's witness Todaro also testified that she knew K.O. was late on May 21 because she found K.O. by her guard's desk around 9:00 when she returned from her rounds. She further testified that she brought K.O. to Giglio's office and informed Giglio that K.O was late. This would not have occurred if one were to believe Moscato that K.O. was at her desk in the class at 9:00 or that Giglio had removed her from the class.

LeProtto credibly testified with great certainty that Giglio brought K.O. into her classroom on all three days of 3rd grade testing after 9:15 a.m. She was so sure because K.O. came in on two days when she was conducting silent reading in her class, and she had to give K.O. her seat because of the crowded situation. She conducted her silent reading on a daily basis precisely between 9:15 and 9:25 a.m. On May 22 Giglio brought K.O. in after silent reading was completed. This timeline more accurately supports Giglio's claim that she encountered K.O. in the lobby area each day after 9:00 than Moscato's claim that Giglio removed K.O. from her classroom before the testing began each morning. Moscato's claim would provide no explanation as to what Giglio did with K.O. each morning between 9:00 and 9:15 or, if true, why Giglio would not have brought K.O. immediately to LeProtto's room. It is noted that, according to LeProtto, the State investigators attempted to have her sign a statement with a timeline,

which was consistent with Moscato's, but she refused to do so because it would not have been the truth.

Although Ordonez, the proctor in Moscato's room, in an effort to corroborate Moscato's story, testified that she observed Giglio remove K.O. from Moscato's classroom on the first day of testing, the undersigned cannot credit any of her testimony. Neither the County nor State investigators ever interviewed her. Therefore, there is no indication that the importance of recalling the specific events of May 2003 were ever imparted to Ordonez close to the time of those events. In fact, she emphasized that she never spoke to anyone about the investigation. However, one year later she claimed to recall the specific instance of Giglio removing K.O. from the room yet did not recall anything else specifically about the days of the NJ ASK testing or even that May 23 was a half day of school. The testimony suggested that she might have harbored a dislike for Giglio because of an unrelated situation where Giglio had criticized her. Regardless of the possibility that a bias against Giglio caused her to be untruthful, the undersigned deems her incredible based on the testimony itself, her demeanor as a witness, and her general lack of recall of anything but the narrowest of information.

In sum, Giglio's explanation of the treatment of K.O. made more sense than Moscato's explanation. Undoubtedly, Moscato believed that she had done something wrong and, in order to protect her job, she decided to change her story to the investigators. However, Giglio made it clear that she was not going to test K.O. during the regular testing week without her records. If an error occurred regarding the accountability of K.O.'s whereabouts during testing, it was because Moscato misinterpreted Giglio's instructions and marked K.O. absent on the attendance roster rather than the test roster. Since she was not going to be tested, even though present in school, it made more sense to mark her absent on the test roster. When Giglio decided to change the attendance roster for K.O., during the testing week, from "absent" to "late," the evidence supports a finding that Giglio reasonably believed that K.O. had been late. It may be that K.O. was in Moscato's class each day before testing and that Moscato sent her downstairs each day. However, Moscato denied this and contended

instead that K.O. was removed each day by someone other than her. However, as indicated above, the weight of the credible evidence draws the undersigned to a determination that Giglio did not remove K.O. from Moscato's room on any day and that on each day of testing, she observed K.O. either inappropriately attired or in what appeared to be a tardy status in the lobby area of School 16. Giglio reasonably concluded from her observations of K.O. that she was tardy on the days in question. In general, Moscato's testimony was too unreliable, when measured against other credible evidence, to form a basis of support for petitioner to meet its burden of proof in this matter.

Moscato's testimony does not support a finding that Giglio threatened or intimidated her or encouraged her to give false or misleading information. Moscato's June 24 statement (*P-10*), prepared after she consulted her union lawyer, indicated that Giglio intimidated her by saying that whoever made allegations against her would not teach in the state. However, her written statement prepared four days earlier, where she changed her story from earlier information she had given investigators, was devoid of any mention of intimidation. Moreover, Moscato never subsequently testified that Giglio had threatened her that she would not teach in the state if she did not tell investigators certain information, which raises a question as to whether it was actually said. Indeed, Moscato obtained employment in another school district in July 2003 without any interference from Giglio.

Moscato testified that just prior to being interviewed by the state investigators on June 17, Giglio told her that she did not do anything wrong, and she should say that all of her students were present. Although her statement alleged that Giglio told her not to say anything about K.O. to the investigators, her testimony was that, when Giglio told her to say all students were present, she assumed that meant to be silent on K.O. Accordingly, Giglio's testimony was more credible that she told Moscato on June 17 that the investigators wanted to see her but did not tell her not to say anything about K.O. Later that day Moscato approached Giglio and asked her what would happen if she lied to the investigators, and Giglio replied that she could lose her license. Giglio also mentioned that K.O. was not tested because she was late, and her attendance was

changed so it should not be a problem. As found above, Giglio was not constructing a lie because she reasonably believed K.O. had been present those days but late. Late students would not have been tested. Again Moscato admitted that, when Giglio made the statement about K.O. being marked late, during the second June 17 conversation, she assumed Giglio meant that she should not mention that she had been instructed to mark K.O. absent. Moscato's testimony was inconsistent in this regard in that she was suggesting on one hand that Giglio did not want her to discuss K.O. at all, and on the other hand that she was supposed to tell the investigators that K.O. was late. Moscato believed she had lied to the investigators when she told them that all students were present for testing and would get in trouble. Her fears were misplaced since they were exacerbated by confusion between "all students being present" and "all students being tested."

Any notion that Giglio interfered with, threatened or encouraged Moscato to lie was dispelled by the fact that Giglio spoke to the investigators as soon as she learned that K.O.'s testing was an issue in the investigation in addition to the extra time allegation. She took responsibility for marking K.O. late and for Moscato marking K.O. absent.

FINDINGS OF FACT

In sum the following findings of fact represent a careful scrutiny of the documentary evidence and of the credibility of the many witnesses weighed against what common sense and rationality would dictate under all of the circumstances present here. In some instances my credibility determinations are at odds with those of the State investigators who had made certain recommendations prior to the filing of the instant charges.[15] However, this is a hearing *de novo.* Additionally, I have had the benefit of a wealth of information either not sought by or not presented to the

[15] Somewhat disturbing was an apparent effort by the investigators to coerce witnesses to tailor their statements to fit the investigators' theory of the case where the recollections of these witnesses did not support the allegations of other people. For instance, LeProtto and Hennessy, both relatively minor and disinterested or neutral witnesses, testified that investigators attempted to pressure them to sign statements containing inaccurate timelines because their timelines conflicted with those of other witnesses. Such conduct raises a question as to how much other witnesses may have been led by investigators while eliciting information from them.

investigators, in particular with regard to the issue of bias or motive of certain primary witnesses. Most importantly, I have had a much more extensive opportunity to observe the demeanor of the various witnesses.

Based upon a consideration of the totality of the testimonial and documentary evidence presented, and having had an opportunity to observe and assess the credibility of the witnesses who testified, I **FIND** the following **FACTS**:

19. Training Coordinator Gil began training School 16 staff including Weil onexaminer and proctor duties with respect to NJ ASK testing procedures for 3rd and 4th graders on May 5.

20 During the morning of May 14, Gil led several focus meetings in 20-minute intervals for different groups of teachers and specialists. Giglio, Gil and Filippelli attended all sessions. The first meeting was attended by specialists including Harvey. The second meeting was for 1st grade teachers, the third for primarily 3rd grade teachers and the fourth for 4th grade teachers Aliu and Aquart. In addition to the morning sessions, Gil led an afternoon in-service workshop for all staff discussing test security procedures as well as test specifications with regard to language, content, what to expect and list minute preparation.

21 In the morning focus meetings, Giglio asked teachers to give Gil a list of any 504 students and special education students they had so that he could set up the proper testing accommodations. Space was limited, and each 504 student might need a different accommodation. At the 4th grade morning focus meeting, Aliu asked what was a 504 classification, and Giglio, by way of example, pointed out student S.L. in her class who was going through the I & RS process for 504 designation. Neither Gil nor Giglio discussed providing students with extra time, designating non-504 students as 504 students for the purpose of the test or asking for a list of students who were disruptive or easily frustrated. As of May 14 at least two students were awaiting 504 designation.

22. Although in prior years schools received their testing materials well in advance of the commencement of standardized testing, because of massive distribution problems by the State to the various districts in 2003, Gil was unable to pick up School 16's materials until late in the day on Friday May 16. Since he did not return to the school until approximately 2:50 p.m., he did not review the test materials until the morning of Monday, May 19.

23. Because Gil still believed that some students would be approved for 504 accommodations by May 20, he created a computer template on May 16 for the roster of student names, with fields of information including a column for a 504 designation using the letter "Y". He did not enter any actual names on that date. The test roster was for internal School 16 use only, and was not required by the NJ ASK testing requirements. It was intended as a vehicle for knowing what students were in what rooms.

24 Gil also prepared a box on May 16 for Harvey who had been scheduled to be the examiner for what was still anticipated to be at least two 504 students. This box was labeled "NJ ASK Grade 4 Mrs. Harvey 504 Accom."

25 Arrangements had been made for partitions to be used in the room designated for 504 students in the event different accommodations were required.

26 Upon reviewing the testing materials on Monday morning May 19, Gil discovered that 20 students had been mislabeled as 504 students based upon labels prepared, not by him or anyone else at School 16, but by Paterson's district testing coordinator. The District had also mislabeled six special education and four limited English/bilingual designations. Gil made handwritten notations of the labeling errors on the label list provided by the State.

27. In the morning of May 19, Reyes, who was scheduled to proctor the bilingual class, suffered a heart attack at school and Weil, who had been scheduled to be an examiner, was still in Florida tending to an ill relative. This caused some

chaos with the planned staff coverage for the testing. That day, guidance counselor Buccolo informed Gil that none of the more than 20 students labeled as 504 were 504 students and that the approval of S.L.'s and T.A.'s 504 status, which had been pending, had not arrived from the District.

28. Both Aliu's and Aquart's 4th grade classrooms were overcrowded in May 2003. Aquart had complained to Giglio about anticipated difficulty of testing in her classroom because of overcrowding and inquired whether some of the children could be removed due to her inability to adequately separate them in the overcrowded classroom. In 2002, when ESPA, the predecessor to NJ ASK, was administered to 4th grade students, a small group of seven to eight students had been pulled from the overcrowded 4th grade classes to alleviate overcrowding and tested in a separate room. Because the test materials had been received in 2002 a week before the testing, there was adequate time to plan for class sizes. There was no claim of irregularities for or arising out of creating this small group in 2002.

29. The Testing Manual distributed by the Department of Education directs that students should not be crowded together and that students should be seated appropriately for testing to eliminate distractions. If an overcrowding condition is discovered before testing commences, an alternate location with another examiner and proctor may and should be used even if the numeric sequencing has been completed on the booklets and security checklist.

30. After Buccolo advised Gil on May 19 that there were no 504 students, Gil and Giglio discussed alleviating the overcrowding in the 4th grade classes by using Propersi's room, which had been previously designated for use for the anticipated 504 students.

31. Both Aquart and Aliu were asked on May 19 to designate approximately five students from their respective classes to be removed to Propersi's room to alleviate the overcrowding. After each teacher provided Gil with a list that

afternoon, Gil placed those names on the in-house roster he had set up the previous week for the anticipated 504 class which Harvey was scheduled to examine in Propersi's room. He placed that roster in the box he had labeled the previous week "NJ ASK Grade 4 Mrs. Harvey 504 Accom."

32. Because of the chaotic situation on May 19 (Reyes' heart attack and Weil's absence requiring a change in the examiner/proctor list), the mislabeling of students by the District and pinning down if there were any 504 students), Gil did not have the opportunity to check and correct the rosters and the template once he realized there were no 504 students. Late into the testing week, Gil realized he never changed the template to reflect that the students tested in Propersi's room were not 504 students. He was unable to correct the codes and information prior to returning the tests to ETS because he was instructed by the investigators as of May 27 to cease all activities.

33. Gil's failures to change the testing box label and the template on the in house rosters were innocent errors in the course of a hectic testing week and were not reflective of a scheme to afford accommodations to non-504 students to which they were not entitled.

34. On May 19 Aquart randomly selected four students to be removed from her room based on their location in her room and not because of any "disruptive behavior" or "easily frustrated" criteria.

35. The majority of the students selected by Aquart and Aliu on May 19 were not the poorest scorers on the 2001-2002 tests nor were they children previously selected by the teachers for performance/behavioral review at 2002-2003 I & RS meetings. They were not selected because they were likely to benefit from special test accommodations.

36. Of the five students selected by Aliu on May 19 for the Propersi class only one, S.L., was selected for review at an I & RS meeting. One other selected child,

D.L., was placed on the November 21, 2002 I & RS meeting agenda but was later removed and not ultimately reviewed for consideration. Moreover, both S.L. and D.L. had passed both the math and language arts portion of the 2001-2002 test. Of the three remaining students selected by Aliu, M.P. and F.S. passed at least one section of the previous test, and T.D. passed both. There were three Aliu students she did not select for the small group who failed both of the test sections the previous year and four others who failed at least one section. Additionally, there were three Aliu students, D.H., H.A., and S.R. whom Aliu had designated for review on the April 23, 2003 I & RS list but did not select for the overcrowding room. Aliu's selections did not reflect a focus on students who would benefit from special accommodations.

37. Of the four students selected for Propersi's room by Aquart, F.R., K.G., Y.G., and O.S., none had previously been designated for I & RS review. Two students, C.T. and I.O. had been selected by Aquart for I & RS review but were not selected by her for the small group. Only one of the four Aquart selections had failed both portions of the previous year's test. Two others were proficient in one section, and the final one had been in a different school and test scores were not available. Of the students Aquart did not select for the small group, two had failed both sections in 2001-2002 and eight had failed at least one section. N.U., who was also selected by Aquart had no test scores from the previous year.

38. On Tuesday May 20 the language arts section of NJ ASK began for 3rd and 4th grade students.

39 Prior to the commencement of the test on May 20, a breakfast party was held for students from 7:15 to 8:15 a.m. Giglio did not observe student K.O. at the party.

40. As the test was about to begin on May 20, student M.C. had a Tourette's Syndrome outbreak which included making loud audible noises and had to be removed from Aquart's room by Giglio initially to the library. Since M.C.'s continued out outbursts were disturbing the special education students being

tested, Giglio again moved M.C. to the nurse's office so that she could be tested there. As Giglio was accompanying M.C. to the library, she observed student K.O. sitting by the security guard's desk at around 9:10 a.m. She directed K.O. to go to see Nurse Hennessy and told her she would be with her. While Giglio walked K.O. from the nurse's office to LeProtto's class, she asked her why she was late, and K.O. responded, "I ain't taking no test.

41. 3rd grade student K.O. was not tested on May 20 or on May 21 or May 22.

42. Giglio did not remove K.O. from Moscato's class on any day of 3rd grade testing. Nor did Gil.

43. On Tuesday morning Gil removed the test booklets from the security closet and disseminated them to proctors from each class who signed them out. He then went to Aquart's class and removed the four students designated for the small class in Propersi's room and their test booklets, which he placed in a box. He did the same for Aliu's class. That day Aquart asked Gil if N.U. could also be removed to the small class because he spoke neither English nor Spanish, and she believed that he would be more comfortable in the small section. Gil agreed to also take N.U. He accompanied them to Propersi's room. The labels for the small group students were not in sequence because the decision to create the overcrowding alleviation group occurred after Gil had affixed the 4th grade labels. Gil then removed three special education students, A.R., I.S. and H.R. from Moscato's class.

44. Harvey was the examiner and Propersi the proctor for the small group in Propersi's room on May 20 for language arts testing.

45. No 504 or special accommodations including extra time were given to any small group student on May 20.[16]

[16] Petitioner presented no evidence or testimony whatsoever to support that part of the allegation of Charge Two that, on May 20, 21 and 22, Giglio directed that certain 4th grade students, approximate[ly] 10, be treated like "504"

46. At the end of testing on May 20, Gil waited for the proctors to return the test booklets to his "test" desk in front of Giglio's office. After each proctor returned the booklets, Gil filled in the date and time of the return. He repeated this procedure on each day of testing. The small group test booklets were returned to the test desk each day before Paciga returned the booklets from Aliu's class. Because the small group booklets were out of sequence, Paciga arranged them each day in order with those of the rest of Aliu's class.

47. After testing was completed on May 20, Harvey confronted Giglio in her office and was upset about not being invited to an awards ceremony that Giglio was attending in Cherry Hill that afternoon with Gil. Harvey was yelling and pointing at Giglio and was visibly upset, and she continued to vocalize her anger in front of other teachers after Giglio left.

48. On the morning of May 21, upon being advised that Harvey was still upset about not being invited to Cherry Hill, Giglio decided to replace Harvey as the examiner for the small group in Propersi's room with Weil who had returned from her absence. Giglio approached Weil and asked her to administer the test.

49. Giglio did not see K.O. at the breakfast party on Tuesday, May 21, and first saw her when Security Guard Todaro brought K.O. over to her at approximately 9:20 a.m. and advised Giglio that K.O. was late. Whereas on regular school days the security guard would issue a late pass and send a late student to class, during testing the procedure was to not issue a late pass because of testing in the classroom but to instead bring that student to the principal. As with the previous day, Giglio brought K.O. to LeProtto's class.

50. Gil delivered the small group students from Aquart's and Aliu's classes to the Propersi classroom on May 21.

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students. Accordingly, the undersigned granted Giglio's motion to dismiss at the end of the presentation of petitioner's case as to that part of Charge Two.

51. Weil was the examiner and Propersi the proctor for the small group in Propersi's room on May 21for language arts testing.

52. No 504 or special accommodations including extra time were given to any small group student on May 21.

53. At the conclusion of testing on May 21, proctors returned the booklets to Gil at the testing desk where he recorded their return. Weil, although an examiner, returned the booklets from the small class.

54. Giglio did not remove test booklets from the school on May 21 or on any other day prior to, during or after testing.

55. On Thursday May 22 K.O. attended the breakfast party but was determined by Giglio to be inappropriately dressed with a "belly" shirt. Giglio directed Secretary Ruiz to call K.O.'s foster mother to bring a change of clothes to school. Instead, the foster mother picked K.O. up and brought her home to change. K.O. returned to school late at approximately 9:30 a.m. with her foster mother whereupon Giglio escorted K.O. to LeProtto's classroom.

56. Gil escorted the small group students and their booklets from Aquart's and Aliu's classes to the Propersi classroom on May 22.

57. Weil was the examiner and Propersi the proctor for the small group in Propersi's room on May 22 for math testing.

58. No 504 or special accommodations including extra time were given to any small group student on May 22.

59. At the conclusion of testing on May 22, proctors returned the booklets to Gil at the testing desk where he recorded their return. Weil again returned the booklets for the small group.

60. In the afternoon of May 22, Giglio handed Harvey a disciplinary memorandum for her conduct on May 20 and faxed a copy to Dr. Stepherson. Giglio had never issued a disciplinary memorandum before.

61. Because there was no testing of 3rd grade students on Friday, May 23, guidance counselor Buccolo had completed her assignment as proctor in Lofus' 3rd grade class. Giglio therefore reassigned Buccolo to proctor the small group in Propersi's classroom so that Propersi could service her own students that day who had been dispersed among several lower grade classes for the testing period. Buccolo, as guidance counselor, did not have her own class to service.

62. On May 23, Gil again accompanied the small group 4th graders and their math booklets to Propersi's room.

63. Giglio did not give any instruction to Weil or anyone else on May 23 to treat the students in the small group like 504 students.

64. Giglio did not give any instruction to Weil or anyone else on May 23 to grant the students in the small group extra time on any portion of their test or to review and correct their responses on the language arts section of the test previously completed after she arranged for the return of those booklets to the students.

65. Giglio did not direct Gil to, nor did he, bring language arts booklets to students in the small group on May 23.

66. Gil did not enter Propersi's room on May 23 while math testing was occurring and instruct Weil to give more time on math.

67. Weil returned the math booklets for the small group to Gil's testing desk, prior to the proctors from Aquart's and Aliu's class returning their math booklets on May 23.

68. The small group did not receive extra time to complete the math section of the test on May 23.

69. The small group did not work on the language arts section of NJ ASK on May 23.

70. On the morning of May 23, Giglio advised Weil, that, if students finished testing early enough, they would begin activities to prepare the tributes for the moving up ceremony scheduled for the end of the school year. Giglio decided that since May 23 was a one half day and the students would be tired from testing, work on the tributes would be fun.

71 At approximately 10:40 a.m. on May 23, after Weil had returned the math test booklets to Gil, Giglio asked Weil into her office to discuss the selection of students as leaders for the group tribute. They considered selecting students who had not been selected for other events during the year or had won awards. R.M., J.Q., G.D., J.E. and S.M were all shy and had not previously received honors. I.O. was chosen to do the honor for Paciga who was the baseball coach since I.O. was on his midget baseball team. J.N. was chosen because her father had not allowed her to perform as Snow White in an earlier presentation. I.L. was chosen because her mother was the home/school/community liaison, and Giglio wanted to give her mother special recognition. Giglio prepared a list of eight students in her office but decided not to include J.N. and I.L. on the group tribute since they would be doing special tributes. She then rewrote the list to have only six names on it but changed her mind again as Weil was leaving around 11:00 a.m. and told her to pick up I.L and J.N. as well as the other six from their 4th grade classes and bring them to Propersi's empty classroom.

72 This discussion involved only the tributes and not giving students more time on any portion of the test or redistributing the language arts booklets.

73. Student I.O. was assisting Paciga in the hallway at 11:30 a.m. on May 23 in setting up for a baseball team sale.

74. Gil accessed blank blue-covered test books (not used for NJ ASK) for the students to enter their tribute anagrams and brought them to Propersi's room while he was waiting for the return of bilingual NJ ASK testing books. Filippelli, who was on a lunch break, went to Propersi's room because the overall tribute project was her responsibility.

75. Weil had given the list of students to Buccolo and instructed her to assemble the students from the list in Propersi's room. She brought the students to Propersi's class, returned the list to Weil, and left.

76. When Gil arrived with the bluebooks, Weil left. Filippelli arrived as Gil was distributing the bluebooks, and he told the students that Filippelli would finish explaining what the students should do. While Gil was present the custodian tried to slide the door open between Martinez' room and Propersi's room whereupon Gil said, "Don't do that. We're not ready." Filippelli explained the tributes and that it was to be a surprise for the teachers. She had the students write the letter they were going to use and then instructed them to put their names on the front of their bluebooks and to write "writing assignment" on the cover. The meeting with the students lasted about five minutes. They were then returned to their classrooms.

77. Of the eight students selected to participate in the preparation of tributes for the moving up ceremony, only one, I.O. had been discussed in an I&RS meeting, and he had been removed from consideration at the April 23 I&RS meeting. I.O.'s test performance in 2001-2002 was proficient in language arts and advanced proficient in math. Every student selected for the tribute group, except

R.M. (who did not attend School 16 in the prior year), was proficient in at least one section of the ESPA test. 16 students from Aliu and Aquart's classes, who were not selected by Giglio for the tribute group, had lower or comparable proficiency than those selected.

78. Giglio did not select the second group of students taken to Propersi's room for the purpose of returning their language arts booklets to them for additional work on their essays.

79. Giglio did not select the second group of students because they had not done well on their language arts section earlier in the week.

80. No one returned language arts booklets to the second group of students on May 23 nor did the second group work with their language arts booklets on May 23.

81. Prior to the commencement of testing, Giglio had concerns that new student K.O. needed special accommodations because of her emotional and academic condition and perceived language problem. She could not verify these needs before the commencement of testing because K.O.'s records had not yet been received from her previous schools. Without K.O.'s previous school records, Giglio would not have tested K.O. during the regular testing week. Unless she received the records, she was planning to test K.O. during the following makeup week. Prior to the regular testing, Gil had prepared a handwritten label for K.O.

82. If K.O. had been tested during the regular testing week, her score would have been voided since her records, some of which arrived after the testing week, subsequently showed that she was ESL or a Limited English Proficient student and would have needed the time and one half accommodation accorded to ESL students. Her score would not have counted anyway because she had been in the Disrict less than one year.

83. Prior to the testing Giglio instructed Moscato that, in the event they did not test her, to mark K.O. absent for the test on the test roster. She told Moscato that, if K.O. were entitled to a special accommodation, she would be able to do that during the makeup week.

84. Moscato misunderstood Giglio's instruction and marked K.O. absent on the daily class attendance records rather than the test roster.

85. Just before noon on May 23 Giglio reviewed the class attendance sheets to ascertain how many makeup exams she would need to schedule the following week. She discovered that Moscato had marked K.O. absent on the class attendance sheets rather than the test roster as she had instructed. That day Giglio asked Moscato why she had marked K.O. absent on the attendance sheets rather than the test roster, and Moscato replied that she thought that is what Giglio had instructed. Giglio told her that her intention was to mark K.O. absent on the test roster if she did not take the test, which she had not, and that she would have Secretary Ruiz change the attendance sheets for K.O. from absent to late. Moscato did not then express any disagreement as to whether K.O. had been late on the testing days.

86. On May 23 Giglio instructed Secretary Ruiz to change K.O.'s status on the attendance sheets from absent to late since she believed K.O. had been late on May 20, 21 and 22 based on her good faith observations on each of those days that she did not see K.O. until after 9:00 a.m. on May 20 and 21, and sent her to change her clothes on May 22.

87. On June 17 just prior to Moscato's interview with State investigators, Giglio told her that the investigators wanted to see her. Giglio did not instruct Moscato not to say anything about K.O.

88. Moscato believed that she had lied to the investigators when she told them that all students were present during testing.

89. After the June 17 interview Moscato asked Giglio what would happen if she lied to the investigators. Giglio replied that she could lose her license. Giglio mentioned to Moscato that K.O. was not tested because she was late, and her attendance was changed so it should not be a problem.

90. As soon as Giglio realized that the testing of K.O. had become an issue in the investigation, she told the investigators that she had marked K.O. late and that Moscato had marked K.O. absent at Giglio's direction.

91. Giglio did not instruct Moscato to give information to the investigators that Giglio knew or believed to be untrue. K.O. was present during the testing week but was late on each of the testing days based on Giglio's observations. She was not tested.

92. Weil and Giglio had a conversation on June 12 before Weil was to be interviewed by Dr. Nuccetelli. Giglio told Weil what Buccolo had related to her of her interview with Dr. Nuccetelli. Giglio was surprised to learn from Buccolo that she, rather than Weil, had gathered the second group of students on May 23 since Giglio had asked Weil to get them. When Giglio said to Weil, "don't stray from that," she was referring to Buccolo's comment, which was the truth.

93. Weil and Giglio had another conversation on June 13. Referring to the investigation, Giglio said: "I am not going down" and "you need to wise up, sharpen up, find out who your friends are cause it is not them." At the time of making this statement, Giglio was unaware that Weil had initiated the charges and believed instead that Harvey had caused the investigation to occur. This comment was not in reference to any information Weil had given to Giglio regarding her recitation of what occurred during the testing week.

94. During the June 13 conversation, Weil advised that she was going to see a lawyer. Giglio suggested that Weil not submit a statement until her lawyer ok'd it.

Giglio asked to see her statement and that she would show Weil hers "so we're all on the same page." Nothing was said in this conversation by Giglio to direct Weil to make any particular representations in her statement.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The District bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. *N.J.S.A.* 11A:2-21; *N.J.A.C.* 4A:2-1.4(a). *Atkinson v. Parsekian*, 37 *N.J.* 143 (1962); *In re Polk*, 90 *N.J.* 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. *Bornstein v. Metropolitan Bottling Co.*, 26 *N.J.* 263 (1958). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." *Jackson v. D.L. and W.R.R.,* 111 N.J.L. 487, 490 (E. & A. 1933). The evidence is found to preponderate if it "established 'the reasonable probability of the fact.'" *Jaeger v. Elizabethtown Consolidated Gas. Co.,* 124 N.J.L. 420,423 (Sup. Ct. 1940) (citation omitted). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." *Loew v. Union Beach,* 56 N.J. Super. 93, 104 (App. Div. 1959). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. *State v. Lewis*, 67 *N.J.* 47 (1975).

Tenure protects teachers from arbitrary dismissal for "unfounded, flimsy or political reasons." *Spiewak v Rutherford Bd of Educ.*, 90 N.J. 63, 73 (1982). It is designed to aid in the establishment of "a competent and efficient school system" by affording to teachers a measure of security in the ranks they hold after years of service. *Viemeister v Prospect Park Bd of Educ.,* 5 *N.J Super.* 215, 218 (App. Div. 1949). Accordingly, *N.J.S.A.* 18A:6-10 provides that no tenured teacher shall be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause." The seven charges brought by the District collectively allege conduct unbecoming an employee through gross misconduct.

"Unbecoming conduct" is an elastic term broadly defined to included any conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." *Karins v City of Atlantic City*, 152 N.J. 532, 554 (1998). Behavior rising to the level 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. *Hartmann v Police Dep't of Ridgewood*, 258 *N.J Super.* 32, 40 (App. Div. 1992). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." *In re Tenure hearing of Grossman*, 127 N.J Super. 13, 29 (App. Div. 1974), certif den. 65 N.J. 292 (1974).

Children in New Jersey have a constitutional right to receive a free and appropriate public education. N.J Const., art. VIII, § 4, ¶ 1. "It has been said that the purposes of an educational system are to further the best interest of the community at large, the teachers and especially the school children." *Zimmerman v Newark Bd of Educ.*, 38 N.J. 65, 69 (1962). The best interests of school children certainly are not met when educators intentionally abrogate their responsibility to accurately and honestly assess the academic performance of the children in accordance with standardized testing mandated by the State Board of Education. While tenure laws are designed to protect teachers against arbitrary action or political favoritism, they were never intended to perpetuate the employment of teachers who are not properly performing their jobs.

I **CONCLUDE** that petitioner District has failed to prove any of the charges by a preponderance of the competent, relevant and credible evidence. According to the reasonable probability of truth, the weight of the evidence preponderates in favor of Giglio as to all charges. That being so, Giglio has not engaged in any conduct, which has destroyed public confidence in the operation of public services.

As to Charge One, although already determined in the motion to dismiss at the conclusion of the presentation of the District's case, I reiterate that, based on the findings above, the District failed to prove by a preponderance of competent, relevant

and credible evidence that Giglio, on or about May 14, 2003, directed staff to identify students perceived as "disruptive" or "easily frustrated" for purposes of labeling them as 504" students entitled to special accommodations knowing that there were no 504 students. The credible evidence disclosed that staff was asked to identify actual 504 students, since several students were awaiting 504 designation as of May 14 and before the commencement of NJ ASK. Giglio did not ask staff to identify students for 504 purposes at a time she knew there would be no 504 students. She did not know that the potential 504 students had not been approved until May 19, the day before the commencement of the NJ ASK testing. Accordingly, I **CONCLUDE** that Giglio did not engage in conduct unbecoming an employee regarding Charge One.

As to Charge Two, the District failed to prove by a preponderance of the credible, competent and relevant evidence that, on or about May 20-23, 2003, Giglio directed that approximately 10 4th grade students be removed from their regular classes to another class and be treated as 504 students during the NJ ASK testing while knowing that no students were in fact 504 students entitled to special accommodations. The more credible evidence led to the above findings that Giglio directed that approximately 10 4th grade students be removed from their regular classrooms during the NJ ASK testing for the purpose of relieving overcrowding in each of the regular 4th grade classrooms and not to give them 504 accommodations. She did so because she knew by May 19 that there were no 504 students and that, consequently, the Propersi classroom would not be needed to test 504 students and could be used to alleviate overcrowding. Accordingly, I **CONCLUDE** that Giglio did not engage in conduct unbecoming an employee regarding Charge Two.

As to Charge Three, the District failed to prove by a preponderance of the credible, competent and relevant evidence that Giglio granted students extra time on the NJ ASK test. The more credible evidence led to the above findings that Giglio did not direct Gil or Weil to allow the ten 4th grade students extra time to complete their math section over and above that scheduled for the test, or to review and correct their responses to the language arts section of the test previously completed on May 21,

2003. Accordingly, I **CONCLUDE** that Giglio did not engage in conduct unbecoming an employee regarding Charge Three.

As to Charge Four, the District failed to prove by a preponderance of the credible, competent and relevant evidence that, on May 23, 2003, Giglio gave Weil a list of students who "had not written enough on their essays" on the language arts section of NJ ASK or directed Weil to allow the students on that list to re-review and correct their responses on the language arts section of the test completed on May 21. The more credible evidence led to the above findings that Giglio did, indeed, give Weil a list of students on May 23 but for the purpose of assembling certain 4th grade students, after the completion of testing for that day, to start preparing tributes to teachers for the upcoming moving up ceremonies. This second group of students worked on the tributes and did not have their language arts sections returned to them. Accordingly, I **CONCLUDE** that Giglio did not engage in conduct unbecoming an employee regarding Charge Four.

As to Charge Five, the District failed to prove by a preponderance of the credible, competent and relevant evidence that Giglio engaged in a pattern of unprofessional conduct involving student K.O. Undisputedly, K.O. was not tested during the regular testing week. The District's charges are based on a theory that Giglio plotted a scheme to cheat on the NJ ASK test in order to enhance School 16's overall performance and that K.O.'s preclusion from the test because she was a predictable or anticipated poor performer would further that plot. As found above, the facts do not support such an intent, and, therefore, Giglio engaged in no unprofessional conduct. The notion of an intent not to test K.O. for this reason is discredited by the fact other potential poor performers, particularly one in the throws of a significant medical episode, were tested. Had Giglio truly intended to preclude K.O. from the entire testing process, the perfect opportunity to hide her presented itself since K.O., having just arrived in the School District, was not even among the preprinted labels prepared by ETS for the testing. Under the District's theory, Giglio should have simply kept K.O. off any official testing records. Instead, Gil prepared a handwritten label for K.O. in anticipation of her being tested.

K.O. enrolled in School 16 a mere few weeks before the NJ ASK administration as a result of a DYFS placement. She had a woeful personal history, readily apparent emotional and academic problems and a possible English language deficiency. Efforts to obtain her student records from her previous schools in other districts before the test were unsuccessful. These records would have disclosed whether K.O. had been entitled to an accommodation due to her perceived deficiencies. Without the records Giglio did not have sufficient information upon which to determine whether or not K.O. was entitled to testing accommodations. Indeed, the partial records received by School 16 only after the NJ ASK testing revealed that K.O. was an ESL student who should have received time and one half to complete the test if she had been tested. Therefore, had she been tested, the score would have been voided. In any event her score would not have counted toward the School 16 score under the NJ ASK rules because she had been in the district less than one year, and moreover, the 2003 test was a field test, which would not have counted. Faced with these conditions, Giglio's decision not to test K.O. during the regular testing week, convincingly does not support an intentional scheme to inappropriately enhance School 16's overall test score.

As found above, Giglio did not direct Moscato to exclude K.O. from taking the test by marking her absent. She instructed Moscato that, in the event they did not test her, to mark K.O. absent for the test on the in-house test roster. She did not instruct Moscato to mark her absent on the classroom attendance sheets. The District's proofs were inconsistent with the allegation of Charge Five since Moscato claimed that either Giglio or Gil removed K.O. from Moscato's room each day whereas the Charge alleges that Moscato removed her from class before giving the test at Giglio's direction and sent her to the principal's office, the school nurse and the security officer.

Indeed, the NJ ASK Administration Manual required that <u>all</u> regular 3rd grade and 4th grade students be tested. Although, K.O. was not tested during the regular test week, Giglio credibly testified that it was her expectation that, if K.O.'s records had not arrived before the regular test week, they would arrive at least by the makeup week at which time she would have tested K.O. whether or not the records arrived. Accordingly,

a process was in place as well as an intent by Giglio to permit compliance with the requirement that all students be tested. However, without dispute, she was not permitted to test K.O. during the makeup week because the investigators immediately precluded any further activity regarding the testing process. Most significantly, State Department of Education test coordinator Gourley, who created the NJ ASK Administration Manual, acknowledged that, although all students are to be tested under all circumstances and makeup tests are for absent students, if a student's first language is Spanish entitling her to extra test time and the records from her previous school have not arrived at the time of testing, the test may be given on the makeup week. In retrospect Giglio probably should have consulted someone from the District such as Assistant Superintendent Stepherson regarding the unique K.O. situation. However, the failure to do so certainly does not constitute gross misconduct, any misconduct or unprofessional conduct. In view of K.O.'s horrific personal circumstances and in the extraordinary circumstance of the absence of records, it was appropriate not to test K.O. during the regular test week even if she had not been late. Giglio exercised reasonable discretion without malevolent intent as the primary administrator of School 16. Accordingly, I **CONCLUDE** that Giglio did not engage in conduct unbecoming an employee regarding Charge Five.

As to Charge Six, the District failed to prove by a preponderance of the credible, competent and relevant evidence that Giglio tried to cover up K.O.'s exclusion from the test. As found above Moscato had misunderstood Giglio's instructions when she marked K.O. absent on the regular School 16 attendance sheets rather than the the in-house test roster. Although Charge Six alleged that Giglio directed Moscato to change her attendance records by marking K.O. late, she actually instructed school secretary Ruiz to change the records from "absent" to "late". Giglio simply informed Moscato that the records would be changed to late when she pointed out her error in marking K.O. absent on the wrong document. The claim that Giglio's alteration of the attendance sheets was an attempt at a cover-up is negated by the credible evidence that Giglio's conversation with both Ruiz and Moscato regarding the attendance sheets occurred on May 23 before any allegations of testing irregularities were made or the investigation began. Giglio's changing of the attendance records from absent to late does not

support the claim of a cover-up because, based on the credible evidence, Giglio, in good faith, based on her observations, believed that K.O. had been tardy on each of the three days in question. Curiously, Moscato never questioned Giglio upon her announcement that she was having K.O. marked late although Moscato subsequently claimed that K.O. had not been late. If K.O. had been in Moscato's class on time and Moscato sent her downstairs each day (which Moscato denied) logic would dictate that Moscato would have so informed Giglio when Giglio told her of the change to "late" on the attendance roster. The fact remains that, based on what Giglio observed, her alteration of K.O.'s attendance roster was not a cover up. Finally, as to the allegation that Giglio directed Moscato not to mention K.O. when questioned by investigators, Moscato herself testified that she was never actually told this by Giglio. Rather, she "assumed" that she was not supposed to mention K.O. A charge of cover-up must be supported by proof of an affirmative act by the accused. Moscato's "assumption" does not prove any inappropriate affirmative act by Giglio. Accordingly, I **CONCLUDE** that Giglio did not engage in conduct unbecoming an employee regarding Charge Six.

As to Charge Seven, the District failed to prove by a preponderance of the credible, competent and relevant evidence that Giglio engaged in a pattern of unprofessional conduct involving the investigation conducted by the Department of Education. There was no evidence whatsoever that any investigator instructed Giglio not to speak to any of her staff regarding any allegations or the investigation or any statements made by staff members to the investigators. Inferences by witnesses that they were afraid of or intimidated by Giglio because of her nature as a strict and demanding principal, falls woefully short of proving that, during any time period relevant to the allegations and the ensuing investigation, Giglio made any affirmative statement or committed any affirmative act that constituted a threat or intimidation against any individual. As indicated above, never in her conversations with Weil and Moscato, did Giglio instruct either of them to change facts, which were contrary to any that either of them had expressed to Giglio as different. If one were to state to others what he or she truly believed were the honest and accurate operative facts and even expressed the need for everyone to stay on the same page, there is no improper interference with an investigation unless it was clear that the people being addressed had expressed a

different view of the facts. This did not occur here. As found above, Giglio did not encourage staff members to give false and misleading information to investigators. Accordingly, I **CONCLUDE** that Giglio did not engage in conduct unbecoming an employee regarding Charge Seven.

In the course of the hearing, the District introduced certain evidence regarding test security, which actually constituted a diversion or distraction from the actual charges against Giglio. For instance, admittedly, for the most part, proctors rather than examiners picked up and returned the test booklets each day of the NJ ASK testing from Gil's test desk, although the Manual directs that examiners should perform that role. Most witnesses testified that this use of proctors had been the practice, not only at School 16 prior to and before Giglio's presence there, but as School No. 10 as well. The expressed reason for limiting the handling of test booklets to examiners is that all handlers must be certified teachers. However, all of the proctors used in School 16 in 2003 were certified teachers. In any event Giglio is not charged with misconduct arising out of the use of proctors. Moreover, there is no nexus between this deviation from test administration rules and the allegation of a scheme to cheat.

I made no findings of fact with regard to whether Propersi, Weil and Harvey were specifically trained to administer for the 2003 NJ ASK because Giglio was not charged with a violation of test security in this regard, and, in any event, Gil rather than Giglio was responsible for training. Aside from the presentation of evidence that they were indeed trained and that they had been specifically trained to administer many similar tests in the past, this claim does not support any of the actual charges against Giglio.

The location of the test booklets in the test closet or locked in the principal's office is also a non-issue. The Manual requires that test booklets be stored in a central location accessible to only the school test coordinator and the principal. Giglio was not charged with a violation of test security regarding the stowing of the booklets, and, in any event, that was Gil's responsibility. A suggestion that the presence of the booklets in Giglio's office gave her an opportunity to review the tests and choose poor performers for additional testing is unavailing since I made no finding that Giglio reviewed the tests.

Also, a question was raised as to whether substitute principal Cathy Blank had secured or had initialed the return of the special education test booklets on the afternoon of May 20 since the initials on the form were "KB" whereas she spells Cathy with a "C." Even if an improper entry was made, the maintenance of this list was not Giglio's responsibility, Giglio was not charged with any misconduct in this regard, and this matter does not otherwise support the specific charges against Giglio or the claim of cheating.

With regard to claims of sloppiness or inaccuracies on the test security checklists, the responsibility for their maintenance was that of the test coordinator and not Giglio. The reasons why the test booklets for the small group where not separately signed out and in each day by Gil or the examiner or proctor in the Propersi room each day was explained above because of the sequencing issue. That is why Paciga and Generals picked up and returned those booklets each day with those of the rest of Aquart's and Aliu's class.

At best these several matters were technical violations of test security procedures. That is not meant to diminish the importance of adherence to all test security procedures. All of the procedures provided in the Manual serve the important purpose of maximizing the security and integrity of the test. However, such violations, standing alone, would not constitute unbecoming conduct because they are not of such import as to destroy public respect for public employees and confidence in the operation of public services. In any event, Giglio was not charged with or responsible for committing any of these potential violations, and they do not provide dispositive support for any of the charges specifically lodged against Giglio.

In sum, I **CONCLUDE** that Giglio has not engaged in any conduct, which has deviated from the stringent standard of behavior expected of a principal or which constitutes conduct unbecoming an employee.

ORDER

It is hereby **ORDERED** that all charges against respondent Grace Giglio be **DISMISSED.**

It is hereby further **ORDERED** that the State-operated School District of the City of Paterson, Passaic County reinstate Grace Giglio to her former position and compensate her for any lost salary, benefits and increments.

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 (45) 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 (13) 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, 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.

8/9/04
DATE

JESSE H. STRAUSS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on: 8/9/04

DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

AUG 10 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Exhibits

PETITIONER'S EXHIBIT LIST

EV	#	DESCRIPTION
x	P-1	Preliminary Investigation Report by County, dated June 19, 2003, to State Department of Education ("DOE") (24 pps.)
x	P-2	Memo by Ray Montgomery, Director Office of Compliance Investigation to Dr. Brian Robinson, Office of Evaluation and Assessment, dated July 25, 2003, and Investigative Report, dated July 2003 (10 pps.)
x	P-3	School 16 Order of Interviews (2 pps.)
x	P-4	School 16 Chronology of Events (3 pps.)
x	P-5	School 16 Summary of Interviews (9 pps.)
x	P-6	School 16 NJ ASK Testing Schedule (2 pps.)
x	P-7	School Security Checklist Spring 2003 (with notes) (14 pps.)
x	P-7A	School Security Checklist Spring 2003 (without notes and how existed at time) (14 pps.)
x	P-8	NJ ASK Test Administration Manual Spring 2003
x	P-9	Written Statement by Melissa Moscato, dated June 20, 2003 (3 pps.) (with 6/25/03 notations by Y. Tierney)
x	P-9A	Written Statement by Melissa Moscato dated June 20, 2003 (3 pps.) (as written)
x	P-10	Typed Statement by Moscato, dated June 24, 2003 (3 pps.)
x	P-11	Homeroom Attendance Sheet for Moscato, dated May 16, 2003 (ignore extraneous writing) (2 pps.)
x	P-11A	Homeroom Attendance Sheet for Moscato, dated May 16, 2003, with Tierney's Notes Attached (3 pps.)
x	P-12	Tardy Slips for May 19 to 28, 2003 (3 pps.)

EV	#	DESCRIPTION
x	P-13	Statement by Carla Propersi, dated June 30, 2003 (3 pps.)
x	P-14	Written Statement by Carla Propersi (2 pps.)
x	P-15	Linda LeProtto's statement, dated June 25, 2003 (1 pp.)
not admitted	P-16	Statement by Mary Veronelli, dated June 25, 2003 (1 pp.)
x	P-17	Written Statement by Anna Martinez (formerly Santos), dated June 12, 2003 (1 pp.)
x	P-18	Typed Statement by Ms. Martinez, dated June 25, 2003 (1 pp.)
x	P-19	Typed Statement by Arlene Weil (2 pps.), and written statement (1 pp.)
x	P-20A	Photograph of box with Ms. Moscato's name (1 pp.)
x	P-20B	Photograph of box with Ms. Filippelli's name (1 pp.)
x	P-21A	Photograph of box with Mrs. Harvey's name (1 pp.)
x	P-21B	Photograph of box with Mrs. Aquart's name (1 pp.)
x	P-22	Transcript of Tape Recording June 12, 2003, prepared by Arleen Weil (1 pp.)
x	P-23	Transcript of Tape Recording June 13, 2003, prepared by Arleen Weil's attorney's office (3 pps.)
x	P-24	Forensic Laboratory Examination Report (2 pps.)
	P-25	**(No Exhibit 25 Anymore)** [Formerly Copy of Enhanced Audio Tapes (2 tapes)]
x	P-26	Request for Course Approval form for Arlene Weil, dated August 20, 2002 (2 pps.)
P not moving in	P-27	2 page Typed Statement by Patricia Harvey and 3 pages written, dated June 25, 2003 (5 pps.)

EV	#	DESCRIPTION
withdrawn by P; remarked as R-69	P-28	Written Statement by Elmas Aliu, dated June 11, 2003 (2 pps.)
x	P-29	School 16 Notes of Focus Group Meeting by Elmas Aliu (2 pps.)
x	P-29A	School 16 Notes with June 25, 2003 writing (2 pps.)
X	P-30	Harvey 504 Accommodation Roster (1 pp.)
x	P-31	Yvonne Tierney Notes, dated June 25, 2003 (29 pps.)
x	P-32	Yvonne Tierney Notes (and other documents) pertaining to Kate Hennessy (6 pps.)
x	P-33	Yvonne Tierney Notes of Grace Giglio Interview, dated June 25, 2003 (11 pps.)
x	P-34	Yvonne Tierney Notes of Elmas Aliu Interview, dated June 18, 2003 (1 pp.)
x	P-35	Yvonne Tierney Notes of Elmas Aliu Interview, dated June 25, 2003 (1 pp.)
P not moving in	P-36	Certification of Michael Paciga, dated October 18, 2003 (3 pps.)
x	P-37	Yvonne Tierney Interview Notes (various), dated June 17, 2003, June 18, 2003 and June 20, 2003 (38 pps.)
not admitted	P-38	Propersi Diagram of Propersi, Moscato, Santos and Loftus classrooms and teacher's room (drawn on large pad in courtroom) (added to by Ana Martinez) (1 pp.)
x	P-39	Letter from Dr. Duroy to Carla Propersi re: Teacher of the Year, dated May 15, 2003 (1 pp.)
not admitted	P-40	Propersi timeline of events for May 23, 2003 (drawn on large pad in courtroom) (1 pp.)
P not moving in	P-41	Photograph of Center Hallway and Melissa Moscato's Classroom
x	P-42	Evaluation of Arlene Weil, dated April 9, 2003 (2 pps.)

EV	#	DESCRIPTION
x	P-43	Job Description, Technology Coordinator (1 pp.)
x	P-44	Calendar Page, dated May 2003, marked by Arlene Weil on March 17, 2004
x	P-44A	Calendar Page, dated June 2003, marked by Arlene Weil on March 18, 2004
P not moving in	P-45	Photograph of Staircase at School 16
x	P-46	List of 6 students (without sticker) (1 pp.)
P not moving in	P-47	Diagram of Propersi classroom, dated May 23, 2003
x	P-48	Envelope from Sergeant Gripp (previously sealed)
x	P-48A	Envelope signed by Mary J. Hammer, dated February 25, 2004
x	P-49	Original Weil Micro-cassette, dated June 12, 2003, 11:30 AM
x	P-50	Original Weil Micro-cassette, dated June 13, 2003
x	P-51	Enhanced CD of June 12, 2003 conversation
x	P-52	Enhanced CD of June 13, 2003 conversation
P not moving in	P-53	Diagram of School by Graciela Todaro on April 7, 2004
x	P-54	Pictures (2) of outside of School 16 (1 pp.)
x	P-55	3/6/03 Evaluation of Melissa Moscato (3 pps.)
P not moving in	P-56	Chart on easel by Melissa Moscato
x	P-57	Borman notes re: Melissa Moscato (1 pp.)
x	P-58	Borman notes re: Melissa Moscato (1 pp.) (double-sided)
x	P-59	Borman notes re: Felix Gil (3 pp.)
x	P-60	Borman notes (12 pps.)

EV	#	DESCRIPTION
duplicative of P–63	P-61	5/22/03 Giglio to Harvey memo Re: Conduct Unbecoming a Professional Staff Member (1 pp.)
duplicative of P-63	P-62	5/22/03 memo from Harvey to Giglio (rebuttal) (1 pp.)
x	P-63	5/22/03 memo from Giglio to Harvey and attached 5/22/03 Harvey rebuttal (2 pps.)
x	P-64	6/25/03 Harvey statement (4 pps.) (P-27 minus last page)
x	P-65	Form – Section 504 Accommodation Identification Paterson Schools (1 pp.)
x	P-66	Copies of labels 5/03 for School 16 sent to by District
X	P-66A	Labels with mistakes noted (P-66 with handwritten notes)
withdrawn	P-67	Aquart Certification dated 10/17/03
X	P-68	Test Attendance Rosters (9 pps.)
withdrawn	P-69	Certification of Felix Gil 10/27/03 (7 pps.)
X	P-70	Letter to Filippelli dated 1/30/04 (1 pp.)
X	P-71	Check #2861 dated 11/1/02 from Giglio to Coldwell Banker
X	P-72	Official Transcript of 6/12/03 Recorded Conversation (CD Rom)
X	P-73	Official Transcript of 6/13/03 Recorded Conversation (CD Rom)
X	P-74	Typed notes identified by Todaro (2 pps.)
X	P-75	Memo dated 3/21/03 from Kildow to Elementary Test Coordinators
X	P-76	Guidelines for Proctoring (undated) (2 pps.)
X	P-77	NJ ASK Spring 2003 Training Agenda (1 pp.)
X	P-78	Paterson NJ ASK Training Materials 2003 (5 pps.)
X	P-79	Fax cover sheet dated 1/9/03 and report card – Weil - Caldwell College (2 pps.)

RESPONDENT'S EXHIBIT LIST

EV	#	DESCRIPTION
X	R-1	Yvonne Tierney notes of Michael Paciga Interview, dated June 25, 2003 (1 pp.)
X	R-2	Fax transmission from Roseanne Hiatt Harris to Ray Montgomery, dated May 28, 2003 (14 pps.)
X	R-3	Intervention and Referral Services Meeting Agenda, School Sixteen dated November 19, 2002, January 23, 2003, April 23,2003 (5 pps.)
X	R-4	Handwritten Original of Yvonne Tierney notes of Aliu and Aquart students (2 pps.)
X	R-5	Yvonne Tierney notes of Pat Harvey interview, dated June 18, 2003 (5 pps.) (subset of P-37)
X	R-6	Yvonne Tierney notes of Carla Propersi interview, dated June 18, 2003 (2 pps.)
X	R-7	Certification of Linda LeProtto, dated October 17, 2003 (3 pps.)
X	R-8	Letter from Ray Montgomery to Edwin Duroy, dated July 16, 2003 (2 pps.)
X	R-9	Letter from Mary J. Hammer to Kim Belin, dated June 26, 2003 (1 pp.)
X	R-10	Letter from Dr. Edwin Duroy to Eric Potts, dated May 1, 2003 (1 pp.)
X	R-11	Memo from Grace Giglio to Eric Potts re: Conference Follow-up Student Folders, dated December 3, 2002 (1 pp.)
X	R-12	Memo from Grace Giglio to Eric Potts re: Conference Follow-up Presidential Physical Fitness Award, dated December 3, 2002 (1 pp.)
X	R-13	Memo from Grace Giglio to Eric Potts, dated February 21, 2003 (1 pp.)
X	R-14	Memo from Grace Giglio to Eric Potts, dated March 10, 2003 (1 pp.)

X	R-15	Letter from Michael P. Krause to Eric Potts, dated May 29, 2003 (1 pp.)
X	R-16	Letter from Alice Filippelli to Grace Giglio, dated June 1, 2003 (1 pp.)
X	R-17	Notes re: Telephone call, Dr. Nuccetelli with Ana Santos, dated June 12, 2003 (1 pp.)
X	R-18	Tuition Reimbursement submitted by Weil with backup of bills and course approvals, dated February 1, 2003 (9 pps.)
X	R-19	Caldwell College Transcript, dated February 24, 2004 (2 pps.)
X	R-20	Arleen Weil Report Card from Caldwell College, dated Fall 2002-2003 (1 pp.)
X	R-21	Arleen Weil Facilitator position (resume and posting), dated December 2002 (4 pps.)
X	R-22	Arleen Weil Evaluation 2000-2001 (1 pp.)
X	R-23	Arleen Weil Evaluation 2001-2002 (1 pp.)
X	R-24	Snap Shots of Temporary Internet Files from Arleen Weil work computer (GG0769-GG0871) 03/01-6/03 (102 pps.)
X	R-24A	Snap Shots of Temporary Internet Files from Arleen Weil work computer (GG0769-GG0871) 03/01-6/03 (with notations from Arleen Weil regarding websites she accessed and which she does not recognize made on 4/5/04) (102 pps.)
X	R-25	June 5, 2003 Telephone Interview by Diane Mosley-Whitt of Arleen Weil (1 pp.)
X	R-26	Enhanced Tape June 12, 2003, by State Police
X	R-27	Enhanced Tape June 13, 2003, by State Police
X	R-28	Non-Enhanced Tape June 12, 2003, copied by State Police
X	R-29	Non-Enhanced Tape June 13, 2003, copied by State Police
X	R-30	Photographs of wedding of Arleen Weil's daughter's friend Jennifer, accessed by Arleen Weil on computer
X	R-31	List of students from Santos/Quispe, Aliu and Aquart with letters next to names

X	R-32	Giglio Tribute
X	R-33	Original Card attached to Computer Case Containing Arleen Weil's computer
X	R-34	Copy of Front Page of G.D. Examination Book with attachment (GG-0580 – 0581) (Remarked original Blue Book as R-89c)
X	R-35	Letter from Mary J. Hammer to Maria Nuccitelli, dated June 13, 2003 (1 pp.)
withdrawn duplicative of R-8	R-36	Letter from Ray Montgomery to Dr. Edwin Duroy, dated July 16, 2003 (2 pps.)
X	R-37	Statement by Graciela Todaro, dated October 14, 2003, with attached notes, marked Todaro-5 (2 pps.)
X	R-38	Incident Report from Graciela Todaro to Grace Giglio regarding Arleen Weil and Patricia Harvey unauthorized entry, dated July 23, 2002 (sic.) (1 pp.)
X	R-39	Report by Yolanda Vesgas regarding Arleen Weil and Patricia Harvey unauthorized entry, dated July 23, 2003 (1 pp.)
X	R-40	Memorandum from Graciela Todaro to Captain Smith, Director of School Safety regarding Patricia Harvey unauthorized entry, dated August 14, 2003 (1 pp.)
X	R-41	Handwritten Statement by Garciela Todaro regarding Harvey unauthorized entry, dated August 14, 2003 (1 pp.)
X	R-42 (formerly R-37)	State of New Jersey, No Child Left Behind in New Jersey, Consolidated State Application Accountability Workbook, dated May 7, 2003 (1 pp.) [Note: This document had been marked as R-37, but had to be remarked as R-42.]
X	R-43	Tape counter comparison requested by Court (6/12/03 Weil tape)
X	R-44	Moscato evaluation signed on 11/12/02
X	R-45	Moscato evaluation signed on 12/19/02
X	R-46	Handwritten Moscato wish list (1 pp.)
X	R-47	Borman Filippelli notes (2 pps.)

X	R-48	Borman 6/18/03 Harvey notes (3 pps.)
X	R-49	Borman 6/18/03 Weil notes (4 pps.)
X	R-50	Borman Weil notes (undated) (1 pp.)
X	R-51	Borman LeProtto notes (2 pps.)
X	R-52	Borman 6/18/03 Propersi notes (1 pp.)
X	R-53	Borman notes (undated) (1 pp. – legal-sized)
X	R-54	8/13/03 letter from Johnson to Belin
X	R-55	NJ Ask Training Sign-in Sheet 5/14/03 (2 pp.)
X	R-56	NJ Pass Testing Meeting 4/2/03 (2 pps.)
X	R-57	3/03 Harvey Evaluation by Giglio (2 pps.)
X	R-58	3/03 Harvey Evaluation by Giglio (R-57 with additional sentence added on p.2)
X	R-59	5/13/03 Fax from Giglio to Stepherson with attached letter from Harvey dated 5/13/03 (2 pps.)
X	R-60	5/20/03 Filippelli memo to Giglio re: Harvey (1 pp.)
X	R-61	6/5/03 Nuccetelli Interview notes – Pat Harvey (1 pp.)
X	R-62	6/12/03 Nuccetelli Interview notes – Pat Harvey (1 pp.)
X	R-63	6/12/03 Nuccetelli Interview notes, with handwritten note Pat Harvey? (1 pp.)
X	R-64	6/26/03 Key Return Sheet - School 16 (1 pp.)
X	R-65	Grace Giglio Budget Memo (1 pp.)
X	R-66	5/28 Emails re: Make-Up Exams (2 pps.)
X	R-67	5/29 Emails re: Pick Up Tests (2 pps.)
X	R-68	Grace Giglio Budget Memo (R-65 with handwritten notes) (1 pp.)
X	R-69	Aliu Statement 6/11/03 (2 pps.) (formerly P-28)

X	R-70	5/30/03 email from Harris to Montgomery (1 pp.)
X	R-71	1 page memo re: Interviews 5/27/03
X	R-72	NJ ASK Testing Assignments (Revised 5/16/03 (1 pp.)
X	R-73	Handwritten Statement of Edwardo Gonzalez (1 pp.)
X	R-74	Paciga 5/03 Schedule
X	R-75	Hennessy memo 916/03
X	R-76	The Rocket Reader (School 16 Newsletter (16 pps.)
X	R-77	5/5/03 Faculty Meeting Record (2 pps.)
X	R-78	5/14/03 In Service Record (2 pps.)
X	R-79	NJ ASK Training Materials-School 16 (7 pps.)
X	R-80	Appendix I Test Checklist (3 pps.)
X	R-81	JF 3/25/03 I & RS document (Under Seal)
X	R-82	JF 4/24/03 Action Plan (Under Seal) (12 pps.)
X	R-83	I & RS File (Under Seal)
X	R-84	Paterson District Test Coordindator Training Materials (11 pps.)
X	R-85	WSR Facilitator Job Description (2 pps.)
X	R-86	7/24/03 Memo from Filippelli to Giglio (1 pp.)
X	R-87	Pictures Moving-Up Party (2 pps.)
X	R-88	Tribute Assignments (6 pps.)
X	R-89 A, B, C, D	Four Original Blue Books – RM, IL, GD, JE (cover and first page writing) (8 pps.)
X	R-90	7/15/03 Letter to Filippelli re: Tuition Reimbursement (1 pp.)
X	R-91	6/12/03 Buccolo Statement (1 pp.)
X	R-92	Memos from Giglio to Weil (3/21/02; 9/24/02; 12/11/02) (3 pps.)

X	R-93	Whole School Assessment Team Report (132 pps.)
X	R-94	NJ Department of Education Announcement Title I Awards (3 pps.)
X	R-95	Original Pictures of School 16 taken on 8/15/03 (25 pictures)
X	R-96	Copies of pictures (R-95) with explanations (12 pps.)
X	R-97	Diagram – Second Floor, School 16
X	R-98	Diagram – First Floor, School 16
X	R-99	Handwritten List of Eight Students
X	R-100	Standards Proficiency Assessment Test Scores – School 16, Third Grade, Spring 2002 (with analysis) (9 pps.)
X	R-101	Summary / Analysis of I & RS / Test Scores of Children Selected / Children Not Selected
X	R-102	Letter Received 5/20/03 by Giglio from MC's mother (1 pp.)
X	R-103	Document Indicating Changes in ESPA for May 2003 (1 pp.)
X	R-104	List of Children ("Snow White") (2 pps.)
X	R-105	Memo dated 7/28/03 from Giglio to Duroy re: Security Breach Incident
X	R-106	8/20/03 Herald News article (2 pps.)
X	R-107	8/20/03 Record article (2 pps.)
X	R-108	8/20/03 letter from Shafer to Gil Re: Transfer (1 pp.)
X	R-109	Giglio 5/20/03 Cell Phone Record (1 pp.)
X	R-110	Fax Activity Report April 2003
X	R-111	Memorandum faxed 1/9/03 from Stepherson to Giglio

Witness list

Petitioner

1. Yvonne Tierney
2. Carla Propersi
3. Lily Ruiz
4. Ana (Santos) Martinez
5. Arleen Weil
6. Emma Ordonez
7. Marlene Gourley
8. Beatrice Loftus
9. Graciela Todaro
10. Sgt. Gripp
11. Melissa Moscato
12. Barrie Borman
13. Patricia Harvey
14. Emmajean Stepherson
15. Roseanne Harris
16. Elmas Aliu
17. Raymond Gonzalez
18. Mary Kildow
19. Cathy Blank

Respondent

1. Linda LeProtto
2. John Sico
3. Johnathan Hodges
4. George Hirschberg
5. Andre Sayegh
6. Anna Taliaferro
7. Michael Paciga

8. Geraldine Aquart
9. Kathleen Hennessy
10. Felix Gil
11. Alice Filippelli
12. Jane Buccolo
13. Grace Giglio

#378-04

378-04

OAL DKT. NO. EDU 07679-03
AGENCY DKT. NO. 243-7/03

R.S., on behalf of minor children, R.S. AND O.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Release, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/17/04

Date of Mailing: 9/17/04

* Paragraph two of the settlement agreement references possible claims for the provision of Special Education services. The Commissioner's review and approval of the within agreement pursuant to *N.J.A.C.* 1:1-19.1 does not reach to matters which may arise under the Individuals with Disabilities Education Act (IDEA) and/or Section 504 of the Rehabilitation Act of 1973, which he is without jurisdiction to hear and determine. *I.D. and M.D. on Behalf of C.D. v. Board of Education of the Township of Hazlet, Monmouth County*, State Board Decision April 2, 1997; *see also, East Brunswick Board of Education v. New Jersey State Board of Education,* EHLR DEC. 554:122 (DCNJ 1982); *A.N. v. Clark Bd. of Ed.*, 6 *N.J.A.R.* 360 (1983).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07679-03

AGENCY DKT. NO. 243-7/03

R.S. ON BEHALF OF MINOR CHILDREN

R.S. AND O.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE VILLAGE

OF RIDGEWOOD, BERGEN COUNTY,

Respondent.

Richard J. Kaplow, Esq., for petitioner

Phillip E. Stern, Esq., for respondent (Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: July 19, 2004 Decided: August 2, 2004

BEFORE **LESLIE Z. CELENTANO,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on August 19, 2003, for determination 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 hearing was scheduled on June 29, 2004 and July 1, 2004. On the date of hearing the parties settled the matter. They prepared and submitted on July 26, 2004, the attached Stipulation of Settlement indicating the terms of agreement, which are incorporated herein by reference.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their 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 (45) 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 2, 2004
DATE

LESLIE Z. CELENTANO, ALJ

Receipt Acknowledged:

8/13/04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 16 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

da

380-04

#380-04E

OAL DKT. NO. EDU 6852-04
AGENCY DKT. NO. 280-8/04

E.D., on behalf of minor child, K.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this emergent matter and the Administrative Law Judge's (ALJ) Order, which included a summary of the evidence presented at the emergent hearing conducted at the Office of Administrative Law (OAL) on September 10, 2004, has been reviewed.

Upon such review, the Commissioner concurs that petitioner has failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) necessary to warrant the extraordinary remedy of emergent relief. Accordingly, the recommended Order of the ALJ is adopted for the reasons expressed therein. This matter shall continue at the OAL with a plenary hearing scheduled for September 23, 2004.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/22/04

Date of Mailing: 9/23/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER-EMERGENT RELIEF

OAL DKT. NO. EDU 6852-04

AGENCY DKT. NO. 280-8/04

E.D. O/B/O K.D.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR ATLANTIC COUNTY,

Respondent.

N.D. and E.D., petitioning parents, *pro se*

James B. Arsenault, Esq., for respondent (Cooper Levenson, attorneys)

BEFORE **W. TODD MILLER**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies received a petition for emergent relief on or about August 16, 2004. The matter was transmitted to the Office of Administrative Law (OAL) on September 3, 2004, to be heard as an emergent contested case. The Director of the OAL assigned the undersigned to hear this matter pursuant to *N.J.S.A.* 52:14F-5o.

The matter was scheduled for hearing on September 10, 2004 at 10:00 a.m. at the OAL office in Atlantic City, New Jersey. The hearing proceeded on that date.

SUMMARY OF FACTS

K.D. is a 7th grader at the Egg Harbor Township Middle School. He is currently repeating 7th grade. Prior to 6th grade, K.D. was an above-average student. During 1st through 5th grades, K.D. generally received A's and B's. Starting in 6th grade, his academic progress and grades significantly declined. Both petitioners and the District agree that the primary reason for his decline in academic progress was the result of a series of family tragedies.

K.D.'s parents are hardworking individuals and concerned parents. Nevertheless, K.D. spent a significant amount of time with his grandfather. K.D. was similarly close to other family members, including his aunt. Both his grandfather and his aunt passed away during the 6th and 7th grade academic years. These events set K.D. back. They were compounded by other family incidents. K.D.'s father had significant surgeries during this period. The family history and details of these tragedies are outlined in greater detail in petitioner's letters. (P-1 and P-2).

During K.D.'s 6th grade academic year, his performance was substandard relative to his prior years. His final grades were as follows: arithmetic - F; reading - D; language arts - D; science - D; history - D. Additionally, he was absent 33 days. His teacher commented at the conclusion of the 6th grade academic year as follows: "It was recommended that [K.D.] be retained by his 6th grade teacher." (R-3). It is the policy of the elementary school that if a student receives two Fs in any of the core academic areas, they must be retained. K.D. received only one F, but the balances of his grades were D's. Accordingly, it was recommended that K.D. be retained. However, it was not mandated in accordance with the elementary school's policy. K.D. was not retained.

Seventh grade would prove to be not better. K.D received all F's in his core content classes. Based upon K.D.'s substandard performance in 6th grade and his failing performance in 7th grade the District retained him. He is presently in 7th grade for the 2004-2005 school year.

K.D.'s parents, E.D. and N.D. testified at the emergent hearing. Collectively, they urged that K.D. possesses the necessary skills in order to academically achieve and progress in 8th grade. While they did not offer any data, expert reports, psychological reports, testing scores or other information, they did rely upon their parental instincts and gut feelings. They claim that K.D. has come through tough times, but has realized the position that he has placed himself in. He appears to be more motivated this year and willing to put forth the effort to succeed in 8th grade. K.D. performed well on the standardized progress examination offered to 7th graders notwithstanding his poor academic performance in 6th and 7th grade. He received a score of 7.6 denoting that he possesses the skills of a student at grade level 7.6. E.D. and N.D. emphasized that the TerraNova standardized examination illustrates that K.D. is proficient at grade 7.6. (R-1). Thus, even though his in-class performance was poor, he was able to obtain the necessary skills and measure up against his 7th grade peers in standardized testing. Petitioners urged that retaining K.D. in 7th grade would be detrimental. K.D. will become disenchanted with school. He may shut down and want to quit school.

LEGAL ANALYSIS AND DISCUSSION

Petitioners assert that K.D. should not be retained in 7th grade. K.D. historically has been a good student with above average grades. The family has experienced several personal tragedies over the past two years, which have adversely impacted K.D. Consequently, his grades have significantly declined.

Petitioner carries the burden in seeking emergent relief. The standard is set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), necessary for the awarding of this relief. See also, *Princeton Ins. Co. v. 349 Associates, L.L.C.* 147 N.J. 337, 340(1997). *Crowe* requires a showing of **each** of the four specific criteria:

1. The relief must not be granted except when necessary to prevent irreparable harm, or harm for which there is no adequate legal remedy;

2. Relief should not be granted when the legal right underlying the applicant's claim is unsettled;

3. The applicant for relief must make a preliminary showing of a reasonable probability of ultimate success on the merits; and

4. The relative hardship to the parties in granting or denying relief must be considered. *Id.* at 132-34.

Petitioners have not met the abovementioned elements necessary for emergent relief. K.D. performed poorly in 6th grade. His basic skills were, at best, failing, when he completed 7th grade. As explained by Dr. Heery, School Superintendent, each succeeding academic year builds upon the last. Students develop a pyramid of skills. If the skills are lacking from a prior year, it is detrimental to advance a student with sub-standard core skills.

Here, K.D. barely passed 6th grade. K.D. was offered many services by the District including counseling. He did not like the counseling offered by the District therefore, his parents did not push the issue. In 7th grade, K.D. was given a second chance to overcome his poor performance and external obstacles of the prior year. K.D. did not stabilize in 7th grade. In fact he declined further. His final grades were all F's in the core content areas. This performance followed all D's and one F in 6th grade. As explained by Dr. Heery, if the District failed to act and retain K.D. it would be educational malpractice. His last two academic years were notably poor when compared to grades 1 through 5th. The TerraNova examination results of 7.6 may indicate that K.D. is a good test taker on one given day. But this test cannot be viewed in isolation. It has to be measured against his performance for he full school year. This includes class work, class participation, as well with quarterly and final examinations. The District was not insensitive to K.D.'s family history, but his lack of educational progress could not be ignored. Therefore, the District urged that retaining K.D. is in his best interest. Another failing year in 8th grade would be catastrophic. K.D. would have deficient skills from 6th, 7th and 8th grades. He may not recover.

Based upon the evidence and testimony presented, I **FIND** that petitioners have failed to establish K.D. will suffer irreparable harm if he is retained in 7th grade, pending a plenary hearing. K.D. failed all of the core content areas in 7th grade. (2003-2004 school year). On balance, repeating 7th grade, where he previously failed all of the core content areas, is in his better interest. The school policy mandates that a child be retained if they fail two out of the five

core content areas. K.D. failed all five core content areas. I **FIND** the policy and the decision of the District, at this juncture to reasonable under the circumstances presented.

CONCLUSION AND ORDER

For the reasons set forth above, I **CONCLUDE** and hereby **ORDER** that petitioner's request for emergent relief be **DENIED.** A **plenary hearing is scheduled for September 23, 2004,** for 10:00 a.m., at the OAL office located at 1601 Atlantic Avenue, Atlantic City. New Jersey. I further **ORDER** that K.D. shall remain in 7th grade, pending a plenary hearing. The District shall continue to offer those services that are necessary to assist K.D. or his family, including counseling, Child Study Team or other evaluations or interventions.

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 (45) 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 (45) 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.

9-13-04
DATE

W. TODD MILLER, ALJ

/sd

OAL DKT. NO. EDU 6852-04

APPENDIX

Documents In Evidence

For Petitioner:

P-1 Letter from N.D.

P-2 Letter from E.D.

For Respondent:

R-1 TerraNova Performance Test

R-2 2003-2004 Middle School Report Card, K.D.

R-3 Summary of Grades 1st - 7th, K.D.

Witnesses

For Petitioner:

N.D., Father of K.D.

E.D., Mother of K.D.

For Respondent:

Dr. Philip Heery, Superintendent of Schools

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

September 23, 2004

Steven Scher
Deputy Attorney General
Division of Law – Box 112
Trenton, NJ 08625-0112

Thomas Portelli, Esq.
1037 Route #46 East
Clifton, NJ 07013

IN THE MATTER OF THE TENURE HEARING OF JUNE NICHOLSON, NEW JERSEY DEPARTMENT OF HUMAN SERVICES, OFFICE OF EDUCATION, AGENCY DKT. NO. 217-6/03, OAL DKT. NO. EDU 7078-03 AND EDU 5908-04 (ON REMAND)

Dear Parties:

We are enclosing a copy of the decision of the Commissioner of Education dated, September 17, 2004, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer preparing a synopsis or summary of the Commissioner's decision or providing an additional copy of the initial decision to the parties in the case.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/dec ltr/Nicholson
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library
(w/copy of initial decision)

#379-04

OAL DKT. NO. EDU 07078-03 AND EDU 05908-04 (ON REMAND)
AGENCY DKT. NO. 217-6/03

IN THE MATTER OF THE TENURE	:	
HEARING OF JUNE NICHOLSON,	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF HUMAN	:	DECISION ON REMAND
SERVICES, OFFICE OF EDUCATION.	:	

The record, Settlement Agreement and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.[1] Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.[2] A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/17/04

Date of Mailing: 9/23/04

[1] As they did in the Agreement originally proposed, the parties again misapply the terms "petitioner" and "respondent." The petitioner herein is actually the charging party, the Department of Human Services, and the respondent is Ms. Nicholson.

[2] It appears that the terms of the settlement have already been effectuated through respondent's resignation, effective December 12, 2003. The parties are, therefore, admonished that settlement agreements of controverted matters are of no force and effect and may not be implemented absent the Commissioner's approval, pursuant to *N.J.A.C.* 1:1-19.1.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05908-04

EDU 07078-03 (**ON REMAND**)

AGENCY DKT. NO. 217-6/03

IN THE MATTER OF THE TENURE HEARING OF JUNE NICHOLSON, NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES, OFFICE OF EDUCATION,

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Thomas Portelli, Esq., for petitioner

Steven L. Scher, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: August 9, 2004 Decided: August 10, 2004

BEFORE **CAROL I. COHEN**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on July 16, 2003 for determination as a contested case. A hearing was scheduled for December 9, 2003, which was adjourned for settlement purposes. A hearing was rescheduled for December 17, 2003.

On the date of the hearing, the parties were able to resolve the matter. On January 20, 2004, the parties submitted a settlement agreement. On March 8, 2004 the Commissioner of Education filed a decision remanding the matter to the Office of Administrative Law (OAL) for further expansion and revision of the documents consistent with the Cardonick standards. The attorneys appeared before the Administrative Law Judge on August 9, 2004 with a revised Settlement Agreement consistent with the Cardonick standards. The court had the agreement read into the record. The attorney for Ms. Nicholson was questioned regarding her understanding of the terms of the agreement and whether her consent to same was voluntary. The Deputy Attorney General was questioned, as to the reason why the state had agreed to the settlement. He represented that, because of problems with the proofs and the question of admission of hearsay and the need for finality, the State believed that it was in their interest to settle the matter. The attached Settlement Agreement indicates the terms of the agreement. Having reviewed the record and the settlement terms, I **FIND**:

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

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

3. The settlement conforms with the standards set forth in *Cardonick v. Brookline BOE, dec'd by the Comm'r,* April 7, 1992, *aff'd. St. Bd. of Ed.*, April 6, 1983, 1990 *SLD* 842, 846.

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 (45) 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.

8/10/04
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

8/13/04
DATE

M Kathleen Duncan/kp
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 16 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Attorney for State of New Jersey
Department of Human Services
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625

By: Steven L. Scher
Deputy Attorney General
(609) 984-8464

OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO. EDUTH 07078-2003N
AGENCY REF. NO. 217-6/03

JUNE NICHOLSON, Petitioner, v. NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES, OFFICE OF EDUCATION, Respondent.	Civil Action SETTLEMENT AGREEMENT

This matter was transmitted to the Office of Administrative Law pursuant to N.J.S.A. 52:14B-1-18 and N.J.S.A. 52:14B-14F -1 to -15 upon petitioner's request for a hearing on board certified charges against a tenured teacher for conduct unbecoming a teacher on July 16, 2003.

The charges set forth in particular that On April 30, 2003, after a jacket had been unclaimed for over a week, an employee at the Passaic Campus searched the jacket pocket for identification. During the search what appeared to be marijuana,

pills and drug paraphernalia were discovered and therefore the Human Services Police were notified. Upon arrival the Human Service Police, Office Sullivan questioned Mrs. Nicholson who admitted in front of a witness that the jacket and its contents belonged to her. This led to Mrs. Nicholson being arrested at the Passaic Campus by the Human Service Police and charged by Totowa Boro Court with the following:

N.J.S. 2C:35-10(a)(4)
Within the jurisdiction of this Court, knowingly or purposely obtain or possess a controlled dangerous substance that was not obtained directly from a practitioner or under valid prescription issued by a practitioner, specifically by possessing less than 50 grams of marijuana.

N.J.S. 2C:36-2
Within the jurisdiction of this Court, use or possess with intent to use drug paraphernalia to store, contain, ingest, inhale or introduce into the human body a controlled dangerous substance or controlled substance analog, specifically a film canister(s), brown wooden pipe and a white and pink Tupperware container to hold and ingest marijuana and unknown pills.

N.J.S. 2C:35-10.5
Within the jurisdiction of this Court, knowingly possess with intent to use a prescription drug legend, specifically 87 unknown various types of multicolored pills of unknown medicinal value.

The lab reports indicated that all drugs discovered, with the exception of .72g of THC, were legally possessed by petitioner. On September 15, 2003 the remaining charge was resolved by a conditional discharge without the entry of a guilty plea and the charges were subsequently dismissed.

The facts as to Nicholson's knowledge of the presence of the small amount of THC is disputed by petitioner and no one can

testify to seeing petitioner in possession of the jacket ont he day in questions.

Based upon all the facts present and the state police laboratory report, the agency believes it is in the best interest of both the petitioner and the agency to settle this matter in the manner set forth below:

The parties agree to settle this matter in accordance with the following terms:

1. The petitioner will withdraw her request for a hearing on certified charges against a tenured teacher and the respondent-appointing authority agrees to withdraw the disciplinary action contained therein.

2. The petitioner will resign effective December 12, 2003 and agrees not to seek or accept employment with the Department of Human Services in any capacity in the future.

3. Respondent agrees it will respond to any inquiry by any outside person or entity, either prospective employer or other, by stating only that petitioner "resigned". Her record will reflect a resignation from the unclassified position of teacher.

4. The parties hereto stipulate that this agreement shall fully dispose of all issues in controversy between them with regard to this matter.

5. The petitioner shall not receive any back pay for the period of suspension without pay which ended on October 18,

2003, counsel fees, costs, or any other monetary relief as a result of this settlement.

5a. Petitioner is entitled to pay for that period between October 19, 2003 and her date of resignation and any accumulated vacation.

6. Petitioner understands that the Commissioner of Education may still refer this matter to the State Board of Examiners for possible suspension or revocation of her teaching certificate pursuant to N.J.A.C. 6A:3-5.6.

7. This stipulation of settlement shall not constitute a precedent in any other matter involving another employee.

8. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.

9. This agreement will only become effective when it is approved by the Commissioner of Education. Any disapproval by the Commissioner shall operate to return the parties to the status quo pre-agreement.

10. The parties waive the right to file exceptions and cross-exceptions.

Authorization has been given by the Department of Human Services to agree to this settlement; the parties have read this settlement agreement and freely and voluntarily agree to its provisions.

Dated: 7-12-04

For the Appointing Authority
Walter Miziuk
Human Relations Officer

Dated: 6-22-04

Petitioner

Dated: 6-22-04

Petitioner's Representative

Dated:

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY

By: Steven L. Scher
Deputy Attorney General

CERTIFICATION

I, June Nicholson, being the moving party in the above-captioned matter hereby certify that I have been represented in this matter by Thomas Portelli, Esq., that my representative has reviewed the foregoing Settlement Agreement with me and I fully understand the meaning and terms of this Agreement.

It is also my understanding that if the Settlement Agreement is approved by the Commissioner of Education my claims as set forth in the above-captioned matter will terminate against the State of New Jersey, Department of Human Services as long as the terms and conditions of this Settlement Agreement are met by the State of New Jersey.

Dated: 6-22-04

June Nicholson
Petitioner

379-04

OAL DKT. NO. EDU 07078-03 AND EDU 05908-04 (ON REMAND)
AGENCY DKT. NO. 217-6/03

IN THE MATTER OF THE TENURE	:	
HEARING OF JUNE NICHOLSON,	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF HUMAN	:	DECISION ON REMAND
SERVICES, OFFICE OF EDUCATION.	:	

The record, Settlement Agreement and initial decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.[1] Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.[2] A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/17/04

Date of Mailing: 9/23/04

[1] As they did in the Agreement originally proposed, the parties again misapply the terms "petitioner" and "respondent." The petitioner herein is actually the charging party, the Department of Human Services, and the respondent is Ms. Nicholson.

[2] It appears that the terms of the settlement have already been effectuated through respondent's resignation, effective December 12, 2003. The parties are, therefore, admonished that settlement agreements of controverted matters are of no force and effect and may not be implemented absent the Commissioner's approval, pursuant to *N.J.A.C.* 1:1-19.1.

#381-04

OAL DKT. NO. EDU 6417-03
AGENCY DKT. NO. 237-7/03

DIANE CONFORTI,[1]	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter.[2] The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/24/04

Date of Mailing: 9/24/04

[1] It is noted that the ALJ's Initial Decision erroneously identifies petitioner "Diane" Conforti.

[2] Respondent is reminded of its obligation, pursuant to *N.J.S.A.* 43:21-5(b), to transm any monies offset for reimbursement of unemployment compensation. A copy of thi the Department of Labor so as to facilitate prompt reimbursement of such monies by

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6417-03
AGENCY DKT. NO. 237-7/03

DANIEL CONFORTI,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,
Respondent.

Kathleen Naprstek Cerisano, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Francis J. Campbell, Esq., for respondent (Kenney, Gross, Kovats, Campbell & Pruchnick attorneys)

Record Closed: August 6, 2004 Decided: August 10, 2004

BEFORE **ANA C. VISCOMI**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 3, 2003, 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.

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 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 (45) 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 10, 2004
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

Receipt Acknowledged:

8-12-04
DATE

M. Kathleen Duncan/ch
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 13 2004
DATE

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/tmp

RECEIVED

2004 AUG -6 A 10:4_

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

KENNEY, GROSS, KOVATS, CAMPBELL & PRUCHNIK
130 Maple Avenue, Bldg. 8
P.O. Box 8610
Red Bank, New Jersey 07701
732-530-7500
Attorneys for Respondent

DIANE CONFORTI, Petitioner vs. BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY, Respondent	BEFORE THE COMMISSIONER OF EDUCATION – OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDUOT 06417-2003S Agency Ref. No. 237-7/03 STIPULATION OF SETTLEMENT

The above-captioned matter having been brought before the Commissioner of Education upon the Petition of Appeal filed by Diane Conforti (the Petitioner) against the Board of Education of the Township of Middletown, Monmouth County (the Board) and the parties having agreed to resolve the dispute between them now pending before the Court, subject to the terms and conditions set forth hereinbelow:

1. The Petitioner is the holder of a permanent educational services certificate with an endorsement as a School Social Worker. She was employed by the Board as a contracted service

provider rendering services as a School Social Worker on a part-time basis for the period running from May 15, 2000 through June 22, 2000, for which she was compensated at an hourly rate of pay.

2. The Petitioner was thereafter employed by the Board on a full-time basis for the 2000-01, 2001-02 and 2002-03 school years. The Petitioner was paid an annual salary of $55,542 (Step MA-19) for the 2000-01 school year, an annual salary of $58,616 (Step MA-20) for 2001-02 school year, and an annual salary of $71,019 (Step MA-21) for the 2002-03 school year.

3. By letter dated April 28, 2003, Petitioner was notified by the Superintendent that she was not being renewed for the 2003-04 school year and that her employment was terminated, effective June 30, 2003. By a letter dated June 10, 2003, the Petitioner was notified by the Board that it had determined to accept the Superintendent's recommendation that the Petitioner not be rehired for the 2003-04 school year.

4. The parties have agreed to settle this dispute by retaining the Petitioner and reinstating her as a full-time School Social Worker for the 2003-04 school year. The Board agrees to reinstate the Petitioner to the Petition of School Social Worker retroactive to September 1, 2003, and to pay her annual salary of $73,234 (Step MA-21) for the 2003-04 school year.

5. Although, under the terms of the settlement, Petitioner is entitled to a back pay award of $73,234 for the 2003-04 school year, she also had a duty to mitigate her damages. Taking such duty into consideration, the parties have agreed that respondent shall therefore pay to Petitioner the gross amount of ~~$59,780.50~~ $60,034.50, subject to standard and ordinary deductions, which sum represents the annual salary of $73,234 she would have earned during the 2003-04 school year, less the sum of ~~$12,532~~ $12,278.00 which she received in unemployment compensation during this period of time and the sum of $921.50 which she received for consulting work performed during

this period of time for entities or employers other than the Board. The Petitioner shall verify the amount of unemployment compensation and other compensation that she received from September 1, 2003 through June 30, 2004 as referenced in this paragraph.

6. This award of back pay shall be made to the Petitioner within thirty days following the execution of this agreement, approval of its terms by action of the Board, and receipt of a duly executed affidavit or certification of the Petitioner, submitted to counsel for the Board of Education, verifying the amount of monies that she was paid in mitigation of her salary claim.

7. During the 2003-04 school year, Petitioner would have received Board-paid health insurance coverage for herself. The Board shall therefore reimburse the Petitioner for her expenses for securing COBRA health insurance coverage for the period running from September 1, 2003 through August 31, 2004, and for the additional sums that Petitioner paid for dental care and for prescription coverage during this period of time. This sum totals $3,355.40 and consists of $2,925.40 which she paid in insurance premiums for COBRA coverage (excluding July and August 2004), the sum of $195 which she paid for dental expenses, and the sum of $210 (estimated) which she paid in prescription charges. The actual figure for reimbursement shall be paid in accordance with the final information stated in a duly executed affidavit or certification of the Petitioner verifying the amounts of payments received by her in mitigation of her salary claim for the period running from September 1, 2003 through June 30, 2004 and verifying amounts to be reimbursed to Petitioner for health insurance coverage, dental expenses and prescription charges as referenced in this paragraph.

8. The parties agree that Petitioner shall pay the employee's share of any pension contributions to the Teachers' Pension and Annuity Fund for the period running from September 1, 2003 through June 30, 2004, based on the Petitioner's gross annual salary for the 2003-04

school year in the amount of $73,234 before any reduction for mitigation of damages. The parties also agree that the employer shall not be liable for the employee's share of pension contributions for the 2003-04 school year and that the State will contribute the employee's share of pension contributions if it agrees to do so. If the State does not contribute the employer's share of pension contributions, the Board shall contribute the employer's share of such contributions.

9. The Board shall reinstate the Petitioner to her position of School Social Worker for the 2004-05 school year at Step MA-21, and will assign the Petitioner to a full-time School Social Worker's position in the discretion of the Superintendent and the Board of Education.

10. The Petitioner shall submit her irrevocable resignation from her position as School Social Worker with the Middletown Township Board of Education as a condition of this Stipulation of Settlement. The Petitioner's resignation shall be effective June 30, 2005, and the Board will act to accept the resignation of the Petitioner at the time that the Board approves this settlement.

11. The parties agree that neither party is responsible for the payment of the other party's attorneys fees in connection with this controversy.

12. The Petitioner shall withdraw the Petition of Appeal presently pending before the Office of Administrative Law and the Commissioner of Education, with prejudice, when the Petitioner's counsel receives notice and documentation that the Board has approved the terms and conditions of this settlement.

13. This Settlement Agreement resolves any and all claims by the Petitioner arising from the Board's termination of her employment which took effect on June 30, 2003, and regarding the Petitioner's allegations that the Board acted unlawfully in terminating her employment and in

failing to retain the Petitioner instead of any other employee in a full-time Social Worker's position.

14. This Stipulation contains all the terms of the agreement between the parties and cannot be modified or changed unless both parties agree to do so in writing. In the event, however, that this Stipulation requires some modification to facilitate its acceptance by the Teachers Pension and Annuity Fund and its approval by the Commissioner of Education, the parties agree to make such modification in a timely fashion in order to effectuate the intent of the parties as stipulated herein.

Dated: July 31, 2004

Diane Conforti
DIANE CONFORTI, Petitioner

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
Attorneys for Petitioner

Dated: 8/3/04

By: Kathleen Naprstek Cerisano
Kathleen Naprstek Cerisano

KENNEY, GROSS, KOVATS, CAMPBELL
& PRUCHNIK
Attorneys for Respondent

Dated: August 5, 2004

By: _____
Francis J. Campbell

OAL DKT. NO. EDU 4426-04
AGENCY DKT. NO. 161-5/04

D.M. AND K.M., ON BEHALF OF MINOR CHILDREN, J.A.H. AND J.I.H.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that J.A.H. and J.I.H. were entitled to attend school in the respondent's district during the period in question. However, the Commissioner does not base this assessment, as does the ALJ, on a conclusion that the students were domiciled in the district during that period pursuant to *N.J.S.A.* 18A:38-1(a). Rather, the Commissioner finds that, on the facts here presenting, petitioners' entitlement arises under *N.J.S.A.* 18A:38-1(b), since the students were, for reasons of family hardship, living with relatives who were district residents and who supported them gratis.

Accordingly, subject to the clarification set forth above, the Initial Decision of the OAL is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/24/04
Date of Mailing: 9/24/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4426-04
AGENCY DKT. NO. 161-5/04

D.M. & K.M. obo J.A.H. & J.I.H.,
Petitioners,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF EWING,
Respondent.

D.M. & K.M., petitioners pro se

Jeffrey F. Belz, Esq., for respondent

Record Closed: July 28, 2004 Decided: August 10, 2004

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

The basic issue here is whether, within the intent of N.J.S.A. 18A:38-1, after December 1, 2003, and until the end of the 2003-04 school year, petitioners J.A.H. and J.I.H. were "domiciled" within the school district served by the respondent Board of Education of the Township of Ewing (BOE). The BOE held a hearing and determined that they were not so domiciled, so that tuition should be paid for their attendance in its school system. D.M. and

K.M., the boys' uncle and aunt, who kept them in their home in the district and who supported them during that time, allege that the boys were so domiciled, so that no tuition is owed.

PROCEDURAL HISTORY

On March 1, 2004, the BOE held a hearing relative to the students' domicile and on March 8, 2004, the BOE adopted a resolution stating that it had determined that the boys were not domiciled in the district, etc. R-1. The BOE's attorney's letter notified J.E.H. that the BOE had determined that the students' were not domiciled in the district, etc. N.J.S.A. 18A:38-1. J.E.H., father of J.A.H. and J.I.H., submitted an appeal, dated April 16, 2004, and showing his address as Trenton. In a letter dated April 19, 2004, the Department cited N.J.S.A. 18A:38-1(b) and N.J.A.C. 6A:28-2.9 and notified J.E.H. that a district resident must file an appeal. D.M. and K.M. (the boy's uncle and aunt) then submitted an appeal, dated May 4, 2004. N.J.S.A. 18A:6-9. On May 21, 2004, the BOE's answer, defenses and counterclaim for tuition were filed with the Commissioner. The Department transmitted the contested case to the Office of Administrative Law, where it was filed on June 4, 2004. N.J.S.A. 52:14B-2(b). I heard the case on July 23, 2004, and, at the petitioners' request, the record remained open to allow them to submit a copy of the order granting custody of the boys to D.M. and K.M. P-2.

FINDINGS OF FACT

J.E.H., husband, and L.H., wife, and their sons, J.A.H., born January 13, 1988, and J.I.H., born April 6, 1989, were domiciled in a single-family house they rented in Ewing Township and J.A.H. and J.I.H. attended the BOE's public schools. The boys are excellent students and members of the school system's athletic teams.

J.E.H. has been very active in service to the Ewing community. An African-American, he coached recreational basketball teams with many African-American players (many of whom do not have fathers in their households), teaching them the values of teamwork and partnership. He also participated in organizations in which he served as a mentor and role model for children, developing their self-esteem, encouraging them to stay in school, etc. He is now president of the Metropolitan Trenton African-American Chamber of Commerce.

J.E.H. and L.H. negotiated with the owner of the Ewing house, but were unable to purchase it, so they then contracted to purchase an old house (built around 1910) in Trenton (*i.e.*, not within Ewing Township). It was built as a single-family house, it had been converted into multi-family shelter, and they intended to converted it back to a single-family house. However, it had been abandoned for about six years, it was not in good condition, and it required substantial renovations.

Best Home Inspections of Trenton inspected the Trenton house and submitted a report showing numerous problems, including the following: The house's electrical system had been "mostly updated." Its heating systems needed major servicing and repair. The heating systems fired up, but heat distribution to all rooms was slow, and poor to the second and third floors. The burners burned yellow, instead of the proper blue, and they were rusted and dirty. Carbon monoxide leaked from both furnaces to the enclosed parts of the house, where it was present at "high" concentrations, showing that the boilers were burning at "dangerous levels." There was medium to heavy creosote buildup in the fireplace and in the chimney, which needed to be swept. The house's exterior surfaces needed attention. Its roof drainage system needed attention: metal, gutters and flashings needed to be patched and about twenty slates (shingles) needed to be replaced. The bathrooms needed improvement. Tub faucets were in poor condition and needed to be replaced and the tub had sluggish drainage. The toilet filler valve leaked and the toilet tank was not securely anchored. Lead paint was on all the windows and framing and needed to be removed. The house's plumbing system had leaks that needed repair. The kitchen sink was in unsatisfactory condition with poor flow and rubber hoses from the faucet needed to be replaced with pipes. Friable asbestos in the basement was "very dangerous" and needed to be professionally removed or encapsulated. The grounds needed improvement. P-1.

In the spring of 2003, J.E.H. and L.H. closed and took title to the Trenton house but, given its above-described condition, it was not fit to live in. They continued to rent the Ewing Township house and J.E.H. worked on the Trenton house and retained contractors to repair it. However, because the repairs were so extensive and expensive, e.g., over $7,000 for the heating system, the repairs were not completed immediately and the house continued to be unfit to live in.

In December 2003 their lease on the Ewing Township house ended. Although the Trenton house was not really fit to live in, J.E.H. and L.H. began to stay there, working on and securing the house. They were willing to risk their health, safety and welfare, but not their children's. They were especially concerned about the carbon monoxide and concerned about sewage leaking from pipes in a ceiling and into a room below. Consequently, D.M., who is L.H.'s brother, and K.M. his wife, kept J.A.H. and J.I.H. in their Ewing Township house. D.M., a State employee and National Guard member, and K.M., a BOE employee, supported the boys and J.E.H.'s financial contributions to the boys' care were only incidental.

On December 1, 2003, K.M. left a message for David Mikalauskas, the BOE's attendance and residency officer, requesting that he contact her to discuss the above-described circumstances. However, because of Mr. Mikalauskas's schedule, they did not discuss the matter until December 4, 2003. The BOE has many reports of students domiciled in adjacent Trenton who attend the BOE's schools, and in September 2003 it had opened a residency (domicile) case on this matter. Mr. Mikalauskas assigned a residency officer to perform surveillance: he determined that there was not sufficient evidence of a change in domicile to Trenton before December 1, 2003, but he determined that, after that date, the boys were no longer domiciled in the BOE's district. He directed that a letter be sent notifying the petitioners of the BOE administration's position that J.A.H. and J.I.H. were not domiciled in the district; that they would be disenrolled as BOE students; and that they could request a hearing before the BOE on the matter. In K.M.'s letter dated February 29, 2004, she wrote of her efforts to contact Mr. Mikalauskas and amicably resolve the matter, but it could not be settled. R-3.

On March 1, 2004, the BOE held a hearing on the matter. (The hearing had been adjourned from an earlier date.) J.E.H. appeared and explained the circumstances, e.g., that the Trenton house had been abandoned and that it needed substantial renovations before the boys could move there. He also described his service to the Ewing community. R-1. Nonetheless, on March 8, 2004, the BOE adopted a resolution finding that by December 2003 the H. family had moved from Ewing Township and begun domicile in Trenton; denying the request that the boys be permitted to attend the BOE's schools as district residents; deciding that they should be disenrolled from the BOE's school system; notifying the family of its right to appeal to the

Commissioner of Education; and notifying the family that, if the Commissioner does not agree with them, the parents and/or guardians will be assessed for tuition for the boys' attendance. Mr. Mikalauskas, a credible witness, testified that based on costs approved by the Department of Education, for students like J.A.H. and J.I.H., in the district's ninth to twelfth grades, and the number of school days, out-of-district tuition was $50.90 per day. See N.J.S.A. 18A:38-1(b)(2).

As written in the procedural history, J.E.H. and D.M. and K.M. appealed for a hearing on the BOE's action (and, consistent with N.J.S.A. 18A:38-1(b)(2), the BOE did not remove the boys from its schools, pending the outcome of this case).

On May 19, 2004, in the Superior Court, Chancery Division-Family Part, County of Mercer, a judge entered an order stating that, as agreed between plaintiffs D.M. and K.M. and defendants J.E.H. and L.H., residential custody was granted to the plaintiffs. P-2.

The boys, who are honor students and who have played on teams representing the BOE's schools, continued to stay in D.M. and K.M.'s Ewing house and they finished the 2003-04 school year in the BOE's school system.

J.E.H. testified that a new, safe heating system has still not been installed in the Trenton house; however, by April 2003 the weather was such that, using plug-in electric heaters and extra blankets, he and L.H. were reasonably comfortable sleeping in the Trenton house. After the 2003-04 school year ended, the boys began to stay in the Trenton house. In previous years, J.A.H. and J.I.H. applied to the private Solebury School in New Hope, Pennsylvania, and they have been admitted with aid for the 2004-05 school year. J.E.H and L.H. will move for an order vacating the above-described order, so that the court's records no longer show that D.M. and K.M. have custody of the boys.

Summary

J.E.H. and L.H. and their sons J.A.H. and J.I.H. were domiciled in the BOE's district and the boys attended the BOE's school system for several years before the 2003-04 school year. J.E.H., a credible witness, has been very active in service to the Ewing community. In 2003,

J.E.H. and L.H. purchased a single-family house in Trenton, but the house had been abandoned, had numerous problems including dangerous levels of carbon monoxide, and was not habitable and J.E.H. did not have sufficient funds for repairs to make it a fit home for children. At the start of the 2003-04 school year, the family continued to be domiciled in the BOE's district. In December 2003 the family ended its lease of the house in which it had lived in the BOE's district; J.E.H. and L.H. began to reside in the Trenton house, which they worked on and protected; and D.M. and K.M., the boys' uncle and aunt, kept them in their house in the district and supported them. By March 2004, when the BOE held a hearing on the matter of the boys' domicile, the Trenton house was still not fit for them to stay in, so D.M. and K.M. continued to keep and support the boys in their home in the BOE's district through the end of the 2003-04 school year.

CONCLUSIONS OF LAW

N.J.S.A. 18A:38-1(b)(2) states, in pertinent part:

> If the superintendent . . . 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. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed

> from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the 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. Nothing shall preclude a board from collecting tuition from the parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner.
>
> [Emphasis added.]

"Domicile" is defined as "**1.** A residence; a home. **2.** One's legal residence." American Heritage Dictionary 550 (3d ed. 1996). Domicile has been described as "the place of [a person's] abode where he has the present intention of remaining and to which, if absent, he 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 several residences or places of abode. However, he can only have one domicile at one time." Collins v. Yancey, 55 N.J. Super. 514, 520 (Law Div. 1959). Between residences, factors used to identify the domicile include: (1) the physical characteristics of each residence, (2) the time spent and things done in each residence, (3) other persons found in each residence, (4) the person's mental attitude about each residence, and (5) whether, when absent, the person has an intention to return. Mercadante, supra, 111 N.J. Super. at 39-40. Acts, statements and documents may be relevant in determining domicile.

The BOE afforded petitioners a hearing and determined that after December 1, 2003, the boys were not domiciled in the district and that they should be removed from its school system, etc. The appeal to the Commissioner stayed the effect of the BOE's determination that they should be removed. Consistent with N.J.S.A. 18A:38-1, petitioners bear the burden of proof by a preponderance (the greater weight) of the competent and credible evidence that the BOE's determination was incorrect and that the boys were domiciled in the district.

It is true, as the BOE contends, that the domicile of minor children usually is consistent with that of their custodial parents, but the circumstances here are unusual. Petitioners' witnesses were credible and, consistent with the above findings of fact, by March 2004, when the BOE held the hearing, the Trenton house was still not fit for the children, so the boys were not domiciled there and they remained domiciled in the district through the end of the 2003-04 school year.

ORDERS

I **GRANT** the relief requested in the petition, reverse and vacate the BOE's determination, and **DISMISS WITH PREJUDICE** the BOE's counterclaim for tuition.

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 (45) 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 (13) 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, 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 10, 2004

DATE

JOHN R. TASSINI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

Aug. 10, 2004

DATE

Mailed to Parties:

AUG 13 2004

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For Petitioners:

P-1 Building Analysis Report, April 26, 2003 EV

P-2 Consent Custody order, May 19, 2004 EV

For Respondent:

R-1 Transcript of BOE meeting, March 1, 2004 EV

R-2A Letter from Solebury School, July 28, 2003 EV

R-2B Letter from Solebury School, October 28, 2003 EV

R-2C Letter from Solebury School, March 1, 2004 EV

R-3 Letter from K.M. EV

WITNESSES

For Petitioners:

J.E.H.

K.M.

For Respondent:

David Mikalauskas

#383-04 383-04

OAL DKT. NO. EDU 2269-04
AGENCY DKT. NO. 71-2/04

TRENTON EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/24/04

Date of Mailing: 9/24/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT
OAL DKT. NO. EDU 2269-04
AGENCY DKT. NO. 71-2/04

TRENTON EDUCATIN ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

Kathleen Naprstek Cerisano, Esq., appearing for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Thomas W. Sumners, Jr., Esq., appearing for respondent (Sumners, George & Dortch, Attorneys)

Record Closed: August 1, 2004 Decided: August 6, 2004

BEFORE **ISRAEL D. DUBIN**, ALJ:

This matter was transmitted to the Office of Administrative Law (hereinafter OAL) on March 31, 2004, 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 matter was scheduled for hearing at the OAL, Mercerville, N.J. on July 1, 2004. On that date the parties met and negotiated the matter.

parties have agreed to a settlement and have prepared a Settlement Agreement e terms thereof, which is attached and fully incorporated herein. (J-1)

ve reviewed the record and the terms of settlement and I **FIND**:

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

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

CONCLUDE that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that ement should be approved. I approve the settlement and therefore **ORDER** that the 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 (45) 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 6, 2004
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

8/11/04
DATE

DEPARTMENT OF EDUCATION

AUG 12 2004

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement agreement

SUMNERS GEORGE
A Professional Corporation
849 West State Street
Trenton, NJ 08618
(609) 393-6604
Attorneys for Respondent, Board of Education of the City of Trenton, Mercer County

RECEIVED
2004 AUG -1 A 10:17
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

TRENTON EDUCATION ASSOCIATION,	:	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY
Petitioner,	:	AGENCY DOCKET NO. 71 2/04
	:	OAL DOCKET NO. EDUOR 02269-2004S
v.	:	
	:	
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
	:	***STIPULATION OF SETTLEMENT***
Respondent.	:	

The parties in the matter, desiring to resolve the within matter that is before this court, hereby stipulates as follows:

1. The Respondent, Board of Education of the City of Trenton, Mercer County ("Board"), hereby agrees that all lunch schedules for members of the Petitioner, Trenton Education Association ("TEA"), shall be consistent with the lunch schedules of school district students pursuant to ***N.J.A.C.*** 6:3-3.2 effective with the 2004-05 school year; and

2. This Stipulation shall not constitute a limitation, restriction, or waiver of any defenses that the Board may have had to the within matter; and

3. Petitioner dismisses the within Petition of Appeal with prejudice; and

4. This agreement is reached voluntarily and without duress.

Thomas W. Sumners, Jr., Esq.
Sumners George, P.C.
Attorneys for Respondent

Date: 6/24/04

Kathleen Naprstek Cerisano, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
Attorneys for Petitioner

Date: 6/22/04

TRENTON BOARD OF EDUCATION
Trenton, New Jersey

RESOLUTION

WHEREAS, the Trenton Education Association ("TEA") has filed a Petition of Appeal with the Commissioner of Education alleging that the Trenton Board of Education ("Board") has violated ***N.J.A.C.*** 6:3-3.2 by scheduling teachers' lunch schedules at times that are not consistent with lunch schedules of students; and

WHEREAS, a Stipulation of Settlement has been recommended to the Board by the Board's attorney whereby the Board would agree to schedule teachers' lunch schedules at times that are consistent with the lunch schedules of school district students effective with the 2004-05 school year, and the Stipulation does not constitute a limitation, restriction, or waive of any defenses that the Board may have had in the within matter; (See Attachment A) and

WHEREAS, by entering into the Stipulation of Settlement, TEA has agreed to dismiss the Petition of Appeal with prejudice;

NOW, THEREFORE, BE IT RESOLVED on this 26th day of July, 2004 that the Board approves the Stipulation of Settlement in the matter of ***Trenton Education Association v. Board of Education of the City of Trenton, Mercer County***, Agency Docket No. 71-2/04, OAL Docket No. EDUOR 02269-2004S.

Melvin L. Wyns
Board Secretary

Bernard J. McMullan, Ph.D.
Board President

SUMNERS GEORGE
A Professional Corporation
849 West State Street
Trenton, NJ 08618
(609) 393-6604
Attorneys for Respondent, Board of Education of the City of Trenton, Mercer County

TRENTON EDUCATION ASSOCIATION, Petitioner, v. BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, Respondent.	: BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY : : AGENCY DOCKET NO. 71 2/04 : OAL DOCKET NO. EDUOR 02269-2004S : : : : : : ***STIPULATION OF SETTLEMENT***

The parties in the matter, desiring to resolve the within matter that is before this court, hereby stipulates as follows:

1. The Respondent, Board of Education of the City of Trenton, Mercer County ("Board"), hereby agrees that all lunch schedules for members of the Petitioner, Trenton Education Association ("TEA"), shall be consistent with the lunch schedules of school district students pursuant to ***N.J.A.C.*** 6:3-3.2 effective with the 2004-05 school year; and

2. This Stipulation shall not constitute a limitation, restriction, or waiver of any defenses that the Board may have had to the within matter; and

3. Petitioner dismisses the within Petition of Appeal with prejudice; and

4. This agreement is reached voluntarily and without duress.

Thomas W. Sumners, Jr., Esq.
Sumners George, P.C.
Attorneys for Respondent

Date: 6/24/04

Kathleen Naprstek Cerisano, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
Attorneys for Petitioner

Date: 6/22/04

Attachment A

384-04

#384-04

OAL DKT. NO. EDU 6708-03
AGENCY DKT. NO. 302-8/03

CHARLES SORIANO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SOMERSET 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. Timely exceptions were filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, to which the Board of Education (Board) duly replied. A further submission by petitioner in response to the Board's reply exceptions is not considered herein, since operative procedural rules make no provision for such submissions.

Petitioner argues on exception that the Initial Decision entirely fails to consider his central claims that the Board had no authority to unilaterally change his proffered retirement date and that doing so additionally violated his tenure rights.[1] (Petitioner's Exceptions at 3-8) Petitioner further objects to the Administrative Law Judge's (ALJ) statements to the effect that petitioner acted improperly in obtaining approval for his vacation requests directly from the superintendent, who was, in fact, his ultimate supervisor, and that he was trying to "cheat" the Board by staying on the payroll

[1] In regard to these claims, petitioner substantially reiterates the arguments of his briefs before the OAL, relying in large measure on *Bloomfield Education Association v. Board of Education of the Township of Bloomfield*, decided by the Commissioner on November 18, 2003, and *Victoria Carrelle v. Board of Education of the Township of Bloomfield*, decided by the Commissioner on February 9, 2004.

while having no intention of providing services to the Board for the remainder of his employment. Petitioner contends that the record contains no factual basis whatsoever for the ALJ's "needless inflammatory conclusory statements" in these regards. (*Id.* at 9-10, quotation at 10)

The Board replies that the Initial Decision "resonates with clarity and reason" and is "entirely and simply correct." Contrary to petitioner's assertions, the Board contends, this matter has nothing to do with tenure rights since petitioner was leaving the district of his own accord; nor are quasi-contractual arguments relevant, since the cited prior case law deals with situations where the respondent board had previously accepted the complainant's proffered resignation, which did not occur in this instance. Instead, as the ALJ recognized, all the Board did was refuse to accept a resignation date for which it would receive no benefit, causing petitioner no harm other than loss of his ability to take a lengthy paid vacation at the Board's expense. (Board's Reply at 1-4, quotations at 1-2)

Upon review, the Deputy Commissioner, to whom this matter has been delegated for hearing pursuant to N.J.S.A. 18A:4-34, has no alternative but to reverse the decision of the ALJ. The record provides ample explanation as to why the Board (and the ALJ) took a heated view of the circumstances herein, where petitioner, who had already accepted employment in a new district along with the Board's outgoing superintendent, submitted his resignation with an effective date that enabled him to invoke the negotiated agreement's provision for immediate accrual of 28 vacation days upon July 1, 2003, then requested leave for the period from July 2, 2003 through the effective date of his proffered resignation. However, regardless of whether this outcome was the result of outrageous connivance, as contended by the Board, or merely a collateral consequence of the 60-day

resignation notice required by *N.J.S.A.* 18A:28-8, as suggested by petitioner, the fact remains that, by unilaterally changing petitioner's proffered resignation date to an earlier one more to the Board's liking, the Board forced petitioner's premature resignation and terminated his employment without consent. Quite apart from the fact that resignation under any circumstances is a voluntary act with which the employee must be in agreement, here, in view of petitioner's undisputed tenure status, unilateral termination of his employment could not be lawfully accomplished in the absence of proceedings pursuant to *N.J.S.A.* 18A:6-10. *Bloomfield, supra* (Note 1) Simply put, whatever its feelings may have been about the fairness to the district of petitioner's actions, the Board had no authority to do what it did, and petitioner must prevail on his appeal herein as a matter of law. As petitioner correctly notes, in the context of the claim he has made, other considerations are immaterial and no findings with regard to them can be made on the stipulated facts.

Accordingly, the Initial Decision of the OAL dismissing the Petition of Appeal is rejected for the reasons set forth herein. The Board is directed to compensate petitioner consistent with the terms of his collective bargaining agreement, less mitigation, for the period between the effective date of his unlawful termination and his proffered resignation date of August 22, 2003.

IT IS SO ORDERED.[2]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 9/24/04

Date of Mailing: 9/24/04

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

386-04

OAL DKT. NO. EDU 4109-04
AGENCY DKT. NO. 63-2/04

S.W., on behalf of minor child, S.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner, who did not appear for the hearing in this matter, has failed to carry her burden of proof that her daughter was entitled to a free education in the Ewing Township School District. The Commissioner further agrees with the grant of the Board's counterclaim for tuition in the amount of $8,627.21 for the 180 days of S.W.'s ineligible attendance in school in the Ewing Township School District between September 8, 2003 through the end of the school year in May 2004.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/29/04

Date of Mailing: 9/29/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4109-04
AGENCY DKT. NO. 63-2/04

S. W., ON BEHALF OF MINOR CHILD, S. W.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,
Respondents.

No appearance by or on behalf of petitioner
Jeffrey F. Belz, Esq., for respondent

Record Closed: August 16, 2004 Decided: August 17, 2004
BEFORE **JOSEPH F. FIDLER**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner S. W. has challenged an adverse residency determination of respondent Ewing Township Board of Education, pursuant to *N.J.S.A.* 18A:38.1. Petitioner asserted that she and her daughter reside within respondent school district in Ewing Township and that pupil S.W. is therefore entitled to attend school within the district. Respondent Board by Answer has denied that petitioner resides within its school district, asserting that the pupil resides with her mother in the City of Trenton. The Board has also asserted a counterclaim for tuition expenses incurred, as

non-resident students enrolled in the Ewing School District are required to pay tuition. *N.J.S.A.* 18A:38-1b(2).

On March 23, 2004, the Bureau of Controversies and Disputes, New Jersey Department of Education, acknowledged receipt of petitioner's submissions seeking to appeal a residency determination of the Ewing Township Board of Education. Respondent Board's answer and counterclaim were filed with the Department on March 31, 2004. On May 18, 2004, the matter was transmitted to the Office of Administrative Law for an expedited hearing pursuant to *N.J.S.A.* 18A:38.1, and determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to –13.

DISCUSSION

The matter was scheduled for hearing at the Office of Administrative Law at 9:00 a.m. on Monday, August 16, 2004. At that date and time, counsel for respondent and its witnesses appeared for the hearing, but petitioner failed to appear. After waiting one hour for petitioner and having heard nothing from her regarding her intention to proceed, the record was opened. Because petitioner did not appear, I **CONCLUDE** that she has failed to meet her burden of proving by a preponderance of the evidence that minor child S.W. is eligible for a free education in respondent school district, pursuant to *N.J.S.A.* 18A:38-1.

Respondent presented brief, undisputed proofs regarding its counterclaim for tuition. David Mikalauskas, Attendance and Residency Officer for the Board since 1989, testified that he has calculated the tuition S.W. owes as the result of her daughter's ineligible attendance in the school district. He obtained the most recent figure for the total annual per pupil cost to the district from the New Jersey Department of Education. For pupils in grades one through five in respondent school district, the applicable amount for annual per pupil cost is $8,771.

To calculate the tuition S.W. owes, Mr. Mikalauskas divided $8,771 by 183 days, representing the length of the district's school year, and obtained a daily tuition figure of $47.92. He then multiplied this amount by the number of days of ineligible attendance from the start of surveillance of S.W.'s residency on September 8, 2003, until the end of the school year in May

2004, which was 180 days. The result of this calculation is tuition owing in the amount of $8,627.21.

I note that if respondent had strictly applied the formula set forth in *N.J.S.A.* 18A:38.1, it would have computed the tuition owing on the basis of 1/180 of the total annual per pupil cost to the district of $8,771, multiplied by the number of days of ineligible attendance, which in this case is 180 days, with a result that the tuition owing would be $8,771. However, counsel for respondent represented on the record that respondent is content with the calculation it used, which results in the somewhat lower figure for tuition owing in the amount of $8,627.21.

In accord with the foregoing undisputed evidence, I **FIND** that petitioner S.W. owes respondent school district $8,627.21 for the period of ineligible attendance of her daughter S.W. in respondent school district. I **CONCLUDE** that petitioner's challenge to the Board's adverse residency determination should be **DISMISSED** for lack of prosecution, and I further **CONCLUDE** that the Board's counterclaim against S.W. for tuition owing for ineligible attendance in the amount of $8,627.21 should be **GRANTED**.

I so **ORDER**.

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 (45) 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 (13) 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, 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 17, 2004
DATE

Joseph F Fidler
JOSEPH F. FIDLER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

8/17/04
DATE

AUG 19 2004
DATE

Mailed to Parties:
Laura Anders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For petitioner:

None

For respondent:

None

WITNESSES

For petitioner:

None

For respondent:

David Mikalauskas

388-04

OAL DKT. NO. EDU 7649-03
AGENCY DKT. NO. 225-6/03

PETER KOROTKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/30/04

Date of Mailing: 9/30/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 07649-03
AGENCY DKT. NO. 225-6/03

PETER KOROTKY,
Petitioner,
v.

BOARD OF EDUCATION OF THE CITY OF PASSAIC,
Respondent.

Alfred F. Maurice, Esq. for petitioner
(Springstead & Maurice, attorneys)

Joel M. Miklacki, Esq., for respondent

Record Closed: August 20, 2004 Decided: August 20, 2004

BEFORE **SANDRA ANN ROBINSON,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 15, 2003 for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a Stipulation of Settlement. 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.

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 (45) 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 20, 2004
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Receipt Acknowledged:

8-24-04
DATE

M. Kathleen Duncan/ch
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 27 2004
DATE

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

Joel M. Mikdacki, Esq.
200 Broadacres Drive, Third Floor
Bloomfield, New Jersey 07003
(973) 893-9800
Attorney for Respondent Passaic Board of Education

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AUG 20 4 07 PM '04

PETER KOROTKY Petitioner, v. BOARD OF EDUCATION IN THE CITY OF PASSAIC Respondent.	BEFORE THE COMMISSION OF EDUCATION IN NEW JERSEY OAL DOCKET NO.: EDU07649-03 EDUCATION DOCKET NO.: 225-6/03

Peter Korotky, Petitioner in the above matter and the Passaic Board of Education responding to the above matter hereby agrees to resolve in their entirety the matter of Peter Korotky vs. Passaic Board of Education before the Commissioner of Education OAL Docket No. EDU07649-03, Agency Reference Number 225-6/03 upon the following terms:

1. Respondent agrees to pay the Petitioner, Petitioner's employment and adjustment increment for the 2003-2004 school year, upon, And to Report the Same to the Division of Pensions TPAF & Certify the Same in his final Salary.

2. Petitioner agreeing to retire from his present position as an employee/teacher of the Passaic Board of Education School District.

3. Petitioner agrees to withdraw his claim before the Commissioner of Education, Peter Korotky vs. Passaic Board of Education, OAL Docket Number EDU07649-03, Agency Reference Number 225-6/03. The withdrawal is contingent upon compliance by both the Respondent and Petitioner with the conditions as set forth in paragraphs one and two of this Agreement.

FROM : SPRINGSTEAD & MAURICE PHONE NO. : 2014870212 Jul. 16 2004 08:58AM P1

4. This Agreement constitutes the entire Agreement between the parties with regard to the matter at issue herein. The Agreement may not be utilized by either party of the proceeding as support of proof of any contention raised by that party in this proceeding and neither party admits any liability with regard to any of the allegations set forth in these proceedings.

5. Each party is responsible for their own attorney's fees in satisfaction of the work performed regarding this claim.

Springstead and Maurice, Attorney for Petitioner Peter Korotky

By:_____ Date: 11/16/04
Alfred F. Maurice, Esq.

Joel M. Miklacki, Esq., Attorney for Respondent Passaic Board of Education

By:_____ Date: 8/10/04
Joel M. Miklacki, Esq.

#387-04

387-04

OAL DKT. NO. EDU 4509-04
AGENCY DKT. NO. 179-5/04

E.H., on behalf of minor child, D.L.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/29/04

Date of Mailing: 9/29/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4509-04
AGENCY REF. NO. 179-5/04

E.H., ON BEHALF OF MINOR, D.L.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,
Respondent.

E.H., petitioner, *pro se*
Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee & O'Donnell, attorneys)

Record Closed: August 9, 2004 Decided: August 16, 2004

BEFORE **DONALD J. STEIN,** ALJ:

This matter was transmitted to the Office of Administrative Law on June 14, 2004 for determination under *N.J.S.A.* 39:5-30 *et seq.*, and 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.*

The parties have agreed to a settlement and have prepared an agreement, marked as J-1 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 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 (45) 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.

8-16-04
DATE

DONALD J. STEIN, ALJ

Receipt Acknowledged:

8-18-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 19 2004

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

jck

EXHIBITS

Jointly submitted:

J-1 Fully executed agreement signed by the parties

Destribats, Campbell, DeSantis & Magee
247 White Horse Avenue
Trenton, NJ 08610
Tel: (609) 585-2448
Attorneys for Respondent

J-1

E.H. on behalf of Minor child, D.L.H.,	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY**
PETITIONER,	**OAL DOCKET NO: EDUCS 04 509 20045**
v.	**AGENCY DKT. NO. 179-5/04**
HAMILTON TOWNSHIP BOARD OF EDUCATION, RESPONDENT.	**STIPULATION OF SETTLEMENT**

The parties having reached a settlement in the above-referenced matter,

IT IS HEREBY AGREED AS FOLLOWS:

1. The Petitioner shall withdraw her Petition in the within matter, without prejudice.

2. The Respondent shall withdraw its Answer and Counterclaim in the within matter, without prejudice.

3. Should D.L.H. ever again be enrolled by any person who does not actually reside within the Hamilton Township Board of Education's School District, then, in that event, the Respondent may re-file its claim with the Commissioner of Education to seek the payment of tuition in the amount of $6,767.30 and the Petitioner may otherwise re-file her Petition.

DESTRIBATS, CAMPBELL, DESANTIS & MAGEE COUNSELLORS AT LAW 247 WHITE HORSE AVENUE TRENTON, NEW JERSEY 08610

DESTRIBATS, CAMPBELL, DeSANTIS & MAGEE, ESQS.

By: _____
DENNIS M. DeSANTIS, ESQ.
Attorney for Respondent
Dated : August , 2004

By: Patricia L. Ratner
PATRICIA L. RATNER, ESQ.
Attorney for Petitioner
Dated : August 9 , 2004

389-04

#389-04

OAL DKT. NO. EDU. 51-04
AGENCY DKT. NO. 334-9/03

K.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF GLOUCESTER COUNTY VOCATIONAL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge, for the reasons clearly detailed in his decision, that the Board's determination that K.D. failed his Electrical Construction 1 class, rendering him ineligible for the second year of his vocational educational program, was not arbitrary, capricious or unreasonable and, therefore, there is no relief which can be accorded him in this matter.

Accordingly, the Initial Decision of the OAL is adopted and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/30/04

Date of Mailing: 9/30/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00051-04
AGENCY DKT. NO. 334-9/03

K.D.,

Petitioner,

v.

BOARD OF EDUCATION OF GLOUCESTER COUNTY VOCATIONAL DISTRICT, GLOUCESTER COUNTY,

Respondent.

K.D., petitioner, *pro se*
Louis Capelli, Jr., Esq., for respondent

Record Closed: July 20, 2004 Decided: August 26, 2004

BEFORE **JEFF S. MASIN**, ALJ:

In June 2003, K.D. was a senior in respondent's high school, and he attended the first year of a potential two-year course at the respondent's school under a shared time arrangement with his local school district. Although Mr. D. first received a report card dated June 18, 2003, that showed that he had earned a grade of 71 in his Electrical Construction I class, taught by Brain Mattei, he then received a second report card, dated June 23, 2003, which showed that he had only earned a 66, which resulted in a failing grade of "F." Mr. D. filed a Petition with the Commissioner of Education on September 16, 2003, requesting that he be "able to go back and complete the course." He also contended that records had been falsified and noted in his prayer for relief that "I feel who ever falsified these records be held accountable for their actions." On November 26, 2003, the Superintendent of the respondent district wrote to the Bureau of Controversies and Disputes, addressing Mr. D.'s Petition. However, the Board did not file a formal Answer, and on January 5, 2004, the Director of Controversies and Disputes transferred

the Petition for hearing before the New Jersey 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 21. An Answer was then filed by counsel for the Board, received at the OAL on January 20, 2004. A hearing was conducted before this judge on July 9, 2004, and supplemental material was submitted on July 20, 2004, on which date the record closed.

The issue as to Mr. D.'s grade involves his attendance, or rather, his alleged lack of attendance. Mr. Mattei testified about the school's "Grading Policy," explained in a document distributed to students during the opening days of school. In its opening section, this writing reflects that "Attendance is very important: A student cannot learn while absent from shop. Vocational programs using hands-on experiences cannot teach the student if they are not present to participate. Poor attendance can only hinder learning, skill development, and is considered a negative work trait by prospective employees." Under the policy, a student receives a 10% reduction in the attendance grade for every day missed during the marking period and no credit for shop work that day. Make up work can be requested and if satisfactorily completed the student may receive a shop work grade of 90% for the day missed and removal of the 10% reduction from every day made-up. A note is required for each absence. Three latenesses are considered an absence. Students with less than 90% attendance, which means 18 days, "whether made up or not," "will receive a failing grade for the course." Mattei iterated that attendance is a major concern for prospective employers. The total grade for the course is determined by averaging attendance, tests and shop performance grades.

Mattei presented a summary of Mr. D.'s grades for his senior year. According to this record, D. started the year with no absences during the first marking period, had six absences in the second, but made up all of the work, had seven absences during the third marking period and did not make up the work, and then, in the fourth marking period, had twenty-two absences and made up no work. His average grades for the four marking periods were 88, 81, 65 and 32, resulting in an overall average of 66.5% for the year, a failing grade. The key component of the fourth marking period average was the zero received for attendance. Additionally, the third marking period average was substantially affected by the grade of 30 received for attendance. Mattei described D. as a "good guy," who, when present, was always respectful and asked what he "could do next," even during the last two marking periods. However, in that fourth marking

K.D. did not believe that he had missed even ten days. He insisted that he did several forms of make up work and turned them in. However, he cannot recall if he turned in the notebook in the fourth marking period. He did not contest the accuracy of the attendance numbers listed on the summary for the second and third marking periods, does not recall if he turned in the notebook in the second marking period (the summary indicates that he did not, and he does not recall if he took the safety test), and does not recall missing tests. However, he "always turned in" make up work. As an adult, he agreed that he "had a lot of leeway" as far as missing school, and he had a car. When he left for school in the morning his mother was still at home. He attended vocational school in the morning and the rest of the day he was at his home district in Clayton.

Mr. Mattei was a "great teacher." However, he recalls no conversation with the teacher about a chance to pass the course.

On rebuttal, Mr. Mattei iterated that the conversation about turning in make up work occurred in early June in the classroom, about ten days before the end of the school year. He told D. he was in danger of failing and that he did not want to fail him. While D. promised to turn in the work, that was the last occasion on which Mattei saw him and nothing was produced.

Discussion

The record clearly demonstrates that the school district made known to Mr. D. early in the school year what its grading and attendance policies were and the relationship between the two. Mr. D. claims that the record of attendance maintained by Mr. Mattei incorrectly charges him with many more absences during the fourth marking period than D. believes he accumulated. However, his recollection is suspect. He does not fault Mattei's bookkeeping for other marking periods, but has limited recollection of missed tests and as to whether he turned in make up work. Mr. Mattei, who even D. relates is a fine teacher without a grudge against the student, conceded that he could be off a day or two if he missed a time when a student arrived late after attendance was taken, but there is absolutely no basis for believing that he was as far off in his recording of absences as D. suggests. Instead, after considering the testimony and documents and the credibility of the witnesses, I am convinced, and **FIND**, that D. was recorded as absent twenty-

one times and that even with some minor allowance for a missed late arrival here and there, during that last marking period he was absent far more that the critical number of ten absences. Further, I **FIND** that D. was offered an opportunity to turn in make up work by Mattei, who did not want to fail the student, but D. once again passed on this chance, turning in nothing. Finally, I **FIND** that there is no evidence whatsoever that anyone "falsified" any records. As such, I **CONCLUDE** that the Board of Education acted properly when it determined that D. had failed the course. As a result he was ineligible to attend the second year of the program, and I understand that the tuition money has been returned. There is no relief to be provided to D., and his appeal is therefore **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 (45) 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 (13) 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, 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, 2004
DATE

JEFF S. MASIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

August 26, 2004
DATE

Mailed to Parties:

SEP - 1 2004

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

JOINT EXHIBITS:

J-1 Report Card, GCIT Day School, for petitioner, printed 6/18/03

J-2 Report Card, GCIT Day School, for petitioner, printed 6/23/03

FOR THE PETITIONER:

FOR THE RESPONDENT:

R-1 Grading Policy, Electrical Construction, received by petitioner 9/5/02

R-2 K.D. 2002-2003 grade summary

R-3a Attendance record for petitioner from 1/27/03 to 3/31/03

R-3b Attendance record for petitioner from 4/1/03 to 6/6/03

#390-04

390-04

OAL DKT. NO. EDU 5198-04
AGENCY DKT. NO. 86-3/04

L.M. and E.A., on behalf of minor child, A.A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/30/04

Date of Mailing: 9/30/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5198-04

AGENCY DKT. NO.: 86-3/04

L.M. AND E.A. o/b/o MINOR CHILD, A.A.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,

Respondent.

L. M., guardian for **A.A.**, appearing pursuant to *N.J.A.C.* 1:1-5.4(a)7, for petitioner

Stanley Turitz, Esq., for respondent
(Ferrar, Turitz, Harraka & Goldberg, attorneys)

Record Closed: August 25, 2004 Decided: August 25, 2004

BEFORE **JEFFREY A. GERSON**, ALJ:

On May 10, 2004 this 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 and heard on August 25, 2004. During the

hearing, the parties agreed to settle the matter. A Stipulation of Settlement indicating the terms of settlement was signed by the parties and a copy is attached hereto.

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 (45) 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.

8/25/04
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

8/27/04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 31 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

PREPARED BY
DATE

(1)

ORDER AOL Docket EDUOS #05198-2004N

The above matter having been amicable settled between the Parties; and the Parties wanting the settlement to be memorialized as an ORDER of this Court: It is hereby ordered as follows:

(1) Minor child to attend school as Tuition Student

(2) The Petitioners Agree to pay as the adjusted Tuition for the school years 2003-2004 + 2004-2005 a total sum of $10,000 as follows:

(2) On Sept 1, 2004 + continuing each first of the month for nine additional months + a sum of $200 each month for a total of $2,000.

(3) On or before September 20, 2004

PREPARED BY
DATE

(2)

The sum of $8,000.

(d) All payments + there due dates are deemed time of the ESSENCE.

(e) In the event any payment is late then the full Tuition of $11,520 shall automatically be due + payable less a credit for any monys Timely paid.

(f) All payments are to be made To the Ridgefield Board of Education at Chestnut St Ridgefield, N.J. 07657.

(g) The petitioners Lissette Marinelli + Eulalia Alvarez shall execute a simple promissory Note prior To September 1, 2004 which incorporates the terms of this ORDER.

PREPARED BY
DATE

(3)

The note shall be prepared by the Boards Attorney with a copy forwarded to the undersigned. Failure to execute the note shall be a deduct of this ORDER and the full amount of Tuition 11,520 shall be due + payable.

So ORDERED this 25th August, 2004

Judge Jeffrey GENSON

Consented to + Agreed

Lissette Marinelli
Lissette Marinelli

Evlalia Alvarez
Evlalia ALVAREZ

Stanley White Attorney
for the Bd. of Education

EDU 5198-04

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OFFICE OF ... JERSEY
... LAW
Aug 30 ... 07 AM '04

RESOLUTION

WHEREAS, as part of the re-registration process for the school year 2003-4, student AA was de-enrolled; and

WHEREAS, said student, through her alleged guardian and natural mother, filed a petition challenging the Board of Education de-enrollment of said minor student; and

WHEREAS, at a hearing scheduled to be heard on August 25, 2004 at the urging of the Judge, the Board of Education attorney, along with the Attendance Officer entered into a settlement agreement to resolve this matter. [Said settlement agreement is reflected in the attached Order signed by Judge Gerson and consented to by the Petitioners dated August 25, 2004]; and

WHEREAS, based on the recommendation of the Board attorney and the Superintendent of Schools, it is in the best financial interest of the district to accept the settlement;

THEREFORE BE IT RESOLVED, that the attached settlement agreement and court Order are hereby ratified and approved by the Board of Education.

G:\MAIN\SCHOOL\SB-7345\Alvarez\resolution 8-25-04.wpd

391-04

OAL DKT. NO. EDU 3658-04
AGENCY DKT. NO. 85-3/04

IN THE MATTER OF THE TENURE	:	
HEARING OF JOSEPH J. VISOTSKI,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

Date of decision 10/01/04

Date of Mailing 10/01/04

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3658-04

AGENCY DKT. NO.: 85-3/04

I/M/O THE TENURE HEARING OF

JOSEPH J. VISOTSKI

Anthony P. Sciarrillo, Esq., for petitioner
(Lindabury, McCormick & Estabrook, attorneys)

Cherie L. Adams, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin Tischman, Epstein & Gross, attorneys)

Record Closed: July 30, 2004 Decided: August 26, 2004

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

On April 19, 2004 this 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 and heard on June 30, 2004. During the hearing, the parties agreed to settle the matter. A Stipulation of Settlement indicating the terms of settlement was signed by the parties and a copy is attached hereto.

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 (45) 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 26, 2004
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

9-1-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 03 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cdr

SILLS CUMMIS EPSTEIN & GROSS P.C.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for Petitioner,
State-Operated School District
of the City of Newark

In the Matter of the Tenure Hearing of JOSEPH J. VISOTSKI, Respondent, -and- STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Petitioner.	BEFORE THE COMMISSIONER OF EDUCATION AGENCY DKT. NO.: 85-3/04 OAL Docket No.: EDU 3658-04 **STIPULATION OF SETTLEMENT**

WHEREAS, the State-Operated School District of the City of Newark, Essex County ("Petitioner" or "District") has certified tenure charges of unbecoming conduct against Joseph J. Visotski ("Respondent" or "Visotski"); and

WHEREAS, Respondent disputes the allegations of the tenure charges and intends to defend these charges and present evidence that his conduct was at all times consistent with his job responsibilities; and

WHEREAS, the parties have reached an amicable resolution of the disputed charges which protects the interests of all parties and avoids the cost and time necessary to pursue litigation over the tenure charges; and

WHEREAS, this resolution serves the public's best interest by achieving the results desired by Petitioner while avoiding the costs and uncertainty attendant to litigation.

NOW THEREFORE, the parties agree as follows:

1. Respondent agrees to resign effective June 30, 2005 and shall submit an irrevocable letter of retirement effective June 30, 2005 upon the approval of this Agreement by the Commissioner of Education.

2. Respondent's salary shall be restored for the period of unpaid suspension commencing on or about March 1, 2004.

3. Respondent shall continue to receive his salary for the 2004-2005 school year. Commencing on October 1, 2004, Respondent shall be placed on terminal leave, during which time he shall utilize accrued leave through the date of his retirement effective June 30, 2005.

4. Respondent shall be entitled to all benefits provided in the collective bargaining agreement between the Newark Public Schools and C.A.S.A. (City Association of Supervisors and Administrators), including, but not limited to, retroactive salary increases to the extent such are provided for under the Memorandum of Agreement between the District and C.A.S.A. Additionally, Respondent shall be entitled to payment for unused sick leave at the rate of three to one.

5. In connection with this Agreement, Respondent shall not return to work in the Newark Public Schools.

6. Respondent acknowledges that the Commissioner of Education shall determine whether this matter will be submitted for review to the State Board of Examiners, which has the power to initiate proceedings to revoke Respondent's educational certificate(s).

7. Respondent acknowledges that he has entered into this Agreement voluntarily and entirely of his own free will and that he was not subject to any duress and/or coercion.

8. This Agreement is subject to the approval of the Administrative Law Judge and the Commissioner of Education.

For the State-Operated School District
of the City of Newark

By: _____
MARION BOLDEN

Dated: June , 2004

By: Joseph J Visotski
JOSEPH J. VISOTSKI

Dated: June 30, 2004

392-04

OAL DKT. NO. EDU 4432-04
AGENCY DKT. NO. 103-3/04

O.C., on behalf of minor child, D.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/01/04

Date of Mailing: 10/01/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4432-04
AGENCY REF. NO. 103-3/04

O.C., O/B/O MINOR CHILD, D.C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,
Respondent.

O.C., petitioners, *pro se*
Dennis M. DeSantis, Esq., for respondent, (Destribats, Campbell, DeSantis & Magee, attorneys)

Record Closed: September 1, 2004 Decided: September 2, 2004

BEFORE **DONALD J. STEIN,** ALJ:

This matter was transmitted to the Office of Administrative Law on June 4, 2004 for determination under *N.J.S.A.* 39:5-30 *et seq.*, and 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.*

The parties have agreed to a settlement and have prepared an agreement, marked as J-1 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 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 (45) 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.

9-2-04
DATE

DONALD J. STEIN, ALJ

Receipt Acknowledged:

9/7/04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP - 9 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jck

EXHIBITS

Jointly submitted:

J-1 Fully executed agreement signed by the parties

O.C. 0/6/0
Mirna Chirl, D.C.
v. Petitioner

Agency DKT. No.:
103-3/04

HAMILTON TOWNSHIP
Board of Ed
Respondent

The parties agree as follows:

1.) The Respondent withdraws its Answer and Counterclaims

2) D.C. may continue her attendance in the Hamilton Township School District

3) The Respondent will not receive any tuition payment from Petitioner.

For the Respondent

Dennis M Mikantes
atty for the Board of Education

OSCAR CORRALES

395-04

AGENCY DKT. NO. 250-7/04

BOARD OF EDUCATION OF THE SOMERSET COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	
RESPONDENT.	:	

This matter comes before the Commissioner by way of a Petition of Appeal filed by the Board of Education of the Somerset County Vocational-Technical School District (Vocational District) on July 21, 2004. Therein, the Vocational District seeks an Order holding that the Franklin Township Board of Education (Franklin) is violating State statute by refusing to send its students to the Vocational District's shared-time programs, and directing that Franklin students who have been accepted into such programs be permitted to attend them.[1]

Following receipt of Franklin's answer to the petition, by letter dated August 6, 2004, the Department advised the parties that the Commissioner would be amenable to deciding this matter on cross-motions for summary decision, since it appeared that the dispute turned on the legal question of whether a district board of

[1] The District also seeks access to Franklin students, pursuant to *N.J.A.C.* 6A:19-3.1(d), for purposes of presenting information about its shared-time, as well as full-time, programs, and a directive that Franklin students be permitted to submit applications to the District's shared-time programs.

education is required by statute to send eligible students to shared-time county vocational school programs.

On August 16, 2004, the Vocational District moved for summary decision, arguing as set forth more fully below. Proceedings were briefly held in abeyance while settlement discussions were attempted by the parties; when these proved unsuccessful, on September 2, 2004, Franklin filed a cross-motion to which the Vocational District replied on September 13, 2004. These submissions, along with their accompanying certifications and exhibits, constitute the substantive record of this matter.

FACTUAL BACKGROUND

The central facts operative herein are undisputed, and, where areas of disagreement exist between the parties, they are so noted:

1. On June 13, 2002, the Franklin Township Board of Education resolved that, as of September 2002, it would no longer send new shared-time (as opposed to full-time) students to the Vocational District; currently enrolled students were "grandfathered," allowing them to complete the programs they had begun. In a letter to Franklin parents, students and staff giving notice of the Board's impending discussion, Franklin's then-superintendent explained that he was recommending the discontinuance because 1) additional graduation requirements were making it increasingly difficult for shared-time students to complete high school in four years, 2) significant time during the school day was being wasted in transit to and from the vocational school, 3) students with the staggered schedules necessitated by shared-time programs were at a disadvantage in fulfilling annual credit expectations and in obtaining remedial instruction, specialized class placements and skills labs, and 4) scheduling and operations at Franklin High School were significantly burdened by the demands of trying to accommodate shared-time arrangements.

2. There is no evidence on record suggesting that, during the 2002-03 school year, the Vocational District either accepted new shared-time students from Franklin or objected to Franklin's decision to discontinue sending such students. [2]

[2] The Commissioner takes notice that subsequent to the events narrated in No. 1 above but prior to the events narrated in No. 3 below, both the Vocational District and Franklin experienced a change in chief school administrators.

3. During the spring of 2004, the Vocational District accepted new shared-time students from Franklin for the upcoming school year. However, by letter from the principal of the Vocational District's high school, these acceptances were rescinded based on Franklin's policy of refusing to send its students to shared-time programs. A concurrent letter to the new Franklin superintendent, also from the principal, apologized for the "mistake." The new Vocational District Superintendent wrote to the Franklin Superintendent, stating that, while the principal's letter was well-intentioned, it was at best premature in light of the requirements of law and the Superintendent's concerns about Franklin's policy as expressed in meetings and communications that had occurred during the preceding weeks.

4. Further oral and written communications ensued between the two superintendents. The parties dispute the specifics of these communications, as well as those referenced in No. 3 above, and the degree to which viable solutions to Franklin's concerns were offered by the Vocational District. However, there is no dispute that, whatever discussions occurred between the parties, they resulted in no change to Franklin's policy of not sending shared-time students to the Vocational District.

5. Shared-time students are in attendance at the Vocational District from every K-12 and regional school district in Somerset County; the five students from Franklin are either home-schooled or "grandfathered" because they were accepted prior to Franklin's change in policy. In an allegation that is neither admitted nor denied by Franklin, the Vocational District states that Franklin is the only district in the county that refuses to send students to share-time Vocational District programs.

6. Franklin's current Superintendent of Schools contends that Franklin's shared-time students are unable to meet State graduation requirements because scheduling limitations preclude them from completing the requisite courses in a timely fashion. The Vocational District Superintendent disagrees with this assessment.

7. No tuition is charged to local districts by the Vocational District, other than for a special alternative education program ("TOPS") not at issue herein.

THE VOCATIONAL DISTRICT'S POSITION

The Vocational District argues that, whatever Franklin's view may be with respect to the viability of shared-time programs, it is statutorily obligated to permit its students to attend the Vocational District on a shared-time basis when such students are

accepted into shared-time programs. The District points to *N.J.S.A.* 18A:54-20.1, which provides in pertinent part:

> a. The board of education of each school district or regional school district in any county in which there is a county vocational school district shall send to any of the schools of the county vocational school district each pupil who resides in the school district or regional school district and who has applied for admission to and has been accepted for attendance at any of the schools of the county vocational school district. The board of education shall pay tuition for each of these pupils to the county vocational school district pursuant to subsection c. of this section. The provisions of this section shall not apply to the board of education of a school district or regional school district maintaining a vocational school or schools pursuant to article 2 of chapter 54 of Title 18A of the New Jersey Statutes.

According to the Vocational District, this statute is clear on its face, and must, therefore, be read consistent with its plain meaning. Contrary to any contention that the law must be read to exclude shared-time programs because the Legislature did not specifically mention them, the District argues, " 'words should never be supplied or changed [in the construction of such a statute] unless to do so will effect the meaning clearly shown by the other parts of the statute, or to carry out an intent somewhere expressed.' *Board of Ed. of Voc. School v. Finne*, 88 *N.J. Super.* 91, 111 (L. Div. 1965)." (Vocational District's Brief on Motion for Summary Decision at 3-5, quotation at 5)

The District proffers that the plain meaning of this statute is reinforced by rules promulgated by the State Board of Education to set forth New Jersey's system of vocational-technical instruction, *N.J.A.C.* 6A:19. According to the Vocational District, these rules, and the explanatory comments published in the *New Jersey Register* at the time of their promulgation, make it abundantly clear that vocational programs are viewed as an integral part of New Jersey's educational system and that all qualified students are to be given access to them, without distinction between full-time and shared-time

programs. (*Id.* at 3-7) Similarly, the Vocational District observes, prior Commissioner decisions, such as *Jack Jacobs v. Bd. of Ed. Of Northern Valley Regional School District, Bergen County,* decided May 4, 1999, have held that all New Jersey students have an independent entitlement to vocational education. (*Id.* at 7-8)

Because there is no question that Franklin refuses to send any of its students to the Vocational District's shared-time programs, the District urges that the material facts of this matter are not in dispute and that the relief it requests can be summarily granted as a matter of law, *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995). (*Id.* at 8-10)

FRANKLIN'S POSITION AND THE VOCATIONAL DISTRICT'S REPLY

Franklin counters that it has no obligation to send shared-time students to the Vocational District because no statutory authority exists for county vocational schools to provide shared-time programs. Rather, Franklin posits, the enabling legislation for county vocational schools provides only that instruction may be offered in "day, part-time and evening classes." According to Franklin, it is clear from the introductory clause "in order that instruction in the principles and practice may go on together," that, in this context, "part-time" refers to the school employment programs known as cooperative vocational-technical education programs and not to shared-time programs which require Franklin students to study academic subjects at their home school in the morning and vocational subjects at the county school in the afternoon. *N.J.S.A.* 18A:54-3. Additionally, Franklin avers, the only mention in *N.J.A.C.* 6A:19 of shared-time programs, *N.J.A.C.* 6A:19-5.2(i), pertains to maintenance of a medical inspection service

for applicants, a reference which is not, in itself, sufficient to overcome the absence of other statute or rule authorizing the existence of shared-time programs. (Franklin's Brief on Cross-Motion for Summary Decision at 2-4)

Alternatively, Franklin argues, even if it is held that the Vocational District may legally conduct shared-time programs without an express grant of statutory authority, Franklin satisfies any obligation it may have under *N.J.S.A.* 18A:54-20.1[3] by sending full-time students to the District. This is because *N.J.S.A.* 18A:54-20.1 must be read *in pari materia* with *N.J.S.A.* 18A:54-3, so that the mandatory language of the former applies only to programs expressly authorized by the latter, and any decision by a local board of education to send students to programs other than those enumerated is purely discretionary. (*Id.* at 4-5)

Finally, Franklin argues that the Vocational District's shared-time program "interferes" with Franklin's duty to provide a thorough and efficient education (T&E) to its students. Franklin contends, based on the certification of its Superintendent, that the hours spent in vocational instruction, coupled with the significant portion of each day shared-time students must spend on a school bus, create a "severe obstacle" to Franklin's ability to ensure that such students meet Core Curriculum Content Standards as embodied in the minimum Statewide graduation requirements established by the State Board of Education at *N.J.A.C.* 6A:8-5.1; indeed, Franklin has experienced instances of shared-time students being "forced" to drop out of vocational programs to take remedial classes in mandated academic subjects at Franklin High School. (*Id.* at 6) Franklin explains:

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[3] Quoted in pertinent part at page 4 above.

> As demonstrated [in the Superintendent's certification], the shared-time program requires ninth and tenth graders to spend their first five periods and lunch at Franklin High School and then travel to the Vo-Tech High School for three periods. Eleventh and twelfth graders spend four periods at the Vo-Tech High School and then travel to Franklin High School for three academic periods and lunch. This schedule provides for the accumulation of ninety academic credits at Franklin High School. However, included in those ninety credits are twenty credits in physical education/health, whereas the state graduation requirement is fifteen credits (3¾ credits per year). 3¾ credits would translate into a 4-day per week physical education course, which is impossible to schedule. Therefore, Franklin students are scheduled for a five-day per week course.
>
> The result is that, under the shared-time schedule, a incoming freshman in 2004-05 would remain one course short of the mandatory graduation requirements of *N.J.A.C.* 6A:8-5.1 after four years. In the sample schedule attached to [the Superintendent's] certification, that course is social studies. Furthermore, current sophomores, juniors and seniors remain subject to the prior requirement of ten credits in world languages, not the five credits currently imposed on incoming freshmen in 2004-05. The shared-time program does not permit the scheduling of an additional one-year foreign language course. Finally, as noted by [the Superintendent], the shared-time schedule does not accommodate the scheduling of the five-credit course for freshmen, and ten credits for upperclassmen, in visual, performing and/or practical arts, as required by *N.J.A.C.* 6A:8-5.1.
>
> The legal conclusion is inescapable; under the shared-time system, it is impossible for [Franklin] to provide its students with a sufficient number of graduation credits in four years. It is for this reason that, as noted by [the Superintendent], at least one other vocational-technical district [Morris County School of Technology] has acted to terminate its shared-time program. (*Id.* at 7-8)

Franklin concludes that *it,* rather than the Vocational District, is entitled to summary decision; however, in the alternative, it asks that the District's motion for summary decision be denied in light of the "significant factual issues" Franklin has raised concerning its ability to provide T&E to shared-time students. (*Id.* at 8)

In reply, the Vocational District counters that Franklin offers no case law contradicting the District's contention that shared-time as well as full-time students are entitled by statute to attend the county vocational school. The District further proffers

that its shared-time programs are fully within the authorization of *N.J.S.A.* 18A:54-3 since they are conducted during the day, are part-time, and offer both theory and "hands on" experience of precisely the type referenced in the statutory language upon which Franklin relies. (Vocational District's Reply Brief at 2) With respect to Franklin's "T&E" argument, the District responds:

> [Franklin] raises arguments regarding scheduling that are red herrings. The main objection raised by [Franklin] to the sending of their students to Shared Time programs is that they will miss one period of gym per week. [Franklin] admits that its current schedule mandates more credits than are necessary for students to graduate in the subject area of gym. Rather than permit [its] students to obtain the benefits of the programs offered at [the Vocational District], Franklin's main objection is that the overscheduling of gym classes [supersedes its] desire to restructure the schedule to give [its] students every opportunity to receive the education suited to their needs.
>
> The [Vocational District] currently has 292 full-time students and 433 shared-time students who come from all over the county. By way of example, Bridgewater sends 103 students as shared-time students, Hillsborough sends 55 shared-time students, Manville sends 50 shared-time students, North Plainfield sends 33 shared-time students, Somerville sends 10 shared-time students and Watchung sends 30 shared-time students.*** Certainly [Franklin] does not contend that these students do not meet the requirements necessary to be graduated from high school in 4 years. These school districts created a schedule to suit the needs of their students. They make it work successfully to the benefit of their students.
>
> [Franklin] also argues that the ***high school graduation [requirement] for world languages [is] 10 credits. [As demonstrated by the appended April 8, 2004 memorandum from the Commissioner of Education, the] 10-credit total has been suspended for students who entered the 9th grade in the school years 2001 through 2002, 2002 through 2003 and 2003 through 2004. Students who are entering the 9th grade in 2004 through 2005 are subject to 5 credits or testing.*** Therefore, the argument regarding world language is also a red herring. (*Id.* at 2-3, footnote omitted)

The Vocational District reiterates its request for summary decision, contending that Franklin has neither presented a genuine issue of material fact nor offered legal argument sufficiently persuasive to defeat the District's motion. (*Id.* at 3)

COMMISSIONER'S DETERMINATION

Upon review, the Commissioner agrees with the Vocational District that Franklin's position is entirely without merit and that the District is entitled to summary decision as a matter of law.

Both of Franklin's legal arguments are rooted in the absence of any explicit reference to "shared-time" instruction in the enabling legislation for the establishment of vocational education programs, *N.J.S.A.* 18A:54-3. However, even if one could, in theory, attempt to argue that the Legislature, upon enactment of the statute in its present form in 1967 or of its predecessor in 1913, might not have specifically contemplated shared-time programs, such interpretation could not be presently sustained in light of State funding laws concurrently in effect since at least 1975.[4]

In that year, the Legislature expressly made formulaic provisions to calculate State aid for "pupils regularly attending both the schools of the district and of a county vocational school district in the same county," P.L. 1975, c. 212 (*N.J.S.A.* 18A:7A-3, definition of "resident enrollment"). Upon repeal of this provision in 1990, a similar provision was incorporated into the new definition of "resident enrollment" enacted that year, P.L. 1990, c. 52 (*N.J.S.A.* 18A:7D-3). Current law, P.L. 1996, c. 138, enacted upon repeal of c. 52, retains similar provisions in its definition of "resident enrollment" at *N.J.S.A.* 18A:7F-3, and additionally provides, at *N.J.S.A.* 18A:7F-21, a formula for State aid to county vocational schools that specifically allows for "pupils attending shared-time secondary programs."

Additionally, both the State Board of Education and the Department of Education have recognized shared-time programs as an integral part of New Jersey's

[4] Earlier funding laws were not reviewed for purposes of this decision.

educational system through diverse indications ranging from the School Register (*N.J.A.C.* 6:3-9.1(c)), to the program criteria for special education students (*N.J.A.C.* 6A:14-4.7(e)1ii), to the Application for State School Aid (ASSA), the Report Card, and official Audit Instructions for statutorily required annual audits. That *N.J.A.C.* 6A:19, Vocational-Technical Education, does not mention shared-time programs, except incidentally, reflects nothing more than the fact that no such differentiation is necessary in that context, since the purpose of the chapter is to regulate *vocational* instruction, not concomitant academic instruction which a student may, in order to receive a State-endorsed high school diploma, take either at a full-time vocational school or at his or her home high school. Simply stated, shared-time vocational programs have been, and remain, an important part of New Jersey's educational landscape, sanctioned by the Legislature, the State Board and the Department.

Franklin's attempt to argue that *N.J.S.A.* 18A:54-20.1 does not apply to shared-time students is equally disingenuous. That statute plainly entitles students whose own district does not maintain a vocational school to attend the county vocational school if they have applied and have been accepted there, without distinction between full-time and shared-time programs. Even if the Commissioner were to grant, solely for purposes of argument, Franklin's alternative contention that *N.J.S.A.* 18A:54-3 permits the offering of shared-time programs but does not create an independent student entitlement to attend them, that statute regulates the provision of vocational instruction in general, whereas *N.J.S.A.* 18A:54-20.1 pertains specifically to county vocational schools and *does* create such an entitlement, since the right to attend the county school is not contingent on the program attended.

Finally, the Commissioner concurs with the Vocational District that any scheduling difficulties Franklin may experience as a result of students attending county vocational programs on a shared-time basis cannot serve to deprive such students of their statutory entitlement to this form of vocational education if they choose and are qualified for it. Even granting every inference to Franklin's factual contentions, the Commissioner does not find them sufficient to support a claim that Franklin cannot provide T&E to shared-time students, particularly in light of the flexibility allowed, indeed encouraged, by the Department and State Board with respect to fulfillment of high school graduation requirements. Nor can it be ignored that such flexibility is expressly provided, at least in part, so that interested students may pursue from shared-time vocational programs.[5]

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[5] See, for example, the following exchange from public comments received on proposed amendments to *N.J.A.C.* 6A:8-5.1:

> 5. COMMENT: The commenter expressed concern that even the five-credit world languages requirement, along with the five-credit requirement in the visual and performing arts, will create a hardship for many students who want to pursue a shared-time vocational-technical program. The commenter concluded that students who are unable to complete these credit requirements plus any required remedial studies in their freshman and sophomore years will not have time in their schedules to attend a shared-time vocational program, and they will be deprived of the opportunity to develop meaningful occupational skills that prepare them for employment after graduation. (8) [Comment from Thomas Bistocchi – President, New Jersey Council of County Vocational-Technical Schools]
>
> RESPONSE: The department, in recognition of time issues associated with shared-time vocational-technical programs, has endorsed the option of having students take a competency-based assessment in world languages in middle school to satisfy the requirement in lieu of seat time in a high school instructional program. This option is included in the proposed amendments at *N.J.A.C.* 6A:8-5.1(a)1i(7). The department also believes that all districts involved in shared-time vocational programs must make every effort to create flexible schedules so that students can participate in vocational programs. (36 N..J. R. 662-663)

See also the following exchange from public comment received by the State Board prior to proposal and the resulting statement included in the summary published by the Department at proposal level:

> **14. Comment:** The commenters expressed concern that while some districts utilize option ii in *N.J.A.C.* 6A:8-5.1(a)1ii, most county vocational-technical schools and local districts that send students on a shared-time basis to *(sic)* do not make use of this option, and most parents and students are unaware of the option. The commenters suggested strengthening the code language by specifically defining the ability of vocational-technical students to address world languages and visual and performing arts competencies through option ii and compelling sending districts to recognize and accept option ii alternatives. This would provide alternatives to a full year of "seat time" without eliminating credit requirements. **(20)** [Comment from William R. Donald, Jr., Supervisor, Fine and Performing Arts, Teaneck Public Schools]
>
> **Response:** The department agrees that option ii is underutilized and that clarification of the language in *N.J.A.C.* 6A:8-5.1(a)1ii might encourage greater utilization of this option by districts, schools, and students. Such clarification is provided in the department's current proposal.
> (http://www.state.nj.us/njded/code/title6a/chap8/amendment2/crform.htm)
>
> The 110-credit requirement may be met in whole or in part through program completion aimed at achieving the Core Curriculum Content Standards, as described in *N.J.A.C.* 6A:8-5.1(a)1ii, commonly referred to as "option ii" or "option two." The proposed amendments will provide additional guidance to help districts take advantage of

Accordingly, the Somerset County Vocational-Technical School District is entitled to prevail in its request for relief as a matter of law. The Commissioner hereby grants summary decision to the District and declares null and void the Franklin Township Board of Education's policy prohibiting the sending of its students to shared-time county vocational programs.[6]

IT IS SO ORDERED.[7]



COMMISSIONER OF EDUCATION

Date of Decision: 10/8/04

Date of Mailing: 10/8/04

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this option. For example, they will provide districts with several possible models for developing option ii activities or programs linked to the Core Curriculum Content Standards. They include interdisciplinary or theme-based programs, independent study, co-curricular or extra-curricular activities, magnet programs, student exchange programs, distance learning opportunities, internships; community service; or other structured learning experiences. The proposed amendments clarify that activities and programs developed in accordance with option ii shall include appropriate assessments and that student achievements may meet or exceed the Core Curriculum Content Standards. Depending on their individual interests, abilities, and career plans, many students will and should develop knowledge and skills that build upon and go beyond the specific indicators in the Core Curriculum Content Standards.

Other proposed additions to the option ii rules empower district boards of education to utilize performance or competency assessment to approve, as fulfilling requirements for high school graduation, the completion of educational programs or activities occurring all or in part prior to a student's high school enrollment.

(35 N.J.R. 4166)

[6] Inherent in this Order is the concomitant relief sought by the District with respect to student applications and informational presentations to students. See Note 1 above.

[7] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

#396-04

396-04

OAL DKT. NO. EDU 3983-04
AGENCY DKT. NO. 474-12/03

ANTHONY GISONTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner is unable to accept the settlement. Notwithstanding that the agreement was signed by counsel for both parties, the file of this matter contains a letter, dated August 16, 2004, from Board counsel, Joel M. Miklacki, to Administrative Law Judge Maria LaFiandra specifically advising that this settlement should not proceed until it has been presented to and approved by the Board, which Mr. Miklacki anticipated would occur at its public meeting scheduled for August 30, 2004. The Bureau of Controversies and Disputes contacted Mr. Miklacki to ascertain whether Board approval had been secured and was advised that, to date, it has not. In that agency approval would render this agreement a final decision pursuant to *N.J.A.C.* 1:1-19.1(d), the Commissioner finds that accord to its terms by all necessary entities must be accomplished prior to the Commissioner's approval of the settlement.

Accordingly, this matter is remanded to the OAL for appropriate action in light of this decision. Should the parties be unable to reach agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/08/04

Date of Mailing: 10/12/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3983-04

AGENCY DKT. NO. 474-12/03

ANTHONY GISONTI,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY

Respondent.

Harold N. Springstead, Esq., for Petitioner (Springstead & Maurice, attorneys)

Joel M. Miklacki, Esq., for Respondent

Record Closed: August 17, 2004 Decided: August 20, 2004

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on May 3, 2004, 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.

A telephone prehearing was scheduled for August 17, 2004, which adjourned to August 31, 2004. On August 17, 2004, they submitted the attached Settlement Agreement, which sets forth the terms of the settlement which are 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 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 (45) 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 20, 2004
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

8-24-04
DATE

M. Kathleen Dunson/CH
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 27 2004
DATE

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
AUG 17 2 07 PM '04

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(973) 893-9800
Attorney for Respondent Passaic Board of Education

ANTHONY GISONTI Petitioner, v. BOARD OF EDUCATION IN THE CITY OF PASSAIC Respondent.	BEFORE THE COMMISSION OF EDUCATION IN NEW JERSEY OAL DOCKET NO.: EDU~~3938-04~~ 3983-04 EDUCATION DOCKET NO.: 474-12/03 SETTLEMENT AGREEMENT

Anthony Gisonti, Petitioner in the above matter and the Passaic Board of Education responding to the above matter hereby agrees to resolve in their entirety the matter of Anthony Gisonti vs. Passaic Board of Education before the Commissioner of Education OAL Docket No. EDU3938-04, Agency Reference Number 474-12/03 upon the following terms:

1. Respondent agrees to pay the Petitioner, Petitioner's back salary withheld as a result of his suspension for being charged criminally.

2. Petitioner agreeing to retire from his present position as an employee/teacher of the Passaic Board of Education School District.

3. Petitioner agrees to withdraw his claim before the Commissioner of Education, Anthony Gisonti vs. Passaic Board of Education, OAL Docket Number EDU3938-04, Agency Reference Number 474-12/03. The withdrawal is contingent upon compliance by both the Respondent and Petitionor with the conditions as set forth in paragraphs one and two of this Agreement.

4. This Agreement constitutes the entire Agreement between the parties with regard to the matter at issue herein. The Agreement may not be utilized by either party of the proceeding as support of proof of any contention raised by that party in this proceeding and neither party admits any liability with regard to any of the allegations set forth in these proceedings.

5. Each party is responsible for their own attorney's fees in satisfaction of the work performed regarding this claim.

Springstead and Maurice, Attorney for Petitioner Anthony Gisonti

By: _____ Date: 8/13/04
Harold N. Springstead

Joel M. Miklacki, Esq., Attorney for Respondent Passaic Board of Education

By: _____ Date: 8/13/04
Joel M. Miklacki, Esq.

#399-04

OAL DKT. NO. EDU 7891-03
AGENCY DKT. NO. 201-6/03

BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL AND TECHNICAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. In accordance with *N.J.A.C.* 1:1-18.4, the respondent Board of Education (Ramapo) filed timely exceptions, to which the petitioning Board of Education (Vocational District) duly replied.

In its exceptions, Ramapo objects to the failure of the Administrative Law Judge (ALJ) to find that Ramapo has, in fact, obtained Department of Education approval and Classification of Instruction Program (CIP) codes for its University Programs, since the record clearly supports such a finding. Ramapo further objects to the ALJ's failure to conclude that such approval, given that Ramapo's University Programs are "of the identical type, with the same CIP codes" as those offered by the Vocational District, qualifies Ramapo as an "approved local secondary vocational-technical education program" meeting the requirement of *N.J.S.A.* 18A:54-20.1(a) for exemption from the obligation to send students to the county schools. (Ramapo's Exceptions at 2-3,

quotations at 3) In this regard, Ramapo protests the ALJ's reliance on the matter of *Board of Education of the Union County Vocational-Technical Schools v. Board of Education of the City of Linden, Union County,* Commissioner of Education decision, December 6, 2002, *affirmed* State Board of Education, May 7, 2003, contending that that matter is factually and legally distinguishable because Linden's high school merely offered a number of vocational courses, whereas Ramapo offers four-year University Programs bearing Department approval through CIP codes and integrating specialized vocational and comprehensive academic training in a manner identical to the programs offered by the Vocational District. In light of this distinction, Ramapo contends, the fact that its programs are not housed in a separate building is of no import for purposes of *N.J.S.A.* 18A:54-20.1(a). (*Id.* at 4)[1]

In reply, the Vocational District urges that the Initial Decision be adopted in its entirety, since Ramapo does not maintain a "vocational school" devoted exclusively to vocational education as contemplated by the statutory exemption provision, but rather comprehensive high schools through which vocational education programs are delivered. The District reiterates that the existence of Ramapo's University Programs does not transform its comprehensive high schools into vocational schools, any more than Linden's vocational courses did, and that Ramapo's efforts to cloud the issue with questions of "approval" and "identity" must be rejected, since, for purposes of *N.J.S.A.* 18A:54-20.1(a) and its implementing rule, *N.J.A.C.* 6A:19-3.1, it does not matter whether Ramapo's programs are approved or CIP-coded; nor does it matter whether their content and structure is similar (or even identical) to that of the Vocational District's academy

[1] Ramapo did not take exception to the ALJ's conclusion that the Vocational District has standing to pursue this matter.

programs. If a student is accepted at the county vocational school, the District contends, the only basis on which a local or regional board of education may lawfully refuse payment for its resident students in attendance there, as found by the ALJ, is if it operates its own vocational school, which Ramapo clearly does not. (Vocational District's Reply Exceptions at 2-10)

Upon careful review and consideration, the Commissioner concurs with the analysis and conclusions of the ALJ as set forth in the Initial Decision.

In essence, this matter turns on the question of whether a comprehensive high school may include, within its range of offerings, a distinct curricular track centered on a DOE-approved, CIP-coded vocational program, and by the existence of such track, be considered a "vocational school" within the meaning of *N.J.S.A.* 18A:54-20.1(a) so as to enable the operating local or regional board of education to absolve itself from any obligation for tuition and transportation for resident students wishing to attend a county vocational school program in the same CIP approval area.[2] For the reasons expressed by the ALJ and those which follow, the Commissioner holds that it cannot.

As noted by the ALJ in the Initial Decision at 9, the last sentence of *N.J.S.A.* 18A:54-20.1(a) refers to a "school district maintaining a vocational school or schools *pursuant to article 2 of chapter 54 of Title 18A of the New Jersey Statutes*" (emphasis supplied). *N.J.S.A.* 18A:54-5 and *N.J.S.A.* 18A:54-6 of that article authorize local and regional districts to establish and maintain vocational schools, but also require the approval of the Commissioner subject to the advice and consent of the State Board in

[2] It is assumed for purposes of this analysis that Ramapo's programs do, in fact, operate under valid CIP codes, since, in the absence of such approval, there could be no arguable basis whatsoever for a claim of the type Ramapo attempts to make herein.

order to do so. There is no claim here that Ramapo has obtained any approval of this type, in contrast, significantly, to boards of education which were denied "vocational school" status notwithstanding their prior approval as Local Area Vocational Schools in recent matters turning on that question, *D.M., on behalf of minor child, A.M., v. Board of Education of the City of Long Branch, Monmouth County, and Board of Education of the Red Bank Regional High School District, Monmouth County*, Commissioner of Education decision, November 28, 2000, *affirmed* State Board of Education, July 10, 2001, and *Union County Vo-Tech, supra.* Indeed, as those matters have made abundantly clear, the present State Plan for Vocational Education has acted, together with the history of State funding laws and the operative State Board of Education regulations, effectively to preclude such status, providing instead for vocational instruction to be delivered either through comprehensive high schools or county vocational schools and approvals to be granted for *programs* rather than schools.[3]

Neither can Ramapo succeed in its attempt to distinguish its situation from that of the Linden Board of Education in *Union County Vo-Tech, supra.* Contrary to Ramapo's contention, Linden did not "simply" offer "a number of vocational courses" (Ramapo's Exceptions at 4); indeed, it had a separate high school building specially constructed for, and largely devoted to, vocational programs; prior approval as a Local Area Vocational School District; and Department approval through CIP codes for its entire range of vocational offerings, which was substantial at the time of the Commissioner and State Board decisions holding that Linden was not exempt from the

[3] In addition to the regulations, practices and documents referenced in the cited decisions, see also the Department's current (2003) *Vocational-Technical Education Program Approval Procedure* at http://www.state.nj.us/njded/voc/occprapp.htm.

requirements of *N.J.S.A.* 18A:54-20.1(a). Nor does it matter whether the programs offered by Ramapo are "identical" to those offered by the Vocational District's academies, either in CIP coding or actual structure and content, both because Ramapo does not operate a "vocational school" within the meaning of the statute and because its arguments with respect to identity are, as correctly noted by the ALJ, based on a regulation pertaining to students seeking vocational instruction in another local or regional school district, not in the county vocational school. (Initial Decision at 10)

Accordingly, for the reasons expressed by the ALJ and herein, the Vocational District is entitled to prevail in its claim for tuition and transportation costs as a matter of law. The Initial Decision of the OAL is adopted as the final decision in this matter, and the ALJ's recommended Orders for relief are to be implemented forthwith. In so holding, the Commissioner, like the ALJ, denies the District's claim for prejudgment interest and counsel fees.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 10/13/04
Date of Mailing: 10/13/04

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7891-03
AGENCY DKT. NO. 201-6/03

BOARD OF EDUCATION OF
THE BERGEN COUNTY
VOCATIONAL AND TECHNICAL
SCHOOL DISTRICT,

Petitioner,

v.

BOARD OF EDUCATION OF THE
RAMAPO/INDIAN HILLS REGIONAL
HIGH SCHOOL DISTRICT,

Respondent.

William C. Soukas, Esq., for petitioner
(Nowell, Amoroso, Klein, Bierman, attorneys)

Allan P. Dzwilewski, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: August 19, 2004 Decided: August 25, 2004

BEFORE **RICHARD McGILL**, ALJ:

This matter concerns a dispute between the Board of Education of the Bergen County Vocational and Technical School District ("petitioner") and the Board of Education of the Ramapo/Indian Hills Regional High School District ("respondent") with respect to respondent's obligation to reimburse petitioner for tuition, transportation and other costs related to the attendance of respondent's pupils at petitioner's Academies program. Petitioner now moves for summary decision, while respondent seeks dismissal of the petition.

PROCEDURAL HISTORY

Petitioner filed a Petition for Declaratory and other Relief with the Commissioner of Education on June 13, 2003, invoking the Commissioner's authority to hear and determine controversies arising under the school laws pursuant to *N.J.S.A.* 18A:6-9. After respondent filed an answer on July 3, 2003, the Commissioner advised the parties by letter dated July 11, 2003, that the matter would proceed as a Petition of Appeal. The matter was transmitted to the Office of Administrative Law on September 3, 2003, for determination as a contested case.

On March 25, 2004, petitioner filed a motion for leave to file an amended petition and for summary decision. Thereafter, respondent submitted a response, and petitioner filed a reply. On June 3, 2004, respondent filed a motion to dismiss for lack of standing, and subsequently, petitioner submitted a response. Petitioner's motion for leave to file an amended petition was granted by Order dated August 19, 2004. Because both motions are based upon substantially the same facts, they will be considered together.

MOTIONS

A. Legal Standard for Summary Decision

A motion for summary decision should be granted where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b). The same standard is applied in the courts of this State pursuant to *R.* 4:46-2. Summary

judgment "is designed to provide a prompt, businesslike and inexpensive method" to dispose of actions which do not present any genuine issue of material fact. *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67, 74 (1954). The movant must show that there is no genuine issue of material fact, and all inferences of doubt are drawn against the movant. *Id.* at 74-75. However, excessive caution which would undercut the purposes of a motion for summary judgment should be avoided. *Pierce v. Ortho Pharmaceutical Corp.*, 84 *N.J.* 58, 65 (1980). Thus, if the opposing party offers only facts which are immaterial or insubstantial in nature, these circumstances should not defeat a motion for summary judgment. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* at 75. Although the pleadings may raise a factual issue, summary judgment procedure pierces the allegations in the pleadings, where the other papers show the absence of any genuine issue of material fact. *Ibid.*

In determining whether there exists a genuine issue as to a material fact, the judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, 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 America*, 142 *N.J.* 520, 523 (1995).

B. Facts

Respondent contends that the motion for summary decision should be denied because there is a genuine issue as to one material fact. This contention will be discussed below. There is no genuine issue as to the balance of the facts, and I **FIND** as follows:

1. Petitioner operates a county vocational school district created under the authority of *N.J.S.A.* 18A:54-1 *et seq.* and provides vocational education.

2. Respondent provides secondary educational services to pupils domiciled in Franklin Lakes, Oakland and Wyckoff, New Jersey (the "FLOW District" or "regional district").

3. Petitioner offers and operates certain vocational and technical educational programs entitled "Academy" programs. Currently, petitioner offers seven Academy programs as follows: (1) The Academy for Medical Science and Technology ("AMST"); (2) The Academy for Business and Computer Technology ("ABCT"); (3) The Academy for Engineering and Design Technology ("AEDT"); (4) The Academy for the Advancement of Science and Technology ("AAST"); (5) The Power and Transportation Institute ("APT"); (6) The Academy for Visual Arts and Graphic Communication ("AVAGC"); and (7) The Academy for Culinary Arts ("ACA").

4. One or more pupils from the Flow District are enrolled, or will become enrolled, in one or more of petitioner's Academy programs.

5. At least six pupils from the Flow District are enrolled as freshman in petitioner's Academy programs.

6. Respondent operates two comprehensive high schools.

7. Respondent offers and operates certain academic programs entitled the University Program for Science, Mathematics and Research, the University Program for International Studies and Business and the University Program for Information Technology.

8. Any vocational programs offered by respondent are offered through its comprehensive high schools.

9. On March 24, 2003, respondent approved a resolution ("March resolution") which purports to authorize the withholding of all tuition and transportation costs for

FLOW District pupils who attend petitioner's AAST and AEDT programs beginning with the incoming 2003-04 freshman class.

10. As support for this action, the March resolution states that respondent has obtained Classification of Instruction Program vocational codes ("CIP codes") to support its University Programs.

11. The March resolution specifically states as follows:

> WHEREAS, these University Programs, based on these CIP Codes and/or their nature, are the exact type of programs offered by the Science and Technology and Engineering and Design Academies operated under the auspices of the Bergen County Vocational Schools, thus prohibiting this Board of Education from paying tuition costs of high school aged students residing in the FLOW District.

12. The March resolution authorized its widespread distribution so that the FLOW Districts and all students affected be immediately notified that they can apply to and attend petitioner's Academies but without tuition from respondent "as such is prohibited by *N.J.A.C.* 6A:19-3.1(b)."

13. In accordance with the March resolution, respondent has failed and refused to pay approximately $35,000 in tuition and transportation costs attributed to six FLOW District pupils who enrolled as freshman in petitioner's AAST program for the 2003-04 school year.

14. Respondent intends to continue to fail and refused to pay tuition and transportation costs for all new pupils enrolling in petitioner's AAST and AEDT programs as freshman beginning in the 2003-04 school year and all successive years.

15. On December 8, 2003, respondent approved a similar resolution ("December resolution") except that it pertains to pupils enrolling in petitioner's ABCT

program and a Business and Finance Academy effective for the 2004-05 school year.

16. Respondent disseminated the March and December resolutions to families within the FLOW area school district.

17. Respondent currently pays tuition and transportation costs for fifty-seven students who attend petitioner's Academies.

18. The number of applications to petitioner's Academies from FLOW District pupils trended upward from seven for the class of 1999 to fifty-one for the class of 2007.

19. The corresponding number of applications for the class of 2008 fell to twenty-six.

20. The tuition per pupil at petitioner's Academies for the 2003-04 school year is $5,750.

Respondent maintains that there is a genuine issue of material fact as to whether respondent actually obtained the CIP codes. In its statement of undisputed material facts, petitioner asserted that respondent failed to obtain valid CIP codes for any of its purported vocational programs. This factual assertion is based upon respondent's failure to respond to a request for admissions which stated in part as follows: "None of the educational programs offered by the respondent to its pupils operate pursuant to a valid classification of instruction program ("CIP") code." In accordance with *N.J.A.C.* 1:1-10.4(c), the requests for admissions, which were made in November 2003, would be deemed to be admitted, because respondent did not respond within fifteen days.

In response to the motion, respondent submitted copies of four letters from the Acting Director of the Department of Education's Office of Vocational-Technical, Career and Adult Programs granting approval to operate four programs with CIP codes. For reasons set forth

below, valid CIP codes for the programs in question would not affect the outcome of the case, and therefore, these facts are not material and do not constitute a reason to deny a motion for summary decision.

C. Analysis

Respondent moves to dismiss the petition in this matter for lack of standing. In support of the motion, respondent argues that petitioner has not demonstrated a sufficient stake in the matter or a substantial likelihood of harm from an adverse decision. More specifically, respondent argues that petitioner interviews about half of the applicants who apply and accepts about two-thirds of those interviewed. The pupils who are rejected include applicants from the FLOW District. Further, a comparison of the number of freshmen from the FLOW District enrolled in the class of 2006 with the number of FLOW District freshmen enrolled in the class of 2007 reveals that the FLOW District enrollment has remained constant at seventeen students. It is especially notable that FLOW District freshmen enrollment in the AAST program actually increased from four students in the class of 2006 to six students in the class of 2007. Thus, despite the drop in the number of applications, the enrollment of pupils from the FLOW District has remained the same. Moreover, there is no evidence that the drop in the number of applications is attributable to the March and December 2003 resolutions. Lastly, petitioner will not suffer a loss of tuition. The only change is that the tuition will be paid by the pupils' families rather than respondent. Respondent concludes that petitioner is not an interested person who will be substantially, specifically and directly affected by the outcome of the controversy.

In response, petitioner argues that it has a specific statutory right pursuant to *N.J.S.A.* 18A:54-20.1 to receive the tuition directly from respondent. Petitioner maintains that it has standing to enforce this right. At present, six of respondent's pupils attend the AAST program, while two are enrolled in the ABCT/ABF program. With a tuition of $5,750 per pupil per year and transportation costs of approximately $1,000 per pupil per year, respondent has withheld approximately $54,000 from petitioner.

The basic requirements for standing are a sufficient stake in the matter and a genuine adverseness. *Strulowitz v. Provident Life and Cas.*, 357 *N.J. Super.* 454, 459 (App. Div. 2003). To have standing, a party only needs to show a substantial likelihood that he or she will experience some harm in the event of an unfavorable decision. *Ibid.* A financial interest in the outcome ordinarily is sufficient to confer standing. *Ibid.*

By these standards, it is evident that petitioner has standing in this matter. Petitioner has a financial interest in that it may recover approximately $54,000 from respondent. Further, the amount is likely to increase with each passing school year. The possibility that petitioner could recover the sums from the pupils' parents is of no consequence in view of petitioner's reliance on a statute which specifically obligates the regional school district to pay tuition to the county vocational school district. Therefore, I **CONCLUDE** that the motion to dismiss for lack of standing is without merit and must be denied.

In regard to the motion for summary decision, the pertinent statute is *N.J.S.A.* 18A:54-20.1(a), which provides as follows:

> The board of education of each school district or regional school district in any county in which there is a county vocational school district shall send to any of the schools of the county vocational school district each pupil who resides in the school district or regional school district and who has applied for admission to and has been accepted for attendance at any of the schools of the county vocational school district. The board of education shall pay tuition for each of these pupils to the county vocational school district pursuant to subsection c. of this section. The provisions of this section shall not apply to the board of education of a school district or regional school district maintaining a vocational school or schools pursuant to article 2 of chapter 54 of Title 18A of the New Jersey Statues.

Petitioner cites this provision as statutory authority for the proposition that a regional school district must send to the schools of the county vocational school district each pupil who resides in the regional school district and who has applied for admission to and has been accepted for attendance at any of the schools of the county vocational school district. Further, the regional

school district is required to pay tuition for each of these pupils to the county vocational school district.

Respondent relies on the last sentence of *N.J.S.A.* 18A:54-20.1(a) for the proposition that this requirement is not applicable to a regional school district which maintains its own vocational school. Respondent maintains that provision of vocational programs in a comprehensive high school equates to operation of a vocational school for purposes of *N.J.S.A.* 18A:54-20.1(a). Respondent's position raises the issue whether respondent maintains a vocational school.

It is noteworthy that the last sentence of *N.J.S.A.* 18A:54-20.1(a) refers to a "regional school district maintaining a vocational school or schools pursuant to article 2 of chapter 54 of Title 18A of the New Jersey Statutes." The key provisions of article 2 for present purposes are *N.J.S.A.* 18A:54-5, which provides that a regional school district may establish and maintain vocational schools, and *N.J.S.A.* 18A:54-6, which states that various approvals by the commissioner are required before any such school may be established, subject to the advice and consent of the state board.

One difficulty with respondent's position is that respondent has not demonstrated that it has received any approvals to establish a vocational school. Another difficulty is that respondent's contention concerning provision of vocational programs at a comprehensive high school is directly contrary to the determination in *Bd. of Educ. of the Union County Vocational-Technical Schools v. Bd. of Educ. of the City of Linden, Union County*, EDU 11819-99, Initial Decision (October 18, 2002), *adopted* Comm'r (December 6, 2002), <http://lawlibrary.rutgers.edu/oal/search.html>, *aff'd* St. Bd. of Educ. (May 7, 2003) <http://www.nj.gov/njded/legal/> to the effect that provision of vocational programs in a comprehensive high school does not amount to establishment of a vocational school. Therefore, I **CONCLUDE** that the exemption in *N.J.S.A.* 18A:54-20.1(a) is not currently applicable to respondent.

Respondent next argues that it is not required to pay tuition to petitioner because respondent offers the identical type of program. As support for this argument, respondent cites *N.J.A.C.* 6A:19-3.1(b), which provides as follows:

> Students shall be permitted to enroll in programs of vocational instruction offered by local district boards of education other than their resident district so long as the resident local district board of education agrees to pay the tuition and transportation costs and does not offer an identical type of program, which is approved and meets or exceeds current program performance standards, with the same Classification of Instructional Programs (CIP) code, and as long as space is available for additional enrollees in the programs offered by the receiving district board of education.

The difficulty with respondent's argument is that this regulation pertains to a situation where a program of vocational instruction is offered by a local district board of education other than the resident district. A county vocational school district is not a local school district. Under the circumstances, I **CONCLUDE** that *N.J.A.C.* 6A:19-3.1(b) does not provide a basis for respondent's refusal to pay tuition for its pupils attending petitioner's vocational school.

In view of these determinations concerning *N.J.S.A.* 18A:54-20.1(a) and *N.J.A.C.* 6A:19-3.1(b), it is immaterial whether respondent had CIP codes for the programs in question. It follows that there is no genuine issue as to any material fact in this matter.

The applicable regulation is *N.J.A.C.* 6A:19-3.1(a), which provides as follows:

> All students shall be guaranteed the right to apply to and, if accepted, to attend a county vocational school. The sending district shall be responsible for the tuition and transportation costs for students admitted to a county vocational school.

In accordance with *N.J.S.A.* 18A:54-20.1(a) and *N.J.A.C.* 6A:19-3.1(a), respondent is obligated to pay to petitioner tuition and transportation and other costs for each of respondent's

pupils attending petitioner's vocational schools. Therefore, I **CONCLUDE** that petitioner's motion for summary decision is meritorious and should be granted.

Petitioner seeks six forms of relief. First, petitioner requests a determination that respondent's withholding of tuition, transportation and other costs is contrary to *N.J.S.A.* 18A:54-20.1 and *N.J.A.C.* 6A:19-3.1. That determination has been made herein, and it follows that the requested relief should be granted.

The second form of relief is an order compelling respondent to rescind the March and December 2003 resolutions authorizing the withholding of tuition, transportation and related cost payments owed to petitioner for the FLOW District students who attend petitioner's Academy educational programs. The March and December 2003 resolutions are unlawful. Additionally, they may still give students and their parents the impression that respondent will not pay tuition and other costs for attendance at petitioner's Academy programs. This circumstance is unacceptable, and therefore, this form of relief requested by petitioner should be granted.

The third form of relief is an order compelling respondent to advise each and every FLOW District student in writing of its violation of State law and its rescission of the March and December 2003 resolutions as required by the Commissioner of Education. Absent this relief, students and their parents may well be unaware of the determinations herein and the rescission of the March and December 2003 resolutions and make their decisions related to petitioner's Academies on the belief that they will be responsible for tuition. This circumstance should be corrected, and therefore, this form of relief should be granted.

The fourth form of relief is an order compelling respondent to immediately tender payment of any and all tuition and transportation and other costs wrongfully withheld by respondent. In accordance with the determinations herein, respondent is obligated to pay these amounts to petitioner. It follows that this form of relief should be granted.

The fifth form of relief is an award of lawful interest on the monies wrongfully withheld by respondent. In order to prevail on a request for an award of interest, a petitioner must request such relief and successfully establish a claim to a money award. *N.J.A.C.* 6A:3-1.17(a). Further, any petitioner seeking an award of prejudgment interest must propose an interest calculation in accordance with *N.J.A.C.* 6A:3-1.17(c). *N.J.A.C.* 6A:3-1.17(a)1. For prejudgment interest to be awarded, the denial of the monetary claim must be an action taken in bad faith and/or has been determined to have been taken in deliberate violation of a statute or rule. *N.J.A.C.* 6A:3-1.17(c)1. Here, petitioner has not submitted a proposed interest calculation, and there is no indication that respondent's actions were taken in bad faith or in deliberate violation of a statute or rule. It follows that petitioner's request for prejudgment interest must be denied. Petitioner may apply for postjudgment interest in accordance with the standard set forth in *N.J.A.C.* 6A:3-1.17(c)2, if respondent fails to satisfy the claim within sixty days of the final decision in this matter.

Lastly, petitioner seeks an award of counsel fees. The difficulty with this request is that the Commissioner does not have the authority to award attorney's fees. *Balsley v. North Hunterdon Bd. of Educ.*, 117 *N.J.* 434, 442-43 (1990). Therefore, this form of relief must be denied.

Accordingly, it is **ORDERED** that:

1. Respondent's motion to dismiss the petition for lack of standing is denied.

2. Petitioner's motion for summary decision is granted.

3. Respondent's withholding of tuition, transportation and other costs is contrary to *N.J.S.A.* 18A:54-20.1(a) and *N.J.A.C.* 6A:19-3.1(a).

4. Respondent shall rescind the March and December 2003 resolutions authorizing the withholding of tuition, transportation and related cost payments for the FLOW District students who attend petitioner's Academy educational programs.

5. Respondent shall advise each and every student in writing that the March and December 2003 resolutions were determined by the Commissioner of Education to be violative of State law and of the rescission of the March and December 2003 resolutions.

6. Respondent shall immediately tender payment of any and all tuition, transportation and other costs wrongfully withheld by respondent as determined herein.

7. Petitioner's request for prejudgment interest is denied

8. Petitioner's request for counsel fees 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 (45) 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 (13) 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, 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.

Aug. 25, 2004
DATE

Richard McGill
RICHARD McGILL, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

8/25/04
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 26 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

#400-04

OAL DKT. NO. EDU 7893-03
AGENCY DKT. NO. 228-6/03

YOUTH CONSULTATION SERVICE, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE, RICHARD ROSENBERG, ASSISTANT COMMISSIONER,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and petitioner's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge. In so doing, the Commissioner agrees that, prior to the recent adoption of the technical amendment of *N.J.A.C.* 6A:23-4.2(a)(2), the rule lacked clarity. The amended regulation, however, clearly obligates private schools for the disabled to notify sending districts during the year of anticipated increases in final tuition rates in excess of 10 percent above the tentative tuition rates charged, a clarification that should prevent the circumstances herein from arising in the future.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/13/04

Date of Mailing: 10/14/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7893-03
AGENCY DKT. NO. 228-6/03

YOUTH CONSULTATION SERVICE, INC.,

Petitioner,

v.

RICHARD ROSENBERG, ASSISTANT COMMISSIONER, DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

Respondent.

Daniel R. Esposito, Esq., for petitioner
(Kalison, McBride, Jackson & Murphy, attorneys)

Allison Colsey Eck, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: July 19, 2004 Decided: September 2, 2004

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by a private school from the denial of an increase in its final tuition rate of more than 10% over its tentative rate for the 2001-2002 school year. Petitioner Youth Consultation Service, Inc. ("YCS") operates the Fort Lee Education

Center ("Fort Lee Center"), an approved private school for children with disabilities. Pursuant to statute, the New Jersey Department of Education ("Department") has the responsibility of regulating tuition rates that a private school for the disabled can charge a sending school district.[1] Regulations promulgated by the Department provide that the Commissioner of Education ("Commissioner") shall approve a tentative tuition rate for the upcoming school year no later than January 1 of the preceding school year.[2] After the close of the pertinent school year, the Commissioner approves the final tuition rate for that year, which must be "equal to or less than the certified actual cost per student."[3]

Recently adopted regulations, effective May 1, 2001, require that, if a private school proposes to charge a final tuition rate in excess of 10 percent of the tentative rate, then it must notify each sending district and the appropriate Department official, "within 45 days after the private school becomes aware of such increase." *N.J.A.C.* 6A:23-4.2(a)(2). [4] The dispute between the parties involves what event triggers the running of this 45-day notification period.

The Department takes the position that the notice requirement must be read in harmony with *N.J.A.C.* 6A:23-4.4(a)(11), which obligates a private school to prepare quarterly financial reports, in a format prescribed the Commissioner, at least every quarter of the school year. While the regulation is silent as to the date of submission, an instruction sheet accompanying the form prescribed by the Department specifies that the quarterly ending dates are September 30, December 31, March 31 and June 30 and "the report should be completed no later than 30 days" after the quarterly ending date. Reading the two regulatory sections together, the Department contends that petitioner "knew or should have known" of the increased costs no later than July 30, 2002, which is thirty days after the close of the fourth quarter, and, therefore, that the 45-day notification period runs from that date. Alternatively, the Department alleges

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[1] *N.J.S.A.* 18A:46-21.
[2] *N.J.A.C.* 6A:23-4.2(i).
[3] *N.J.A.C.* 6A:23-4.(a)(a).
[4] 33 *N.J.R.* 1415(a) (May 7, 2001).

that YCS's internal accounting staff had sufficient knowledge of the increase by mid-August 2002 and that the 45-day notice period runs, at the very latest, from that time.

Relying on the literal terms of the regulation, YCS maintains that the 45-day notification period runs from October 31, 2002, when management received the final audit report from its certified independent auditor and first learned of the cost overruns. YCS challenges the Department's interpretation as contrary to the language of the regulations and as arbitrary, capricious and unreasonable. Moreover, YCS asserts that the Department's attempt to start the notification period running from the time when management "should have known" of the increase, as opposed to when it actually knew of the increase, constitutes illegal rulemaking without following the proper procedures.

The parties stipulate that YCS served the required notice on December 4, 2002. If the Department's interpretation is correct, YCS should have served the notice by September 15, 2002 (45 days from July 30, 2002) or September 29, 2002 (45 days from August 15, 2002) and its notice was out-of-time. If YCS is correct, the deadline for service of the notice did not expire until December 15, 2002 (45 days from October 31, 2002) and its notice was timely.

Procedural History

On December 10, 2002, the Department notified YCS that its final tuition rate could not exceed 10 percent of the tentative tuition rate for the 2001-2002 school year. YCS quantifies its loss as $164,600. Nearly three months later, on March 3, 2003, YCS filed an appeal to Assistant Commissioner Richard Rosenberg, contending that the "YCS management only became aware of the excess over the 10% threshold by our certified independent audit." By letter dated March 31, 2003, Assistant Commissioner Rosenberg reaffirmed the Department's denial of any increase above 10 percent, noting that "a school's accounting records must be maintained on a current basis to provide management with the most up-to-date financial information possible, particularly in the 3rd and 4th quarters" and that inadequate record-keeping does not excuse failure to comply with the 45-day notice requirement.

Shortly thereafter, on or about June 27, 2003, YCS filed an appeal to the Commissioner, naming Assistant Commissioner Rosenberg in his official capacity as respondent. Respondent filed an answer on July 31, 2003. Subsequently, on September 3, 2003, the Commissioner transmitted this matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

Since all of the material facts are undisputed, the parties agreed to submit the matter for disposition on cross-motions for summary decision. Both parties filed notices of motion for summary decision, together with briefs and supporting papers, on July 1, 2004. They filed reply briefs on or before July 15, 2004. The OAL held oral argument on July 19, 2004. Exhibits considered in deciding this case are listed in the appendix.

Findings of Fact

From the pleadings and the affidavits and exhibits attached to the moving papers, **I FIND** the following facts:

Youth Consultation Services, Inc. is a not-for-profit social service organization that provides educational and therapeutic programs at multiple site locations. Fort Lee Educational Center is an approved private school for the disabled operated by YCS in New Jersey. Fort Lee Center's tentative tuition rate for the 2001-2002 school year, expressed as the daily cost per student, was set at $153.23. YCS prepared timely financial reports for the second and third quarters of the 2001-2002 school year, which included a year-to-date tuition rate. Its financial report for the second quarter ending December 31, 2001 shows a tuition rate of $150.85 or a decrease of l.5% from the tentative tuition rate. Its financial report for the third quarter ending March 31, 2002 shows a tuition rate of $164.54 or an increase of 7.38% above the tentative tuition rate. Because these numbers are under the 10% threshold, YCS was not required to notify the school districts and the Department of an excess tuition charge.

Due to a variety of factors, YCS did not prepare its fourth quarter report by the filing date of July 30, 2002. Philip DeFalco, YCS's senior vice president, cites a number of reasons for this delay, including adjustments for increased employee benefits and health costs that were unknown until after the close of the fiscal year, a modification in the agency' accounting system and the leaving of YCS's chief financial officer. DeFalco notes that, if the fourth quarter report had been prepared using information available at the time, the increase would only be 7.8% over the tentative rate. Therefore, it would have been unnecessary to comply with the notice requirement.

There is some disagreement as to when YCS's management should have learned of the existence of excess costs bringing its expenses above the 10% threshold. YCS's own documents reveal that the adjustments were not the result of the year-end outside audit, but rather were generated by YCS's internal accounting staff sometime in mid-August 2002.[5] Accordingly, the Department contends that YCS was in possession of sufficient information in August 2002 to realize that Fort Lee Center's costs exceeded the 10% limit.

YCS's board of directors did not hold meetings over the summer. Consequently, Vice President DeFalco avers in a sworn affidavit that YCS management first had knowledge of the excess costs when he received the completed certified independent audit "on or about October 31, 2002." Nick Magone, the certified public accountant personally involved in performing the outside audit, corroborates that on October 31, 2002 he "signed the completed Certified Independent Audit and first conveyed the certified cost per student figure to Mr. DeFalco based on the final audit." Further, Magone confirms that "[t]he audit reflected adjustments which were made from information received subsequent to the end of the final quarter." Thus, YCS maintains that the 45-day notification period began on October 31, 2002.

[5] Rosenberg's letter of March 31, 2003 recites that "one adjustment was posted on August 6, 2002 and the others after August 8, 2002." YCS's fourth quarter report shows one adjustment was posted on August 6, 2002 and the others after August 15, 2002.

Not having received any notification of a rate increase, a Department representative telephoned DeFalco on December 4, 2002 to advise that the proposed increase above 10% of the tentative tuition rate was disapproved. Immediately upon receipt of this call, DeFalco served notice of the higher tuition rate on all sending school districts and the Department via facsimile and certified mail.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that YCS served notice of the tuition increase within 45 days of the date that management became "aware" that its costs were in excess of the 10% threshold.

N.J.A.C. 6A:23-4.2(a)(2), as written in 2002, provided that:

> If the private school for the disabled proposes to charge a final tuition rate in excess of 10 percent of the tentative tuition rate charged, the private school shall notify each sending district board of education and the Assistant Commissioner, Division of Finance that such an increase will be charged and the reason for the increase *within 45 days after the private school becomes aware of such increase*.[6] (Emphasis added).

Insight into the reasons for adoption of this amendment can be gleaned from the Department's response to public comments concerning the new requirement:

> This section refers to increases in costs above the estimated tuition rate that are incurred during the year due to an increase in unanticipated instructional and other allowable costs. Currently, private schools are not required to notify the Department or the sending districts during the year of any anticipated increases in tuition which will result in back-billing the sending districts for the

[6] In order to clarify its regulatory intent, the Department recently adopted a "technical" amendment, which took effect on August 4, 2004. As currently worded, *N.J.A.C.* 23:2.4(a)(2) provides the notice must be given "on or before the following dates: December 15, for the first quarter, March 15th for the second quarter, June 15th for the third quarter and September 15th for the fourth quarter, or the next business day when applicable." 36 *N.J.R.* 1313(a) (March 13, 2004); 36 *N.J.R.* 3895(a) (Aug. 16, 2004).

> differences at year-end. The notification of increases over 10 percent during the year should encourage better budgeting and tracking of expenditures at the private schools and provide public schools more timely notice of anticipated tuition adjustments.
> 33 *N.J.R.* at 1417.

YCS urges that notification is not due until the final audit is complete and the final rates are struck, but that interpretation would render the requirements of *N.J.A.C.* 6A:23-4.2(a)(2) meaningless. *N.J.A.C.* 6A:23-4.9 already requires that each private school must submit its final audited statements to the Commissioner by November 1 of each year. If the Department had intended the same timeframe for notification of anticipated increases in tuition, all that would be necessary is to require private schools to notify local school districts no later than 45 days from November 1 of each year. Instead, the Department added new language requiring notification whenever the private school "proposes" to increase rates by more than 10% of the tentative rates. Use of the word "proposes" connotes that the regulation requires notice of any anticipated or proposed increases, not merely the actual rates.

Of course, a rule must be clear enough to enable the regulated community to understand what standard it will be required to meet. Words will be given their ordinary and well-understood meaning, unless a contrary meaning is expressly indicated. *In re Schedule of Rates for Barnert Mem. Hosp.*, 92 *N.J.* 31, 40 (1983); *Stevenson v. Keene Corp.*, 254 *N.J. Super.* 310, 317-18 (App. Div. 1992), *aff'd* 131 *N.J.* 393 (1993). By its terms, the notice requirement of *N.J.A.C.* 6A:23-4.2(a)(2) is triggered whenever a private school becomes "aware" of the excess costs rather than by any specific date. The dictionary definition of "aware" is "having or showing realization, perception or knowing." *Webster's Collegiate Dictionary*, 120 (9th ed. 1998).

While the Department seeks to link the notice requirement to the schedule for filing quarterly reports, nothing in the regulation itself would alert a private school to such undeclared purpose. If the Department had wanted to tie the notice requirement to receipt of the quarterly reports, it should have said so. Without such cross-reference, YCS had no way of knowing what it was expected. It would be fundamentally unfair to

deny the cost of providing educational services because YCS failed to divine the Department's unexpressed intent.

Confusion is further compounded by the fact that the deadlines for filing the quarterly reports are directory in nature, and the regulations do not impose any negative sanction for failure to meet them. Compare the precatory language in the instruction sheet for filing quarterly reports (the report "*should* be completed" within thirty days of the close of the quarter) with the definite consequence set forth in *N.J.A.C.* 6:23-4.2(a)(2)(i) (if proper notice is not served, "the private school shall charge only the 10 percent increase.").

Uncontested proofs establish that the management of YCS became aware of the extra costs only after receipt of the final audit on October 31, 2004. YCS notified the sending districts and the Department within 45 days of first learning of the revised figures. Although lower-level clerical staff may have posted these costs sometime earlier, upper management did not learn of the additional costs until that date. The Department does not suggest that clerical staff purposely withheld any information from management or that management deliberately sought to remain ignorant so as not to trigger the 45-day notice period. Insofar as the record discloses, the newly discovered costs were the result of innocent error. Even if YCS had prepared its 4th quarter financial report on time, the outcome would have been no different. Information that was available to the school on July 1, 2002 did not show that the projected tuition increase was likely to exceed the 10% threshold.

In light of this analysis, one may quickly dispose of YCS's other contentions that the regulation is arbitrary, capricious and unreasonable or that the Department failed to follow the statutory procedures for rulemaking. Suffice it to note that regulations are presumed valid and that a challenger bears a heavy burden of proving otherwise. *Smith v. Ricci*, 89 *N.J.* 514 (1982), *appeal dismissed* 459 *U.S.* 962 (1982).. Certainly the state has a legitimate interest in assuring that sending public school districts have advance notice of anticipated increases in tuition rates of private schools for the disabled and

have sufficient time to collect funds for payment. Any administrative difficulties caused by fluctuating expenses do not detract from that overriding concern.

Lastly, this is not a situation where a state agency sought to implement a new policy of general applicability without adopting a rule. *See Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313 (1984). Rather, the Department went through the correct procedures in adopting a rule, which unfortunately did not achieve its desired purpose.

Hopefully, this case presents a problem that will not be repeated in the future. Now that the Department has amended its rule to incorporate specific dates for giving notice of increased tuition rates, private schools for the disabled will no longer be able to plead ignorance of the standard to which they will be held.

Order

It is **ORDERED** that summary decision is granted in favor of YCS approving its request for an increase of 17.23% for the final tuition rate of Fort Lee Education Center for the 2001-2002 school year.

And it is further **ORDERED** that the Department's motion of summary decision 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 (45) 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 (13) 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, 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, 2004
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 3, 2004
DATE

Mailed to Parties:

SEP 07 2004
DATE

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

List of Exhibits

No.	Description
P-1	Affidavit of Nick Magone, C.P.A., dated June 7, 2004
P-2	Affidavit of Philip DeFalco, dated July 1, 2004
P-3	Copy of 2nd quarter financial report of Fort Lee Educational Center for the period ending December 31, 2002
P-4	Copy of 3rd quarter financial report of Fort Lee Educational Center for the period ending March 31, 2002
P-5	Copy of 4th quarter financial report of Fort Lee Educational Center for the period ending June 30, 2002
P-6	Copy of report on audit of financial statements of Fort Lee Educational Center, dated June 30, 2002
P-7	Copy of letter to sending districts and Richard Rosenberg from Philip DeFalco, dated December 4, 2002
P-8	Copy of letter to Richard Rosenberg from Philip DeFalco, dated March 3, 3003, with attachments
P-9	Copy of letter to Philip DeFalco from Richard Rosenberg, dated March 31, 2002

P-10 Copy of petition entitled Youth Consultation Service, Inc. v. Richard Rosenberg, et al., dated June 27, 2003

P-11 Copy of answer of respondents in the above matter, dated July 31, 2003

R-1 Copy of memorandum to directors of private schools for the disabled from Jim Verner, dated December 21, 2001, with attached sample of prescribed financial report

403-04

OAL DKT. NO. EDU 7929-04
AGENCY DKT. NO. 267-8/04

J.M., on behalf of minor child, J.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT 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. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge that the appeal in this matter was untimely filed pursuant to *N.J.A.C.* 6A:3-1.3(d), and that petitioner has presented no compelling basis to warrant relaxation of the rule.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/14/04
Date of Mailing: 10/14/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 07929-04

AGENCY REF. NO. 267-8/04

J.M. o/b/o J.M.,

Petitioners,

v.

JERSEY CITY BOARD OF EDUCATION,

Respondent

Clifford A. Herrington, Esq., for petitioners (Margulies, Wind & Herrington, attorneys)

Rita F. Barone, Esq., for respondent (Purcell, Ries, Shannon, Mulcahy & O'Neill attorneys)

Record Closed: August 26, 2004 Decided: September 9, 2004

BEFORE **CARIDAD F. RIGO**, ALJ:

Procedural History

On or about August 17, 2004, petitioners J.M. on behalf of J.M. filed a petition of appeal with a motion for emergent relief due to J.M.'s denial of admission to McNair Academic High School contending 1) child required accommodation in taking essay portion of entrance exam consistent with classification; 2) child was improperly penalized because counselor did not

explain excused absences; and 3) admission determinations are based on impermissible "quota" system.

The case was assigned to the undersigned on August 18, 2004. A pre-hearing conference was held on August 20, 2004, when the issues were isolated. It was agreed by the parties that a hearing be held on August 26, 2004 for purposes of presenting oral arguments and testimony on respondent's motion to dismiss the petition. The parties requested that the motion to dismiss be heard and ruled on an expedited basis because of the opening of school on September 9, 2004, keeping that in mind an oral decision on record was rendered on August 30, 2004.

Issue

At issue is whether petitioner is barred from pursuing this appeal pursuant to *N.J.A.C.* 6A:3-1.3(d), and whether the ninety day limitation period in this case be tolled.

Facts

It is clear from a review of the certification of R.M., the testimony of the witnesses, and the exhibits that the following facts are essentially undisputed:

1. J.M. was attending the Hudson School in Hoboken, New Jersey.
2. J.M. applied for admission to the McNair Academic High School in Jersey City. He applied and took the entrance exams in October 2003.
3. Amongst other things the entrance exam included a written essay.
4. The entrance exams were graded sometime between December 2003 and mid January 2004.
5. On or about January 23, 2004 the petitioner learned that J.M. was not accepted at the McNair School.

A factual dispute arises between the parties as to when the essay written by the applicant child was graded. According to the petitioners they were allegedly told that the written essay would only be read and graded if the child makes the initial cut. Petitioners contend that because J.M. has a fine motor deficit his handwriting is eligible making it difficult for the examiners to read his essay thus giving him a low score, which impacted on his overall scores. The petitioner further contends that she was told on June 2, 2004 that her son's essay was read sometime during the examination scoring process which occurred sometime between December 2003 and January 23, 2004 therefore, the statute of limitations began to run ninety days from June 2, 2004 making this claim timely.

The respondents contend that the petitioner's claim should be dismissed because it was not filed within the ninety days of the objectionable action of the school district that date being on or about January 23, 2004.

R.M.

R.M. is the mother of J.M. She testified she was told that the entrance exam included an essay when her son returned home following the examinations one Saturday in October of 2003. She said she never received a brochure telling her the examination process included an essay. She said she went to the McNair School the Monday, after the Saturday of the exam, and met with Mr. Roggenstein, the principal of McNair School. R.M. testified she told Mr. Roggenstein that J.M.'s essay would probably be illegible and had she known in advance that an essay was included she would have requested an accommodation for him and he would have typed his essay. According to R.M. this initial conversation took place sometime in October of 2003. R.M. said Mr. Roggenstein told her the essay would be read only if he made the first cut.

R.M. said she met Mr. Roggenstein for the second time on December 3, 2003 when she and her husband, J.M. (father) went to the school to see how the grading process was going. They wanted to discuss the process because J.M. (child) had not received an optimum recommendation from his principal at the Hudson school and the issue of unexplained absences reported by the Hudson school.

R.M. testified that had she known that her son's handwritten essay was going to be read in December she would have filed a claim back in December of 2003. R.M. said the first time she heard about the essay being read and considered was on June 2, 2004 at a meeting with the principals of the McNair School.

Paul Barna

Mr. Barna testified on behalf of the petitioner. He testified that he has a child that is about to enter McNair in September. He said his daughter took the entrance examination the same time as J.M.(son). He said that he went to McNair to pick up the application packet. He said a security person sitting at a desk handed him the packet. Mr. Barna was shown exhibit marked R-A, which is a brochure of McNair High School outlining the admission requirement; he did not recognize it. Mr. Barna testified that he never knew that part of the entrance examination process included writing an essay. The application does not say anything about an essay. Mr. Barna said he was given the application with no envelope and nothing else.

Robert Roggenstein

Robert Roggenstein has been the principal of McNair School for the past 14 years. He testified all application packets include a brochure with a description of all of the entrance requirements. The witness pointed to exhibit R-A. Mr.

Roggenstein testified that the first meeting he had with the petitioner and his wife was on December 3, 2003. He said he remembered the date because the petitioner's signature appeared on the sign-in book at the security desk at the McNair School. Mr. Roggenstein testified that at the December 3, 2003 meeting there was a discussion of the legibility of J.M.'s handwriting on the essay portion of the entrance exams. However, he said that at that meeting he would not have been able to say much about the essay or the rest of the examinations because the exams had not yet been scored and the entire application process had not been completed. He further stated that he did not tell the petitioners that the essays were not read.

Mr. Roggenstein said that if the exam readers had a problem reading the handwritten essay the examiners would not have scored it and reported the matter as a legibility issue and other measures would have been taken to properly grade the essay. The principal testified that the legibility issue was discussed on December 3, 2003.

Dr. Roxanne Johnson

Dr. Johnson testified on behalf of the respondent school district. Dr. Johnson is the director of the district's Special Education Department. Dr. Johnson said she spoke with R.M. for the first time on January 27, 2004, she returned R.M.'s call. She stated R.M. inquired about McNair High School's special education program. R.M. talked about McNair having discriminated against students with a disability. Dr. Johnson said that she began looking into this allegation with respect to R.M.'s child, as she was not familiar with R.M. and her child. She said that in investigating the matter she spoke with either Mr. Roggenstein or Mr. Slattery, the assistant principal of McNair. Dr. Johnson testified that the issue of J.M.'s legible handwriting was discussed in a conversation on January 27, 2004, however, she could not recall if it was discussed with either R.M. or Mr. Slattery or both. She said that she recalls

someone telling her about J.M. injuring his hand just prior to taking the entrance exam or something to that effect.

Arguments of Counsel

Petitioners contend that respondent's motion to dismiss on the basis that their petition is barred by the ninety-day limitations period as outlined in *N.J.A.C.* 6A:3-1.3(d) should be denied because the ninety-day limitation period was tolled. According to the petitioners the ninety-day limitation period began running on June 2, 2004 when they first discovered that J.M.'s essay was read sometime during the exam scoring process.

Respondents contend that the petition is barred by the ninety-day limitations period since the period began to run from on or about January 23, 2004, when petitioners received notice from the district that J.M. was not accepted to the McNair School; therefore, this petition should have been filed no later than on or about April 23, 2004.

Legal Discussion

The threshold issue here deals with whether the petitioner's claim was timely filed pursuant to *N.J.A.C.* 6A:3-1.3(d), which governs the filing of an action arising under the school laws. It states in part that:

> The petitioner shall file a petition no later than the 90th day 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.

The New Jersey Supreme Court in *Kaprow v. Board of Education of Berkeley Township,* 131 *N.J.* 572, 582 (1993), held that the Commissioner and the State Board of Education have the authority to establish a time limitation for the resolution of disputes arising under the school laws and addressed the public policy reasons behind the ninety-day rule:

> The limitations period provides a measure of repose, an essential Element in the proper and efficient administration of 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... *N.J.A.C.* 6:24-1.2 (c) represents a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws.

The ninety-day requirement has been strictly followed and applied almost without exception. Specifically, in *Dreher v. Jersey City Board of Education,* EDU 2777-87, (December 18, 1987), *adopted*, Commissioner (February 2, 1988), *aff'd*, State Bd. (July 8, 1988), a petition filed just two days after the ninety day period expired was dismissed. In this particular case I **FIND** that the petitioner did not know prior to the child taking the entrance exams that an essay was part of the entrance examination requirements. However, I **FIND** that the petitioners knew about the handwritten essay when R.M. overheard J.M. (child) and friends discussing the essay portion of the entrance exams the afternoon of the exam morning. I **FIND** and the petitioner testified that she went to the school the Monday following the Saturday of the exam and discussed with school personnel the problem her child may have had with legible handwriting. I **FIND** that on December 3, 2003, in a meeting with Mr. Roggernstein and others from McNair the issue of the handwritten essay was discussed. I **FIND** that after January 23, 2004 the petitioner had conversations with school district personnel over the entrance requirements and among the concerns discussed was whether or not the handwritten essay legible.

I **FIND** that the petitioner had retained counsel and said counsel had communications with the school district regarding the child's denial of admission into McNair on the basis of the test results and the other entrance requirements. See exhibit P-A.

I **FIND** that Dr. Johnson and the petitioner and/or Mr. Slatterly had a telephone conversation on January 27, 2004 about the child's handwriting on the essay possibly being illegible due to an injury. In **CONCLUSION** I **FIND** that the petitioner at the very least suspected that the handwritten essay may be a problem as early as October of 2003 and that she herself brought that possibility to the attention of district personnel prior to April 23, 2004.

The petitioner also wants this court to determine that because they made attempts between late January 2004 through late July 2004, to have the district reverse its decision denying J.M. admission to McNair tolled the running of the ninety day limitations period, the applicable case law clearly establishes that such attempts to resolve a dispute by means other than filing a petition of appeal do not toll the limitations period. Again, as clearly stated in *Kaprow*, *supra*, attempts to resolve a claim do not toll the running of time limits for filing a petition of appeal.

The ninety-day rule may only be relaxed under exceptional circumstances or if there is a "compelling" reason to do so. *Kaprow, supra,* 131 *N.J.* at 590. Certain cases are excepted from this rule. Such cases are: 1) when the issue involves an important and novel constitutional question; 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. None of these are applicable in the instant case.

Furthermore, there is no evidence nor was testimony provided to support the fact that the petitioner was led to believe that if they continued to informally seek relief they did not have to be concerned about the time limitation for filing their petition.

Finally, I am compelled to point out that in essence the claim asserted by the petitioner is that J.M. should be admitted to the McNair School. J.M. was not

admitted into McNair not just because of an alleged eligible handwritten essay but due to the total score he received on all of the entrance tests and requirements. He did not receive optimum recommendation(s) from certain individual(s) from his prior school. This is not a situation in which the "equities" call for relaxation of the rule.

Conclusion and Order

Based upon all of the above, I **GRANT** respondent's motion to dismiss and petitioner's appeal is hereby **ORDERED, 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 (45) 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 (13) 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, 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 10, 2004
DATE

CARIDAD F. RIGO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:
September 10, 2004, 10:14 AM

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 10 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

404-04

OAL DKT. NO. EDU 4431-04
(ON REMAND EDU 6589-03)
AGENCY DKT. NO. 218-6/03

SUNDEE C. CATHEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/14/04

Date of Mailing: 10/15/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4431-04
(ON REMAND EDU 6589-03)
AGENCY DKT. NO. 218-6/03

SUNDEE C. CATHEY,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,
Respondent.

Charles I. Auffant, Esq., for petitioner
Harvey C. Johnson, Esq., for respondent

Record Closed: August 27, 2004 Decided: September 7, 2004

BEFORE **JOSEPH LAVERY**, ALJ t/a:

This matter was remanded to the Office of Administrative Law on June 4, 2004, by the Commissioner of Education in his decision of May 14, 2004. In the remand, the Commissioner indicated that since the Settlement Agreement and Mutual Release, attached to the Initial Decision Settlement, OAL Dkt. No. EDU 6589-03, decided March 30, 2004, was not signed by the Board attorney and there was no Board Resolution designating Cassandra Brown, Superintendent, to sign the agreement, the settlement agreement could not be approved. Additionally, Item Number iii (Exhibit A, Reference Letter) referred to in the agreement was also not attached to that agreement.

The parties have modified the settlement agreement, and an executed Settlement Agreement and Mutual Release, together with the Board Resolultion and Exhibit A, are attached and the terms 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 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 (45) 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 7, 2004
DATE

JOSEPH LAVERY, ALJ t/a

Receipt Acknowledged:

9-10-04
DATE

DEPARTMENT OF EDUCATION

SEP 13 2004

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mph

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This is a Settlement Agreement and Mutual Release dated as of August 6, 2004, by and between (i) Borough of Lawnside, Board of Education and its present and former directors, officers, employees, agents, administrators, legal representatives, predecessors, successors, and assigns thereof (collectively "**Lawnside BOE**") and (ii) Sundee C. Cathey and her respective heirs, executors, administrators, legal representatives, predecessors, successors, and assigns thereof ("**Cathey**"):

1. In consideration of (i) **Cathey** agreeing to dismiss the pending proceeding before the Department of Education; (ii) the following Mutual Release hereby granted to **Lawnside BOE** by **Cathey**, (iii) **Lawnside BOE** agreeing to provide a reference letter substantially conforming to the **Pro Forma Reference Letter** attached to this Settlement Agreement and Mutual Release as **Exhibit A** ("**Reference Letter**") to prospective employers indicating Cathey's (a) start date and end date; (b) title of her position (c) duties; and (d) satisfactory performance; and (iv) for other good and valuable consideration, receipt of which is hereby acknowledged, **Lawnside BOE** hereby releases, discharges, and waives any and all claims and causes of action, whether asserted or unasserted and whether known or unknown, arising from or associated with the facts and circumstances set forth in the case entitled ***Sundee C. Cathey v.***

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Boro of Lawnside, BOE Camden County before the Office of Administrative Law, OAL Docket No. EDVOR 06589-20038.

2. In consideration of **Lawnside BOE:**

(i) giving Cathey a reasonable opportunity to respond to the Observations that were conducted prior to her voluntary termination of employment;

(ii) appending such response to the applicable Observation and including such response in her employment file;

(iii) providing a **Reference Letter** to prospective employers in connection with any third party request for employment information;

(iv) giving Cathey an original execution copy of such **Reference Letter** and retaining an original execution copy in **Lawnside BOE's** files for use in connection with 2 (iii) above;

(v) (v) providing Cathey with a complete copy of her personnel and employment file;

(vi) the release of Cathey from any further liability to **Lawnside BOE** arising from the facts and circumstances set forth in the Petition; and

(vii) for other good and valuable consideration, receipt of which is hereby acknowledged,

Cathey, hereby releases, discharges, and waives any and all claims and causes of action, whether asserted or unasserted and whether known or unknown, arising from or associated with the facts and circumstances set forth in the case entitled ***Sundee C. Cathey v. Boro of Lawnside, BOE Camden County before the Office of Administrative Law, OAL Docket No. EDVOR 06589-20038.***

3. This Settlement Agreement and Mutual Release shall be binding upon **Lawnside BOE** and its partners, principals, employees, agents, and attorneys, and the heirs, executors, administrators, legal representatives, predecessors, successors, and assigns of all of the foregoing; and **Cathey** and her respective heirs, executors, administrators, legal representatives, predecessors, successors, and assigns of all of the foregoing.

4. This Settlement Agreement and Mutual Release may not be changed, amended, modified or altered, except in a writing signed by both **Lawnside BOE** and **Cathey.**

5. Each party shall bear its own costs, fees (including attorney fees) in connection with the prosecution or defense of this matter.

6. This Settlement Agreement and Mutual Release has been executed pursuant to the laws of the State of New Jersey and shall be construed in accordance with the laws of the State of New Jersey, without regard to its conflict of laws principles.

IN WITNESS WHEREOF, the undersigned have signed this Settlement Agreement and Mutual Release to be effective as of the date first above written.

By: _____
Sundee C. Cathey

Date: 8-9-04

_____
Witness

Attorney for Cathey

Borough of Lawnside, Board of Education

By: _____
Cassandra Brown

_____
ATTEST

Title: Superintendent,
Lawnside Board of Education

Date: 8/12/04

Harry C. Johnson
Solicitor Lawnside
Board of Education
8-12-04

EXHIBIT A

Pro Forma Reference Letter

[Lawnside Board of Education Letterhead]

[Insert Date]

[Insert Name and Address of Requestor]

Re: Sundee Cathey

Dear [Insert Correct Title and Name]:

I am responding to your recent request for information concerning Ms. Sundee Cathey.

Ms. Cathey commenced employment with the Lawnside Board of Education on September 1, 2001 and voluntarily terminated employment on February 15, 2003. Ms. Cathey served as the science educator for both seventh and eighth grade students. Her employment was satisfactory in all respects.

Very truly yours,

_____

Name
Title

RESOLUTION #7-2005

Resolution Authorizing Settlement of Pending Litigation

WHEREAS, Sundee Cathey ("Cathey") voluntarily terminated her employment with the Borough of Lawnside Board of Education on February 15, 2003;

WHEREAS, Cathey filed a Petition with the Commissioner of Education entitled *Sundee C. Cathey v. Boro of Lawnside, BOE Camden County* before the Office of Administrative Law, OAL Docket No. EDVOR 06589-20038 alleging a violation of certain provisions of the New Jersey School Law;

WHEREAS, the Borough of Lawnside, Board of Education denies the allegations set forth in the Petition filed in connection with *Sundee C. Cathey v. Boro of Lawnside, BOE Camden County* before the Office of Administrative Law, OAL Docket No. EDVOR 06589-20038;

WHEREAS, Cathey and the Borough of Lawnside Board of Education have determined that it is in their respective interest to amicably resolve the aforesaid case and that such amicable resolution be embodied in a Settlement Agreement and Mutual Release;

WHEREAS, Cathey is represented by Mr. Charles I. Auffant, Esq.; and

WHEREAS, the Borough of Lawnside Board of Education is represented by Mr. Harvey Johnson, Esq.

NOW THEREFORE BE IT RESOLVED as follows:

1. That the Borough of Lawnside Board of Education authorizes settlement of the case entitled *Sundee C. Cathey v. Boro of Lawnside, BOE Camden County* before the Office of Administrative Law, OAL Docket No. EDVOR 06589-20038; and

2. That the Borough of Lawnside Board of Education authorizes Cassandra Brown, Superintendent, to execute the Mutual Settlement and Release Agreement on behalf of the Borough of Lawnside Board of Education.

Date: 8/12/2004

Moved: Thelma Long

Seconded: Jacqueline Wilcox

Vote: 5 yes, 0 no

I, Theresa Tutt, Secretary of the Board of Education of the Borough of Lawnside, do hereby certify that the foregoing Resolution is a true and exact copy that was adopted at a meeting of the Board held on August 12, 2004.

Theresa Tutt
Board Secretary

405-04

#405-04

OAL DKT. NO. EDU 4990-03
AGENCY DKT. NO. 173-5/03(a)

GEORGE WATSON, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner filed timely exceptions,[1] which were fully considered by the Commissioner in his determination in this matter.

Upon his full and independent review,[2] the Commissioner concurs with the ALJ, for the reasons comprehensively detailed in his decision, that the within petition is properly dismissed since petitioner has failed to meet the limited standard entitling non-tenured, non-renewed teaching staff members to relief, as established by the Appellate Division in *Dore* and *Kopera, supra.*

[1] Petitioner George Watson, Jr. and petitioner Yara Martin, OAL Dkt. No. EDU 6349-04, Agency Dkt. No. 173-5/03(b), filed joint exceptions to the Initial Decision. It is noted that there is no indication that such exceptions were copied to Board counsel or the Administrative Law Judge (ALJ) as required by *N.J.A.C.* 1:1-18.4.

[2] The record of this matter includes transcripts of the hearing conducted at the OAL on June 11, 14, 18 and 30, and July 2 and 8, 2004.

Accordingly, the Initial Decision of the OAL is adopted and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/15/04

Date of Mailing: 10/15/04

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 04990-03S
AGENCY DKT. NO. 173-5/03

GEORGE WATSON, JR.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,
Respondent.

George Watson, Jr., petitioner, *pro se*

Lester E. Taylor, Esq., for respondent Board of Education (Hunt, Hamlin & Ridley, attorneys)[i]

Record Closed: July 8, 2004 Decided: September 13, 2004[ii]

BEFORE **JEFF S. MASIN**, ALJ:

George Watson, Jr., was employed by the respondent school board ("Board"), serving as a librarian, first at the Bangs Avenue School ("Bangs") during the 2000-2001and 2001-2002 school years and then at Thurgood Marshall School ("Thurgood Marshall") for the 2002-2003 school year. He also worked in a teaching position in the adult evening school in Asbury Park. On May 23, 2003, Watson, together with another teacher, Yara Martin, filed a joint Petition with the Commissioner of Education ("Commissioner"), in which they each alleged that the Board improperly denied them tenure as teachers in the district. They asserted that in fact they had

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[i] By order dated July 1, 2004, Lester E. Taylor, Esq., represented the respondent Board "through the completion of the actual hearing and the presentation of any legal briefs in connection with the preparation of this initial decision." A Substitution of Attorney was submitted on July 29, 2004, for Gregory G. Johnson, Esq., (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys) as superceding counsel for the respondent.

[ii] The record was reopened to allow the Board time to submit a certification identifying missing information from exhibit R-1, and to supply copies of exhibits R-10 and R-11, which were missing from the judge's file. *See* footnote vii.

"accepted the employment" of the Board based upon *N.J.S.A.* 18A:27-12. [iii] The Petition made many allegations and assertions of supposed wrongdoing by the Board, its employees and representatives of the union that served as the bargaining agent for the teachers. The respondent Board filed an answer to the Petition, which it characterized as a Petition of Appeal, on June 23, 2003. An answer was also filed by counsel representing Catherine Ahl and Winston Leveille, who were subsequently dismissed as respondents upon the entry of an interlocutory order dated June 8, 2004.

While the joint petition asserts Watson and Martin claim that they accepted employment for a fourth year with the Board and therefore acquired tenure, the Board takes a very different position as to their status. It contends that it gave each timely notice that their contract of employment would not be renewed for the upcoming 2003-2004 school year and that, as non-tenured employees, the petitioners had no legal expectation of renewed employment and certainly did not attain tenure status. Relying upon the "nearly unlimited" discretion afforded to school boards to determine whether to reemploy non-tenured employees from year to year, the Board seeks dismissal of the petitioners' appeals. *Dore v. Board of Education of the Township of Bedminster, Somerset County*, 185 *N.J. Super.* 447 (1982).

The Petition filed by the *pro se* petitioners contained sixteen pages of wide ranging allegations, some directly related to the issue of tenure rights and employment status, and others touching on these issues, but alleging civil rights, Open Public Meetings, harassment and labor union representation issues. During a prehearing conference conducted by Administrative Law Judge Caridad F. Rigo on October 8, 2003, many of the counts of the Petition were withdrawn by the petitioners, with each reserving the right to pursue charges in other appropriate forums. The judge issued a prehearing order dated October 16, 2003, noting therein the numbers of the various withdrawn counts and by whom each was withdrawn.[iv]

[iii] Both Martin and Watson filed a "Notice of Acceptance of Teaching Contract with the Asbury Park Board of Education School Year 2003-2004." These were each dated May 19, 2003. In his Notice, Watson accepted "the employment contract for the school year 2003-2004 as a teacher and for the following positions: 1. Teacher of Adult School 2003-2004, 2. Summer School Teacher 2003-2004 and 3. Teacher-Librarian 2003-2004." He added, "It must be noted that this would be my third year in Summer School Asbury Park District, my fourth year as a Teacher-Librarian, my third year as a evening school ESL Teacher at Asbury Park High School Evening School and my tenure year with Asbury Park School District. However I never had a written Teachers Contract for the employment of Summer School or Adult School as required by law as :19A:27-5 et al."

[iv] The Order noted that if the petitioners sought to file a claim in the United States District Court for these withdrawn counts and the District Court refused to accept the "counts/petition," the petitioners could then file an appropriate motion seeking to reinstate the designated withdrawn counts. The judge established a deadline for the filing of any such motion, keyed to the deadline she established by which date either or both petitioners could file such claims with the District Court. "If the petitioners have not filed their petition with the U.S. District Court by November 12, 2004, they are foreclosed from seeking reinstatement before the OAL."

Following the withdrawal of counts of the petition, Judge Rigo then listed the issues remaining to be determined in the administrative hearing. These were: (1) Were the non-renewal of the petitioners' teaching contracts in violation of *N.J.S.A.* 18A:6-9 and 18A:27-4; (2) Was procedural due process rendered to the petitioners with respect to notice of the April 28, 2003 board meeting; (3) Were there violations of the Open Public meetings Act on April 28, 2003, April 29, 2003, July 17, 2003 and August 21, 2003, by the respondents not providing the required notices for these meetings; hence, these meetings were conducted in violation of the act.

In their joint Petition Watson and Martin state a series of, in some instances, separate, and in some instances, joint or mutual, allegations of fact and assertions of wrongdoing. For reasons that are not revealed by the record, the Department of Education did not sever the individual petitioners' cases prior to transmitting the contested case(s) to the OAL under one docket number and the judge originally assigned to the case did not sever the matters either. By the time this judge received the case there had been a good deal of activity involving discovery, motions and disputes, and at the late date that this judge first entered into the matter he deemed it best not to try to sever the claims and proceed with two entirely separate hearings. Thus, with each petitioner fully advised that their cases constituted individual appeals of the action of the Board denying non-renewal as to each separately, and also to the extent that each claimed that he or she had accepted employment for the coming school year of 2003-2004 pursuant to statute and therefore had a right to the teaching position, the case proceeded as one hearing, with each petitioner presenting his or her witnesses and arguments and conducting his or her examination and cross-examination individually. While it is recognized that Mr. Watson and Ms. Martin have each raised concerns that mutually trouble them about the conduct of the Board and its employees, as was carefully explained to each, their employment status *vis a vis* the Board must be determined independent of the other, judged in accordance with the applicable law. Further, at the close of the hearing I advised the parties that in order to treat each matter separately and to allow for a more efficient presentation of the decision, as well as to prepare written initial decisions that could be more appropriately reviewed throughout the administrative, and perhaps, judicial process, that I intended to sever the matters for purposes of the written decisions. A separate order severing the cases has been issued.

In addition to the dispute relating to Mr. Watson's status as a full-time teacher in the district's system, during the hearing he asserted that he was denied rights with respect to his

employment in the adult school. He contends that the Board improperly denied him employment therein as well, and interfered with his attaining tenure in that employment. The Board disputes the idea that tenure is applicable to employment in the adult school, arguing that its employees are hired on a yearly basis subject to advertising of positions that is based upon the needs of the program, dictated largely by the varying size of the program.

The prehearing and trial portions of this case must, in fairness, be characterized as contentious. Over the course of the case petitioners sought discovery and in some instances made motions to enforce discovery. It must in fairness be stated that at times the board was lax in its responses. One of the ongoing controversies was in regard to the petitioners' demand for the production of the tapes of Board meetings held on numerous dates in 2003. Ultimately, after attempting to determine what the alleged problem was that prompted the petitioners to seek discovery of the tapes for the meetings held on July 17 and August 21, 2003, dates that were significantly subsequent to the Board's notice to the petitioners of April 29, 2003, regarding the non-renewal decision and the Board's May 15 meeting, at which the non-renewal decision was adopted, or for the much broader number of tapes sought of meetings through most of 2003, and considering also the board's contention that the transcription of these tapes would be extremely burdensome given the time and effort necessary to exclude privileged materials such as personnel issues involving other employees, I concluded that this discovery demand was unwarranted. Additionally, to the extent that the prehearing identified as an issue the question of whether the board had violated the Open Public Meetings Act, attempts to identify exactly how any such alleged violations might impact upon the rights of the petitioners *vis a vis* their contention that the Board had denied them tenure, or that the decisions not to renew their contracts were arbitrary, were unsuccessful. To that extent, I concluded that the Open Public Meetings issues were not relevant to this proceeding.

Prior to the hearing, I advised the parties that, although the burden of proof which rested upon the petitioner was to demonstrate that the Board's decision of non-renewal was arbitrary and unreasonable, I would nevertheless require that the Board first present at least a modicum of evidence to explain to me the basis for its decision, so that I could then more intelligently assess the petitioner's proofs as he attempted to meet his burden. This reversal of the general course of testimony, in which the party bearing the ultimate burden of proof first presents evidence seeking to meet that burden and the party seeking to support its action against the petition then responds,

was required so that the petitioner's proofs could be understood against something other than a vacuum. Of course, the burden of proof never left Mr. Watson throughout the case. After the Board presented some limited evidence and its witnesses were cross-examined by Watson, he proceeded to present his individual case and then, after he concluded, the Board presented additional evidence to seek to meet the evidence and charges offered by the petitioner.

The Board's initial presentation

The Board offered evidence that by letter dated April 29, 2003, Dr. Antonio N. Lewis, Superintendent of the Asbury Park School District, notified Mr. Watson that "I will not be recommending the renewal of your employment for the upcoming year. Accordingly, your employment with the Asbury Park School District will terminate at the close of business on June 30, 2003." When served with this notice, the petitioner signed it, but wrote that he did so "under duress and protest." Watson then exercised the statutory right to request a statement of reasons for non-renewal. In response, the Board provided him with a written statement of "Non Renewal Rationale," listing the following

1. Unsatisfactory planning and organization
2. Weak instructional methods and techniques
3. Failure to maintain updated lesson plans, attendance records, and gradebook
4. Failure to maintain complete and updated substitute plans
5. Poor evaluation techniques for assessing student learning
6. Failure to maintain an organized learning environment
7. Failure to submit required lesson plans, gradebook and other requested documents on time

On May 23, Dr. Lewis issued a memorandum to Mr. Watson, in which he responded to Mr. Watson's May 19 memo "regarding your Acceptance of a Teaching Contract for 2003-2004." Dr. Lewis advised that, as Mr. Watson had already received a letter of "non-renewal" on April 29, his "letter of acceptance of a contract is moot." Additionally, the Superintendent noted, "Summer School and Adult School positions are advertised each year based on enrollment. Staff is not automatically renewed."

The Board presented documentary and testimonial evidence of evaluative materials that purportedly served as the basis for the several performance deficiencies that were listed for

Watson in the "Non Renewal Rationale." According to Andrea Bates, who serves as the administrative assistant to the Superintendent and who holds a Masters Degree in Administration and Supervision and is a certified school administrator, teachers are evaluated a minimum of three times per year, as well as informally at other times. Principals, vice-principals and supervisors can evaluate. Findings are then placed upon a district evaluation form, which contains a narrative, suggestions and comments. A package of such evaluation documents were presented regarding Mr. Watson. These begin with an evaluation conducted by Joseph Romano on November 22, 2000, Mr. Watson's first year in the district. The form contains a series of ratings for twelve skills and techniques (plus two "other" categories) that encompass "Instructional and Management Skills" and "Personal Characteristics." Teachers are rated as either "S" for "satisfactory, "N.I." for needs improvement, and ""U" for "Unsatisfactory." They are also rated as to "Standards," in which they may be either "meeting Asbury Park standards," "progressing toward Asbury Park standards" or "does not meet Asbury Park standards." In this particular evaluation, Watson was satisfactory in all categories but one, "Methods and Techniques," in which he received a "N.I." In a narrative comment, Mr. Romano included some suggestions in respect to this category, such as "avoid repeating" student answers and "avoid paraphrasing both what children tell you (in their answers) and what you read to the class." On March 29, 2001, Watson was observed and evaluated by Sharon Gail Harris, who rated him satisfactory in all categories. Among her comments concerning this review of his teaching of a 5th grade class were that he "was well prepared for this lesson. His lesson plan and core curriculum content standards were indicated in his lesson plan book for this period class." In each of these two evaluations, Watson was rated as "progressing toward Asbury Park standards." Ms. Harris again evaluated Mr. Watson on November 19, 2001. Again she rated him as satisfactory in all categories and meeting Asbury Park standards.

The next evaluation occurred on December 5, 2001. The evaluator was Howard Mednick. Mr. Mednick characterization of Watson's performance in connection with this "library science" class was, it is fair to say, harsh. He rated the teacher as unsatisfactory in seven categories under the general topic of instructional and management skills, including methods and techniques, evaluation of students, student time on task, student teacher rapport, classroom control and room environment. He also rated Watson as needing improvement in interest and enthusiasm and attitude/adjustment. The teacher was only satisfactory in two categories. Mednick characterized part of the lesson as "confusing and disjointed." He referred to a lack of

discipline, with students talking to each other and calling out phrases, which he attributed to "a direct result of poor pedagogical techniques and ineffective questioning skills." He found that students did not know what they were doing when broken into cooperative learning groups. Mednick adds, "In our post observation, you became very agitated and said, 'I know why you were sent here, you are on a mission. I want you to release me.' " Mednick listed several areas that he advised Watson were unsatisfactory about the lesson he had just observed, including that it was "unrelated to the subject area you were teaching," and "your questioning skills were unsatisfactory" for two reasons listed on the evaluation form. Mr. Watson signed this form "under duress and protest Harrassment."

The next evaluation form relates to an evaluation conducted on January 4, 2002. The evaluator, Paul Banik, then a Vice Principal at Bangs, rated Watson as unsatisfactory in such categories as planning and organization, methods and techniques, evaluation of students, student time on task, classroom control. He was satisfactory in several other areas, but the overall "standards" rating was that he was not meeting Asbury Park standards. The evaluator wrote extensive comments on the form, detailing deficiencies that were observed. Among the comments is that "there was no record of success (high, medium, or low) observed by this writer. The teacher needs to keep a record for every student in the grade book at each session. There was no evidence of a grade book or a facsimile thereof." The writer also reports that when he asked Watson for the daily lesson plan book, he was advised "he forgot it and that he would have it available for review at the end of the period." The writer also noted, "He must address the specific areas noted above to be an acceptable teacher in the Asbury Park School District." Mr. Watson again signed this evaluation form "under duress and protest Harrassment."

The next evaluation of performance occurred on January 29, 2002. Ms. Harris was the evaluator. She rated Watson as satisfactory in seven categories and needing improvement in five. He was "progressing toward Asbury Park standards." The areas needing improvement included planning and organization, methods and techniques, knowledge of subject matter, student time on task and classroom control. The overall comments made by Harris are positive and note some distractions for the students that were not the fault of Mr. Watson. She also noted that whereas the lesson dealt with music, Watson was "an experienced librarian not an experienced music teacher."

On November 22, 2002, Janice Anderson evaluated Watson. He was teaching library science to a 5th grade class. Anderson rated his performance as satisfactory in four categories, needing improvement in two and unsatisfactory in four. These latter were planning and organization, methods and techniques, student time on task and classroom control. She noted that he did not meet Asbury Park standards. A lengthy commentary about Anderson's observations during the class and her detailed recommendations is attached to the evaluation form. Watson again signed each page, "under duress and protest."

A December 19, 2002, evaluation by Dr. Patricia Moran included ratings of needs improvement for methods and techniques, student time on task, student/teacher rapport, personal attitude and adjustment and unsatisfactory for evaluation of students. Watson was "progressing" toward district standards. The Appraisal contained several commendations for a thorough knowledge of the subject matter, the use of proper English with the students, Watson's interest in the topic and use his of manipulatives (toy trucks) to add to the story telling. The form also contained thirteen recommendations, generally addressed to methodology and style.

Finally, an evaluation performed on March 26, 2003, by Albert J. Reinoso, the principal of Thurgood Marshall, indicated unsatisfactory performance for planning and organization and evaluation of students. The decision to not recommend renewal of a contract followed after this last evaluation. Bates explained that this action was intended to address only the full-time teaching position held by Watson, as the Board did not conceive that the adult school position was a tenurable position. Persons seeking to teach in the adult school had to re-apply each year for a position.

Ms. Bates acknowledged during cross-examination by Mr. Watson that, to her knowledge, no supervisor or administrator in the district is certified as a librarian supervisor or as an educational media specialist, only as a supervisor. Nor did any of these persons hold a masters degree in library science or a masters in education media. A Mr. Springer had been employed by the district as its supervisor of technology and media for a "couple of months."

During questioning of Ms. Bates, Mr. Watson touched upon topics that were to re-occur throughout the hearing. One of these was his question to her as to whether she was aware that he

had filed a complaint regarding the theft of his plan book. Bates "was not aware" of the complaint.

Mr. Watson also questioned Bates, and other witnesses, about their knowledge of the conditions in the library, the space of which was divided up to allow for a number of other activities to occur therein besides purely library activities, such as space given over for reading programs, a guidance counselor's office, storage and the like. He also asked her if she recalled that on a day when Superintendent Lewis was out of the district, she recalled that an issue had arisen because Watson wanted to bring an outside consultant into the library to evaluate it and he was told that there were district procedures that had to be followed before any such outside persons could do such an evaluation.

Dr. Antonio N. Lewis testified that the decision not to renew Ms. Watson's contract was reached after he consulted with administrators and received information such as performance evaluations.

Mr. Watson's presentation

George Watson, Jr.'s testimony explored a number of circumstances regarding his employment and the conditions under which he functioned that he believes establish that the Board and its employees acted arbitrarily towards him.[v] These actions purportedly started during his first year with the district and thereafter continued up to the time of the non-renewal notice. When he first applied for a librarian's position in the Asbury Park district he met Janice Anderson. His first application was "lost," and he had to file a second one, which was again "lost." A third application led to an interview with Ms. Anderson, a Ms. Burford and Sharon Harris. He expected to be fairly and decently treated, but he was never called after this interview. However, he did get hired as a summer school teacher during the summer of 2000. He ultimately received an appointment as a full time librarian. When he first arrived at Bangs, he determined that problems existed in its library. In addition, Ms. Anderson, who was the district's supervisor of elementary education at the time, came to the school and was not pleased that he was working there. She began to "harass[ed] him in her official capacity." He could not

[v] Mr. Watson's testimony was very lengthy and touched upon many issues of concern to him. He had many issues as to how he had been treated or how the district operated and the testimony was at times disjointed. I have tried to relate those matters that he raised, to the extent that they appear to have any reasonable relationship to the issues in this case.

get the union to file grievances about this harassment. He continually asked for a curriculum for the 5th grade, but one was never produced during his three years in the district. Yet, despite not having received a curriculum for the 5th grade, when he was evaluated he received negative remarks and ratings from evaluators.

Mr. Watson noted that when he wrote up students for disrupting class, nothing ever happened to them. If they were sent to the office, they would be sent back to the classroom. Children would laugh when he disciplined them because they knew that nothing would happen to them. Watson also noted that while he was serving at Bangs there was an incident in which he became aware of the abuse of a Black child in a kindergarten class and that child's name was "exposed" by DYFS to the principal and then to the staff at a meeting, actions that Watson believed were in violation of confidentiality laws protecting the identity of children. He claimed that while Mr. Mednick had given out the name, "everyone" said that Watson had done so.

Watson claimed that during his second year at Bangs, he was required to teach music, although he was not trained in that area. He taught children how to dance and to hold a note. Again he had no curriculum until he finally received one from the music person on staff.

During his second year he filed an EEOC petition regarding the promotion of Janice Anderson, who was placed over him as his supervisor. He believes that as a result of the filing of this petition, the district retaliated and sent him to another school, Thurgood Marshall, where he was alone in the library, as opposed to Bangs where there was another librarian. This transfer occurred in August 2002, just prior to the start of his third year with the district. No one told him anything except that he was to go there and he was not told how the library functioned and what was expected of him. He had no aide, whereas he had one at Bangs. At Marshall, Anderson was his supervisor and she conducted his first evaluation.

Watson also contended that in September 2002, while he was assigned to Marshall, he advised the administration that he needed training on the Sagebrush system from the company that produced the software. The prior librarian had received this training at Board expense, although Watson contended that the documentation of this had been stolen. Despite "asking every month," he did not receive this training until May 13, 2003. He noted that he had to check books in and out for twenty-five to thirty students and could not do this as well as teach a class,

all within forty minutes. Library computers were not all tied into the database. Students could not do research unless they used his computer. If thirty students wanted to use the data base there was "chaos." The other computers "only had games."

The witness explained that he had been in the habit of turning in his plan book to Dr. Patricia Moran, who served as an interim vice principal. She had a form that she utilized to show any deficiencies in the plans. These forms were placed inside of the plan book. He contended that Janice Anderson told him that she did not want him to give the book to Moran for her approval. Shortly after this occurred the plan book was stolen. This led to Watson filing a complaint with the police about the theft of the book. As Mr. Deemer, Watson's predecessor at Marshall, advised that Reinoso had a key to the lock where the plan book was kept, Watson believed that the book was stolen in order to support and "fabricate" the recommendation of "termination." At this administrative hearing, Watson claimed that the theft was linked to an attempt to prevent him from showing that he had complied with Dr. Moran's requirement that he show her the plan book. He also submitted as further evidence of alleged harassment a memo received from Reinoso on March 13, 2003, in which the principal, among other items, "reminded" Watson that

> 1. You have submitted your lesson plans once this whole marking period. Grades are supposed to be in the same planbook as your plans. We have seen **NO GRADES**. Please submit this documentation **IMMEDIATELY**, no later than 3:30 on March 13, 2003,

Watson noted that as of that date he had already contacted the police about the stolen plan book.[vi]

In testimony given during the present hearing, Mr. Reinoso acknowledged that he had "confiscated" one of Mr. Watson's plan books after the first marking period of the 2002-2003 year. He did this because he had received letters from parents who complained that grades received by their children were not justified. In fact, in that first marking period, Watson had given every student in the whole school a "B" and parents with students on the High Honor Roll complained. When he spoke to Watson about this and said that there was no reason to give

[vi] It should be noted that Supervisor P. Moran had sent a memo to Watson on March 3, PW-9, in which she noted that lesson plans were to be submitted bi-weekly, and "your lesson plans have not been received for weeks. You have received many reminders in writing and verbally. In addition to the submission of lesson plan, up to date grades should also be submitted, as you know."

everyone a "B," Watson replied that then everyone should get an "A." He examined the plan book and determined that they contained no grades, a violation of the policy regarding the measurement of student progress and the use of instruments of measurement. He confiscated the book, as he has others from other teachers. He sometimes has returned these after showing them to the superintendent, and after he determined that only the plan book was missing from Watson, he advised Dr. Lewis of this fact. He thinks that he returned pages of the book to Watson. Dr. Lewis testified that Watson told him that his plan book was stolen, but Lewis knew that administrators would sometimes take the books "if something is missing."

Also, some sixty tapes were taken out of the building by Mr. Deemer, his predecessor, and as a result, Watson signed a complaint against Deemer. Dr. Lewis promised to discuss these thefts at a meeting, but did not do so and "did not care."

In April 2002, Howard Mednick prepared a Professional Improvement Plan with Watson. That plan called for Mednick to do a demonstration lesson if he had a complaint about the manner in which Watson taught. However, this never occurred. According to Watson, when Janice Anderson gave him an unsatisfactory, "she and two others argued as to whether they had to do that" which is outlined at 11.1 on the Professional Improvement Plan, and they then said that "if the attorney (apparently the Board attorney) said that they did not have to they would not." "Despite" Watson's request, no grievance was ever filed about the failure to carry out this requirement. In addition, Watson claimed that when Mednick did an evaluation of his performance, he gave Watson an unsatisfactory and yet, in the case of a white female teacher, Mednick simply tore up an evaluation that graded her unsatisfactorily. In support of this allegation, the witness produced a letter, purportedly from Janet Tartanella of Bangs Avenue School, attesting to the fact that Mednick had discarded an unsatisfactory evaluation of a lesson that she had taught and allowed her to redo the lesson on another date. Ms. Tartanella did not appear as a witness.

The witness also complained that during his year at Marshall, a book fair came to the school unannounced. Apparently, Mr. Watson's predecessor ordered this program, but despite this fact, school principal A.J. Reinoso was going to write up Watson for ordering the fair without approval. Watson also was harassed about a bank deposit procedure, with Mr. Reinoso's

secretary "insinuating" that Watson might have acted in violation of banking procedures regarding deposits received from students at the book fairs.

Watson alleged that at the beginning of his last year with the District, 2002-2003, he asked Mr. Reinoso how many observations he would receive and was told that there would be six, with a follow-up to each evaluation. However, only three were conducted, by three different persons.

For two years, Mr. Watson had participated in the Neptune Library Cooperative and had been released from school by Mr. Mednick in order to attend its meetings for professional development purposes. Yet shortly after the preparation of the Professional Development Plan, the head of the Neptune Library barred Watson from attending the meetings and Mr. Reinoso questioned him about where he was on some of the days that had been approved for his attendance at the Cooperative. Watson thought all of this was "odd." He believes that it is "obvious" that he was "set up" by Asbury Park.

In early 2003, Watson filed a Notice in Lieu of Complaint in Asbury Park Municipal Court charging that Mr. Reinoso had harassed him. This matter, which was apparently mediated, came before Judge Mark T. Apostolou on April 4, 2003, at which time, according to the transcript offered as evidence by Mr. Watson, Reinoso agreed to review Watson's prior job evaluations in exchange for a dismissal of the complaint "and there will be above recommendations within one week of the date of the agreement provided Mr. Watson, in fact - - and provide Mr. Watson with a letter to that effect." Mr. Reinoso testified that as far as he could recall this "arbitration" only involved an agreement regarding training that Watson wanted to receive.

The petitioner did not know exactly what the concerns were about his planning and organization, as he did the best he could with what he had. He was placed in positions without assistance or support and was never given a teacher to assist him. He only received a job description during the middle of his last year with the district. He planned "as best he could." As for the criticisms that he had weak instructional methods and techniques, he functioned with his classes and they received and enjoyed his instruction. Not one administrator who was a supervisor or anyone from central office who decided upon the non-renewal of his contract ever

observed him during the entire three years. He did not fail to maintain updated lesson plans, insisting that he did everything possible that he could, but that his plan book was stolen. At Bangs he had noticed that some adverse things happened, but his plan book was not stolen, as it was at Thurgood Marshall. He commented, "People evidently had a plan in motion." As for criticisms that he did not have plans available for a substitute teacher, he insisted that he did have a substitute folder, but he had no desk in which to lock up items at Thurgood Marshall. Substitutes were to drill students on the Dewey Decimal System or to have students work on assigned projects.

Watson asserted that the district only wanted libraries for "window dressing," and that Mr. Richard Springer, who had been hired to supervise the libraries, left the district with harsh words. As far as he could see, library skills had not previously been taught. No instruction had occurred at either school and library time was spent watching movies, which was all that was required to obtain A's. Principals used the libraries for storage. At Thurgood Marshall students "resisted totally" when he started to teach the basics of the Dewey System. Most students failed this work. Teachers then complained that this kept their students off of the honor roll. Reinoso called him in about complaints that were received from parents. One parent told him "you're the problem." Reinoso "almost encouraged this behavior." A teacher told Watson that Reinoso was asking students whether they were frightened of Watson. The principal tried to create situations to incite students.

Reinoso testified that he did ask some students whether they were traumatized by comments allegedly made by Watson about the end of the world coming and not having much time left to live as a result of the 9/11 tragedy.

As for the learning environment in Thurgood Marshall, Watson charged that when he first was provided with an aide, she quickly told him that he needed a girlfriend and that she could call him at night. He told her that she was there to work in the library. She then told Reinoso she hurt her back and did not come to work.

The petitioner summed up his response to the criticisms of his performance by arguing, "all things said were not valid." He "put his best foot forward" and "tried to comply." Referring to his treatment by the district, Watson explained that he was "railroaded." During cross-

examination regarding the series of evaluations that he received from various persons, Watson characterized these as part of a "conspiracy," with supervisors acting "in collusion" under Dr. Lewis.

As further evidence of harassment, he presented PW-8, a memo from Reinoso dated March 13. In the memo, the principal thanked Watson for his "understanding of the necessity to curtail the explanation of your question by Ms. Nancy Manning at the Roots Implementation Visit Feedback." Reinoso noted the "very strict time constraints for after school Faculty Meetings and there was less than ten minutes left for the very important safety feature . . . . I'm glad you were able to get a full explanation from Ms. Manning for library alignment of the Success For All Reading program." Watson characterized this memo as an "apology" for conduct by Reinoso at the meeting that had publicly embarrassed the petitioner. In his testimony, Reinoso confirmed the basics, but did not agree that he did anything to embarrass Watson or that the memo was an "apology." Instead, it simply acknowledged Mr. Watson's cooperation at the meeting.

The witness cited other alleged acts of harassment, including a complaint that he had not locked doors during a "Code Red," which is a procedure utilized when there was an armed intruder in the building. He claimed that he was never told what to do in such an incident and that maintenance personnel advised that the door(s) could not be locked. He insisted that this write-up was done simply to "add to the paper trail." He was being written up for things he was not trained in and for "whatever went wrong." In addition, in 2003, he was also purposely assigned to duties requiring that he pick up the duties of a teacher, Ms. Perrier, if she were late in the morning, which assignment prevented him from having time to work on his rooms and organize classes, as other teachers had. He was relieved of this duty on April 1, 2003, as an accommodation to allow him to complete other duties of the job description.

Mr. Reinoso testified that it was common practice to have a certified teacher escort students to their classroom at the beginning of the day. Usually where coverage is needed, the request is made to staff that are not themselves assigned to a homeroom.

As proof of his activities regarding curriculum, Watson presented directions for reports issued by him. He asserted that this was done despite the lack of any curriculum and it had to be signed by parents. This was just one of the things that students did in his library classes.

Watson noted that in February 2003, professional librarian Connie Paul came to the library at Marshall to review it and offer suggestions, but she concluded that the school did not really have a library, as the space was shared with the SFA reading program, a vice-principal's office, room for math facilitators, storage for math and reading materials and a guidance counselor's office. Paul did not know how to recommend changes because the facility was not really a library.

Ms. Paul, Director of the Central Jersey Library Cooperative, a state funded non-profit organization, holds a Masters Degree in Library Sciences and served as a school librarian for twenty-five years. As part of her responsibilities she visits many school libraries. On April 28, 2003, she visited Thurgood Marshall at the invitation of Mr. Watson. This visit was made after she had notified Mr. Reinoso, with whom she met after her visit to the library. Paul explained that when she walked in to the library, she did not have the feeling that she was walking into a functioning library program. The library was divided into three sections, one for reading, one for books and one a bare room. There was a circulation desk, computers and a table. There was a need to make more efficient use of the space and to put things in the front of the room. The setup was not one that invited research. Despite her concerns about the deficiencies and limitations of the space, Ms. Paul nevertheless agreed that there could be a functional library program.

Responding to a question from Mr. Watson regarding his expressed concerns as to the nature of the qualifications held (or not held) by those who supervised or evaluated him, Ms. Paul stated that while it might be the ideal, in fact it was "pretty unusual" for the person who supervised the librarian to have a Masters in Library Science. Indeed, in her many years of service she never had a supervisor with such credentials, yet she was never "encumbered" by this fact in the performance of her duties as a librarian. She also could not identify any series of books for the teaching of library skills.

Called to testify by Mr. Watson, Albert Reinoso testified that when he conducted an evaluation of Mr. Watson in the library on March 27, 2003, he did not require that Mr. Watson stand. He recalled that there had been a discussion earlier in the school year about Mr. Watson's need to sit and that a chair was provided for him.

Reinoso explained that there is a procedure in place for the ordering of materials and supplies needed in the library, with a central office supervisor performing this task. All supplies and materials are ordered based upon the recommendations of instructors. He was sent a copy of a memo dated October 28, 2002, in which Scott Henry, the district's business administrator, discussed with Watson an "unauthorized purchase" of materials made by Watson that, as per the memo, resulted in the district overpaying for laminating materials. He was familiar with the process for the book fairs held at Thurgood Marshall and believed that the librarian was responsible to account for the money taken in. Reinoso does not recall that he ever wrote Watson up about having no right to bring books into the library. He did recall that there had been a delivery of books to the library that was unexpected by either he or Watson, as it had been set up by the previous librarian. When they were delivered Watson asked about them, and Reinoso thought that they had something to do with the Book Fair, but they actually were donated books. He also recalled that he had written about banking procedures because there had been some questions regarding these in connection with past book fairs, although the money for these had all been justified.

The principal explained that at Thurgood Marshall everyone teaches reading during the first one and one-half hours of school. The library was restructured "years ago" to close off into three classrooms. The dividers are closed during the reading period. After the ninety minutes are up, then the front and one side of the library is used for library skill instruction, while another section is used for the storage of SFA materials. A guidance office is adjacent to the library, as is an office for the vice-principal, and a speech therapist utilizes the library office for one-on-one teaching. The librarian has counter space and the use of one-half of the back office to store materials. Math and reading books are stored in the library.

Reinoso did not know of any library skills books, but he "has seen library skills taught," such as how to go to the different sections of the library. The witness is "aware" that there is a library curriculum, but is not aware that the curriculum for the 5th graders is any different than

that in place for other grades. The unsatisfactory ratings that he gave to Mr. Watson were not related to issues regarding curriculum or whether curriculum guides were purchased for the library. If a teacher were brand new to the district, then "you might need" a guide, but after two years in the district at another elementary school it would be expected that a librarian would not need such a guide, and it would not be needed for the evaluation of students.

Richard Springer was called to testify by Mr. Watson regarding his observations of the library conditions in which Watson functioned. Springer began his educational career in 1967 with the Neptune schools and worked in that district until 1989. He then worked for the Morris-Union Jointure Commission until 1992 and then the Greater Egg Harbor district until 2000 when he went to work in Asbury Park for a short time in September and October before retiring. Mr. Springer started as a science teacher and later became a media coordinator and then an assistant superintendent for technology. He later supervised twenty-two districts for the Jointure Commission and in this and his later positions he supervised technology uses and traveled to many schools, assessing the state of the libraries and reading programs and how the district functioned. He met Watson during a visit to Bangs School. He observed the multiple uses to which the so-called library space was put, including the use of space to accommodate a much-needed reading program. There was "great disturbance" in the library due to other uses and competing areas of concern and responsibility. He spoke to Mrs. McDavid, the director of curriculum, and they discussed the concerns about the libraries and the district's need to make serious decisions as to how to meet its shortcomings. Springer also related that from his examination there was "very little in the way of library curriculum." However, despite his concerns, Springer agreed that while the library situation was "challenging and far from perfect," this did not make the job impossible.

The Board's rebuttal

Dr. Antonio Lewis explained that he made his recommendations regarding the renewal of contracts based upon his discussions with the supervisor of elementary education and the building principal. Based upon these discussions and the evaluations conducted, he felt that Mr. Watson's contract should not be renewed.

Dr. Lewis was personally concerned about the condition of the library. He spoke to Watson in January about the need to correct a situation which he described in a memo, prepared after a subsequent visit of March 3 as, "utterly disgraceful." Books were "all over the place" and the library section itself was "rather cluttered." Lewis characterized the space dedicated for library use as "enough" and "more than adequate." As the district is an *Abbott* district, every space in the building is utilized for reading instruction. The memo dated March 7, 2003, reflects that Dr. Lewis was "dismayed, horrified and appalled at the condition(s) of the media center." He added, "I found it difficult to believe that you would allow our students to be subjected to such mess."

Lewis recalled that he had observed Watson teaching a class on at least five occasions. Two of these involved blackboard instruction by Watson, the others may have involved students working on projects. However, Lewis never formally evaluated Watson. He had some concerns about what he saw during these visits, and when he had any serious concerns about what he saw during an informal observation he would communicate these concerns to the school principal. In response to this testimony, Mr. Watson denied that Lewis had ever observed him, calling such testimony a "lie." He never saw Lewis in any of his classrooms and was in the hospital on the day that Lewis came to the Marshall library in March. Lewis agreed that he recalled this fact and that the visit that he wrote about in his memo might have occurred earlier than March 3, because as he recalled, Watson was present on the day of this visit.

Discussion

N.J.S.A. 18A:28-5 provides that teachers acquire tenure upon the completion of "three consecutive academic years, together with employment at the beginning of the next succeeding academic year." *N.J.S.A.* 18A:27-3.1 requires that "every board of education . . . shall cause each nontenure teaching staff member employed by it to be observed and evaluated in the performance of his or her duties at least three times during each school year . . . Said evaluations are to take place before April 30 each year. . . . Each evaluation shall be followed by a conference between that teaching staff member and his or her superior or superiors. The purpose of this procedure is to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence." *N.J.S.A.* 18A:27-4.1 b. provides, "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. . . A nontenured officer or employee who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed. . . An officer or employee whose employment contract is not renewed shall have the right to a written statement of reasons for nonrenewal . . . and to an informal appearance before the board."

A local school board has "virtually unlimited discretion in hiring or renewing the contracts of nontenured teachers." *Dore v. Board of Education of the Township of Bedminster, Somerset County*, 185 *N.J. Super.* 447 (1982). The board is not limited to acting where the statements presented in its reasons for nonrenewal are supported by evaluations, for indeed the board may reach its conclusion about a nontenured teacher "on a broad base of input received from a variety of people, including members of the public . . . ." *Id.* at 454. The breadth of the board's discretion is so great that the Appellate Division has said, "absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board." *Id.* at 456. The board's decision will only be vacated where it acts in an arbitrary, capricious and unreasonable manner. *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 294 (App. Div. 1960).

The record presented by the respondent contains a series of evaluations performed over the three years during which Mr. Watson was employed by the district. Taken at face value, they reflect initial impressions that Watson was performing satisfactorily, followed by later evaluations that he either needed improvement in several areas or even that he was performing unsatisfactorily and was not meeting the standards expected of a teacher in the district. In addition to these evaluations, the record presented includes additional indications of less than satisfactory performance, such as Dr. Lewis' memorandum concerning the condition of the library and his subsequent visit that revealed continued unsatisfactory conditions, as well as evidence that Mr. Watson failed to include any grades in his plan book. Given the vast discretion vested in the school board under the statute, this record of documented performance at less than satisfactory levels over a period of time would, without question, be more than sufficient to insulate the board against any claim that its decision not to renew Watson's contract was arbitrary or unreasonable.

Of course, as this decision notes and as the full record of the case will amply display far more than can be reasonably related in even a decision of this detail, Mr. Watson argues vehemently that the records and the testimony produced by the board cannot be taken at face value. For reasons that he has explained and for other reasons he may not have fully revealed, Watson sees the actions of the board, its superintendent and supervisory employees, and indeed apparently also its attorneys, as part of a grand conspiracy, a collusive "mission" to act contrary to his interests, to negatively affect his job performance, to interfere with his rights and to ultimately deny him tenure within the district. This concerted effort apparently started when his first two applications were, "lost," and continued, first apparently due to the perceived animus of Janice Anderson and then through the efforts of others, including Mr. Mednick, Mr. Reinoso and Dr. Lewis. In his attack upon the board's decision, Mr. Watson has focused upon a laundry list of issues, incidents, perceived examples of harassment and mistreatment that he believes reflect what really is at issue here, that is, that everything that this board and its supervisory personnel have done with respect to him has been arbitrary, improper and illegal. Further, it is also clear that he has strong, and I am sure, honest concerns about how the district is, or is not, properly educating its largely minority students. Indeed, this was the theme of the last statements in his closing remarks.

There is absolutely no denying that the conditions within which Mr. Watson was called upon to perform his job as a librarian were considerably less than ideal. Mr. Springer and Ms. Paul noted this, although each agreed that while this was so, it did not mean that the job was impossible. And despite Watson's repeated complaint at hearing that he was never supervised or evaluated by someone holding a Masters in library science, Ms. Paul denied that this was unusual. Indeed, she never had such supervision and the lack thereof never prevented her from functioning properly as a librarian over a lengthy career. While the lack of better working conditions and the clear and undisputed fact of a library environment that was less than what it no doubt should have been do mean that Watson might be given some "break" due to having to work in difficult circumstances, nevertheless the observations of his teaching performance and the deficiencies noted in the reports, as well as such matters as the lack of grades, appear to demonstrate some fundamental weaknesses that transcend the difficult environment. Indeed, even if the petitioner might perform satisfactorily in a different environment more conducive to a true "library" experience, that possibility, even if taken as true, does not mean that a decision by

this board that he could not function effectively enough in the environment in which he was required to work was arbitrary.

Having listened very carefully to Mr. Watson present his version of the truth, and his analysis of the actions and motivations of those who criticized him in one manner or another, I am thoroughly convinced that, despite the passion of his opinions, he is simply seeing only what he wants to see, only seeing and no doubt believing, that others who do not agree with him are not simply entitled to their opinions, but that they are lying, conniving and conspiring to "get him." I have carefully considered the credibility of his testimony and of his allegations, as well as the testimony of those called by the board, or called by Watson, but otherwise arguably identified with the board, who presented evidence that was adverse to Watson's asserted positions. Given that consideration, I **CONCLUDE** that the record simply does not "come within a mile" of proving that the decisions of those who either advised or made the decision to recommend against renewal were so motivated. Indeed, I simply cannot credit his conspiracy theories. While Watson might have been perceived as a difficult employee by some, while his actions might have "put off" some persons, in the end, I **FIND** that the evaluations and assessments of his work performance were legitimate expressions of reasonable and qualified persons who concluded that he was not performing in a satisfactory manner in respect to at least some of his required areas and ultimately determined that he was a less than satisfactory employee, who, for legitimate, work related reasons, was not a person that the district should keep on after he had failed to prove himself as a satisfactory teacher over an extended period of three school years. The record amply demonstrates that he was not progressing as the board was entitled to expect and that the evaluation that he was not meeting standards was by no means arbitrary. Under the statute and the case law, there is absolutely no basis whatsoever for the Commissioner to interfere with the local board's vast discretion in this matter and the appeal is therefore **DISMISSED**.

The Adult School Issue

As has been noted above, Mr. Watson also claims that the board improperly denied him renewal of a teaching position in the evening adult school operated by the district. He also seems to argue that, to the extent that he would achieve tenure upon the renewal of the contract for the mandatory public school term for 2003-2004, renewal improperly denied him by the board, he

would likewise be assured of a position in the Adult School. The board, which of course argues that the decision to deny this renewal was properly made within its discretion, further argues that no tenure status can be achieved in the Adult School position. In *Capella v. Board of Education of the Camden County Vocational Technical School*, 145 *N.J. Super.* 209 (App. Div. 1976), guidance counselors employed for more than three academic years in an adult evening high school, working three hours a night for two evenings a week, argued that they had achieved tenure in their positions, pursuant to *N.J.S.A.* 18A:28-5. The court relied upon several grounds to conclude that the school laws "cannot be construed so as to confer tenure in these part-time positions." *Id.* at 215. Among these were its analysis that the school laws "indicate that tenure was to attach only in those school programs which are *required* to be provided by a school system, and not in optional programs as an adult evening high school which a board of education "may" maintain." *Id.* at 214. However, following upon the later case of *Spiewak v. Rutherford Board of Education*, 90 *N.J.* 63 (1982), which critically assessed the *Capella* ruling, subsequent cases decided by administrative law judges and the Commissioner have determined that *Capella* is no longer good law and that even the "mandatory" or "optional" nature of the program did not matter. *See, Trenton Education Association v. Trenton Board of Education*, 93 *N.J.A.R.* 2d (EDU) 777; *Bergen County Vocational-Technical Schools Education Association, Inc. v. Board of Education of the Bergen County Vocational School District, OAL* DKT. EDU 5971-82 (August 15, 1983), *aff'd*, Commissioner of Education (October 3, 1983). Thus, teachers who serve even in a non-mandatory night adult high school may obtain tenure if they meet the test of the statute, which requires that they have served for (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; (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. In addition, the teacher must hold a state-issued teaching certificate that is appropriate for the position held.

Given the current state of the law, tenure might be achieved by a teacher in the adult school. But in order to attain that status, the teacher must have served the required time under the three alternatives offered by *N.J.S.A.* 18A:28-5. The petitioner has not shown that he meets this requirement. His "acceptance" of employment, stated in his letter of May 19, 2003, that Dr. Lewis addressed in his letter of May 23, 2003, provides no basis for a conclusion that tenure was obtained in the adult school, any more than in the regular school program where Watson's

contract was clearly not renewed. The credible evidence here is that teachers were not automatically retained in the adult school from year to year. They served on a one-year basis. Despite the fact that if they received a sufficient number of yearly appointments they would be eligible for tenure, Mr. Watson has not shown that he served for three academic years and then did so at the beginning of the following academic year, nor has he asserted that he meets the other time factors that are alternatives under the statute. Further, as his attempt to overturn the board's decision not to renew his contract has failed, he cannot achieve tenure in the Adult School on the basis that the board wrongly deprived him of his fourth, or tenure, year, in the district. Thus, to the extent that he claims tenure in the adult school, that claim must fail.

I **CONCLUDE** that the Superintendent had ample reasonable grounds to determine that non-renewal was appropriate due to Mr. Watson's demonstrated deficiencies. Mr. Watson has failed to meet his burden of demonstrating that the decision was unreasonable. Therefore, his request that the Commissioner overturn that decision must be **DENIED** and the appeal **DISMISSED**. It is so **ORDERED**.

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 (45) 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 (13) 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, 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, 2004
DATE

JEFF S. MASIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 13, 2004
DATE

Mailed to Parties:

SEP 16 2004
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

PW-1	Asbury Park Public Schools Appraisal of Teacher Performance for George Watson dated 5/29/02
PW-2	Professional Improvement Plan for George Watson dated 4/24/02
PW-3	Administrator's Request for Professional Leave for Staff, George Watson, dated 9/30/02
PW-4	Note from Miss Janet Tartanella to "To whom this may concern", 2001-2002 School Year
PW-5	Transcript of Proceedings on Notice in Lieu of Complaint, dated 4/4/03, *State of N.J. v. A.J. Reinoso*
PW-6	Certificate of Completion, Spectrum CIRC/CAT, for George Watson, Jr., dated 5/13/03
PW-6a	Spectrum Advanced Agenda
PW-7	Memorandum dated 3/13/03 to George Watson from P. Moran; A.J. Reinoso
PW-8	Memorandum dated 3/13/03 from Mr. A.J. Reinoso to George Watson
PW-9	Memorandum dated 3/3/03 from P. Moran to George Watson
PW-10	Memorandum dated 4/30/03 from A.J. Reinoso to Mr. Watson
PW-11	Report Directions, Grades 2,3,4,5 – Library, Teacher-Mr. George Watson, Jr., Report Outline
PW-12	Charge of Discrimination filed by George Watson, Jr., dated 8/2/02
PW-13	Memorandum dated 4/1/03 from P. Moran; A.J. Reinoso to George Watson
PW-14	Program Incentive Voucher issued 4/3/03 and Profit Option Voucher issued 3/24/03 for Mr. Watson
PW-15	Scholastic Book Fairs, Inc., Financial Form for Mr. Watson, dated 3/7/03
PW-16	Request for Library Books blank form
PW-17-21	Not admitted into evidence
PW-22	Memorandum dated 4/29/03 from A.J. Reinoso to Mr. Watson
PW-23	Memorandum dated 10/28/02 from Scott Henry to George Watson
PW-24 & 25	Not in evidence
PW-26	Letter dated 8/16/02 from Antonio N. Lewis to George Watson
PW-27	Memorandum dated 12/11/02 from Cecilia Tucker-Brown to George Watson

PW-28	Status Review of the Conditional Certification of the Asbury Park School District, August 2003
PW-29	Memorandum dated 12/6/01 from Ms. R. Beauford to Mrs. A. Bates
PW-30	Memorandum dated 12/6/01 from Mr. Paul J. Banik, Jr., to Ms. Andrea Bates
PW-31	Transcript of Proceedings on Notices in Lieu of Complaint, dated 4/4/03, *State of N.J. v. Scott Henry* and *State of N.J. v. Graft Diemer*

FOR THE RESPONDENT:

R-1	Package of Appraisals of Teacher Performance for G. Watson, Library (Media)
R-2	Letter dated 4/20/03 from Dr. Antonio N. Lewis to George Watson
R-3	Letter dated 4/30/03 from Ronald R.Villano to Lestor Taylor, Esq.
R-4	"Non Renewal Rationale" and attached memo dated 5/8/03 from Dr. A. Lewis to Mr. Taylor
R-5	Memorandum dated 5/23/03 from Dr. A. Lewis to George Watson
R-8	Letter dated 4/30/03 from Ronald R. Villano to Lestor Taylor, Esq.
R-9	"Non Renewal Rationale" and attached memo dated 5/8/03 from Dr. A. Lewis to Mr. Taylor
R-10	Memorandum dated 11/21/00 relating to a training workshop[vii]
R-11	Memorandum dated 2/27/03 from A. J. Reinoso to George Watson Re: Library
R-22	Memorandum dated 3/7/03 from Dr. A. Lewis to George Watson
R-23	Position Announcement, Evening High School, ESL Instructor
R-25	Job Application Form for George Watson dated 1/24/02
R-26	Recommendations of the Superintendent of Schools, 2/28/02
R-28	List of teachers
R-29	Cover letter dated 8/31/04 from Carol R. Smeltzer to Hon. Jeff S. Masin with enclosed certifications
R-29a	Certification of Paul Banik dated 8/27/04
R-29b	Certification of Andrea Bates dated 8/25/04

[vii] While preparing this decision it was discovered that the judge did not have the copy of R-10. A copy was requested from counsel for the Board (with notice to Mr. Watson), but as of the date of this decision a copy was not provided. However, from a review of his notes, the judge has determined that the contents of that memorandum are such that it would not change the outcome of this case and the initial decision should be issued in order to prevent further delay. Either party may supply a copy of R-10 to the Commissioner of Education for inclusion with the file prior to the Commissioner issuing a final decision.

406-04

#406-04

OAL DKT. NO. EDU. 6349-04
AGENCY DKT. NO. 173-5/03(b)

YARA MARTIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner filed timely exceptions,[1] which were fully considered by the Commissioner in his determination in this matter.

Upon his full and independent review,[2] the Commissioner concurs with the ALJ, for the reasons comprehensively detailed in his decision, that the within petition is properly dismissed since petitioner has failed to meet the limited standard entitling non-tenured, non-renewed teaching staff members to relief, as established by the Appellate Division in *Dore* and *Kopera, supra.*

[1] Petitioner Yara Martin and petitioner George Watson, Jr., OAL Dkt. No. EDU 4990-03, Agency Dkt. No. 173-5/03(a), filed joint exceptions to the Initial Decision. It is noted that there is no indication that such exceptions were copied to Board counsel or the Administrative Law Judge (ALJ) as required by *N.J.A.C.* 1:1-18.4.

[2] The record of this matter includes transcripts of the hearing conducted at the OAL on June 11, 14, 18 and 30, and July 2 and 8, 2004.

Accordingly, the Initial Decision of the OAL is adopted and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/15/04

Date of Mailing: 10/15/04

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06349-04S
AGENCY DKT. NO. 173-5/03

YARA MARTIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,
Respondent.

Yara Martin, petitioner, appeared *pro se*

Lester E. Taylor, Esq., for respondent Board of Education (Hunt, Hamlin & Ridley, attorneys)[i]

Record Closed: July 8, 2004 Decided: September 13, 2004[ii]

BEFORE **JEFF S. MASIN**, ALJ:

Yara Martin was employed by the respondent school board ("Board") as a special education teacher in its school system. She also worked in a teaching position in the adult evening school in Asbury Park. On May 23, 2003, Martin, along with a fellow Asbury Park teacher, George Watson, Jr., filed a joint Petition with the Commissioner of Education ("Commissioner"), in which they alleged that the Board had, among other things, improperly

[i] Throughout these proceedings, Lester E. Taylor, Esq., represented the Board. However, prior to the final day of hearings, he advised that the Board had determined not to renew its contract with his law firm for the upcoming year, beginning on July 1, 2004. Due to the delay and confusion that a last minute substitution of counsel would have necessitated, I entered an Order dated July 1, 2004, mandating that Mr. Taylor remain as counsel "through the completion of the actual hearing and the presentation of any legal briefs in connection with the preparation of this initial decision." With the hearings completed and closing arguments having been presented orally, a Substitution of Attorney has now been submitted on July 29, 2004, for Gregory G. Johnson, Esq., (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys) as superceding counsel for the respondent.

[ii] The forty-five (45) day statutory period within which to file the Initial Decision with the Department of Education expired on August 23, 2004. The undersigned judge requested additional time to complete the Initial Decision in the instant matter because of the complexity of the case and his pending, pre-planned vacation, which began on August 9, 2004, and continued through the expiration of the forty-five day statutory period. Therefore, pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, the time limit for filing the Initial Decision was extended until October 7, 2004.

18A:27-12.[ii] The Petition made many allegations and assertions of supposed wrongdoing by the Board, its employees and representatives of the union that served as the bargaining agent for the teachers. On June 23, 2003, the Board filed an answer to the Petition, which it characterized as a Petition of Appeal. Catherine Ahl and Windsor Leveille also filed Answers. They had been named as respondents along with the Board. However, they were dismissed as respondents upon the entry of an interlocutory order dated June 8, 2004.[iii]

While the joint petition asserts that the petitioners accepted employment for a fourth year with the Board and therefore acquired tenure, the Board takes a very different position as to their status. It contends that it gave each timely notice that their contracts of employment would not be renewed for the upcoming 2003-2004 school year and that, as non-tenured employees, the petitioners had no legal expectation of renewed employment and certainly did not attain tenure status. Relying upon the "nearly unlimited" discretion afforded to school boards to determine whether to reemploy non-tenured employees from year to year, the Board seeks dismissal of the petitioners' appeals. *Dore v. Board of Education of the Township of Bedminster, Somerset County*, 185 *N.J. Super.* 447 (1982).

As filed by the *pro se* petitioners, their petition contained sixteen pages of wide ranging allegations, some directly related to the issue of tenure rights and employment status, and others touching on these issues, but alleging civil rights, Open Public Meetings, harassment and labor union representation issues. During a prehearing conference conducted by Administrative Law Judge Caridad F. Rigo on October 8, 2003, the petitioners withdrew many of the counts of the Petition with each petitioner reserving the right to pursue charges in other appropriate forums. The judge issued a prehearing order dated October 16, 2003, noting therein the numbers of the various withdrawn counts and by whom each was withdrawn.[iv] Judge Rigo then listed the issues remaining for determination in the administrative hearing. These were: (1) Were the non-renewal of the petitioners' teaching contracts in violation of *N.J.S.A.* 18A:6-9 and 18A:27-4;

[ii] Both Martin and Watson filed a "Notice of Acceptance of Teaching Contract" with the Asbury Park Board of Education School Year 2003-2004. These were each dated May 19, 2004. In this Notice, Martin first advised that she accepted employment for a position as 1. Teacher of Adult School 2003-2004 and 2. Teacher K-8 or Special Education Teacher. She added, "this will be my tenure year at the Asbury Park School District, my fourth year as a teacher at Thurgood Marshall and my second as evening school ESL Teacher at Asbury Park High School Evening Program. However I have never had a written Teacher's Contract for the employment of my third year at Thurgood Marshall or for my first year at Adult School as required by law as 19A:27-5 et al."

[iii] Their dismissal was based upon a determination that, as the focus of this dispute concerns the tenure status of teachers or the non-renewal of teaching contracts, no relief could lie against them as union officials or representatives.

[iv] The Order noted that if the petitioners sought to file a claim in the United States District Court for these withdrawn counts and the District Court refused to accept the "counts/petition," the petitioners could then file an appropriate motion seeking to reinstate the designated withdrawn counts. The judge established a deadline for the filing of any such motion, keyed to the deadline she established by which date either or both petitioners could file such claims with the District Court. "If the petitioners have not filed their petition with the U.S. District Court by November 12, 2004, they are foreclosed from seeking reinstatement before the OAL."

(2)Was procedural due process rendered to the petitioners with respect to notice of the April 28, 2003, board hearing; (3) Were there violations of the Open Public Meetings Act on April 28, 2003, April 29, 2003, July 17, 2003, and August 21, 2003, by the respondents not providing the required notices for these meetings; hence, these meetings were conducted in violation of the act.

In their joint Petition Watson and Martin state a series of, in some instances separate, and in some instances, joint or mutual, allegations of fact and assertions of wrongdoing. For reasons that are not revealed by the record, the Department of Education did not sever the individual petitioners' cases prior to transmitting the contested case(s) to the OAL under one docket number and the judge originally assigned to the case did not severe the matters either. By the time this judge received the case there had been a good deal of activity involving discovery, motions and significant disputes, and at the late date that this judge first entered into the matter he deemed it best not to attempt to sever the claims and instead decided to proceed with one combined hearing at which both petitioners would present their claims. Thus, with each petitioner fully advised that their cases constituted individual appeals of the action of the Board denying non-renewal as to each separately, and also to the extent that each claimed that he or she had accepted employment for the coming school year of 2003-2004 pursuant to statute and therefore had a right to the teaching position, the case proceeded as one hearing, with each petitioner presenting his or her witnesses and arguments and conducting his or her examination and cross-examination individually. While it is recognized that Mr. Watson and Ms. Martin have each raised concerns that mutually trouble them about the conduct of the Board and its employees, as was carefully explained to each, their employment status *vis a vis* the Board must be determined independent of the other, judged in accordance with the applicable law. Further, at the close of the hearing I advised the parties that in order to treat each matter separately and to allow for a more efficient presentation of the decisions, as well as to prepare written initial decisions that could be more appropriately reviewed throughout the administrative, and perhaps, judicial process, that I intended to severe the matters for purposes of the written decisions. A separate Order severing the cases has been issued.

In addition to the dispute relating to the petitioner's employment status as full-time teachers in the district's system, during the hearing the petitioners also asserted that they were each denied rights with respect to their employment in the adult school. They contend that the Board improperly denied them employment therein as well, and therefore interfered with their

ability to attain tenure in that employment. The Board disputes the idea that tenure is applicable to employment in the adult school, arguing that its employees are hired on a yearly basis subject to advertising of positions that is based upon the needs of the program, dictated largely by the varying size of the program.

The prehearing and trial portions of this case must, in fairness, be characterized as contentious. Over the course of the case petitioners sought and, in some instances, made motions to enforce discovery. It must in fairness be stated that at times the board was lax in its responses. One of the ongoing controversies was in regard to the petitioners' demand for the production of the tapes of Board meetings held on numerous dates in 2003. Ultimately, after attempting to determine what the alleged problem was that prompted the petitioners to seek discovery of the tapes for the meetings held on July 17 and August 21, 2003, dates that were significantly subsequent to the Board's notice to the petitioners of April 29, 2003, regarding the non-renewal decision and the Board's May 15 meeting, at which the non-renewal decision was adopted, or for the much broader number of tapes sought of meetings through most of 2003, and considering also the board's contention that the transcription of these tapes would be extremely burdensome, given the time and effort necessary to exclude privileged materials such as personnel issues involving other employees, I concluded that this discovery demand was unwarranted. Additionally, to the extent that the prehearing identified as an issue the question of whether the board had violated the Open Public Meetings Act, attempts to identify exactly how any such alleged violations might impact upon the rights of the petitioners *vis a vis* their contention that the Board had denied them tenure, or that the decisions not to renew their contracts were arbitrary, were unsuccessful. To that extent, I concluded that the Open Public Meetings issues were not relevant to this proceeding.

Prior to the hearing, I advised all parties that, although the burden of proof rested upon the petitioners to demonstrate that the Board's decision of non-renewal was arbitrary and unreasonable, I would nevertheless require that the Board first present at least a modicum of evidence to explain to me the basis for its decision, so that I could then more intelligently assess the petitioners' proofs as they attempted to meet their burden. This reversal of the general course of testimony, in which the party bearing the ultimate burden of proof first presents evidence seeking to meet that burden and the party seeking to support its action against the petition then responds, was required so that the petitioners' proofs could be understood against something

other than a vacuum. Of course, the burden of proof never left Ms. Martin throughout the case. After the Board presented some limited evidence and its witnesses were cross-examined by Martin, she then proceeded to present her case and, after she had concluded, the Board presented additional evidence, seeking to meet the evidence and charges offered by the petitioner.

The Board's Initial presentation

The Board offered evidence that, by letter dated April 29, 2003, Dr. Antonio N. Lewis, Superintendent of the Asbury Park School District, notified Ms. Martin that "I will not be recommending the renewal of your employment for the upcoming year. Accordingly, your employment with the Asbury Park School District will terminate at the close of business on June 30, 2003." When served with this notice, Martin signed it, but she wrote that she did so "under duress and protest." She then exercised her statutory right to request a statement of reasons for non-renewal. In response, the Board then provided her with a written statement of "Non Renewal Rationale," identifying the following:

1. Poor classroom management
2. Incomplete lesson plans
3. Weak planning and organization
4. Lack of effective instructional methods and techniques.

Dr. Lewis testified that the district had conducted evaluations of Ms. Martin's performance and the evaluating supervisory personnel had prepared documents setting forth their "Appraisal of Teacher Performance," beginning with an evaluation conducted on December 14, 2000, by Deidre Calderon, the district's supervisor of special education for pre-kindergarten through 5th grade. Ms. Calderon reported that Martin performed satisfactorily in each of the twelve areas assessed (the form also contains two "other" categories not reported on in this evaluation). These twelve covered various issues within two broad categories, "Instructional and Management Skills" and "Personal Characteristics." Overall, Martin was characterized as, "meeting Asbury Park standards." On February 15, 2001, Calderon again evaluated Martin, and this time she reported that the teacher was satisfactory in most areas, but "needed improvement" in the categories of "planning organization," "methods and techniques" and "knowledge of subject matter." At the time Martin was a Grade One inclusion teacher, working with Ms.

Maneff. The appraisal form contains comments that are generally favorable, but also two "suggestions/comments," one a "second reminder" to "please include CCCS [Core Curriculum Standards] to lessons in your plan book" and "Need to increase knowledge of the subject area i.e. Attend Workshops." Calderon now reported that Martin was "progressing toward Asbury Park standards."

Calderon next evaluated Martin on October 2, 2001. This report indicated satisfactory performance in all areas, that Martin was meeting standards and that her "lesson plan is right on the mark." Calderon added, "Keep up the good work." The April 9, 2002, evaluation was a bit less strong. Here, evaluator Y. Lockley reported that Martin needed improvement in planning and organization, methods and techniques and classroom control. She was progressing toward standards. A series of ten "recommendations" were listed, along with three "commendations."

Ms. Calderon again evaluated Martin as a Grade Three inclusion teacher on April 17, 2002, just a week after Lockley's April 9 report. Here, Calderon reported that all areas were satisfactory and Martin was meeting standards. A recommendation was to "continue to improve in your instructional and management skills." Dr. Lewis testified that this note was "cautionary."

By the time of the next evaluation report, early in her third year with the district, dated October 23, 2002, Martin was teaching in a self-contained "SLD-M class." The report prepared by Ms. Calderon states that Martin had a para-educator to assist her. In this report, Calderon found Martin to need improvement in the areas of planning and organization, methods and techniques and knowledge of subject matter. She was progressing toward standards. Comments addressed means of assisting with student feedback and a recommendation "for greater professional growth, [she should] consider visiting other classrooms, and incorporate at least one new idea from each visit into your teaching and/or classroom environment." Lewis testified that the comment about student feedback referred to "almost rudimentary" concepts. Interestingly, the Appraisal form notes that Martin "refused to sign" this report.

Ms. Calderon issued her next appraisal report on February 3, 2003. The only area less than satisfactory was planning and organization. Martin was progressing toward standards. Recommendations were that her plan book "should include accommodations and modifications

for all of your students and should be readily accessible at all times" and "your lesson plan should be more descriptive."

The next appraisal report, dated March 17, 2003, presents a very different assessment from those previously produced. Here, Ms. Calderon found that Martin, still a self-contained SLD teacher, was in need of improvement in methods and techniques, knowledge of subject matter, student time on task, classroom control and room environment. Her planning and organization was unsatisfactory. Calderon ranked her, for the first time, as not meeting Asbury Park standards. In her commentary, Calderon noted that there were eight students in this class, in which a Ms. Barnes assisted. She mentioned, "the classroom atmosphere was very chaotic at times. The students had a hard time staying on task." Additionally, "Upon observation of her lesson plan book, it was noted that there was no change from her last observation which stated it needed improvement. Her plans are still not complete even after giving, for the second time, more information on how to do a lesson plan." Calderon recommended that Martin "secure and maintain student's attention and participation, take advantage of professional development opportunities to enhance professional abilities, visit other classrooms to observe different learning styles and seek help and instruction when planning for your classroom."

A subsequent evaluation was conducted on March 20, 2003, by the school's principal Mr. Albert J. Reinoso. This report lists Martin as needing improvement in the areas of knowledge of subject matter, student/teacher rapport and voice projection. Unsatisfactory performance was noted for planning and organization, methods and techniques and classroom control. Comments included reference to her performance in presenting a "day two" lesson for the SFA Reading Wings curriculum. She "did not box and underline the starred words for section one. There was no reference to the use of the starred words in the context of the story. At this point the 'Day Two' schedule calls for showing predictions with evidence. This important element was omitted by Ms. Martin." Martin also "awarded team points with no reference to the cooperative learning standard," "did not model the meaningful sentence process with a graphic organizer," did not mention other elements, but "did a very effective job of using the Treasure Hunt as a guide for answering questions." She "did not have a pre-planned 'Two minute edit' sentence prepared." There was also "no evidence of the use of SFA classroom management strategy or the numbered heads classroom management strategy." The document contained five recommendations, including that the teacher

> follow-up on the many conferences which you have had with administrators, implement all of the many suggestions and remedies for deficiencies that have been given to you and documented by the SFA facilitators, incorporate into your lesson preparation and instruction the ideas, concepts and methods that were presented at the numerous trainings which the district has provided for you, and review the objectives in the corrective action plan which you received on October 11, 2002, paying particular attention to the plan and substitute plans.

Dr. Lewis explained that the SFA lesson is a prescribed program where "every second of time is prescribed" as to what to do, and if the teacher varies from this plan then she is not following the continuity of the instruction. If a teacher can justify a variance from the prescribed plan, then this may be all right, but certainly not on a daily basis, as the history of the program is that it will not work if not presented within the model.

Dr. Lewis had discussions at various times with building principals, the supervisor of special education, parents and classroom aides who voiced concerns about aspects of Ms. Martin's performance. He also had repeated discussions with the director of pupil personnel services. Ms. Martin was not following the SFA instruction program. He also visited her class just prior to recommending against renewal of her contract. In his view, she did not seem to understand that if she did something out of the ordinary, her students would react to this change of routine. He observed this when he came into her classroom.

The witness recalled that during her last year in the district, complaints were received that Ms. Martin would close the shades in her classroom and keep the room dark, with all, or at least most, of the lights turned off. It was reported that students could not work on their lessons. She was told two or three times to open the shades and turn the lights on. She claimed that she had to take these steps due to the bright sun that came into her classroom, however, he recalled that this happened when the sun was actually on the other side of the room. On cross-examination, Lewis claimed that he was not aware whether any of the children's Individual Educational Plans ("IEPs") requested or required that half of the lights be turned off.

Another area of concern was that Ms. Martin had repeated difficulties interacting with staff. This problem started in her first year, 2000-2001. She was assigned to a special education inclusion class and had difficulty interacting with the other teacher in the room, so much so that

it became necessary to transfer Martin out of that class. Lewis denied any knowledge that she had been approached to transfer because she was told by Mr. Reinoso that he needed a favor from Martin because two teachers in the class into which she transferred could not get along and were fighting. Later on in her teaching service, she was given her own class and clashed with an aide assigned to her.

Acknowledging on cross-examination that he was aware that Ms. Martin had signed a complaint in the Asbury Park Municipal Court charging Mr. Reinoso with harassment, the superintendent denied any knowledge on his part prior to his recommendation of non-renewal that Ms. Martin had signed an EEOC complaint charging Reinoso with sexual harassment.[v] He was never contacted about this by any NJEA representative and only learned of this after the recommendation was made. Lewis also denied personal knowledge that Ms. Martin taught English as a Second Language ("ESL") in the district's night school.

Andrea Bates, who has served as the district's affirmative action officer since 2000, similarly denied any knowledge of Martin having complained about harassment by Reinoso. Postings regarding the procedure for filing complaints are sent out from her office to the various schools two or three times a year. She did not conduct any workshops to instruct persons how they should file complaints.

Albert J. Reinoso served as the principal at Thurgood Marshall School for seven years before he became the principal at Asbury Park High School. Reinoso testified that he had seen Ms. Martin teach many times, however his observation of her on March 20, 2003, may have been the first formal evaluation that he ever conducted of her. He denied any recollection of his ever questioning students about her teaching capacities, but he does recall that he asked about "what happened when he was not there."

Reinsoso has received training in the SFA Program and he "usually" tries to observe teachers as they present this work.[vi] When it became apparent that Martin was having difficulties with the program, he offered to provide an SFA facilitator to demonstrate for her.

[v] This complaint, sworn to on March 27, 2003, alleged that on March 20, 2003, Reinoso "did harass the complainant by making unwanted remark toward her and caused her to be uneasy." The statutory violation noted was of *N.J.S.A.* 2C:33-4A. It is apparent from the testimony in this case that the date of the alleged harassment does not relate to any one specific event, as opposed to what Martin explained was a history of harassment.

[vi] He has attended four national workshops and received training at an "institute" in Baltimore. Although he has never taught the program, he has presented demonstration lessons.

However, he believes that on the day that it was planned for this to occur, Martin was absent. She said that she would call to arrange another date, but she never did. However, he acknowledged that he "might" have seen a memo from Martin, dated April 15, 2003, in which, despite her disagreement with his recent evaluation of her reading class, she requested that he teach an SFA class to her class "at your earlier convenience." He also acknowledged receipt of a two page "Rebuttal letter," written in response to his evaluation of that class. In this document, Martin defended herself, disagreeing that she had omitted "showing predictions with evidence," as the "story was not a story, but rather a description of the sounds of each musical instrument and the kinds of feelings we have when listening to them," that she did present a model of the meaningful sentence process with a graphic organizer without implementing circles around the steps, in order to provide a varied method of learning to the students, that she wrote the two minute edit on the board because the overhead projector was not working, that "classroom management strategy" was effectively used, with the names of disruptive students written on the blackboard as necessary, that "numbered heads classroom management strategy" was utilized, that "my extensive knowledge of the lesson was demonstrated repeatedly throughout the class" and that the class was "fully planned and organized" and "methods and technique were carried out" "according to SFA standard." She also denied that her voice projection was anything other than "loud and clear enough for the entire class to hear," and defended her classroom control, noting that there were two disruptive students, whose behavior had previously been called to the attention of "Mrs. Ahl several times, but her only response was, 'I don't know what to tell you about it, I have no answers. . . .' "

The witness identified Ms. Barnes, an aide who was working with Ms. Martin at the time, as the source of the complaints about the lights and shades. He personally observed shades closed and lights turned off. He directed that the room was not to be darkened unless audio-visual equipment was in use, and opined that turning off the lights and pulling down the shades was a "negative" for special education students, unless such equipment was in use. He did not recall that Martin had asked that Barnes be removed from Martin's class due to her allegation that Barnes was "watching" her for Reinoso. He only recalled that Martin asked that Barnes be removed, but not why she made that request. Barnes, who had been with the students in that class for two years, told him that she wanted out of the class, but staffing issues and issues concerning pupil/teacher bonding caused him not to move Barnes. He recalled that Ms. Martin alleged that Barnes was causing discipline problems, ate in the classroom all day except when

she disappeared for extensive periods of time, and used students for errands and that the students wanted her removed. He spoke to the students about these issues, but he could not corroborate these charges. Reinoso acknowledged that due to the fact that Martin and Barnes did not get along, he did speak to students during 2002-2003 about how comfortable they were in the class. These discussions did not touch upon Martin's teaching ability.

Reinoso did not recall any request by Martin for a job description and did not remember providing one to her. He knew that teachers were entitled to one, but he was unsure who was responsible for providing it.

Questioned as to whether Ms. Martin's accent ever became an issue regarding the performance of her job, Reinoso acknowledged that during her first year students did complain that they had trouble understanding her, as did her co-teacher, Ms. Ownes. He spoke to Martin about this, in a meeting with Ms. Anderson and a union representative. The principal acknowledged that he eventually had to transfer Martin from Ownes' class, as Ownes' was insisting that she be removed, and that in order to make it easier to transfer her, he told Martin that he needed a favor from her. He said that it would be in the best interests of both classes if she transferred.

Mr. Reinoso was aware that prior to her employment by the district, Ms. Martin had a business cleaning the communal areas of the building in which he lived. He denied that she cleaned his apartment, at least to his knowledge. He does not recall that after she was employed by the district, he ever offered to help Martin with her accent at his apartment. He also never told her that no one would believe her about such meetings due to his influence. He denied telling her during her second year at Marshall that many requests had been made to terminate her, but that he really liked her and was doing everything he could to help her and that all she had to do was to accept his help. However, aware of her performance problems during that second year, he did say that he would arrange to help her, but he never told her he was a very powerful man in Asbury Park. He told her that she was having problems getting along with other staff and that this was a concern to him, but he recalls no invitations to his apartment. He never heard any conversation from her about buying a unit in his apartment building and only learned of a sale after it had occurred. He does not recall asking her to go out with him. As for the problems she had with other staff, this occurred each year that she was in the district, and it

was a factor in her evaluations and observations. Ownes complained not only about the difficulty that students had understanding Martin, but that Martin did not follow the shared teaching assignment plans.

Deidra Calderon testified that new teachers received an orientation prior to the start of school. Referring to her evaluation of Martin's performance on February 15, 2001, she noted that her directive from the very first day of school was that CCCS were to be put in the plan books. While in the main she had rated Martin as either progressing toward or meeting district standards, by Martin's third year she did not see any improvement in performance. She had reviewed with Martin the need to modify the SFA program to meet IEP requirements for particular student's needs, and referred her to the case manager to discuss how the goals of the IEP could be reached if modifications to systemic programs were not working. Concerns about this were brought to the attention of SFA monitors, but Martin would not modify. She does not recall that Martin ever asked her for any other reading program.

Queried by Ms. Martin about how Martin could have found the opportunity to observe any other class, as recommended in the October 23, 2002, appraisal, Calderon said that she could have requested coverage for her class from the building administration, or done so on her lunch or her prep time. As for the statement in the March 17, 2003, appraisal regarding the lesson plan book, the book was missing references to pages and exercises that were to be done. She had previously reviewed these informally with Martin and recommended that she look at other special education teachers' plan books.

The witness identified a memo of November 21, 2002, regarding grades that Martin turned in late despite having received an announcement from the main office as to the deadline. She was aware of problems between Ms. Martin and Ms. Barnes, and, despite Martin's oft-repeated testimony that Barnes claimed that she and Calderon were related, Calderon steadfastly denied any such relationship. As for her criticisms in the November 21, 2002, appraisal, she explained that Martin was not implementing the SFA program as directed and was not using adaptations. She was acting more as a paraprofessional than as a team teacher. Indeed, similar concerns were reflected in a memo issued to Martin on February 27, 2001, regarding the February 15, 2001, observation. Despite any claims to the contrary, Martin had in fact received training in SFA, but did not seem to reflect a grasp of the program or of team teaching.

Ms. Martin's Presentation

Yara Martin testified that prior to working in the Asbury Park school district, she was attending Georgian Court College and also operated a maintenance cleaning service, working at the building in which Mr. Reinoso lived with his then girlfriend. Martin cleaned the communal areas of the building and also some of the apartments. She always had at least one employee with her. Reinoso's girlfriend hired Martin to clean their apartment and while she did so she never spoke to Reinoso, other than to say "hi" and "bye."

When she first interviewed with the Asbury Park district, Ms. Martin met with Janice Anderson, who was a school principal. Anderson was "aggressive" and "offensive" and made Martin "scared." Martin did not get the job and she felt "terrified" and "like a criminal." Subsequently she applied again, at a job fair, and this time dealt with a Mr. Jackson, a vice-principal at Thurgood Marshall, who was very nice and professional. She was hired.

When she started at Thurgood Marshall, Martin continued to clean and worked at that job from 3:00 am to 7:00 am and then started at Marshall at 8:00 am. She no longer cleaned any apartments. Mr. Reinoso called her in to his office and told her that he needed someone to take care of children in the 7:00 am breakfast program. She told him that she could not because she had to clean, but he said that she should do as he asked, as "she had not been there too long." She felt that she had no choice. This caused her to start cleaning at 2:00 am. In conversations with Ms. Ownes, who had been a teacher for twenty years, she was told of "gossip" about Reinoso that later turned out to be true, but which at the time she ignored.

The petitioner acknowledged that at first there were some problems with Ms. Ownes, who was insulted that she had to work with someone with no experience. Martin told Reinoso that she was treated as a helper and that Ownes would not let her teach. Reinoso then told Ownes that she had to allow Martin to teach, and, while this insulted Ownes, over time the situation settled down so that there was no conflict after the first month. After about six months Reinoso came to Martin and told her that he had a problem that required that he transfer her to another class where two teachers were fighting in front of their students. Martin did not want to leave her class, where things were "fine," but Reinoso said that she had no choice. This meant

that the ties that Martin had with her students were broken and she had to start all over with another group of children and integrate into another teacher's system. She was very disturbed by this, and when she left, the children and Ms. Ownes cried. The teacher with whom she was now assigned, Ms. Maneff, did not want any other teacher in her class and did not want to share. This made the adjustment harder and it took a while for her to be accepted in this first grade class. Maneff never did accept her, did not let her do anything and made many complaints about her. Martin felt like an intruder and had many meetings with Reinoso about these issues. At the same time she was dealing with the SFA program. The first graders were utilizing the Roots program, and the Wings program started in the second grade. Martin had been trained in the Wings program. The programs require many workshops and the formats have to be followed closely. She received only one training session on Roots and really did not know the program. She spoke to Reinoso about this and he told her that, as the school year was significantly advanced and the students were "almost passing to Wings," she should help Maneff with it, alternating classes with her. Ms. Calderon observed and realized that she was not really teaching the class and wrote her up for this, then said that she was lying about not being trained for Roots. She showed Martin a copy of an attendance sheet for training. Martin was "overpowered as to what to do." Reinoso told her not to worry, "all was fine. Everything will be in place." He told her that she had obtained the job at Asbury Park because he liked her very much and that he appreciated what she was doing for the breakfast program. Reinoso insisted that she "got the job and was hired because of ' me.' " He told her that she needed to work on her accent. He then told her that she was placed in Maneff's class because of Ms. Ownes' complaint regarding her accent. This surprised Martin, who had been in the United States for twenty-one years and had never heard any complaint about her accent before. He told her that there had been complaints by parents and students about the accent, but she did not believe this. He said he would supply her with proof of the complaints and told her that the accent impacted strongly upon first graders. He told her that she should come to his apartment on nights or weekends or after school for help with the accent. She felt that this would be okay, that they were "friends," but she was naïve and when she mentioned this to friends, she felt "ridiculous" and "awkward." On many occasions Reinoso called her to his office to discuss whether a student had misbehaved, but he would then refer to the accent problem and ask her why she would not come to his apartment for help. Later on, he started to ask her inappropriate questions about her private life and she was very upset about this, unsure of what to do about it.

Martin had asked Reinoso and the board for a job description, but she was "ping-ponged" and never received one in three years.

Martin eventually discussed her problems with Reinoso with a union representative, Mr. Leveille, who said that the union would help her and mentioned the possibility of grievances. She thought such would be filed, but she did not really understand it all. Her problems with Reinoso continued into the second year of her employment, 2001-2002. Again, she was in an inclusion class, this time with Ms. Furlong, also a special education teacher.[vii] One was to act as the regular teacher, the other as the special education teacher. Reinoso asked her what she wanted to do and she told him "whatever he decides." He told her to act as the regular teacher and this very much upset Furlong. Furlong kept a diary as the year proceeded, and the two clashed at times, each prevailing on some matters[viii]. Furlong would interrupt her in front of the class, correct her and then make notes in the diary. Martin met with Reinoso to complain about Furlong. Mr. Leveille and Janice Anderson were present. She said that she could not teach "like this" and that it was not good for the teachers to disagree in front of the class. Lesson plans were not being prepared together. Each teacher had her different ways. Anderson, who was the supervisor, was "against her in that meeting." Anderson had been in the class many times, and she now agreed with Furlong. Martin was "wrong." Anderson commented that one time when she was in the class she saw Martin going to specific students throughout the entire class time instead of helping the whole class. Martin retorted that these students needed specific instruction on a one-on-one basis in order to understand what was being taught. Another comment dealt with Martin's having attempted to translate for a student who did not speak English. Anderson said that she was not in class to serve as a bilingual teacher and that she should be directing her attention to the special education students. Martin questioned why she should not try to help a student who needed assistance. Anderson then "yelled and screamed" at her, "Ms. Martin, you don't understand what I am saying." This was the same manner in which Anderson had spoken to her before, when she had "terrified" Martin. She started to cry, as she was being told that she was not a good teacher and was not following SFA, but she knew that this was not right. After the meeting she contacted professors at her college, who assured her that she was doing the right things. The day after this meeting occurred Reinoso called her into his office and said that the outcome of the meeting was not good. Martin said that she wanted a grievance, as that was "no

[vii] She identified Furlong as a long time friend of Reinoso's, whose mother had grown up with him. Furlong had taught for ten years, but had started in Asbury Park as a permanent substitute. This class was her first job as a full time teacher in the district.
[viii] Martin knew of the diary because Reinoso showed it to her.

way to treat her." She asserted that she was teaching the correct way. Reinoso was "sympathetic." However, he told her that no one at the school liked her, mentioned her accent again and said that she was Hispanic, which she is not. Indeed, Ms. Martin was well aware that other teachers also had accents. Reinoso then said that he "loves her," which at the time did not seem all that odd, as he often hugged the children and asked teachers to tell the children that they loved them. Reinoso asked that she reconsider accepting his help. She told him that was not going to happen, that she was not looking for a relationship with anybody. Reinoso told her that if she talked about what was said in his office that no one would believe her. "Everybody does what I want. I can make life very easy or dismiss her."

The petitioner explained that, despite the existence of some "needs improvements," her evaluation reports were generally good and she was either progressing toward or meeting standards. Nevertheless, she was upset, cried every day and felt that "everything was against her." By the middle of her second year, 2001-2002, she was still working with Ms. Furlong. She told Mr. Jackson, who was a vice-principal, that she could not continue to work with Furlong. Jackson was "supporting her" professionally, but said he had to be discrete so as not to jeopardize his position. She told him, "they're working against me." He arranged to transfer Furlong out of her classroom and replace her with another good teacher. However, when she went on a field trip with the class and with this new co-teacher and returned from the trip, she found that her classroom had been stripped of filing cabinets and everything from the walls. She called Jackson and found out that Reinoso had allowed Furlong to take everything to her new classroom. This caused a big battle, with Jackson in the middle. She eventually got her filing cabinets back, with the IEPs inside. Jackson soon departed for another district.

At the start of her third year, 2002-2003, Calderon told Martin that she would have her own class and therefore would no longer have problems with other teachers. As Martin did not see herself as the cause of conflict, she found this statement, "remarkable." Calderon then wrote negative reports on Martin. The petitioner acknowledged that she did sometimes forget to put CCCS in her lesson plans, but Reinoso told her that no one did and she did not have to do so either. As Calderon said that she had to, Martin did not know whom to follow, and she started to do it, then talked to others and found out that they did not include the standards. She believes

that this indicates the totally bad faith, arbitrary manner of her treatment by the district. There was "no rationale basis, no notice."[ix]

Martin had sixteen students in her self-contained class, a number well in excess of the other such class. The number varied over time as students went in and out of the class, but the disparity was never resolved. Some were highly classified, with serious behavior disorders. She had "3, 4, 5 grades in the same class," as many could not function at grade level, but were kept together due to their similar age. She had to group them by functional level and consulted with the social worker and psychologist on this. The students and parents were "happy." Nevertheless, some of the students were provocative and fought. They would frequently curse and throw things. Students got hurt. There were two or three whom she could not calm down. Eventually, Ms. Ahl of the SFA program told her that the students had to be in class, not in the discipline office. She was told to just "deal with," these pupils, she and her aide, for that is what a special education teacher is to do. However, the aide, Ms. Barnes, knew some of the students and she totally worked against the petitioner. Martin denied that she was keeping the room dark all day, as Barnes alleged. She only darkened the room during the first hour of the day, when the sunlight and heat in the room were problematic and disturbed students. She claimed that three of the student's IEP's said that luminosity disturbed them and they could not concentrate, so she dropped half of the lights and shades. Reinoso told her that she could not do this, and that he did not care what the IEPs said. Barnes complained when Martin locked the doors, but Martin acted in accordance with instructions from Reinoso, who told her that the law required that she do so at all times. Martin felt harassed and wanted Barnes removed from the class. Martin claimed that the children did not like Barnes, that she yelled at them, ate in class all day and could not move around the room due to her size. Barnes told Martin that Martin was doing everything wrong and claimed that she was related to Calderon and was updating her on all of Martin's wrongdoing. Martin felt that "everything was against me." When she tried to spark an investigation by sending material to the union and the board, the union told her that Affirmative Action Officer Bates would investigate, but nothing happened. All of this led to Martin becoming stressed, physically sick and visiting the hospital. She felt that "nothing at school was working for me." She finally filed a "criminal" complaint against Reinoso, which, when she saw how it had been written by the court personnel, found that it did not say exactly what she had wanted it to say. Ultimately, the matter was mediated. The next day Dr. Lewis came to her

[ix] Martin further explained that she did not write CCCS in the plan book "maybe three times in three years."

class, failed to identify himself to her and walked around while she discussed with the students what professions they wanted to enter. At the end of the day Reinoso came to the class and asked her what materials had been stolen from the room. She asked why Lewis had been there and Reinoso replied that he wanted to check regarding stolen materials. Since the superintendent had not asked her about this, she found Reinoso's comment, "weird." After this, the NJEA representative told her that she could file an EEOC complaint, and she did so, although the complaint was not filed until May 12, 2003, a date that is subsequent to the receipt of the notice that her contract would not be renewed.

Martin testified that Reinoso did not understand how SFA worked. He would question students about whether she followed the schedule on a daily basis, something that she contended they would not know, and about what she was doing. During her last year he "manipulated" students against her. Students would tell her what she was not supposed to do and became defiant.

Referring to a memo dated October 1, 2002, that Calderon wrote to her regarding a lack of "sufficient plans" available in the classroom on September 30, 2002, when Calderon visited the class and Martin was absent, she noted that she did have such plans, but that "supposedly Ms. Barnes misplaced" them. As for Calderon's offers of help, these were only offered in memos, but when Martin called her she never returned the calls or actually helped.

George Watson, Jr., a fellow teacher at Marshall during Martin's third year in the district, who, as previously noted, filed the joint Petition with Martin challenging the board's failure to renew either of their contracts, testified on her behalf that he overheard a conversation in January or February 2003 between Reinoso and Barnes in which the principal told the aide not to worry because the decision had already been made that Martin was "gone." He also had observed Martin teaching during that year and noted that Barnes was talking out loud and being very disruptive. Watson felt that Martin was "professional, had a lot of respect and dedication and cared about the results and the students."

The Board's rebuttal

Dr. Lewis testified that the decision not to renew Martin's contract was made after discussions with the building principal, the director of pupil personnel services, the vice-principal and after assessment of the evaluations carried out over the three years of her work. He personally never spoke to Martin and did not know her personally. He denied that he did not identify himself when he came to her classroom, as it is his habit to acknowledge teachers and students. He was unaware of any alleged harassment of Martin by Reinoso until after the decision not to renew was made, when he first learned of the May filing of the EEOC complaint. The filing of the municipal court complaint played no role in the decision, although he did have some awareness that they had been to court. Reinoso "was not convicted" of anything, and as far as Lewis knew the matter was dismissed.

Lewis opined that Martin always had an excuse about the need for her to implement a curriculum strategy. She simply did not do it, and seemed unwilling to try any strategies to accomplish what was necessary. Her inability to co-exist with other staff was also a problem. She would not follow the district's discipline plan, giving the students candy, which brought these matters to his attention when several parents complained to the principal. As for a job description, he found it hard to believe that she did not have one. This should have been supplied to her by the school principal.

Discussion

N.J.S.A. 18A:28-5 provides that teachers acquire tenure upon the completion of "three consecutive academic years, together with employment at the beginning of the next succeeding academic year." *N.J.S.A.* 18A:27-3.1 requires that "every board of education . . . shall cause each non-tenure teaching staff member employed by it to be observed and evaluated in the performance of his or her duties at least three times during each school year . . . Said evaluations are to take place before April 30 each year. . . Each evaluation shall be followed by a conference between that teaching staff member and his or her superior or superiors. The purpose of this procedure is to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence." *N.J.S.A.* 18A:27-4.1 b. provides, "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."

A local school board has "virtually unlimited discretion in hiring or renewing the contracts of nontenured teachers." *Dore v. Board of Education of the Township of Bedminster, Somerset County*, 185 *N.J. Super.* 447, 453 (1982). The board is not limited to acting where the statements presented in its reasons for non-renewal are supported by evaluations for, indeed, the board may reach its conclusion about a non-tenured teacher "on a broad base of input received from a variety of people, including members of the public . . . ." *Id.* at 454. The breadth of the board's discretion is so great that the Appellate Division has said, "absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board." *Id.* at 456. The board's decision will only be vacated where it acts in an arbitrary, capricious and unreasonable manner. *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 294 (App. Div. 1960).

On its face, the board has presented evidence that documents Ms. Martin's three years as a teacher in the district and shows that while at times she appeared to be on the right track, at other times her performance was somewhat less impressive. The appraisals vary to some degree, and it is fair to say that they do not overwhelmingly demonstrate that Ms. Martin could not teach. On a number of occasions even Ms. Calderon gave her decent, even good ratings. Yet, according to Calderon's testimony, as the time for the decision on renewal approached that would have given Martin a contract for a fourth year and with it tenured status, Calderon, the person responsible for special education instruction, concluded that Martin simply was not meeting the standards expected, particularly in the areas identified by the district in its rationale for non-renewal. In her evaluative comments, she noted that some of these problems presented continuing issues, such as the lack of complete plans. Mr. Reinoso's appraisal, performed just a few days after Calderon's, criticized Martin for the way in which she taught the SFA lesson, and noted that she had received prior assistance to help her and remedy deficiencies that she had apparently not utilized. Thus, as the date of decision approached, the last evaluations of Martin's in-class performance were certainly not glowing, clearly documenting problems observed that, given the board's great discretion, could, even if standing by themselves, support its decision. Further, several of the areas were found deficient at various times throughout Martin's three

years in the district. However, as the record reveals, if the board's evidence is believed, the board's decision is supported by much more. Specifically, the petitioner seemed to have a disturbing problem with interacting successfully with other staff members with whom she was required to work, whether it was Ms. Barnes, Ms. Ownes or Ms. Furlong. If it is accepted that she did in fact not get along with these persons, and that as a result of this discord, substantially traceable to her as opposed to the others, the district was required to continually referee disputes, change assignments and, not incidentally, that such turmoil had some negative impact on the classroom settings in which children were expected to learn, then, either coupled with, or separate from the appraisals, the board's decision would surely pass the reasonableness standard.

It is recognized that the issue of Martin's alleged difficulties in interpersonal relationships was not identified by the Board as a stated rationale for non-renewal in its formal reply to Martin's demand for reasons. It no doubt would have been appropriate for the Board to have included this in its reply, although it must be clearly emphasized here that the evidence presented in support of the stated rationale, if ultimately credited, would be readily sufficient to pass the test of reasonableness. However, I do not believe that the failure to list this additional ground is fatal to the board's ability to rely, at least in part, on this factor as well. No doubt the statute intends that the Board advise the teacher of the reasons for non-renewal, but, as the court in *Dore* noted, the board could rely upon a reason for non-renewal, such as the failure of the employee to maintain a deportment appropriate to a public meeting of a local governmental body, and could in fact rely on this as the sole reason for its decision, even though an examination of the decision indicates that this reason was not listed in the board's rationale provided in accordance with the statute. *Dore, supra*, at 451-456.

Kopera places an extremely high burden on someone seeking to overturn a board decision not to renew. In her attempt to meet that standard, Ms. Martin must demonstrate that the board's decision not to renew her contract was so far afield, so outside the realm of rational, evidentially based decision-making as to fail to even stand as a reasonable determination. To do that she contends that from the beginning Mr. Reinoso displayed an unusual interest in her, sought to develop a relationship with her outside the school building, and attempted to "persuade" her to do his bidding, at least in school if not also outside of school, by telling her of his power and influence within the district and community of Asbury Park. Ultimately, her allegations led to an EEOC complaint charging sexual harassment, but as this charge was not

filed at EEOC until after the documented date on which Dr. Lewis notified her of the non-renewal recommendation, the filing of the complaint cannot, in itself, be given any weight as a motivation for a retaliatory action by the district or as otherwise playing a part in the recommendations that Reinoso made to Lewis before that notice was issued to Martin. The allegation that Reinoso might have been attempting to develop a sexual relationship with Martin, or even that he otherwise may have harassed her, is troubling. He completely denies any such misconduct, and as Dr. Lewis correctly noted, Reinoso was never "convicted" of anything. But in assessing the question of whether the board's non-renewal decision was arbitrary and unreasonable, it must be remembered that the evidential basis upon which the superintendent's recommendation was made is broader than merely Reinoso's unfavorable appraisal. Ms. Martin clearly believed that others were acting in concert with Reinoso, and therefore Calderon's 2003 appraisal must be dismissed as tainted. However, having reviewed the documentation and assessed the credibility of the testimony, I **FIND** no evidence that would support any conclusion that Ms. Calderon gave anything but her honest appraisal of Martin's work. Further, despite Martin's claim that Ms. Barnes stated that she was related to Calderon, I **FIND** that Calderon testified truthfully that they were not related. I **FIND** no evidence to support any suggestion or implication that the problems that arose between Ms. Barnes and Ms. Martin, or between Ms. Furlong and Ms. Martin, or, despite her suggestions otherwise, the problems between Ms. Ownes and Ms. Martin, were the result of any plot, conspiracy or collusion between these individuals and Reinoso, or that Dr. Lewis was working with Reinoso to drum up reasons to support non-renewal or that he was a part of any conspiracy.

Decisions related to the competence of teachers to perform their work within a school district are necessarily affected by subjective reactions and sometimes by differing views on effective methods. Interpersonal relationships are an important aspect of employment, and in situations where teachers are required to work together in a classroom, it is essential that they at least maintain a calm, cooperative environment in which children can learn. The record here is replete with information that supports the conclusion that in Ms. Martin's case, she could, or would, not do this. As much as she tried to throw the blame for these interpersonal problems on others, I am not convinced that they were at fault. That is not to say that in some instances problems arose between Martin and her fellow teachers that could not be laid at the doorstep of the other person involved. Martin may well not have been wholly to blame for each and every problem. But there is enough credible evidence to support the conclusion that she was a difficult

member of the staff and that each year she could not get along with someone she had to work with in the classroom. A board of education confronting a decision as to whether to continue to employ a teacher who has not yet attained tenure can of course consider whether retaining that person will likely promote continued tension and disruption within the staff. This is a completely legitimate factor that can reasonably lead to the conclusion that it is best to avoid such future turmoil. In this case, the evidence is that these interpersonal problems started very early in Martin's career in Asbury.

The Adult School Issue

As has been noted above, Ms. Martin also claims that the board improperly denied her a new contract for a position teaching in the evening adult school operated by the district. Further, she apparently claims that renewal of her contract with the district for a fourth year as a teacher in the mandatory daytime school program operated by the district would grant her tenure that would secure her position in the Adult School as well. The board, which of course contends that its decision not to renew her contract with the district effectively terminated her employment before she acquired tenure, additionally argues that no tenure status can be achieved in the Adult School teaching position. In *Capella v. Board of Education of the Camden County Vocational Technical School*, 145 *N.J. Super.* 209 (App. Div. 1976), guidance counselors employed for more than three academic years in an adult evening high school, working three hours a night for two evenings a week, argued that they had achieved tenure in this positions, pursuant to *N.J.S.A.* 18A:28-5. The court relied upon several grounds to conclude that the school laws "cannot be construed so as to confer tenure in these part-time positions." *Id.* at 215. Among these were its analysis that the school laws "indicate that tenure was to attach only in those school programs which are *required* to be provided by a school system, and not in optional programs as an adult evening high school which a board of education "may" maintain." *Id.* at 214. However, following upon the later case of *Spiewak v. Rutherford Board of Education*, 90 *N.J.* 63 (1982), which critically assessed the *Capella* ruling, subsequent cases decided by administrative law judges and the Commissioner have determined that *Capella* is no longer good law and that even the "mandatory" or "optional" nature of the program does not matter. *See, Trenton Education Association v. Trenton Board of Education*, 93 *N.J.A.R.* 2d (EDU) 777; *Bergen County Vocational-Technical Schools Education Association, Inc. v. Board of Education of the Bergen County Vocational School District,* OAL DKT. EDU 5971-82 (August 15, 1983), *aff'd,*

Commissioner of Education (October 3, 1983). Thus, teachers who serve even in a non-mandatory night adult high school may obtain tenure if they meet the test of the statute, which requires that they have served for (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; (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. In addition, the teacher must hold a state-issued teaching certificate that is appropriate for the position held.

Given the current state of the law, tenure might be achieved by a teacher in the adult school. But in order to attain that status, the teacher must have served the required time under one of the three alternatives offered by *N.J.S.A.* 18A:28-5. The petitioner has not shown that she meets this requirement. The credible evidence here is that teachers were not automatically retained in the adult school from year to year. They served on a one-year basis. Despite the fact that if she had received a sufficient number of yearly appointments she would be eligible for tenure, Ms. Martin has not shown that she served for three academic years and then did so at the beginning of the following academic year, nor has she asserted that she meets the other time factors that are alternatives under the statute. Further, as her attempt to overturn the board's decision not to renew her contract has failed, she cannot achieve tenure in the Adult School on the basis that the board wrongly deprived her of her fourth, or tenure, year, in the district. Thus, to the extent that she claims tenure in the adult school, that claim must fail.

I **CONCLUDE** that the superintendent had ample reasonable grounds to determine that non-renewal was appropriate due to Ms. Martin's demonstrated difficulties in meeting the standards expected of a teacher in Asbury Park, as well as her demonstrated difficulties with interpersonal relationships with staff members, problems that affected the school environment for children and staff as well. Ms. Martin has failed to meet her burden of demonstrating that the decision not to renew her contract was unreasonable. Therefore, her request that the Commissioner overturn that decision must be **DENIED** and the appeal **DISMISSED**. It is so **ORDERED**.

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 (45) 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 (13) 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, 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, 2004
DATE

JEFF S. MASIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 13, 2004
DATE

Mailed to Parties:

SEP 16 2004

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

PM-1	Note dated 4/15/03 from Yara Martin to Mr. Reinoso
PM-2	Rebuttal letter in response to Mr. Reinoso's evaluation of Ms. Martin's reading class
PM-3	Note to Mr. Reinoso dated 11/4/02
PM-4	Memorandum dated 9/13/02 from Ms. D. Calderon to Mr. Shannon
PM-5	Rebuttal letter in response to Ms. Calderon's 3/17/03 evaluation of Ms. Martin's Reading class, from Yara Martin to Ms. Calderon, dated 4/3/03
PM-6	Memorandum dated 11/21/02 from Ms. D. Calderon to Ms. Y. Martin
PM-7	Note to Mr. Reinoso from Yara Martin undated
PM-8	Note to Mr. Leroy Hayes from Yara Martin dated 2/25/03
PM-9	Note dated 4/2/03 from Yara Martin to "To Whom it may concern"
PM-10	Complaint/Summons in *State of N.J. v. A.J. Reinoso*, filed by Yara Martin on 3/27/03

FOR THE RESPONDENT:

R-3	Letter dated 4/30/03 from Ronald R. Villano to Lestor Taylor, Esq.
R-4	Non Renewal Rationale and memorandum dated 5/8/03 from Dr. A. Lewis to Mr. Taylor
R-6	Package of Asbury Park Public Schools Appraisal of Teacher Performances for Yara Martin
R-7	Letter dated 4/29/03 from Dr. Antonio N. Lewis to Ms. Yara Martin
R-8	Letter dated 4/30/03 from Ronald R. Villano to Lestor Taylor, Esq.
R-9	Non Renewal Rationale and memorandum dated 5/8/03 from Dr. A. Lewis to Mr. Taylor
R-15	Memorandum from Ms. D. Calderon to Ms. Y. Martin dated 11/21/02
R-16	Memorandum from Ms. Deidra Calderon to Ms. Yara Martin dated 2/27/01
R-18	List of substitute plans

R-19	Memorandum dated 10/1/02 from Ms. D. Calderon to Ms. Y. Martin
R-23	Position Announcement, Evening High School, ESL Instructor

#407-04

OAL DKT. NO. EDU 3451-04
AGENCY DKT. NO. 96-3/04

KATHERINE MUELLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/15/04

Date of Mailing: 10/19/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3451-04

AGENCY DKT. NO. 96-3/04

KATHERINE MUELLER,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,

Respondent.

Christine Carey Lilore, Esq., for Petitioner

Andrew B. Brown, Esq., for Respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: September 7, 2004 Decided: September 15, 2004

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on April 1, 2004, 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. Petitioner was seeking injunctive relief from the Board's requirement that she submit to a complete medical examination before she is permitted to return to work.

A hearing was scheduled for September 8, 2004 at the OAL, 33 Washington Street, Newark, New Jersey. Prior to the hearing, settlement discussions were held and a settlement was reached.

The parties have agreed to a settlement and have prepared a Settlement Agreement and Stipulation of Dismissal 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 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.

Within thirteen (13) 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, 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 15, 2004
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

9/21/04
DATE

M. Kathleen Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 24 2004
DATE

Laura Sanders
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE (hereafter "Agreement") is made between Katherine Mueller ("Petitioner") and The Board of Education of the Borough of Waldwick, Bergen County ("Respondent").

RECITALS

WHEREAS, Petitioner has filed a Petition with the Office of Administrative Law under Docket #: EDUOR 03451-2004N ("Petition") in which Petitioner seeks injunctive relief from the Respondent's requirement that she submit to a complete medical exam before she returns to work; and

WHEREAS, the parties have reached an agreement concerning the medical examination of the Petitioner.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the parties do hereby agree as follows:

1. The Petitioner will consent to a neurological examination with an appropriate doctor of the Respondent's choosing, to be scheduled as soon as possible; and
2. The Respondent will withdraw its request for the Petitioner to undergo a psychological or psychiatric evaluation; and
3. The Petitioner will withdraw her Petition in the above matter; and
4. Nothing herein shall be construed as a waiver by either party of any rights and/or remedies available under the law in the future.

Christine Carey Lilore, Esq.
Attorney for Petitioner
Dated:

SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER, LLP

Andrew D. Brown, Esq.
Attorney For Respondent
Dated:

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER, LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001; FAX (973) 301-0203
Attorneys for Respondent
Borough of Waldwick
Board of Education

KATHERINE MUELLER,	:	OFFICE OF ADMINISTRATIVE LAW
PETITIONER	:	AGENCY REF NO.: 96-3/04
VS.	:	OAL DOCKET NO.: EDUOR 03451-2004N
BOROUGH OF WALDWICK, BOARD OF EDUCATION, RESPONDENT	:	**STIPULATION OF DISMISSAL**

It is hereby stipulated and agreed that the Petition in the above referenced matter is hereby dismissed with prejudice.

Christine Carey Lilore, Esq.
Attorney for the Petitioner

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER, LLP

By: _____
Andrew B. Brown, Esq.
Attorneys for the Respondent

{00197298;1}

#408-04

OAL DKT. NO. EDU 7610-04
AGENCY DKT. NO. 150-4/04

M.V. and M.V., on behalf of minor children, K.V., T.V. and M.V.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/15/04

Date of Mailing: 10/19/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7610-04
AGENCY DKT. NO. 150-4/04

M.V. and M.V. ON BEHALF OF MINOR CHILDREN K.V., T.V. and M.V.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,

Respondent.

Mitchell H. Levine, Esq., for petitioners (Scarinci & Hollenback, attorneys)

Stanley Turitz, Esq., for respondent (Ferrara, Turitz, Harraka & Goldberg, attorneys)

Record Closed: September 15, 2004 Decided: September 17, 2004

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

This matter involves an appeal by petitioners M.V. and M.V. on behalf of K.V., T.V. and M.V. from a residency determination by respondent Board of Education of the Borough of Ridgefield (the Board). The Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) where, on August 5, 2004, it was filed for determination as a contested case. The matter was assigned to the undersigned on September 7, 2004 and scheduled for hearing on December 27, 2004.

By letter dated September 13, 2004, counsel for petitioners advised the undersigned that the matter had been settled and forwarded the attached Settlement Agreement, Amendment to Settlement Agreement and Promissory Note, which had been sent to the Commissioner of Education under letter dated July 28, 2004 and, thereafter, forwarded by the Director of the Bureau of Controversies and Disputes to the OAL Clerk under letter dated July 30, 2004. Under correspondence dated September 14 and September 15, 2004, counsel for petitioners forwarded the attached letter from the Board's attorney dated July 27, 2004 and resolution adopted by the Board authorizing the settlement agreement.

Having reviewed the record and the terms of the settlement, 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 agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the 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 (45) 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 17, 2004
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

9-21-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 24 2004
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

SETTLEMENT AGREEMENT

This Settlement Agreement (hereinafter referred to as the "Agreement") between Plaintiffs **MARIA and MANUEL VALDIVIA** (hereinafter "the Valdivias") and Defendant **RIDGEFIELD BOARD OF EDUCATION** (hereinafter "Board of Education").

WHEREAS, the Board of Education refused to allow the minor children of the Valdivias to continue their education in the Ridgefield School District because the Board of Education believed that the minor children were not domiciled in Ridgefield;

WHEREAS, The Valdivias commenced an action against the Board of Education with the Commissioner of Education captioned M.V. and M.V. o/b/o minor children, K.V., T.V. and M.V. v. Board of Education of the Borough of Ridgefield, Bergen County, Agency Docket No. 150-4/04 (hereinafter referred to as "the Action"), disputing the Board of Education's determination that the minor children were not domiciled in Ridgefield;

WHEREAS, the Valdivias and the Board of Education desire to resolve all outstanding issues with respect to the Action.

NOW, THEREFORE, in consideration of the terms and conditions set forth herein, the Valdivias and the Board of Education agree as follows:

1. The Valdivias will make a tuition payment of $11,197.00 payable in twelve (12) monthly installments of Nine Hundred Thirty-three Dollars and 09/100 ($933.09) to the Board of Education commencing July 1, 2004.

2. This debt will be memorialized by a Promissory Note bearing no interest and it will not be secured with a mortgage on any property owned by the Valdivias.

3. The Promissory Note will only go into effect upon the signature of a duly authorized representative of the Board of Education being placed at the bottom of this Settlement Agreement.

4. The Valdivias do not make any admissions regarding their domicile during the time period at issue in the Action.

5. The Board of Education recognizes that the Valdivias and their minor children are presently domiciled in Ridgefield and that the minor children can attend public school in Ridgefield free of charge, as long as they REMAIN DOMICILED ~~maintain their domicile~~ in Ridgefield. MH

The parties have read the above Settlement Agreement and have conferred with counsel regarding its contents and hereby agree to abide by its terms and conditions.

[redacted]

DATED: 6/21/04

MARIA VALDIVIA

By: _____

DATED:

MANUEL VALDIVIA

By: _____

RIDGEFIELD BOARD OF EDUCATION

By: _____

DATED: 6/24/04

PROMISSORY NOTE

As per the agreed upon Settlement Agreement resolving the case of M.V. and M.V. o/b/o Minor Children K.V., T.V. and M.V. v. Ridgefield Board of Education, before the Commissioner of Education, the undersigned **MARIA and MANUEL VALDIVIA**, residing at 678 Slocum Avenue, Ridgefield, New Jersey (the "Maker"), hereby promises to pay to the order of the **RIDGEFIELD BOARD OF EDUCATION** (the "Payee"), at 555 Chestnut Street, Ridgefield, New Jersey, or at such other place as the Payee from time to time may designate, the sum of Eleven Thousand One Hundred Ninety-Seven Dollars ($11,197.00), in such coin or currency of the United States of America as, at the time of payment, shall be legal tender for the payment of public and private debts. This Promissory Note shall be hereinafter referred to as the "Note".

1. **Payment of Principal and Interest.**

(i) This Note shall not bear interest.

(ii) Commencing on July 1, 2004 and continuing on the first day of each month thereafter, the undersigned shall make twelve (12) equal consecutive monthly payments of principal in the amount of Nine Hundred Thirty-three Dollars and 09/100 ($933.09).

(iii) This Note shall not be secured by any assets, including property, owned by the Valdivias.

2. **Termination Upon Death of Payee.** In the event that the Payee ceases to exist during the term of this Note, the Note shall automatically terminate and all payments hereunder shall cease.

3. **Prepayment.** This Note may be prepaid in whole or in part at any time without penalty.

4. **Termination of this Note.** Upon payment in full to the Payee of the principal pursuant to this Note, whether such payments shall be made by or on behalf of the undersigned, or shall be received by the Payee from any source for the account of the undersigned, this Note and all obligations of the undersigned hereunder shall automatically terminate.

5. **Governing Law.** This Note is executed and delivered in the State of New Jersey and shall be governed in all respects by the laws of the State of New Jersey, excluding New Jersey conflicts of law, and all controversies shall be heard in the state courts of New Jersey.

6. **Receipt of Note.** The Maker hereby acknowledges receipt of a copy of this Note.

7. **No Oral Changes.** This Note can only be changed by an agreement in writing signed by both the Maker and Payee.

8. **Settlement Agreement.** The undersigned states that this Note be in effect only upon the placement of the signature of a duly authorized representative of the Board of Education to the Settlement Agreement resolving the action before the Commissioner of Education captioned M.V. and M.V. o/b/o minor children, K.V., T.V. and M.V. v. Board of Education of the Borough of Ridgefield, Bergen County, Agency Docket No. 150-4/04.

Date: 6/21/04

Maria Valdivia

Date: 6/21/04

Manuel Valdivia

AMENDMENT TO SETTLEMENT AGREEMENT

WHEREAS, the Board of Education and the Valdivias have entered into a Settlement Agreement resolving the matter of M.V. and M.V. o/b/o minor children, K.V., T.V. and M.V. v. Board of Education of the Borough of Ridgefield, Bergen County, Agency Docket No. 150-4/04.

NOW, THEREFORE, in consideration of the terms and conditions set forth in the Settlement Agreement, the Valdivias and the Board of Education agree to amend the Promissory Note in the Settlement Agreement to include the following additions:

1. **Payment of Principal and Interest.**

(iv) There will be a ten (10) day grace period for payment beginning on the first of the each month. If payment is not received during this grace period, the Valdivias will be considered in default. As penalty for default, interest will be assessed at a rate of five percent (5%) per annum for each day the Board does not receive payment after the expiration of the grace period.

The parties have read the above Amendment to Settlement Agreement and have conferred with counsel regarding its contents and hereby agree to abide by its terms and conditions.

~~RIDGEFIELD BOARD OF EDUCATION~~

By: 7/2/04
DATED:

RIDGEFIELD BOARD OF EDUCATION
By: James P Verbist
JAMES P VERBIST
DATED: JULY 27 2004

MARIA VALDIVIA

By:
DATED: 7/2/04

MANUEL VALDIVIA

By:
DATED:

{00163705.DOC}

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MARLA WOLFE TAUS (NJ AND NY BAR)
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SEVENTH FLOOR
NEW YORK, NY 10017
(212) 233-2122

OF COUNSEL:
MICHAEL J. FERRARA
RICHARD H. INSLEY
CHARLES BARTEL (NY BAR ONLY)
JAMES R. NORMAN

July 27, 2004

VIA FACSIMILE AND FEDERAL EXPRESS
Mitchell H. Levine, Esq.
Scarinci & Hollenbeck, LLC
1100 Valley Brook Avenue
P. O. Box 790
Lyndhurst, NJ 07071-0790

Re: M.V. and M.V., o/b/o minor children K.V., T.V. and M.V. vs. Ridgefield Board of Education
Your File No. 9630.1000
Our File No. SB-7302

Dear Mr. Levine:

Confirming our telephone conversation of Friday, enclosed please find copy of Ridgefield Board of Education Resolution authorizing and approving the Settlement Amendment along with the executed Settlement Agreement signed by James P. Verbist, Board Secretary, along with a copy of the Amendment to Settlement Agreement reflecting the changes to the Promissory Note. It is my understanding that you will forward the Settlement Agreement to the Commissioner of Education for final approval. In the interim, the checks should be forwarded to the Business Administrator directly.

Very truly yours,

FERRARA, TURITZ, HARRAKA
& GOLDBERG, P.C.

By: _____
Stanley Turitz, Esq.

ST:ld
Encl.
cc: Dr. James P. Verbist
C:\MAIN\SCHOOL\SB-7302\ltr to levine 7-27-04.wpd

RESOLUTION

WHEREAS, as part of the re-registration process instituted by the Board of Education certain issues arose concerning the domicile of certain minor children known as K.V.T.V. and M.V.; and

WHEREAS, as a result of the de-enrollment process the Board of Education voted to de-enroll said minor children; and

WHEREAS, in accordance with the law in the event that said minor children institute an action with the Commissioner of Education said de-enrollment process is stayed until a determination is made by the Commissioner of Education; and

WHEREAS, as a result of settlement negotiations between the parties, the matter has been amicably resolved on the terms and conditions as reflected in the settlement agreement attached hereto as Schedule A;

THEREFORE BE IT RESOLVED, that subject to the approval of the Commissioner of Education the Board of Education hereby authorizes the settlement agreement in accordance with the terms reflected in Schedule A attached hereto; and

BE IT FURTHER RESOLVED, that the Board Secretary Business Administrator is authorized to execute the said settlement agreement.

410-04

OAL DKT. NO. EDU 7642-03
AGENCY DKT. NO. 233-7/03

Z.G., on behalf of minor children, E.G. and V.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, Initial Decision and Settlement Agreement, have been reviewed. Noting the absence of any document containing the terms of the parties' settlement so as to permit his review under *N.J.A.C.* 1:1-19.1, the Commissioner shall consider this matter a withdrawal pursuant to *N.J.A.C.* 1:1-19.2. The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/04

Date of Mailing: 10/21/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER OF DISMISSAL
OAL DKT. NO. EDU 07642-03
AGENCY DKT. NO. 233-7/03

Z.G., o/b/o minor children, E.G. and V.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,

Respondent.

Arthur L. Raynes, Esq., for petitioner (Wiley, Malehorn & Sirota, attorneys)

Paul N. Barger, Esq., for respondent (Riker, Danzing, Scherer, Hyland & Perretti, attorneys)

BEFORE **THOMAS E. CLANCY,** ALAJ:

This matter was transmitted to the Office of Administrative Law on August 15, 2003. During its pendency at OAL, the attorneys for the parties agreed it should be Dismissed without prejudice (see attached agreement).

Accordingly, I hereby **ORDER** that this case **BE** (and is hereby) **DISMISSED** without prejudice.

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

This recommended order 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 order within forty-five (45) days and unless such time limit is otherwise extended, this recommended order shall become a final order in accordance with *N.J.S.A.* 52:14B-10.

9/10/04
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:

9-15-04
DATE

M. Kathleen Duncan/ch
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 16 2004
DATE

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

SETTLEMENT
AGREEMENT

we, the undersigned, attorneys for the respective parties have settled the issues in the dispute between us in OAL case bearing Docket # EDS 7642-03 and hereby authorize ALJ Clancy to dismiss same without prejudice.

A. Rayner 9/9/04

9/9/04

SETTLEMENT
AGREEMENT

we, the undersigned, attorneys for the respective parties have settled the issues in the dispute between us in OAL case bearing Docket # EDS 7642-03 and hereby authorize ALJ Clancy to dismiss same without prejudice.

A. Rayner 9/9/04

9/9/04

#420-04

420-04

OAL DKT. NO. EDU 6165-03
AGENCY DKT. NO. 247-7/03

KEVIN O'BRIEN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
RESPONDENT.	:	

The record, the parties' proposed Stipulation of Settlement, 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 review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/29/04

Date of Mailing: 10/29/04

* The Commissioner notes that the settlement agreement assigns petitioner to a position which does not have a recognized title. Therefore, the district is reminded of its obligation to submit this title, if it has not already done so, to the county superintendent for review pursuant to N.J.A.C. 6A:9-5.5.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6165-03

AGENCY DKT. NO. 247-7/03

KEVIN O'BRIEN,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

Arnold M. Mellk, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners, George & Dortch, attorneys)

Record Closed: September 23, 2004 Decided: September 28, 2004

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner charged that, in violation of law, the Board reduced his salary for the 2003-2004 school year. As shown on the attached Stipulation of Settlement, the parties have settled the case.

PROCEDURAL HISTORY

On July 22, 2003, the verified petition was filed with the Department of Education (DOE). N.J.S.A. 18A:6-9, N.J.A.C. 6A:3-1.1 et seq. The DOE transmitted the contested case to the Office of Administrative Law (OAL) where it was filed on August 19, 2003. N.J.S.A.52:14B-2(b). On December 10, 2003, the attorneys and I engaged in a telephone conference. The case was scheduled for a hearing to begin on May 3, 2004, but at petitioner's attorney's request the hearing was adjourned from that date. The case was scheduled for a hearing to begin on July 14, 2004, but at respondent's attorney's request the hearing was adjourned from that date. On July 22, 2004, petitioner's attorney moved for a decision on the pleadings and the attorneys and I engaged in a settlement conference. On July 26, 2004, respondent's attorney notified the OAL that the case had been settled, conditioned on approval by the Board of Education (BOE). On September 23, 2004, the parties submitted the executed Stipulation of Settlement and BOE Resolution approving the settlement. N.J.A.C. 6A:3-1.3.

FINDINGS OF FACT

1. The petitioner understood the Stipulation of Settlement and the parties voluntarily entered in to it.

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

The case involved substantial issues of fact. The Stipulation of Settlement avoids the time and expense of full hearing and further litigation. The terms of the Stipulation of Settlement are reasonable and in the public interest.

CONCLUSIONS OF LAW

This Stipulation of Settlement meets the requirements of N.J.A.C. 1:1-19.1 and should be approved. See N.J.A.C. 6A:3-1.3.

ORDER

I **ORDER** that the parties comply with the Stipulation of Settlement 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 (45) 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 28, 2004

DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

10-1-04

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 5 2004

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

SUMNERS GEORGE
A Professional Corporation
849 West State Street
Trenton, NJ 08618
(609) 393-6604
Attorneys for Respondent, Trenton City Board of Education

RECEIVED
2004 SEP 2
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE

KEVIN O'BRIEN,	:	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY
Petitioner,	:	
	:	AGENCY DOCKET NO. 247-7/03
v.	:	OAL DOCKET NO. EDUOR 6165-03
	:	
TRENTON CITY BOARD OF EDUCATION,	:	
	:	***STIPULATION OF SETTLEMENT***
Respondent.	:	

The parties to the within matter agree that the matter shall be deemed settled and resolved, subject to the following terms and conditions:

1. It is agreed that Petitioner, Kevin O'Brien, will be assigned to a Technology Facilitator position at Columbus Elementary School for the 2004-05 school year.

2. Petitioner's salary shall be in accordance with the collectively bargained salary guide between the Respondent and the Trenton Education Association. Petitioner shall receive credit, for salary guide purposes only, for three years of service.

3. The claims and defenses of each respective party as to the issue of whether Petitioner had obtained tenure in the position of Technology Facilitator remains unresolved at this time with each party preserving its rights should a dispute arise in the future.

4. Petitioner agrees to dismiss his Verified Petition in consideration for Respondent's agreement to assign him to a Technology Facilitator position.

5. The parties agree that they have considered the merits of each other's position and agree that there is no admissions of any wrongful conduct on either party.

6. The parties agree that each and every term of this agreement is material and an integral part of this agreement.

7. The parties agree that the Board reserves the right to transfer Petitioner from his agreed upon assignment at Columbus School in the future in exercise of its managerial rights.

8. The parties agree that this settlement is entered into with the advice of counsel, voluntarily, without duress, and there are no other promises, agreements, or expectations that are not set forth herein.

9. The parties agree that this agreement must be approved by Administrative Law Judge John Tassini and the Commissioner of Education and that if either rejects any term or condition of this agreement, this agreement shall be deemed null and void and this matter shall remain or be remanded to the Office of Administrative Law for resumption of the proceedings as a contested case.

10. Petitioner will not receive any compensation for wages that he did not earn in the Technology Facilitator position during the 2003-04 school year.

Arnold M. Mellk, Esq.
Wills, O'Neill & Mellk
Attorneys for Petitioner

Kevin O'Brien
Petitioner

Melvin L. Wyns
Board Secretary
Trenton Board of Education

Bernard McMullan, Ph.D.
Board President
Trenton Board of Education

Thomas W. Sumners, Jr., Esq.
Sumners George, P.C.
Attorneys for Trenton Board of Education

TRENTON BOARD OF EDUCATION
Trenton, New Jersey

RESOLUTION

WHEREAS, Kevin O'Brien has filed a Verified Petition against the Trenton Board of Education with the Commissioner of Education, Agency Docket No. 247-7/03 and OAL Docket No. EDUOR 06165-2003S, challenging the Board's decision to terminate his interim Technology Facilitator/Kilmer School position and transfer him to the position of Computer Teacher/Robbins School with a reduction in salary, effective September 1, 2003; and

WHEREAS, the Trenton Board of Education denies that the action taken violates state law and regulation; and

WHEREAS, the parties agree it is in their respective best interest to settle this Petition given the uncertainty and cost of litigation and without admission of any wrongful conduct of either party;

NOW, THEREFORE, BE IT RESOLVED on this 13th day of September, 2004 that the attached Stipulation of Settlement is approved by the Trenton Board of Education whereby Kevin O'Brien dismisses his Verified Petition in consideration for the Board's agreement to transfer him to a Technology Facilitator position at Columbus Elementary School.

Melvin L. Wyns
Board Secretary

Bernard J. McMullan, Ph.D.
Board President

SUMNERS GEORGE
A Professional Corporation
849 West State Street
Trenton, NJ 08618
(609) 393-6604
Attorneys for Respondent, Trenton City Board of Education

RECEIVED
2004 SEP 2
STATE OF NEW JERSEY
BUREAU OF ADMINISTRATIVE

KEVIN O'BRIEN,	:	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY
Petitioner,	:	
	:	AGENCY DOCKET NO. 247-7/03
v.	:	OAL DOCKET NO. EDUOR 6165-03
	:	
TRENTON CITY BOARD OF EDUCATION,	:	
	:	***STIPULATION OF SETTLEMENT***
Respondent.	:	

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1. It is agreed that Petitioner, Kevin O'Brien, will be assigned to a Technology Facilitator position at Columbus Elementary School for the 2004-05 school year.

2. Petitioner's salary shall be in accordance with the collectively bargained salary guide between the Respondent and the Trenton Education Association. Petitioner shall receive credit, for salary guide purposes only, for three years of service.

3. The claims and defenses of each respective party as to the issue of whether Petitioner had obtained tenure in the position of Technology Facilitator remains unresolved at this time with each party preserving its rights should a dispute arise in the future.

4. Petitioner agrees to dismiss his Verified Petition in consideration for Respondent's agreement to assign him to a Technology Facilitator position.

5. The parties agree that they have considered the merits of each other's position and agree that there is no admissions of any wrongful conduct on either party.

6. The parties agree that each and every term of this agreement is material and an integral part of this agreement.

7. The parties agree that the Board reserves the right to transfer Petitioner from his agreed upon assignment at Columbus School in the future in exercise of its managerial rights.

8. The parties agree that this settlement is entered into with the advice of counsel, voluntarily, without duress, and there are no other promises, agreements, or expectations that are not set forth herein.

9. The parties agree that this agreement must be approved by Administrative Law Judge John Tassini and the Commissioner of Education and that if either rejects any term or condition of this agreement, this agreement shall be deemed null and void and this matter shall remain or be remanded to the Office of Administrative Law for resumption of the proceedings as a contested case.

10. Petitioner will not receive any compensation for wages that he did not earn in the Technology Facilitator position during the 2003-04 school year.

Arnold M. Mellk, Esq.
Wills, O'Neill & Mellk
Attorneys for Petitioner

Kevin O'Brien
Petitioner

Melvin L. Wyns
Board Secretary
Trenton Board of Education

Bernard McMullan, Ph.D.
Board President
Trenton Board of Education

Thomas W. Sumners, Jr., Esq.
Sumners George, P.C.
Attorneys for Trenton Board of Education

TRENTON BOARD OF EDUCATION
Trenton, New Jersey

RESOLUTION

WHEREAS, Kevin O'Brien has filed a Verified Petition against the Trenton Board of Education with the Commissioner of Education, Agency Docket No. 247-7/03 and OAL Docket No. EDUOR 06165-2003S, challenging the Board's decision to terminate his interim Technology Facilitator/Kilmer School position and transfer him to the position of Computer Teacher/Robbins School with a reduction in salary, effective September 1, 2003; and

WHEREAS, the Trenton Board of Education denies that the action taken violates state law and regulation; and

WHEREAS, the parties agree it is in their respective best interest to settle this Petition given the uncertainty and cost of litigation and without admission of any wrongful conduct of either party;

NOW, THEREFORE, BE IT RESOLVED on this 13th day of September, 2004 that the attached Stipulation of Settlement is approved by the Trenton Board of Education whereby Kevin O'Brien dismisses his Verified Petition in consideration for the Board's agreement to transfer him to a Technology Facilitator position at Columbus Elementary School.

Melvin L. Wyns
Board Secretary

Bernard J. McMullan, Ph.D.
Board President

#421-04

AGENCY DKT. NO. 352-10/04

IN THE MATTER OF ANNE PIRILLO, :
WASHINGTON TOWNSHIP BOARD OF : COMMISSIONER OF EDUCATION
EDUCATION, GLOUCESTER COUNTY. : DECISION
:

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of censure, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon Respondent Anne Pirillo, former member of the Washington Township Board of Education, based upon findings of fact and conclusions of law by the Commission that she violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act when she was present at, and participated in, discussions during the October 15, 2003 meeting of the Business Affairs Committee. At that meeting, bids for the purchase of new copiers were discussed, and one of the bidders was a company in which respondent's husband possessed a financial interest. The Commission found that respondent's statements at the meeting could have had a beneficial impact on the bid offered by her husband's company, and stressed that respondent had an obligation under *N.J.S.A.* 18A:12-24(c) not to act in her official capacity in any matter involving her husband's company, including being present during the aforementioned discussions.

Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration. No comments, however, were submitted by respondent, or on her behalf.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner herein**. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that censure is the appropriate penalty in this matter for the reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied that, in recommending a penalty for the violations found, the Commission fully considered the nature of the offenses and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS hereby ORDERED that Anne Pirillo be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/29/04

Date of Mailing: 10/29/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
ANNE PIRILLO	:	**Docket No. C12-04**
WASHINGTON TOWNSHIP BOARD OF EDUCATION	:	
GLOUCESTER COUNTY	:	**DECISION**

PROCEDURAL HISTORY

Complainant, Ray Montgomery, filed a complaint against Anne Pirillo, who, at the time of the complaint, was a member of the Washington Township Board of Education (Board). The complaint was filed on February 26, 2004, alleging violations of N.J.S.A. 18A:12-24(a), (c) and (f) of the School Ethics Act (Act). Specifically, Mr. Montgomery alleged that Ms. Pirillo attended and participated in discussions during the October 15, 2003 Business Affairs Committee meeting when bids for the purchase of new copiers were discussed and one of the vendors that had submitted a bid was a company in which her husband possessed a financial interest. On March 5, 2004, the Commission sent the complaint to Ms. Pirillo notifying her that she had 20 days from receipt of the complaint to file an answer with the Commission. On March 30, 2004, the Commission sent a letter to Ms. Pirillo notifying her that, per a conversation with Greg Santori, Esq., she had been granted a 10 day extension to file an answer. On April 16, 2004, the Commission received a letter from Mr. Santori that confirmed his representation of Ms. Pirillo and notified the Commission that Ms. Pirillo elected not to submit a written statement in opposition to the complaint since she intended to resign from the Board.

On April 27, 2004, the Commission sent a letter to Mr. Santori indicating that Ms. Pirillo's resignation did not make the complaint moot, but only made certain penalties moot. It further provided notification that the Commission, pursuant to N.J.A.C. 6A:28-1.10(e), deemed each allegation in the complaint as admitted due to Ms. Pirillo's failure to answer the complaint and would discuss the complaint at its May 25, 2004 meeting.

At the May 25, 2004 meeting, the Commission heard testimony from Kim Belin and Karl Feltes, both from the Office of Compliance Investigation in the Department of Education. The Commission tabled the complaint until the June meeting in order to obtain further information from the complainant. The complainant submitted additional information to the Commission on June 17, 2004. At its public meeting on June 22, 2004, the Commission voted to dismiss the allegation that Ms. Pirillo violated N.J.S.A. 18A:12-24(a) and voted to find probable cause to credit the allegations that Ms. Pirillo violated N.J.S.A. 18A:12-24(c) and (f). The reasons for this decision were set forth in a probable cause decision dated July 9, 2004.

The Commission found that the material facts were not in dispute with respect to the issue upon which it found probable cause and, therefore, the Commission advised Mr. Santori that it would decide the matter on the basis of written submissions. Mr. Santori was invited to provide a written submission to the Commission within 30 days of the date of the probable cause decision and set forth why the Commission should not find Anne Pirillo in violation of N.J.S.A. 18A:12-24(c) and (f) for attending and participating in discussions during the October 15, 2003 Business Affairs Committee meeting when bids for the purchase of new copiers were discussed and one of the vendors that had submitted a bid was a company in which her husband possessed a financial interest. He was also told that his written submission should include the respondent's position on an appropriate sanction should the Commission determine that the Act was violated.

Mr. Santori submitted a timely response on August 9, 2004, which included a written statement from Ms. Pirillo. Ms. Pirillo set forth in her statement that because of her experience in the business, she thought that her presence in the deliberations would be helpful for the Board. She noted that in filing her ethics disclosure statement that she had disclosed her husband's interest to the Board. Ms. Pirillo further set forth that the business administrator was told by the counsel for the Board that it was not a conflict of interest if the contract was bidded upon or awarded to her husband due to the fact that she did not hold an interest in Panasonic of Southern NJ/Tri State Office Solutions (Panasonic), a company in which her husband possessed a financial interest. She also argued that she did not make any statements regarding her husband's company and the statements she did make did not shed any favor on her husband's bid. She denied giving her husband information to cause him to resubmit his bid and explained that it was a conversation with the business administrator that caused her husband to resubmit his bid. She stated that she had no intentions to further her husband's business or to gain privileged information or contacts. Mr. Santori requested the Commission to seriously consider imposing a reprimand in the event that the Commission determines that a violation of the Act has occurred, especially given that Ms. Pirillo has resigned from the Board. He argued that Ms. Pirillo made a full disclosure of her husband's interest in the company and she reasonably believed that her attendance at the October 15, 2003 meeting would assist the Business Affairs Committee in reaching a decision.

The Commission discussed Ms. Pirillo's response at its August 24, 2004 meeting. The Commission voted to find Ms Pirillo in violation of N.J.S.A. 18A:12-24(c) and (f) and recommended a penalty of censure in light of the fact that she is no longer a Board member.

FACTS

The Commission was able to discern the following facts based on the pleadings, documents submitted and testimony.

In October 2002, Ms. Pirillo was appointed to the Board and, subsequently, in April 2003, she was elected to the Board. She resigned from the Board effective April 20, 2004. Up until May 2003, she was employed in the photo-copying industry by Panasonic of Southern NJ/Tri State Office Solutions (Panasonic), a company in which her husband possesses a financial interest. Following her election to the Board, Ms. Pirillo was appointed to serve on the Business Affairs Committee.

During the October 15, 2003 Business Affairs Committee meeting, Ms. Pirillo was present during a review and discussion of bids submitted from commercial vendors in response to a solicitation from the district for photo-copying equipment to replace the district's copiers. One of the four bids that were reviewed and discussed was from Panasonic. Based on Ms. Pirillo's written statement that was included in a response from Mr. Santori to the Commission's probable cause determination, Ms. Pirillo made two statements during the October 15, 2003 meeting. The first statement was regarding the reputation of one of the companies that submitted a bid because "...it was well known throughout the industry that they had several issues regarding service." The second statement was about an aspect of a contract submitted by another company that may have thrown off the figures in comparison to the other companies.

During the Business Affairs Committee meeting, the district's purchasing agent discussed with the committee the district's preference for the configuration of copier models submitted by Xerox. The district's purchasing agent adjusted the bid amounts for the bids from the three other vendors to correspond to the bid offered by Xerox. The vendors were not notified by the district of this adjustment. Meanwhile, Panasonic submitted a modified quotation dated October 17, 2003, two days after the Business Affairs Committee meeting. Based on the bid amount adjustment, Panasonic's price quotation became the lowest bid. On October 28, 2003, the Board approved the award of a contract to Panasonic. In the public meeting, Ms. Pirillo abstained from the vote awarding the contract to Panasonic.

ANALYSIS

The Commission found probable cause to credit the allegation that Anne Pirillo's attendance at and participation in discussions during the October 15, 2003 Business Affairs Committee meeting was in violation of N.J.S.A. 18A:12-24(c) and (f) of the Act.

N.J.S.A. 18A:12-24(c) sets forth:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, 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 or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

In order to find that a board member has violated subsection 24(c), the Commission looks to whether a school official or a member of his immediate family has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. Ms. Pirillo's husband falls within the definition of "member of immediate family," pursuant to N.J.S.A. 18A:12-23. The Commission must next determine if Ms. Pirillo's husband had a direct or indirect financial involvement that might reasonably be expected to impair Ms. Pirillo's objectivity or independence of judgment in acting in her official capacity. In this case, Ms. Pirillo's husband has a direct financial involvement in Panasonic since he possessed a financial interest in Panasonic. This direct financial involvement on the part of her husband might reasonably be expected to impair Ms. Pirillo's objectivity or independence of judgment because the contract could result in increased income to her husband and thus the household. Although Ms. Pirillo abstained from the Board vote to award the contract to Panasonic, she was present at and participated in discussions during the October 15, 2003 Business Affairs Committee meeting when a bid submitted by Panasonic was reviewed and discussed. The Commission noted in SEC v. Michael Kilmurray, C12-94 (January 27, 1998) that "when a school official has a conflict of interest of which the public is aware, and that school official goes behind closed doors when that item is discussed, the situation creates a justifiable impression among the public that their trust is being violated." In Kilmurray, the Commission noted that the public may believe that a board member that sits in on a private session discussion regarding his sister-in-law is actively participating in the discussion behind closed doors, that the board member will tell his relative what was said, or at the least, that the other board members will be inhibited in their discussion of the matter because of his presence.

In the present case, Ms. Pirillo was present at and participated in a discussion related to a bid submitted by the company in which her husband had a financial interest. She made two comments during those discussions regarding two of the other companies that had also submitted bids. The first comment was about the bad reputation of one of the four companies that had submitted bids to the Board. The second comment was about an aspect of a contract offered by one of the four companies that would have thrown off the figures in comparison to the other companies. In Ms. Pirillo's statement in response to the Commission's probable cause determination, Ms. Pirillo argues that she never made any statements regarding her husband's company and that none of the statements she made shed favor on his bid. The Commission disagrees that her statements did not shed favor on her husband's company. By commenting on one of the other companies in comparison to her husband's company and by commenting on the bad reputation of one of the other companies, Ms. Pirillo did make statements in violation of subsection 24(c) that could have had a beneficial impact on the bid from her husband's company.

Ms. Pirillo also argues that the business administrator was told by the counsel for the Board that it was not a conflict of interest if the contract was bidded upon or awarded to her husband due to the fact that she did not own an interest in her husband's company. The Commission agrees that the Board could have accepted a bid from her husband's company and could have entered into a contract with that company. However, Ms.

Pirillo had an obligation under subsection 24(c) not to act in her official capacity in any matter involving her husband's company, including being present during discussions related to her husband's company and participating in those discussions. For the foregoing reasons, the Commission finds that Ms. Pirillo's attendance at and participation in the October 15, 2003 Business Affairs Committee meeting violated N.J.S.A. 18A:12-24(c).

Finally, both Mr. Santori and Ms. Pirillo argue that Ms. Pirillo made a full disclosure of her husband's interest in the company and reasonably believed that her attendance at the October 15, 2003 Business Affairs Committee meeting would be helpful in assisting the committee in reaching a decision. The Commission notes that, pursuant to N.J.A.C. 6A:28-1.5(b), the School Ethics Commission disclosure forms are required to be filed with the County Superintendent with an additional copy maintained on file by the local school district. There is no evidence that Ms. Pirillo's disclosure statement was disseminated to the entire Board. Thus, there is no evidence that Ms. Pirillo made a full disclosure of her husband's interest in the company to the members of the Business Affairs Committee or the entire Board. While Ms. Pirillo may have thought that her attendance at the October 15, 2003 meeting would be helpful to the Business Affairs Committee in making a determination, she still had the duty to comply with the Act and not act in her official capacity on any matter where a member of her immediate family has a direct financial interest. Her attendance may have been helpful if her husband's company was not a bidder, but since her husband's company was a bidder, her attendance only raised suspicions that she was there to help her husband.

The Commission also found probable cause to credit the allegations that Anne Pirillo violated of N.J.S.A. 18A:12-24(f) of the Act, which sets forth:

> No school official shall use, or allow to be used, his public office or employment, or any information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated;

Panasonic's resubmission of a bid to the Board just two days after the October 15, 2003 Business Affairs Committee meeting created the appearance that Ms. Pirillo violated subsection 24(f) by providing her husband with information from that meeting to assist in development of the resubmitted bid. Panasonic was the only company of the four bidders to resubmit a bid to the Board. However, in Ms. Pirillo's statement, she denies that she gave her husband any information that caused him to resubmit his bid. She states that it was a conversation with the business administrator that caused her husband to resubmit his bid. Under subsection 24(f), an appearance of a violation is not enough to sustain the finding of a violation, especially in this case where Ms. Pirillo has denied that she gave her husband any information that caused him to resubmit his bid. Therefore, the Commission cannot find a violation of N.J.S.A. 18A:12-24(f).

DECISION

For the reasons discussed above, the Commission finds that Anne Pirillo violated N.J.S.A. 18A:12-24(c) when she was present at and participated in discussions during the October 15, 2003 Business Affairs Committee meeting when bids for the purchase of new copiers were discussed and one of the bidders was a company in which her husband possessed a financial interest. Mr. Santori argues that the sanction should be a reprimand in light of the fact that Ms. Pirillo resigned from the Board. The Commission is not persuaded that the sanction should be a reprimand simply because of the fact that Ms. Pirillo has already resigned from the Board. She was not only present during the discussions at the October 15, 2003 meting, but she made two statements during that meeting. Therefore, the Commission recommends that the Commissioner of Education impose the highest sanction that he is capable of imposing on a former board member, a penalty of censure.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was mailed to the parties, Mr. Santori may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C12-04

Whereas, the School Ethics Commission has considered the pleadings and the response filed by the parties and the documents submitted in support thereof; and

Whereas, at its meeting of August 24, 2004 the Commission found that Anne Pirillo violated N.J.S.A. 18A:12-24(c) of the Act and recommended that the Commissioner of Education impose a sanction of censure; and

Whereas, at its meeting of September 30, 2004, the Commission reviewed a draft decision prepared by its staff and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on September 30, 2004.

Lisa James-Beavers
Executive Director

PCG/LJB/MET/ethics/decisions/C12-04

433-04

#433-04

OAL DKT. NO. EDU 11296-03
AGENCY DKT. NO. 351-9/03

CHRISTINE CUTHBERTSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,[1]	:	DECISION
RESPONDENT.	:	

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the parties' submissions on exception, have been reviewed.

In her exceptions, petitioner urges the Commissioner to reject the analysis and conclusion of the Administrative Law Judge (ALJ), taking issue with the ALJ's characterization of her claim and stating that she is *not* asking to be *paid* for non-work days, but rather that she not be *docked* for non-work days. Petitioner explains:

> ***[Petitioner] is not claiming that she should be paid for the days in June that followed June 24 (the last day of school in the 2002-2003 school year). In fact, if petitioner were claiming that she should be paid for the non-work days remaining in June 2003, she would be requesting $800 since there were four days in June 2003 that would normally be work days if school had not ended on June 24, 2003 -- that is, June 25, 26, 27 and 30. However, petitioner did not claim that she should be paid for non-work days. She is asserting that she should not be *docked* for non-work days. The ALJ saw this as "a distinction without a difference." Petitioner asserts that there is a difference. She was forced to request a leave without pay because she had run out of sick days. The respondent requires

[1] The respondent is not a State-operated School District, as the caption of the Initial Decision erroneously states.

employees who have run out of sick days to request a leave of absence and grants such a leave *without* pay.

Petitioner was not on a long-term leave of absence, such as someone on a maternity leave. She had worked the entire year until her surgery on May 22, 2003. As stated in petitioner's initial brief, she is paid on a yearly basis. She is paid an annual salary which is distributed in twenty equal installments over the course of a ten (10) month school year (N.J.S.A. 18A:27-6). The number of working days varies as to each such installment period, but the amount paid does not vary. The only exception is when a deduction of salary is required by virtue of an unauthorized absence on a day when work is scheduled. Therefore, petitioner requests that her pay be docked only for the days that she should have been at work and not for the entire month of June because her contract ran to June 30, 2003. The ALJ notes that, "If the school year had to be extended through June 30, 2003, the teachers would have been required to work until then." (Initial Decision, page 8). However, that did not occur. In fact, as stated in the Stipulation of Facts, the last day of work for petitioner for the 2002-2003 school year was June 24, 2003.

(Petitioner's Exceptions at 1-3, emphasis in text)[2]

In reply, the Board of Education (Board) counters that petitioner's insistence on using the word "docked" (which has disciplinary connotations) is misplaced, and that the ALJ did, in fact, understand the issue correctly; indeed, in characterizing it as a claim by petitioner to be paid salary totaling $600 for three days beyond the end of the work year, the ALJ has stated precisely what petitioner seeks. The Board also objects to petitioner's claim that she was "forced" to take unpaid leave, when the stipulated facts clearly show that, after being fully advised of her options upon exhaustion of her sick days, petitioner chose to take a leave in order to protect her pension benefits and job status. Finally, the Board objects to petitioner's attempt to argue

[2] Petitioner also notes an incorrect factual statement in the Initial Decision (at 3), pointing out that $1,200 was withheld from petitioner's *June 15*, 2003 pay while her June 30, 2003 pay was withheld altogether. (Petitioner's Exceptions at 1) However, it is clear from the ALJ's Findings of Fact and Conclusions (at 8) that the ALJ's "misstatement" reflects nothing more than a lacuna in the transcription of Items 10 and 11 of the parties' joint Stipulation of Facts into the Initial Decision, and that the error had no impact on the ALJ's decision.

that she was not on a long-term leave of absence, noting that petitioner was absent approximately six weeks, an extended leave by any standard. The Board states:

> ***[Petitioner], like any employee on a maternity leave or other leave without pay was not paid for non-work days. As the ALJ noted, the Board was under no obligation to treat [petitioner] differently. [Petitioner] argues that her contract ran through June 30, 2003 and, therefore, she should be paid for the days after the work year ended, after June 24, 2003, as the school year was not extended past June 24, 2003, and other teachers were not required to work. However, unlike other employees who were paid through June 30, the Board could not have required her to work had the school year been extended because she was on leave.
>
> [Petitioner] argues that the amount paid does not vary and that the only exception is when there is an unauthorized absence. The Board disagrees. Since [petitioner] did not work the full year, her distribution will be different from those employees who worked the full year. [Petitioner] claims to have worked "the entire year..." (*citation omitted*) and in the same breath states that she began her leave on May 22, 2003. May 22, 2003, was not the end of the school year, as such [petitioner] did not work the "entire year" as other employees.
>
> [Petitioner] also argues that although teachers would have been required to work had the school year been extended through June 30, 2003, that such should be discounted because it did not occur. However, it is significant because such an extension is always real in school districts and had it occurred, [petitioner], unlike other teachers, could not have been required to work because she made herself unavailable.*** [Petitioner] requested unpaid leave from May 22, 2003 through the end of her contract year and beyond. The Board agrees with the ALJ that she received exactly what she requested. [Petitioner] is not entitled to pay for a period in which she was unavailable to work and placed on an unpaid leave. (Board's Reply at 3-5)

Upon careful review and consideration, the Commissioner concurs with the ALJ that petitioner is not entitled to the relief she seeks. However petitioner attempts to characterize her situation, the fact remains that the days for which she asks "not to be docked" occurred at a time during which petitioner was on an *extended, pre-arranged leave of absence*, unpaid as of the date (June 6) on which petitioner exhausted all of her accumulated sick, personal and family days. Once her paid leave was exhausted,

petitioner's status by its very nature precluded any entitlement to or expectation of pay for the duration of the leave; it is of no import whatsoever that events transpired so that active teachers, i.e., those not on leave, were not required to report to work on three days falling within the unpaid leave period. In effect, with respect to the days at issue, petitioner is demanding that the Board treat her as an employee not on leave, a position which is simply not tenable under the factual circumstances of this matter.

Accordingly, for the reasons expressed therein and above, the Initial Decision of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED. [3]

COMMISSIONER OF EDUCATION

Date of Decision: 11/03/04
Date of Mailing: 11/03/04

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11296-03
AGENCY DKT. NO. 351-9/03

CHRISTINE CUTHBERTSON,
Petitioner,
v.
STATE-OPERATED SCHOOL BOARD OF THE CITY OF ELIZABETH,
Respondent.

Mary J. Hammer, Esq., for petitioner (Bucceri and Pincus, attorneys)

Mary E. Hennessy-Shotter, Esq., for respondent (The Murray Law Firm, attorneys)

Record Closed: August 27, 2004 Decided: September 21, 2004

BEFORE **EDITH KLINGER**, ALJ:

PROCEDURAL HISTORY

On September 24, 2003, Christine Cuthbertson filed a Verified Petition with the Commissioner of Education (Commissioner) alleging that respondent, the Board of Education of the City of Elizabeth, Union County (Board), docked her pay for three days at the end of the 2002-2003 school year in violation of *N.J.S.A.* 18A:30-6. On October

14, 2003, the Board filed its answer and affirmative defenses. On November 21, 2003, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) 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.

After a series of telephone conferences with the parties, it was determined that the hearing in this matter could proceed upon the papers. The parties submitted a joint stipulation of facts and exhibits and cross-motions for summary decision. The record closed on August 20, 2004, when the final submissions were received from the parties.

STIPULATION OF FACTS

The parties stipulated the following facts:

1. Petitioner, Christine Cuthbertson, was employed by the respondent, Board, as a teacher for the 2002-2003 school year.

2. Petitioner's annual salary for the 2002-2003 school year was $40,000.

3. As of June 5, 2003, petitioner had exhausted her sick, personal and family illness days for the 2002-2003 school year.

4. Petitioner was advised by the Human Resources staff that she should request a leave of absence since she had exhausted her sick days.

5. Petitioner requested, and was granted, a family medical leave of absence beginning on May 22, 2003, and ending July 18, 2003. The leave of absence was approved without pay from June 6, 2003, to June 30, 2003.

6. The original 2002-2003 school calendar scheduled school to begin for all staff on September 4, 2002, and end on June 18, 2003.

7. The calendar was extended to June 24, 2003, to make up for instruction days missed due to emergency closings throughout the year.

8. The last day of work for petitioner for the 2002-2003 school year was June 24, 2003.

9. Petitioner missed thirteen days of work during her unpaid leave of absence in June 2003 on the following dates: June 7, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 2003.

10. Respondent withheld $1,200 from petitioner's June 30, 2003, pay of $2,000 (gross) due to her absences.

11. Petitioner's payroll record for the 2002-2003 school year is stipulated into the record.

THE APPLICABLE LAW

This appeal is based upon the provisions of *N.J.S.A.* 18A:30-6, Prolonged Absence Beyond Sick Leave Period, which states:

> When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case. A day's salary is defined as 1/200 of the annual salary.

Sick leave is defined in *N.J.S.A.* 18A:30-1 as follows:

> Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household.

This is a statutory managerial prerogative that the Board can not bargain away. *Board of Educ. of Piscataway v. Piscataway Maint. and Custodial Ass'n*, 152 *N.J. Super.* 235, 244 (App. Div. 1977). The payment of salary for prolonged absence beyond a sick leave period is clearly a matter within the Board's discretion to determine on a case-by-case basis:

> Our concern is over the payment of salary, in whole or in part, for prolonged absence beyond the allowable annual or accumulated sick leave. As to such payment, the controlling statute, *N.J.S.A.* 18A:30-6, plainly leaves the matter to the discretion of the local board of education, which may pay any such person each day's salary, less the pay or estimated cost of a substitute, for such length of time as may be determined by the board of education in each individual case.
>
> [*Id.* at 246.]

As a result, I **CONCLUDE** that the discretionary action of the Board in this matter is subject to review only to determine whether it was arbitrary and capricious. *Matawan Reg. Teachers Ass'n v. Board of Educ. of the Matawan-Aberdeen Reg. Sch. Dist.*, 202 *N.J. Super.* 142, 148 (App. Div. 1985).

THE POSITIONS OF THE PARTIES

Petitioner's argument is basically that she did not have to work from June 24 to June 30, 2003, because no teachers were required to work during that period and, therefore, she should not be docked for those days even though she requested, and received prior approval for, unpaid sick leave "through the end of the school year." She seeks to recover three days' salary, or $600, for the additional time her pay was docked beyond the end of the actual work year. The amount of recovery sought is not in dispute.

Respondent replies that Cuthbertson requested unpaid leave through June 30, 2003, and even beyond. The school year was originally scheduled to end on June 18, 2003, but had to be extended because of emergency closings during the year.

Although no teacher was called upon to work after June 24, 2003, had the school year been extended further because of closings, Cuthbertson would not have been available for work because of her approved unpaid leave. The Board further points out that, if she were absent on an approved unpaid leave at any other time during the school year, she would not have been paid for snow days and holidays during her leave period even though these were non-work days; at most, her leave time might have been extended. Respondent further states that Cuthbertson never requested that her paid sick leave benefits be extended past June 24, 2003, pursuant to *N.J.S.A.* 18A:30-6.

Petitioner cites *Oteri v. Board of Education of the Borough of Magnolia*, 1980 *S.L.D.* 954, in support of her application for reimbursement of salary for the three docked days. In that case, the petitioner, a teacher, was out sick, not on a requested unpaid leave, during the final days of the school year. The Magnolia Board withheld her salary for the period from June 15 through June 30, when school was not in session, on the grounds that she had received benefits from a private insurance carrier based upon her absence from work due to illness. Oteri argued that the final days of the school year are no different from other days of the year, such as holidays, when absent teachers are not required to work, and, therefore, she should be paid for them. The administrative law judge who held the hearing determined under the circumstances of that case that Oteri could not be denied salary through June 30 for the reasons expressed by the Magnolia Board. His Initial Decision was affirmed by the Commissioner and the State Board of Education.

Respondent argues that *Oteri* does not govern the outcome in the present matter since Oteri never asked for nor received an unpaid leave of absence as Cuthbertson did. The Board did not pay Cuthbertson for the remainder of June 2003 because she requested unpaid leave in advance through, and after, June 30, 2003. In this way, Cuthbertson, unlike Oteri, made herself unavailable to work during the final days of her contract year. The analysis in *Oteri* of payment for snow days and holidays is irrelevant to the present matter because the instant case deals with a requested and approved unpaid leave. The situations are not analogous.

Cuthbertson suggests that the Board required her to request the leave of absence since she had exhausted all of her paid leave time. However, as respondent points out, had she not done so she would have been absent without permission which could have caused her to lose her job.

The Board states that all leaves granted run until the return date for the employee or the last date of their contract. No employees on unpaid maternity leave were paid for holidays and vacations as other, active, employees were. None of them were paid after the last day of school because of their leave status. Petitioner should not be treated any differently than these employees. Cuthbertson did not dispute these facts in any of her papers; she simply claims that they are irrelevant to her situation.

REVIEW OF DOCUMENTS

On May 29, 2003, Cuthbertson wrote a memorandum to Margaret Alago concerning a "Payroll Change." The memorandum states:

> I will be out of work through the end of this school year due to a surgical procedure. My leave began on May 22, 2003. I will return for the new school year in September 2003.
>
> Kindly use the balance of my sick days, personal days and family illness day to pay me.
>
> [Emphasis added.]

Cuthbertson submitted a second memorandum to Alago on the same date requesting family leave. It states:

> This is a request to take 6 weeks of family leave, due to a surgical procedure I recently had. The leave would begin on May 22, 2003 and last for 6-8 weeks. Thank you.

It should be mentioned at this point that a leave for six to eight weeks from May 22, 2003, would have ended on July 3, or July 17, 2003, respectively. Both dates fall after June 30, 2003, the end of her contract year.

A note from Cuthbertson's surgeon, dated June 3, 2003, states that she would be unable to return to work after surgery before July 18, 2003.

On June 4, 2003, Thomas G. Dunn, Jr., superintendent of schools, recommended to the Board that Cuthbertson be granted a medical leave of absence, without pay, from June 6, 2003, through June 30, 2003. The unpaid leave was to begin on June 6 because petitioner exhausted all of her paid leave as of June 5, 2003. The leave ended on June 30, 2003, because Cuthbertson's contract year ended on that date, even though she actually requested unpaid leave into July 2003.

Cuthbertson's leave without pay from June 6 through June 30, 2003, was approved by the Board on June 26, 2003, and presented in the Personnel Report of the superintendent of that date.

FINDINGS OF FACT AND CONCLUSIONS

Based upon the stipulated facts, the documentary evidence and the briefs of the parties, I **FIND** the following facts:

1. Cuthbertson asked for an unpaid leave of absence from June 6 through July 3 or July 17, 2003.

2. At the time of her request, she indicated that she would not return to work until September 2003, the beginning of the next school year. Therefore, there is no merit to her suggestion that she actually asked for unpaid leave until the end of the school year as opposed to the end of her contract year.

3. The Board granted her request although it terminated her leave as of June 30, 2003, the last day of her contract.

4. The school year was supposed to end on June 18, 2003, but teachers were required to work through June 24 to make up for days missed on account of

weather. If the school year had to be extended through June 30, 2003, the teachers would have been required to work until then.

5. Cuthbertson was not available to work after June 24, 2003, because she was on sick leave. The Board could not have required her attendance under any circumstances. She specifically informed the Board in May 2003 that she would not return to work until the start of the next school year.

6. Cuthbertson says that her final pay period was the last two full weeks of June and she is not asking to be paid for June 30, 2003. She claims that she should not have been docked for June 25, 26 and 27, 2003, because none of the other teachers had to work on those three days.

7. Petitioner attempts to distinguish her situation, in which she appeals having her pay docked for three days, from the situation covered by *N.J.S.A.* 18A:30-6, by claiming that she is not asking the Board to pay her for those three days. Since the end result is the same in both cases, this is a distinction without a difference.

8. Petitioner received exactly what she requested when she sought her unpaid leave of absence. She had every reason to know from the outset that she would not be paid for the remainder of her contract year because that is precisely what she asked for.

9. The Board has no obligation to treat her any differently than it treats other teachers in similar circumstances.

10. There is no equitable reason to require the Board to pay Cuthbertson for June 25, 26, and 27, 2003.

I, therefore, **CONCLUDE** that it was reasonable, not arbitrary and capricious, for the Board to deny Cuthbertson's request to be paid for June 25, 26 and 27, 2003, because she was on a requested unpaid leave at the time. The petitioner can not circumvent the provisions of *N.J.S.A.* 18A:30-6 by characterizing discretionary payments as "docking."

ORDER

Accordingly, it is **ORDERED** that the Board's decision not to pay Cuthbertson for June 25, 26 and 27, 2003, is hereby **AFFIRMED** and the petition herein 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 (45) 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 (13) 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, 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 21, 2004
DATE

EDITH KLINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 21, 2004
DATE

Mailed to Parties:

SEP 22 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Exhibits:

Joint

J-1 Employment Contract

J-2 Elizabeth BOE Human Menu 2002/2003

J-3 Two Memoranda, Cuthbertson to Alago, dated May 29, 2003
Doctor's Note, dated June 3, 2003

J-4 Memorandum, Medical Leave of Absence, dated June 4, 2003

J-5 Elizabeth Public School Calendar, 2002-2003 School Year

J-6 Elizabeth Public School Calendar, 2002-2003 School Year, Revised 4/10/03

J-7 Employee Ledger Report by Employee Name

F-1 Personnel Report, Leaves of Absence, etc., June 26, 2003

440-04

#440-04

OAL DKT. NO. EDU 940-03
AGENCY DKT. NO. 76-3/03

IN THE MATTER OF THE TENURE HEARING OF MARYANNE BARANOWSKI, SCHOOL DISTRICT OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter, the parties' Separation Agreement/Release,* and the Initial Decision of the Office of Administrative Law issued pursuant to *N.J.A.C.* 1:19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms, since, under the circumstances set forth in the record of this matter, they comport with the *Cardonick* standards for review of settlements in 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; also, *N.J.A.C.* 6A:3-5.6(a).

Accordingly, the Commissioner adopts the settlement as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement. In so doing, however, the Commissioner notes that the parties' agreement contains terms to be effectuated prior to the Commissioner's review and approval, and he cautions the Administrative Law Judge and the parties against inclusion of such terms in proposed settlements of controverted matters.

COMMISSIONER OF EDUCATION

Date of Decision: 11/08/04
Date of Mailing: 11/08/04

* The record of this matter includes a written representation by the Board Attorney that the proposed settlement agreement was approved by resolution of the Board of Education at its regularly scheduled meeting on August 31, 2004

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 940-03

AGENCY DKT. NO. 76-3/03

IN THE MATTER OF THE TENURE HEARING OF MARYANNE BARANOWSKI, SCHOOL DISTRICT OF OLD BRIDGE, MIDDLESEX COUNTY.

Phillip Stern, Esq., for Old Bridge Township Board of Education (Sills, Cummis, Radin Tischman Epstein & Gross, attorneys)

Michael T Barrett, Esq., for Maryanne Baranowski (Bergman & Barrett, attorneys)

Record Closed: September 20, 2004 Decided: September 21, 2004

BEFORE **DANIEL B. MCKEOWN**, ALJ, t/a:

This matter was transmitted to the Office of Administrative Law on March 20, 2003, 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 Separation Agreement Release 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 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 (45) 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 21, 2004
DATE

DANIEL B. MCKEOWN, ALJ, t/a

Receipt Acknowledged:

9-24-04
DATE

M. Kathleen Duncan/CH
DEPARTMENT OF EDUCATION

Mailed to Parties:
Laura Anders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 27 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

SEPARATION AGREEMENT/RELEASE

RECEIVED
2004 SEP
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

This Separation Agreement and Release ("Separation Agreement") is made this day of June, 2004 by and between MaryAnn Baranowski ("Ms. Baranowski"), and the Old Bridge Township Board of Education ("Board").

RECITALS

WHEREAS, Ms. Baranowski is an employee of the Board, serving as a tenured teaching staff member; and

WHEREAS, Tenure charges alleging unbecoming conduct by virtue of excessive absenteeism against Ms. Baranowksi were filed with the District; and

WHEREAS, said charges were certified to the Commissioner of Education; and

WHEREAS, the parties agree that it is in the public interest to avoid the time, expense and uncertainty attendant to litigation; and

WHEREAS, the parties further agree that the charges at issue do not represent a danger to the public welfare; and

WHEREAS, the Board and Ms. Baranowski have concluded that, effective July 1, 2004, their employer-employee relationship will terminate; and

WHEREAS, the Board and Ms. Baranowski desire to resolve amicably and in good faith all matters and issues arising out of Ms. Baranowski'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. Baranowski and the Board agree as follows:

ARTICLE I
Separation and Release

1. Separation of Employment – Ms. Baranowski and the Board hereby agree that, effective at the close of business on June 30, 2004, Ms. Baranowski's employment with the Board will, in all respects, cease. Ms. Baranowski and the Board also agree that

after the close of business on June 30, 2004, Ms. Baranowski will neither seek nor receive offers of employment in any capacity whatsoever with the Board.

2. Mutual Releases – In return for their obligations pursuant to this Separation Agreement, Ms. Baranowski and the Board hereby release and discharge each other as well as any and all of their 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 they may have had, now as or may hereafter have for any reason whatsoever on account or arising out of or in consequence of their employment relationship, including, but not limited to:

A. Any pending litigation, including, but not limited to IMO MaryAnn Baranowksi/ Old Bridge Township Board of Education OAL Docket No. EDUTH 00940-035.

B. 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;

C. 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;

D. Any claims arising out the terms and conditions of Ms. Baranowski's employment with the Board, including claims arising out of Ms. Baranowski's acquisition of tenure, the termination of such employment, and/or any of the events relating directly or indirectly to or surrounding that termination;

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;

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.

Ms. Baranowski does not waive or release her right to seek indemnity pursuant to NJSA 18A:16-6 and/or NJSA 18A:16-6.1 in the event of a claim or accusation by a third party. Nothing in this release shall be construed as waiving or releasing the Board's right to assert any defenses it may have to such a claim or indemnity. Ms. Baranowski does not waive or release her right to pursue her pending New Jersey Workers' Compensation claim, docket number 2003-344-33.

ARTICLE II
Terms of Settlement

2.1 Separation - Simultaneously upon the execution of this Separation Agreement, Ms. Baranowski shall submit an irrevocable letter of retirement/resignation, effective July 1, 2004, forever terminating any and all employment with the Board.

2.2 Consideration - As consideration for Ms. Baranowski's retirement and Release as set forth herein, the Board agrees to the following:

a.) Effective March 15, 2004, until June 30, 2004, Ms. Baranowski shall be placed on a paid leave of absence. Following Ms. Baranowski's leave, she shall retire from all service with the Board.

b.) Contemporaneously upon the signing of this Agreement, the Board shall reinstate Ms. Baranowski's salary increments which were withheld for the 2001-2002, 2002-2003 and 2003-2004 school years. Ms. Baranowski's salary shall be adjusted as follows:

2001-2002:	Base Salary	$72,444	Adjusted increment
	Longevity	$ 3,210	withheld $3,338.00
	Speech Stipend	$ 561	
	Total	$76,215	
2002-2003:	Base Salary	$74,195	Adjusted increment
	Longevity	$ 3,653	withheld $5,089.00
	Speech Stipend	$ 586	
	Total	$78,434	
2003-2004:	Base Salary	$76,421	Adjusted increment
	Longevity (30 yrs)	$ 4,551	withheld $7,315.00
	Speech Stipend	$ 613	
	Total:	$81,585	Total withheld $15,742.00

c.)Upon Ms. Baranowski's retirement from the Board, Ms. Baranowski shall receive all benefits and emoluments due her pursuant to the Collective Bargaining Agreement between the Board and the Old Bridge Teachers' Association.

Ms. Baranowski 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. The Board shall pay Ms. Baranowski the total adjusted increment amount within two (2) weeks of the date of approval of this Settlement Agreement by the Commissioner of Education. and shall pay to the Division of Pensions all amounts necessary to adjust this increment restoration.

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 – Nothing contained in this Separation Agreement shall be construed to constitute an admission or acknowledgment by any party hereto of any wrongful or improper conduct, nor of any liability to any other 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.

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 Approval of the Commissioner of Education -- This Agreement is freely and voluntarily executed by each party hereto. Both parties have had the terms of this Agreement thoroughly explained by their respective legal counsel and understand such terms and the legal implications arising therefrom. Ms. Baranowski understands that the Commissioner of Education may accept, reject or modify this Settlement, and that the Commissioner of Education may forward this matter to the State Board of Examiners for consideration of revoking his certificate.. This Agreement is subject to the approval of the Commissioner of Education. Should the Commissioner fail to approve the application for approval of the parties' settlement and withdrawal of the tenure charges, this Agreement shall be null and void.

3.11 **BY SIGNING THIS SEPARATION AGREEMENT MS. BARANOWSKI 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 TENURE LAWS SET FORTH IN TITLE 18A OF NEW JERSEY STATUTES, 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 OTHER 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 HAS AN ADDITIONAL 7 DAYS FOLLOWING THE DATE ON WHICH HE 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 WHEREOF, the parties have executed this Separation Agreement on the date above written.

MARYANN BARANOWSKI

OLD BRIDGE BOARD OF EDUCATION

ANNETTE HOPMAN, PRESIDENT

442-04

OAL DKT. NO. EDU 3802-04
AGENCY DKT. NO. 83-3/04

A.D., on behalf of minor child, J.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of petitioner's failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with a copy of the notification sent to the parties by OAL on September 8, 2004, providing petitioner ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, the petition of appeal is hereby dismissed with prejudice due to petitioner's failure to appear at hearing or provide an explanation for his nonappearance.

Notwithstanding the dismissal of the petition, the Commissioner notes that the Board's Answer in this residency matter contained a counterclaim for tuition which was left unresolved by the Administrative Law Judge. In that the record before the Commissioner contains no affidavit of a responsible Board official attesting to the amount of tuition claimed by the Board as a consequence of the ineligible attendance of petitioner's two children in its schools, this matter is hereby remanded to the OAL for supplementation of the record in this regard and an appropriate recommended order regarding the payment of tuition.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11/10/04
Date of Mailing: 11/10/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.*

457-04

AGENCY DKT. NO. 353-10/04

IN THE MATTER OF REMOND PALMER,	:	
ASBURY PARK BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission") finding that Asbury Park Board of Education (Board) member Remond Palmer violated *N.J.S.A.* 18A:12-24.1(a) and (e) of the Code of Ethics for School Board Members of the School Ethics Act (Act), and recommending a penalty of removal from his position as a member of the Board, have been reviewed. Upon issuance of the decision of the Commission, Mr. Palmer was provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration.

No comments were filed by Mr. Palmer.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that removing Remond Palmer from his position as a member of the Board is the appropriate penalty in this matter for the reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied that, in recommending a penalty for the

violations it found, the Commission fully considered the nature of the offense and weighed the effects of aggravating circumstances.[1] Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS hereby ORDERED that Remond Palmer be removed from his position as a member of the Board as of the date of the filing of this decision.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 11/12/04

Date of Mailing: 11/12/04

[1] Mr. Palmer did not participate in the hearing before the School Ethics Commission, nor did he respond in any manner to the charges herein notwithstanding the provision of several opportunities to do so. There were no mitigating circumstances presented to the Commission, therefore, for its consideration.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

#455-04

AGENCY DKT. NO. 402-10/04

BOARD OF EDUCATION OF THE CITY OF UNION, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

For Petitioner, Thomas R. Kobin, Esq. (Chasan, Leyner, Bariso & Lamparello, P.C.)

For Respondent, Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter originally came before the Commissioner of Education on November 5, 2004 through the filing of a Petition of Appeal and Motion for Injunctive Relief by the petitioning Board of Education of the City of Union seeking to enjoin the New Jersey State Interscholastic Athletic Association (NJSIAA) from issuing high school playoff brackets for football on Monday, November 8, 2004. On that date, the NJSIAA Executive Committee was also scheduled to hear petitioner's appeal of its disqualification from participating in the football playoffs because three of its players had been disqualified for flagrant unsportsmanlike conduct. Following a conference call including the parties and the Director of the Bureau of Controversies and Disputes, it was agreed that the NJSIAA Executive Committee would issue two playoff brackets, one with and one without petitioner's participation so that, in the event petitioner was not successful in its appeal before the NJSIAA Executive Committee, petitioner would have the

time to pursue an appeal to the Commissioner. (Letter on Behalf of Petitioner, dated November 5, 2004) Accordingly, the Commissioner did not issue a ruling on the Board's motion.

On November 8, 2004, the NJSIAA Executive Committee denied petitioner's appeal. Accordingly, on November 9, 2004, petitioner filed an Amended Petition and a brief in support thereof seeking reversal of the November 8, 2004 final decision of New Jersey State Interscholastic Athletic Association (NJSIAA) which concluded that Union Hill High School (Union Hill) may not participate in the football playoffs because it had three player disqualifications for "flagrant unsportsmanlike conduct," pursuant to NJSIAA Specific Sport Regulation, Note 4.f., p. 92. On November 10, 2004, the NJSIAA submitted a Brief in Opposition to the Motion for Emergent Relief, along with the underlying record of proceedings before the NJSIAA, in accordance with the provisions of *N.J.A.C.* 6A:3-7.1 *et seq.* In that petitioner's motion sought to enjoin NJSIAA from establishing playoff brackets prior to the hearing of its appeal before the NJSIAA Executive Committee and that aspect of petitioner's motion was addressed by the establishment of the contingency brackets as noted above and the hearing of its appeal before the NJSIAA Executive Committee, and in that the parties have provided sufficient information for the Commissioner to proceed on the merits, the Commissioner has determined to render a determination on the merits in this matter.

The material facts and procedural history of this matter are as follows: On September 10, 2004, Union Hill participated in a football game with Dickinson High School. Union Hill was winning the game 47-0 and, therefore, petitioner's coach put many of the junior varsity players into the game. A physical altercation, lasting 34 seconds, occurred between the players of the two teams. As a result, three of the petitioner's junior varsity players, two of whom were special education students with aggressive behavior issues, and two of Dickinson's

players, were ejected from the game for flagrant unsportsmanlike conduct. This was the only time since Coach Joseph Rotondi became coach in 1998 that petitioner's players have been disqualified for flagrant unsportsmanship violations. Although NJSIAA rules require only that a school impose a one-game suspension for such offense, petitioner subsequently gave a two-day suspension to two of its disqualified players and a one-day suspension to the other.

On September 14, 2004, the game's officials filed a "Disqualification Form" with the NJSIAA indicating that three of petitioner's players had been ejected from the game for flagrant unsportsmanlike conduct. As a result, NJSIAA barred petitioner from participating in the upcoming football playoffs, pursuant to a new rule, Specific Sport Regulation, Note 4.f., p.92, adopted for the 2004-05 school year. Petitioner states that it became aware it had been barred from the playoffs through a newspaper article and, by letter of November 1, 2004 notified NJSIAA that it wished to appeal the NJSIAA's decision. On or about November 1, 2004, petitioner was notified that its appeal before the NJSIAA Executive Committee would occur at 10:00 a.m. on November 8, 2004. Following a hearing on November 8, 2004, the Executive Committee determined that petitioner was barred from participating in the football playoffs because three of its players had been disqualified for flagrant unsportsmanlike conduct.

PETITIONER'S POSITION

Petitioner contends that the NJSIAA's application of Specific Sport Regulation, Note 4.f., p. 92, under these facts, is arbitrary, capricious and unreasonable. (Brief in Support of Petition of Appeal at 6) Petitioner points out that the Regulation at issue states:

> Any varsity team accumulating three or more player or coach disqualifications for flagrant unsportsmanlike conduct prior to the start of 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. (Amended Verified Petition, Ex. 2, Specific Sport Regulation, Note 4.f., p. 92)

Petitioner contends that the above rule clearly applies to a situation where there are three separate incidents and that the clear purpose of the rule in allowing two disqualifications before being barred from tournament play was to allow coaches and players to correct egregious conduct as in a "three strikes you are out" concept. (Brief in Support of Petition of Appeal at 6) Petitioner notes that it did act to take corrective action by suspending two of the three students for two games and the other one for one game and that there have been no subsequent incidents. (*Id.* at 7) Since all three disqualifications occurred in a single incident in this case, petitioner argues that three disqualifications should count as one chance because by "merging" these three disqualifications, Union Hill, in essence, was only given one chance. (*Ibid. at* 7)

Petitioner further contends that, since the present coach became head coach in 1998, the team has had no other flagrant disqualifications and that it is an injustice for such a team to be so severely sanctioned for one incident. (*Id.* at 8) Petitioner asserts that the videotapes show that the number of Dickinson players involved in the altercation exceeded the number of Union Hill players, and it claims that Union Hill players were the victims, not the aggressors. (*Id.* at 9) Petitioner finds it ironic that the player it alleges started the fight was not ejected. (*Ibid.*)

Petitioner also argues that it should not be barred from the playoffs because the rule in question applies to varsity teams and that, at the time of the altercation, the entire varsity team had been taken out and replaced by junior varsity players because Union Hill was ahead 47-0. (*Id.* at 10) Moreover, petitioner takes issue with the NJSIAA's Executive Committee finding that the intent of the rule is to cover situations such as the one herein, arguing that the

rule, which is new, is impermissibly vague in attempting to portray that intent and, thus, to apply the rule in this manner to the facts of this case is arbitrary, capricious and unreasonable. (*Ibid.*) Petitioner also contends that the rule, on its face, applies only to varsity teams. (*Id.* at 11) In addition, petitioner points out that two of the students disqualified were special education students with aggressive behavior issues, which, petitioner argues, provides an additional reason why a team should be given an opportunity to take corrective action. (*Ibid.*) Petitioner also notes that, in the event that the NJSIAA decision is reversed, it will participate in the playoffs as the number 8 seed and would play the number one seed, which is currently scheduled for a "bye." (Amended Verified Petition, number 35 at 6-7) Thus, petitioner contends, if it gets into the playoffs, no other team will be bumped from the playoffs. (*Id.* at 7)

Finally, petitioner avers that NJSIAA failed to provide due process and failed to consider all the facts when it did not view the videotapes petitioner provided and when it did not allow the referee to be questioned by petitioner. (Brief in Support of Petition of Appeal at 14) Petitioner contends that there was clearly a disagreement between petitioner and the referee and that reviewing the tapes would have conclusively resolved the discrepancies. (*Id.* at 13) Moreover, in that the referee's testimony was very damaging to its case, petitioner submits, "[f]or the Committee to hear the referee's version of the facts, without viewing the videotape, constitutes a lack of due process, and a patent failure to consider all the available evidence." (*Ibid.*) Additionally, petitioner contends that the Executive Committee asked the referee questions, but would not allow it to do so. (*Id.* at 14) Accordingly, petitioner concludes, the NJSIAA Executive Committee acted arbitrarily and capriciously and the NJSIAA's decision, therefore, must be reversed pursuant to *N.J.A.C.* 6A:3-7.4 so that Union Hill will be entered into the playoffs. (*Id.* at 15)

NJSIAA'S POSITION

The NJSIAA contends that the rule in question, Specific Sport Regulation 4.f., p. 92, "arose out of a genuine crisis that was occurring with serious fighting and injuries to players in three separate incidents during the 2003-04 school year." (NJSIAA Brief at 9) All of these serious episodes were reported to the NJSIAA and hearings were conducted by the Controversies Committee in April 2003, which issued detailed decisions and penalties against the affected schools and some of the student athletes. (*Id.* at 2) After the hearings were concluded, the Controversies Committee recommended to the NJSIAA Policy Committee that it consider more substantial penalties against any varsity team accumulating three or more player or coach disqualifications for flagrant unsportsmanlike conduct during any season. (*Ibid.*) The NJSIAA Policy Committee made a number of recommendations, including the adoption of a new rule, known as Specific Sport Regulation, Note 4.f., which provided that "[a]ny varsity team accumulating three or more player or coach disqualifications for flagrant unsportmanlike conduct prior to the start of an NJSIAA tournament will not be permitted to participate in same," and that "Seeded teams will forfeit their right to compete if a disqualification limit is reached prior to the start of the tournament for the team." (*Id.* at 3) On May 5, 2004, the Executive Committee considered the proposed regulation and on June 2, 2004, the Executive Committee adopted it on second reading. (*Ibid.* at 3)

In compliance with Article V, Sections 5 and 6, NJSIAA contends, notice was given to all member schools and the regulation was published on the NJSIAA website. (*Ibid.*) NJSIAA maintains that the new regulation was also included in all tournament regulations issued for each sport, and that mailings, clinics and sectional meetings were conducted throughout the state on the new rule. (*Ibid.*) NJSIAA submits that, at the November 8 hearing before the

Executive Committee, petitioner's Athletic Director acknowledged that he had attended such a clinic and acknowledged his awareness of such a rule. (*Id.* at 4) NJSIAA further points out that petitioner also signed a Tournament Regulation Card in September 2004, which stated, as follows:

> We verify that our team will have played at least six games against New Jersey Schools prior to the cutoff (70% Rule) and understand that three disqualification (Coaches/Athletes) will disqualify our team. (*Ibid.*, referencing Sands Certification, Exhibit E.)

Additionally, NJSIAA avers that the new rule was included in the 2004-05 NJSIAA Handbook which was distributed to all member schools and their athletic staffs. (*Ibid.*) NJSIAA contends that it was made clear during the discussions in clinics and sectional meetings about this new rule that multiple disqualifications in one contest would be cumulative, and specific references were made to the Controversies Committee decisions rendered during the 2003-04 school year, all of which involved multiple infractions, wherein several athletes were disqualified. (*Ibid.*)

NJSIAA submits that "[*a*]*s a direct result of the new rule, disqualifications for flagrant unsportsmanlike conduct have been reduced by approximately 40% from the Fall 2004 sports season.*" (*Ibid.*, emphasis in text) With respect the incident that occurred in the within matter, NJSIAA points out that the head referee described the September 10, 2004 altercation as "the closest thing I came to an all out riot." (*Id.* at 4)

NJSIAA explains that the Executive Committee conducted a full hearing on November 8, 2004, at which time presentations were given by petitioner's attorney, the Head Coach and the Athletic director. (*Ibid.*) NJSIAA further avers that it considered petiitoner's brief, and that, after the one-hour presentation and discussions on petitioner's application for a waiver of the Disqualification Rule, the Executive Committee unanimously determined not to

grant petitioner's request. (*Ibid.*) Therefore, petitioner remained disqualified for the 2004 NJSIAA tournament. (*Ibid.*)

With respect to the Executive Committee's decision not to review the videotape submitted, the NJSIAA reasons that disqualifications cannot be revisited since they were judgment calls by game officials, which are not reviewable under Note 4, and reviewing a videotape would not be relevant to the issue of a waiver. (*Id* at 7) NJSIAA argues that, aside from the video, petitioner's interpretation of the rule is belied by its plain language and that it was clear that the disqualification rule would apply even if the ejections of players for flagrant misconduct occurred in only one contest. (*Id.* at 8)

NJSIAA further submits that the rule in question was adopted by the NJSIAA members themselves, and that, when petitioner adopted its resolution joining NJSIAA for this year, it agreed that Specific Sports Regulation, Note 4.f. would be part of its own rules and regulations and that it would be bound by this rule as a voluntary member of NJSIAA. (*Id.* at 10)

Finally, the NJSIAA points out that the Commissioner has consistently held in cases of tournament disqualification that he will not substitute his judgment for that of the NJSIAA with respect to its rules and regulations unless there is a clear violation of those rules or NJSIAA has acted in a patently arbitrary manner in interpreting or enforcing its regulations. (Id. at 11) In that the rule at issue had a rational basis and was clearly communicated to petitioner and all NJSIAA members, and in that petitioner signed a Tournament Entry Card acknowledging the application of the rule and petitioner was provided with due process in terms of notice and a plenary hearing, none of those factors are present in this instance. (*Ibid.*)

COMMISSIONER'S DETERMINATION

The NJSIAA is a voluntary association of public and nonpublic schools, organized pursuant to *N.J.S.A.* 18A:11-3, to oversee athletics for its member schools in accordance with its Constitution, Bylaws, rules and regulations, which are approved by the Commissioner of Education and adopted annually by the member schools. Upon adoption by the member schools, these rules and regulations are deemed school policy and are enforced by the internal procedures of the NJSIAA.

It is well-established that the Commissioner's scope of review in matters involving NJSIAA determinations is appellate in nature. *N.J.S.A.* 18A:11-3; *N.J.A.C.* 6A:3-7.4; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a finding that the Association applied the rules in a patently arbitrary, capricious or unreasonable manner. *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Nor may the Commissioner substitute his judgment for that of the NJSIAA, *even if he would decide differently in a de novo hearing,* where due process has been provided and where there is adequate basis for the decision reached by the NJSIAA Committees. *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259; *see, also, N.J.A.C.* 6A:3-7.4(a). The scope of the Commissioner's review in NJSIAA matters has also been codified to provide notice of this standard to the public and regulated parties:[1]

> 1. If the NJSIAA has granted a petitioner due process and its decision is supported by sufficient credible evidence in the record as a whole, the Commissioner shall not substitute his ***judgment

[1] *See*, 31 *N.J.R.* 4173(a) and 32 *N.J.R.* 1177(a).

> for that of the NJSIAA, even if the Commissioner might judge otherwise in a *de novo* review.
>
> 2. The Commissioner shall not overturn NJSIAA's application of its own rules absent a demonstration by the petitioner that such rules were applied in an arbitrary, capricious, or unreasonable manner. *N.J.A.C.* 6A:3-7(a).

Moreover, the burden of proof that an action was thus improper rests with the person or entity challenging the decision. *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). It must be remembered that the arbitrary, capricious or unreasonable standard of review is extremely narrow in its scope and, consequently, imposes a heavy burden on those who challenge determinations of the NJSIAA. The standard, as defined by the New Jersey courts, provides:

> 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 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.*** (citations omitted) *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).

Upon careful consideration of the record of this matter, and mindful of the applicable standard of review, the Commissioner is satisfied that the decision of the NJSIAA was not arbitrary, capricious, unreasonable or violative of law. Initially, in this regard, the Commissioner determines that petitioner was provided with the full measure of due process to which it was entitled. Notwithstanding petitioner's complaint that it was not afforded due process because the Executive Committee did not review the tapes it provided, the Commissioner agrees with NJSIAA that the tapes have no relevance to the interpretation of the

rule which is at issue in this manner. Moreover, the Commissioner has reviewed the tapes in question and finds that the NJSIAA's determination denying a waiver of Specific Sport Regulation, Note 4.f. is only strengthened by such review in that they reflect precisely the type of melee that the regulation seeks to address. Likewise, the Commissioner is not convinced that petitioner's questioning of the referee would have any relevance in this matter in that calls by game officials are not reviewable under Note 4 of the Handbook. Accordingly, the Commissioner concludes that petitioner was afforded the due process to which it was entitled.

Turning to whether NJSIAA's decision was arbitrary, capricious or unreasonable, the Commissioner notes that the rule at issue states:

> Any varsity team accumulating three or more player or coach disqualifications for flagrant unsportsmanlike conduct prior to the start of 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. (Amended Verified Petition, Ex.. 2, Specific Sport Regulation, Note 4.f., p. 92)

The Commissioner does not find this rule ambiguous as petitioner contends, but, instead, finds that the rule clearly applies to any three disqualifications whether they occur on one occasion or over several occasions. Moreover, petitioner was clearly on notice as to how this rule would be applied.

Additionally, the Commissioner rejects petitioner's contention that the rule should not be applied because the varsity players were not on the field at the time the altercation occurred. Whether the players are on the field are varsity, junior varsity players or a combination of both, when such players are representing the school in a varsity game, they are part of the varsity team. The Commissioner concludes, therefore, that the NJSIAA's decision

was reasonable, consistent with Specific Sport Regulation, Note 4.f., and made after due consideration of the facts in this matter.[2]

Accordingly, having concluded that petitioner was provided the due process to which it was entitled and that petitioner has failed to sustain its burden of establishing that the NJSIAA's decision was arbitrary, capricious, unreasonable or violative of law, the Commissioner upholds the NJSIAA's decision and dismisses the Petition of Appeal.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 11.10/04

Date of Mailing: 11/12/04

[2] Although petitioner briefly references the special education status of two of the students involved, urging that such status is another reason why the team should be given an opportunity to reform its conduct before being disqualified from Tournament play, the Commissioner does not find arguments pertaining to the circumstances of the individual students involved germane to the central question on appeal, that is, whether Specific Sport Regulation, Note 4.f. was properly applied by the NJSIAA to three offenses within a single contest.

[3] Pursuant to *N.J.S.A.* 18A:11-3, this decision shall constitute the final decision of the State administrative agency and may be appealed to the Superior Court. *N.J.A.C.* 6A:3-7.5.

462-04

OAL DKT. NO. EDU. 11700-03
AGENCY DKT. NO. 388-10/03

H.V., on behalf of minor child, B.R.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of petitioner's failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with a copy of the notification sent to the parties by OAL on September 8, 2004, providing petitioner ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, the petition of appeal is hereby dismissed with prejudice due to petitioner's failure to appear at the hearing or provide an explanation for his nonappearance.

Notwithstanding the dismissal of the petition, the Commissioner notes that the Board's Answer in this residency matter contained a counterclaim for tuition which was left unresolved by the Administrative Law Judge. In that the record before the Commissioner contains no affidavit of a responsible Board official attesting to the amount of tuition claimed by the Board as a consequence of the ineligible attendance of petitioner's child in its schools, this matter is hereby remanded to the OAL for supplementation of the record in this regard and an appropriate recommended order regarding the payment of tuition.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11/17/04
Date of Mailing: 11/17/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.*

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

WILLIAM L. LIBRERA
Commissioner

November 17, 2004

Herman Vargas
180 Harding Avenue
Clifton, NJ 07011

Anthony D'Elia, Esq.
Chasan, Leyner, Bariso & Lamparello
300 Harmon Meadow Boulevard
Secaucus, NJ 07094-3621

Dear Parties:

H.V., on behalf of minor child, B.R.C. V. BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY, OAL DKT. NO. EDU11700-03, AGENCY DKT. # 388-10/03

We are enclosing a copy of the decision of the Commissioner of Education dated November 17, 2004 in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer preparing a synopsis or summary of the Commissioner's decision or providing an additional copy of the initial decision to the parties in this case.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/kk:o/dec ltr/HVandBRC
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library

#463-04

463-04

OAL DKT. NOS. EDU 9418-04 AND
EDU 1910-03 (ON REMAND)
AGENCY DKT. NO. 52-2/03

D.G. and R.G., on behalf of minor children,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH HALEDON, PASSAIC COUNTY, RESPONDENT.	:	DECISION ON REMAND

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/17/04

Date of Mailing: 11/17/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9418-04

AGENCY DKT. NO.: 52-2/03

D.G. AND R.G. O/B/O MINOR CHILDREN,

Petitioners,

v.

BOARD OF EDUCATION OF THE BROUGH OF NORTH HALEDON, PASSAIC COUNTY,

Respondent.

Craig S. Hughes, Esq., for petitioner

Anthony P. Sciarillo, Esq., for respondent
(Lindabury, McCormick & Estabrook, attorneys)

Record Closed: September 28, 2004 Decided: October 4, 2004

BEFORE **JEFFREY A. GERSON**, ALJ:

On March 10, 2003 this 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 hearing on several occasions and during that time the parties agreed to settle the matter. On June 21, 2004, the parties submitted a signed Stipulation of Settlement indicating the terms of settlement. An Initial decision incorporating the settlement terms was also signed by the ALJ on June 21, 2004 and

the file was returned to the Agency as a settled case. Upon reviewing the file, the Director of Controversies and Disputes remanded the matter back to the OAL because a signed copy of the Board's resolution approving the settlement was not attached. A copy of the resolution is attached hereto and is made apart of the Stipulation of Settlement that was signed by the parties on May 10, 2004.

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 (45) 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.

10/4/04
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

Oct 8, 2004
DATE

Kathy Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 14 2004
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

LINDABURY, MCCORMICK & ESTABROOK
53 Cardinal Drive
P.O. Box 2369
Westfield, N.J. 07091
(908) 233-6800
Attorneys For Respondent
North Haledon Board of Education

DARREN GILMORE and RITA GILMORE, on behalf of minor children	: BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioners,	: AGENCY DOCKET NO.:52-2/03 : OAL DOCKET NO.:EDUOUS 01910-03N
-vs-	:
NORTH HALEDON BOARD OF EDUCATION	: **SETTLEMENT AND RELEASE**
Respondent.	:

This Settlement Agreement is made this 26th day of May, 2004, between Darren & Rita Gilmore ("Gilmores") and North Haledon Board of Education (hereinafter the "Board").

Whereas, there are currently legal proceedings pending before the Commissioner of Education of New Jersey, Office of Administrative Law, captioned Darren Gilmore and Rita Gilmore, on behalf of minor children v. North Haledon Board of Education, bearing Docket No.: 52-2/03; and

Whereas, the parties have reached a settlement of all disagreements and disputes between them and now wish to record the terms of their settlement,

Now, therefore, in consideration of the terms contained herein, the parties agree as follows:

1. The Gilmores shall pay the Board the sum of $30,000.00 in settlement of any and all of Board's claims;

2. All legal actions currently pending before the Commissioner of Education of New Jersey, Office of Administrative Law, captioned Darren Gilmore and Rita Gilmore, on behalf of minor children v. North Haledon Board of Education, bearing Docket No.: 52-2/03; and any other legal tribunal, shall be immediately dismissed with prejudice upon the parties signing of this Agreement;

3. The Board releases any and all claims that it has against the Gilmores, whether known or unknown, in consideration for the Gilmores' entering into this Agreement;

4. The parties recognize that each has been represented by legal counsel of their own choosing and that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein;

5. This Agreement shall be subject to the laws of the State of New Jersey; and

6. All terms of this Agreement are deemed material. This document may not be altered, amended or modified or revoked accept by an instrument executed in writing by the parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

NORTH HALEDON BOARD OF EDUCATION

By: _____
Name: Anthony Vaccaro
Title: Board President
Date: 5/26/04

DARREN & RITA GILMORE

By: _____ 5/10/04
Darren Gilmore

By: _____
Rita Gilmore

EXTRACTED FROM THE MINUTES OF A MEETING OF:
THE NORTH HALEDON BOARD OF EDUCATION
PASSAIC COUNTY, NEW JERSEY,
AS RECORDED IN THE OFFICIAL MINUTE BOOK.

The Board of Education of North Haledon, County of Passaic, New Jersey, convened in public session on May 26, 2004 at 7:32 p.m. , in the Dr. Joseph E. Kutner Library/Media Center at High Mountain School.

The following members of the North Haledon Board of Education were present: Mrs. Blanos, Mr., Bleeker, Mrs. Lampe Mr. Malpica, Mr. Martinez, Mr. Ruitenberg, , Mr. Stoll, Mr. Vaccaro
The following members of the North Haledon Board of Education were absent: Mrs. Wuensch

The following motion was offered by Mr. Stoll and seconded by Mr. Bleeker and adopted by the Board of Education by the following vote:8-0-0-0-1

ACCEPTANCE OF JUDGEMENT

BE IT RESOLVED: UPON THE RECOMMENDATION OF THE SUPERINTENDENT, THE BOARD HEREBY ACCEPTS THE COURT RECOMMENDED JUDGEMENT FROM MR. AND MRS. DARREN GILMORE IN THE AMOUNT OF $30,000.00

AYES: ALL MEMBERS PRESENT
NAYS: NONE

I, Virginia Merlino, Secretary of the Board of Education of North Haledon in the County of Passaic, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the North Haledon Board of Education duly called and held on May 26, 2004 has been compared by me with the original minutes as officially recorded in my office in the minute book of said North Haledon Board of Education is true, complete copy thereof and of the whole of said original minutes so far as the same related to the subject matter referred to in said extract. In witness I have hereunto set my hand and affixed the corporate seal of the North Haledon Board of Education this 26th day of August, 2004.

Virginia Merlino
Business Administrator/Board Secretary

459-04

OAL DKT. NO. EDU 5043-04
AGENCY DKT. NO. 139-4/04

L.W., on behalf of minor child, J.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
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.

Upon careful and independent review of the record, the Commissioner concurs that this matter is properly dismissed, inasmuch as petitioner failed to appear for the hearing and carry her burden of proving that J.W. was entitled to a free public education in respondent's district.

Accordingly, the Initial Decision is adopted for the reasons expressed therein. The Commissioner directs that petitioner remit to the Board the amount of $2,978.50 for tuition from March 1, 2004 until June 17, 2004, the period of J.W.'s ineligible attendance in the district.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11/15/04

Date of Mailing: 11/16/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
FAILURE TO APPEAR
OAL DKT. NO. EDU 5043-04
AGENCY DKT. NO. 139-4/04

L.W. on behalf of minor child, J.W.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD,
Respondent.

None for or on behalf of petitioner

Mark A. Wenczel, Esq., for respondent
(Gaccione, Pomaco & Malanga, attorneys)

Record Closed: October 4, 2004 Decided: October 5, 2004

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal brought on behalf of a child seeking continued enrollment in the Bloomfield, New Jersey school system. Although the family moved from Bloomfield

to Springfield, New Jersey prior to March 1, 2004, the mother sought permission for her child to remain in the Bloomfield school system through the end of 2003-2004 school year. Respondent Bloomfield Board of Education ("Board") filed a counterclaim seeking assessment of tuition prorated to the time of the child's ineligible attendance in the school district.

Procedural History

On April 20, 2004, the mother filed a petition with the Commissioner of Education ("Commissioner") seeking emergent relief. Thereafter, on May 11, 2004, the Board filed its answer and counterclaim. Meanwhile, on May 4, 2004, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for consideration of petitioner's application for emergent relief.

The OAL held a hearing on May 21, 2004 limited to petitioner's application for emergent relief. By order entered on May 25, 2004, the administrative law judge determined that petitioner "is not legally entitled to attend the Bloomfield school district" and should "be immediately disenrolled from the Bloomfield school district and relocated to the district in which petitioner now resides[.]" The OAL scheduled a full hearing on petitioner's underlying complaint and the Board's counterclaim for October 4, 2004.

Findings of Fact

All of the relevant facts are undisputed. I **FIND**:

1. During the course of the 2003-2004 school year, the Board obtained information that the student's mother, with whom the student resided, had moved out of Bloomfield to Springfield, New Jersey.

2. At the emergent relief hearing held on May 21, 2004, the mother admitted having moved from Bloomfield to Springfield at the end of February 2004.

This testimony is consistent with information compiled by the school district.

3. Tuition for a 180-day school year at the Franklin School is $7,245.00 or $40.25 per day.

4. Between March 1, 2004 and June 17, 2004 (the last day of school), there were 74 school days.

5. Despite the prior administrative order directing the mother to remove her child from the district, the parent failed to register the child in the Springfield school district. Instead, the child remained in the Bloomfield district throughout the 2003-2004 school year.

6. Accordingly, the amount of tuition owed on the district's counterclaim is 74 times $40.25 or a total of $2,978.50.

7. A transfer card has been sent to the Springfield school district. The mother has not registered her child to attend the Bloomfield public schools for the 2004-2005 school year.

8. On September 28, 2004, the Board advised the OAL that the family had recently moved to an unknown address in another state. Board records contain the Springfield address as the last known address.

9. On September 29, 2004, Anna Leggett, a secretary at the Office of Administrative Law, had a telephone conversation with the mother. Although the mother admitted that she had moved to North Carolina, she was unwilling to reveal her current address.

10. Ms. Leggett reminded the mother that a hearing was scheduled for October 4, 2004 and that attendance was mandatory.

11. Nonetheless, the mother responded that she would not attend the hearing and "would not be back until next year."

12. At the hearing on October 4, 2004, Mr. Wenczel appeared on behalf of the Board. The OAL waited one-half hour before determining that the petitioner had abandoned the request for a hearing.

Conclusions of Law

N.J.A.C. 18A:38-1(a) provides that the public school shall be free to any person over five and under twenty years of age "who is domiciled within the school district." As minor child, petitioner has the same domicile as his custodial parent. When the family moved from Bloomfield to Springfield, petitioner was no longer eligible to attend the Bloomfield public school district free of charge.

Pursuant to *N.J.A.C.* 18A:38-1(b), a child must be allowed admission during the pendency of the proceedings before the Commissioner. If, however, the evidence does not support the claim of residence, the Commissioner must assess tuition for the student prorated to the time of the student's ineligible attendance in the school district. Such 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.

Previously, on May 21, 2004, the administrative law judge had determined that petitioner was ineligible to attend the Bloomfield school district and must transfer to his new district as of May 21, 2004. Notwithstanding this clear order, the mother continued to send her child to the Bloomfield school district for the remainder of the 2003-2004 school year.

Order

It is **ORDERED** that petitioner has abandoned the request for a hearing.

And it is further **ORDERED** that judgment is hereby entered in favor of the Bloomfield Board of Education against petitioner's mother, L.W., in the amount of $2,978.50.

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 (45) 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 (13) 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, 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, 2004
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

October 5, 2004
DATE

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 6 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

List of Exhibits

No.	Description
1	Certification of Dr. Nicholas Bruno, dated September 30, 2004

475-04

OAL DKT. NO. EDU 1911-04
AGENCY DKT. NO. 22-1/04

DOLORES I. RABENOU,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner filed timely exceptions pursuant to the provisions of *N.J.A.C.* 1:1-18.4, to which the Board of Education (Board) duly replied. Petitioner's further submission in response to the Board's reply is not considered herein, since applicable rules make no provision for such submissions.

In her exceptions, Petitioner points to the finding of the Administrative Law Judge (ALJ), in the Initial Decision at 2, that petitioner requested a leave of absence for maternity purposes, and, from this, concludes that this "factual determination***resolves the matter in favor of the Petitioner.***Upon reaching this conclusion as a finding of fact, the Petitioner is now entitled to apply to the TPAF [Teachers' Pension and Annuity Fund] to purchase credit***for purposes of her pension. In effect there need be no further proceedings since the Petitioner is now entitled to apply directly to the TPAF for the relief which she has requested. This was a finding of fact which was questioned by the TPAF and is now resolved." (Petitioner's Exceptions at 1-2, quotation at 2) Petitioner further opines that the above-noted finding renders moot

the subsequent conclusion that Petitioner's appeal was untimely filed, but in the alternative, reiterates her argument before the ALJ that the 90-day limitation period did not begin until October 28, 2003, when the Board denied petitioner's request to amend its minutes. Petitioner states that she "followed a logical course of action by requesting the local district to amend its erroneous conclusion which the [ALJ] has now determined to be inconsistent with the facts in this matter.***Petitioner was pursuing an administrative remedy by requesting the local district to amend its minutes as requested by the TPAF which had denied the Petitioner's request to purchase credits because***[the Board] would not correct their mistake in the minutes.***Therefore an exception to the [ALJ's] decision is in order as the Petitioner was in the process of attempting to comply with the TPAF request to seek the amendment of the local district's minutes." (*Id.* at 3-4)

In reply, the Board argues that petitioner is fixing on one finding, i.e., that she *requested* a leave (Finding No. 1), while ignoring another, i.e., that the Board *granted* a resignation (Finding No. 3). The Board notes that petitioner's request for a leave is undisputed; the issue of concern to TPAF was not what she requested, but rather what the Board granted. Moreover, the Board observes, the Initial Decision does not even address the merits of petitioner's claim, having been decided solely on the issue of untimely filing; therefore, petitioner cannot claim the ALJ's "conclusions" on the merits render the untimeliness issue moot. (Board's Reply at 2-3) In this latter regard, the Board reiterates its argument, made before the ALJ, to the effect that petitioner's cause of action is not the Board's refusal to amend its minutes, but rather the error they purportedly reflect. (*Id.* at 3-5)

Upon consideration of the record and the parties' arguments on exception, the Commissioner concurs with the ALJ that the instant matter must be dismissed as untimely filed. Although petitioner couches her complaint as an appeal from the Board's refusal to amend the minutes of its March 13, 1969 meeting, what petitioner is actually appealing, as recognized by the ALJ, is the district's underlying determination to deem her to have *resigned* by letter of that same date, and not, as she contends, merely to have arranged for a leave of absence which ultimately extended until September 30, 1971, although she did not return to the district thereafter. Clearly, petitioner had notice of the district's official characterization of her status by June or July 2003 at the latest; what she is attempting to overcome by identifying her cause of action as the Board's subsequent refusal to amend its minutes is the unfortunate fact that she did not move to dispute such characterization until she realized its impact on her ability to purchase pension credit, and then waited to file her appeal with the Commissioner until she failed in her attempts to negotiate with the Board. That such attempts do not toll the statute of limitations is by now well established. See, *Kaprow, supra*; also, *Riely v. Hunterdon Central Bd. of Educ.*, 173 *N.J. Super.* 109, 413 *A.*2d 628 (App. Div. 1980).[1]

[1] The undisputed documentary record in this matter clearly demonstrates that: petitioner was provided with a copy of her district personnel record by memo from the payroll department dated May 28, 2003; in her response to Interrogatory No. 14, petitioner states that she became aware of the district's "error" on June 15, 2003; a letter from the TPAF dated June 16, 2004 clearly advised that the records provided to the TPAF indicated that petitioner was not employed during the period in question; and petitioner by her own admission received a copy of the Board minutes on July 22, 2003.

Additionally, attempting to plead this matter solely as a challenge to the Board's refusal to amend its meeting minutes would appear to raise a question of jurisdiction, since the Commissioner may hear claims arising under the Open Public Meetings Act only when they are ancillary to a primary school law dispute. *Sukin v. Northfield Board of Education*, 171 *N.J. Super.* 184 (App. Div. 1979), *Jenkins v. Newark Board of Education*, 166 *N.J. Super.* 357 (Law Div. 1979), aff'd. 166 *N.J. Super.* 300 (App. Div. 1979) However, that consideration was neither pled nor briefed herein, and need not be addressed given the Commissioner's holding on the timeliness of the Petition.

Additionally, in view of petitioner's statements on exception, the Commissioner stresses that no determination is made herein, or in the Initial Decision, regarding the merits of petitioner's underlying claim; indeed, the ALJ expressly states that her findings of fact are for purposes of deciding the Board's motion to dismiss on grounds of untimely filing, and the Board itself does not dispute petitioner's contention that, by her letter of March 13, 1969, her *intent* was to request a leave of absence, although that is not what the Board granted.

Accordingly, for the reasons expressed therein and above, the Initial Decision of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 11/29/04
Date of Mailing: 11/30/04

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

CORRECTED COPY

AGENCY DKT. NO. 387-10/04

IN THE MATTER OF RICHARD LEE,	:	
CAMDEN BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty against the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25, and/or an annual financial disclosure statement, as required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2004 for school officials in office since January 30, 2004, or 30 days from swearing-in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on August 20, 2004, indicating that if the completed statement was not filed by September 10, 2004, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 17, 2004 directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official filed the completed disclosure statement thereafter; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official did not provide any reason why he failed to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 26, 2004 to recommend a censure of the above-named school official in light of his failure to respond to the Commission's letter before the September 10, 2004 deadline, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated October 28, 2004 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending censure; and

Whereas, no response was received from the above-named school official; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and finds that the Commission's recommendation is inconsistent with the penalty recommended in previous matters of this nature with substantially similar facts, (*See, e.g., In the Matter of Denise Irvin-Johnson, Willingboro Township Board of Education, Burlington County*, decided by the Commissioner February 11, 2004 and *In the Matter of Joel Pabon, Sr., Perth Amboy Board of Education,*

Middlesex County, decided by the Commissioner February 5, 2004, where the Commission recommended, and the Commissioner concurred, that where a school official completed and submitted the required disclosure statement after the issuance of an Order to Show Cause, but did not provide *any* reasons for failure to comply within the requirement under *N.J.S.A.* 18A:12-25 and 26, the appropriate penalty was a reprimand); and

Whereas, the penalty of reprimand has additionally been recommended and imposed under circumstances where noncompliance with the filing requirement was egregious, (*See*, e.g., *In the Matter of Beverly Evenson, Willingboro Township Board of Education, Burlington Township,* decided by the Commissioner December 22, 2003 and *In the Matter of Lynel Dunkins, Gateway Charter School, Hudson County,* decided by the Commissioner December 22, 2003, where the Commission recommended, and the Commissioner concurred, that where a school official did not complete the required disclosure statement after the issuance of an Order to Show Cause and did not provide any reasons for failure to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26, the school official was suspended until such disclosure statement was filed and automatically removed from the Board if he/she failed to file the required statement within 30 days, but was reprimanded if he/she filed the necessary statement prior to the filing date of the Commissioner's decision); and

Whereas, the School Ethics Commission did not articulate its reasoning in recommending the imposition of the more severe penalty of censure in this instance; and

Whereas, the Commissioner, in the absence of such explanation, cannot concur with the Commission's recommendation and, instead, determines that a reprimand is the proper penalty in that it is consistent with the penalty imposed in prior matters of this nature, and

Whereas, the Commissioner nevertheless admonishes the school official for his/her failure to timely file the requisite statement in that such delay has caused administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named school official be reprimanded as a school official found to have violated the School Ethics Act.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/23/04

Date of Mailing: 12/06/04 (CORRECTED COPY)

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

466-04

OAL DKT. NO. EDU 3805-04
AGENCY DKT. NO. 50-2/04

A.M., on behalf of minor children, A.M.C. and J.M.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon careful and independent review of the record in this matter, and based on the credibility assessments of the Administrative Law Judge (ALJ), *N.J.S.A.* 52:14B-10(c), the Commissioner finds no cause to disturb the factual findings and legal conclusions of the ALJ.

Accordingly, the Initial Decision is adopted for the reasons expressed therein and the instant Petition of Appeal is dismissed. Petitioner is hereby directed to pay the Board tuition, in the amount of $40,254.60,[1] for the cost of her children's ineligible public school education at the Board's expense for the 2003-04 school year.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 11/17/04

Date of Mailing: 11/18/04

[1] As explicated by the ALJ on Page 17 of her decision, $31,953.60 of this total represents tuition for J.M.C.'s attendance at ARC of Essex County for 180 days at a per diem rate of $177.52 and the remaining $8,301 comprises tuition for A.M.C.'s attendance at Franklin School during the school year at issue.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3805-04
AGENCY DKT. NO. 50-2/04

A.M. ON BEHALF OF MINOR CHILDREN, A.MC. AND J.MC.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,
Respondent.

A.M., petitioner, *pro se*

John P. Harrington, Esq., for respondent
(Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: October 8, 2004 Decided: October 8, 2004

BEFORE **ELINOR R. REINER**, ALJ:

Procedural History

This school residency case was transmitted by the Department of Education to the Office of Administrative Law on April 27, 2004, as a result of a challenge by A.M.,

the mother of twins A.MC. (a boy) and J.MC. (a girl), to a determination by the respondent, Board of Education of Union Township (Board), that during the 2003-2004 school year A.MC. attended Franklin School in Union and J.MC. attended an out-of-district special education placement in Livingston, with tuition paid by Union, when neither child was a legal resident of Union. The Board's answer denied the allegations of the petition and included a counterclaim for tuition reimbursement for the period of their illegal attendance. The matter was assigned to the undersigned judge on May 25, 2004, and a telephone prehearing conference was held on July 15, 2004, when the issues were isolated. A plenary hearing was conducted by the undersigned on August 27, 2004, and the record closed at the conclusion of the agreed schedule for my receipt of proposed findings of fact and conclusions of law. No submission was filed by petitioner. The witnesses who testified and the exhibits marked into evidence are listed in the Appendix.

Issue

At issue is whether A.M.'s two minor children, A.MC. and J.MC., are "domiciled" within the Union Township school district for purposes of entitlement to a free public education pursuant to *N.J.S.A.* 18A:38-1. If not, what is the proper tuition reimbursement owed to Union for their illegal attendance in the district, or, as to J.MC., for her attendance in Livingston at Union's expense?

Testimony for the Board

Although the burden of proof to establish domicile in Union by a preponderance of the credible evidence is on petitioner, it was agreed that respondent would present its case first. First to testify was James Ford, a part-time "residency investigator" in the employ of the Board for about three years. Previously, he was a lieutenant in the Chatham Police Department, for which he worked for thirty years and where he conducted many police investigations. On or about November 10, 2003, he was directed to begin an investigation to determine the residency of minor children A.MC. and J.MC. Ford first visited the Franklin School to meet with the kindergarten teacher

to observe A.MC. and D.M., A.M.'s nephew, and receive pertinent documentation. Thereafter, he conducted several surveillances at 45 M. Avenue in the Vauxhall section of Union, New Jersey, which A.M. claimed was the place where she lived with both of her children. To conduct this surveillance, Ford parked on M. Avenue between the house and the school bus stop. The surveillances were conducted from approximately 6:30 a.m. to 9:00 a.m. on ten separate occasions, November 19, 20, 21, 24, 25 and 26 and December 1, 2, 3 and 4, 2003. On none of these days did either of A.M.'s two children, or another child also the subject of this investigation, D.M., A.M.'s nephew, exit the 45 M. Avenue residence to attend school. Instead, the students were dropped off at the school bus stop on V. Street and M. Avenue, exiting from either a 1998 Hyundai, registered to M.H., mother of D.M., or from a 2004 Mercedes SUV registered to D.M., father of D.M., who reside at 20 A. Lane, Newark. On November 19, 20 and 21, 2003, Ford observed the children get on the school bus to go to school. After school, their grandmother met them at the bus stop and walked them to 45 M. Avenue. They did not enter the house; rather, they got in the Hyundai and were driven by petitioner to Newark.

In order to follow A.M.'s car, Ford enlisted the services of another residency investigator, William Sheridan. On the afternoon of November 24, 2003, Ford and Sheridan observed the children enter the Hyundai at 45 M. Avenue and followed them to 20 A. Lane in Newark. From then on, Ford continued his surveillance in Union while Sheridan's surveillance was at 20 A. Lane. Ford recounted that on November 25 and 26, 2003, the children were dropped off in Union and in the afternoon left from 45 M. Avenue in the Hyundai to return to Newark. Ford explained that Sheridan observed the situation at 20 A. Lane in the morning and called him by cell phone to advise when the children left the house. Ford observed them arrive at the school bus stop in Union. Although Ford was particularly referring only to D.M. and A.MC., Sheridan saw all three children leave the house in Newark.

On November 26, 2003, Ford was told that A.M. requested that J.MC. be picked up on M. Street rather than M. Avenue. At his next observation on December 1, 2003, he observed D.M. arrive in his Mercedes SUV at approximately 8:10 a.m. and place

observed. On December 2, 2003, J.MC. was not observed on the school bus. Ford and Sheridan went to the 45 M. Avenue house and were advised by the "grandmother" that J.MC.'s mother, A.M., had dropped J.MC. there before going to work, because J.MC. was ill that day. When Ford asked her where J.MC. lived, she noticeably hesitated before replying, "She lives here."

On December 3 and 4, 2003, J.MC. was present in school, but according to Ford was not picked up by F&S Transport, the provider bus company. On December 4, Ford was advised by Sheridan that the two boys (A.MC. and D.M.) had left Newark at 8:05 a.m. and would not make it to the bus stop on time. The two investigators then met at Franklin School and asked the teacher to question the two boys as to how they got to school that day. Although D.M. stated that they came by bus, A.MC. jumped up and corrected him, stating, "Your daddy drove us here."

Ford also testified that he never observed A.M. leave 45 M. Avenue in the morning, or return to stay there in the afternoon. He also stated that while he was parked at V. Street and M. Avenue, observing the boys get out of the Mercedes, two neighbors told him that the students do not live in Union but do go to school there. He did not record the neighbors' names.

Based on his investigative activities, Ford concluded that A.MC. and J.MC. did not live in Union, but lived at 20 A. Lane in Newark. Although Ford noticed that petitioner's sister, M.H., wife of D.M., sometimes dropped the children off in Union in the Mercedes, he stated that usually D.M., J.MC.'s and A.MC.'s uncle, dropped them off there. In the afternoon, petitioner usually met them and drove back to A. Lane in Newark in the Hyundai. Finally, according to Ford, an affidavit of residency submitted by A.M. indicated that she and the children were "tenants" at 45 M. Avenue and the landlord was her sister, M.H. Ford also agreed that he did not see anyone else other than D.M. put J.MC. on the bus, and this was only on one occasion.

William Sheridan, the other part-time investigator who testified for respondent, has conducted approximately forty residency investigations. He recently retired as a

sergeant from the Essex County Sheriff's Office, where he had served for thirty-two years. He recalled that Ford asked for his assistance in this investigation on November 21 or November 22, and on November 24, 2003, Ford asked him to meet him on M. Avenue at 3:40 p.m. He observed a black female, later identified as petitioner A.M., pick up three young children outside 45 M. Avenue in her Hyundai and followed the vehicle as she drove to 20 A. Lane, Newark, where they entered a townhouse.

Thereafter, on November 25 and 26, December 1, and December 23, 2003, Sheridan conducted a surveillance of 20 A. Lane. He usually began his investigation at 6:00 a.m. and remained until about 7:40 a.m., when the children left in the 2004 Mercedes driven by D.M. He reported this information to Ford by cell phone.

On December 2, 2003, only the two boys left the house in Newark. At 9:30 a.m., Sheridan met Ford at the Board office, where they learned that J.MC. was not in school that day. They then proceeded to 45 M. Avenue, where an elderly woman answered the door. J.MC., the young girl, stood behind her and called her "Grandmother." They told the woman they were concerned that J.MC. was not in school since the office had not received a phone call. The woman replied that J.MC. had been dropped off there by her mother that morning. The "grandmother," apparently taken aback at their question as to whether petitioner also lived at 45 M. Avenue, first said, "no," then "yes," and then "sometimes."

On December 4, 2003, the children left the house in Newark at 8:05 a.m. Since it was not the usual time, Sheridan called Ford and both went to the Franklin School. Sheridan was present in the classroom when the boys were asked how they got to school that day and responded as previously testified to by Ford. Sheridan also testified that the mailbox at 45 M. Avenue only has the name "Thomas" on it; he thinks that "Thomas" is the name of a part-owner of the house.

Testimony for Petitioner

R.M. is a resident at 49 M. Avenue in Union. He testified that petitioner has always lived at 45 M. Avenue, even prior to her children being born. He claimed that since she worked at night, and therefore did not leave home in the morning, it was difficult for him to know when she was home. He also claimed that petitioner and her sister, M.H., baby-sit for each other's children and he sees the sister come and go as well. M.H. moved from 45 M. Avenue when she got married.

On cross-examination, R.M. could not recall when petitioner's sister was married and did not know where she now lives. He contended that he was just "[at the hearing] to support [petitioner]."

On questioning by the undersigned as to who now lives at 45 M. Avenue, R.M. indicated someone named "Kenny," who he assumed was petitioner's father. He did not know the name of the "grandmother," but said he knows her when he sees her.

The next witness, G.Z., has known petitioner for three or four years and thinks of her as "family." She first met petitioner when they both worked the 6:00-a.m.-to-2:30-p.m. shift at Fellowship Village in Basking Ridge, a nursing home and retirement community. G.Z. knew petitioner's three children, A.M.'s sister, M.H., and her brother-in-law, D.M.

G.Z., questioned by petitioner as to whether petitioner lived anywhere other than on M. Avenue, stated, "Not that I know of." G.Z. also claimed that petitioner and her sister baby-sit each other's children, and that since petitioner had to be at work so early, either her sister or brother-in-law would put her children on the school bus. She also claimed that at times petitioner dropped the children at "Danielle's" house on M. Street, and "Danielle" then took the children to kindergarten, where she worked, and dropped them off at 5:30 p.m. Although she stated that petitioner's schedule has not changed, she then stated that petitioner has not been working for at least three months. G.Z.

claimed that she has also picked up the children for petitioner, and dropped them off at either M. Street or at petitioner's sister's house on A. Lane.

G.Z. also stated that to her knowledge petitioner does not live at 20 A. Lane in Newark. She agreed, however, that the children could spend the week there with their "auntie" and petitioner could spend the weekend there too. Although G.Z. confided that she barely listens to what petitioner says, she knew that sometimes D.M. "drops the children off" and that the children may stay at 20 A. Lane for that reason. She maintained that J.MC. is dropped off at the school bus stop by either D.M. or Danielle.

On cross-examination, G.Z. said that as far as she knows, M.H. has always lived on A. Lane.

On questioning by the undersigned, the witness indicated that she left her job at Fellowship Village in 2001 to become a professional driver. Petitioner worked there until 2004. She also said that she has visited petitioner at 45 M. Avenue and sometimes slept there. She also has spent a weekend at A. Lane. Questioned as to who she believes lives at 45 M. Avenue, she indicated that petitioner's father lives downstairs, while an "aunt" ("Aunt B."), petitioner and her two children live upstairs. She claimed that a niece and petitioner's brother no longer live there. She did not know petitioner's brother's name and said that she saw him only once. She thought his name might be "Thomas."

Petitioner, A.M., then testified. She did not deny that since she had to be at work at 6:00 a.m., her brother-in-law takes A.MC. to the school bus. She explained that A.MC. then goes home with her sister, M.H., basically every night, to be dropped off at 8:30 a.m. the next day by her brother-in-law. She contended, however, that she brings her daughter, J.MC., to Danielle R.'s home on M. Street at 5:30 a.m., and Danielle puts J.MC. on the bus to go to Livingston. (Danielle's mother is an aide on the bus.)

In further testimony, petitioner alleged that on the day J.MC. was sick, J.MC. had first been at Danielle's. Although 45 M. Avenue is only about thirty feet from the

M. Street house, A.M. contended that on that day she left work in Basking Ridge to go back to Union to pick J.MC. up from Danielle's and take her to her "aunt's" house on M. Avenue so Danielle could go to work. She then testified that D.M. sometimes drops J.MC. at the bus stop and J.MC. also slept at her sister's house at night. She admitted that she, too, stays at her sister's house on weekends and sometimes spends the night there during the week. In fact, she lived there from June 2002 to October 2002 when her son, A.MC., underwent chemotherapy while her father was redoing the house at 45 M. Avenue. After the apartment was finished, they returned to live on M. Avenue. She claimed that she does not associate with the neighbors who presumably told Ford that she does not live at 45 M. Avenue. Indeed, she contended that she has been living there for fourteen years. Her twins are now six years old and have only been in school in Union for one year.

On cross-examination, petitioner revealed that she left her employment at Fellowship Village on January 18, 2004, and now is attending school in South Orange. J.MC. receives Supplemental Security Income (SSI) benefits and A.M.'s sister is helping her with finances. In further testimony, she stated that M.H. and a brother, L.T. (who lives in Irvington), own the 45 M. Avenue house. Her sister lets her use the apartment there and petitioner claimed that she pays half the mortgage, about $425 a month, and half the water bill. She explained that her father lives on the first floor, she lives on the second floor and a tenant lives "in the back." Her sister, M.H., and brother-in-law, D.M., moved to Piscataway three weeks ago and tenants now live at 20 A. Lane. She was unsure where another sister lives, but indicated that another sister lives in New York.

On cross-examination, petitioner agreed that in September 2003 her sister, M.H., lived at 20 A. Lane in Newark, but had enrolled her own children in Union schools, too. Petitioner contended that her sister did not know this was improper. Although petitioner had applied to have her son attend a school in Newark, she was told the school was full. Although A.M. contended that her sister told her it was a good school, she could not recall its name or even if it was a public or private school. Therefore, both sisters went to Franklin School to enroll their children there. Petitioner alleged that when she

went to the Board meeting to discuss residency, she did not know that the Board was conducting an investigation. Although she received a letter from the Board, she could not identify it and claimed that she did not present evidence at the Board meeting because she was not asked to do so.

In further testimony, A.M. agreed that her sister, M.H., who was not present at the hearing before me, provided no written statement either. In fact, she admitted that M.H.'s name is not on the petition, which she prepared, and had various people sign (R-4). She also provided no written statement from her brother, L.T., nor did she call him to testify. She agreed that her sister did not contest the Board's decision and removed her own child, D.M., from the Union school, and enrolled him in a Catholic school.

Questioned as to what she pays M.H. to live at 45 M. Avenue, A.M. said she pays "half," which varies from month to month. She estimated it to be about $650 per month, but not less than $600 per month. Referring to her answers to interrogatories, which included "rental receipts," she admitted that the amount of the "rental" was the same amount each month (R-6). Her sister, not she, maintains a receipt book.

A.M. also testified as to the affidavit from M.H. that was used to enroll the children in Union and as to various documents that she provided to support her case. She points out that her earnings statements for the periods ending February 15, 2003, April 26, 2003, May 10, 2003, June 21, 2003, and December 20, 2003, all indicate her address to be 45 M. Avenue, as does an unemployment check for March 2004. On cross-examination, she agreed that she files tax returns each year and maintains a copy of them, but forgot to bring them to court. Questioned as to how she will get the children to school this year, she contended that her school would be over in two weeks and she would "figure something out for the fall."

On questioning by the undersigned, A.M. pointed out that the amount she pays for rent ($650) was written on the rental receipt by her sister because it was supposed

to be that amount. However, since her sister gives her money while she is in school, she agreed that she actually pays only $400.

Discussion

Petitioner claims that her twin children, her son, A.MC., and her daughter, J.MC., are entitled to a free public education in Union because she lives there and thus her children are "domiciled" in respondent's school district. Respondent asserts that in actuality A.M. and her two children lived with M.H. and D.M. in Newark during the 2003-2004 school year.

To be entitled to a free public education in New Jersey, a student must be a domiciliary of the particular school district where admission is sought. *See V.R. on behalf of A.R. v. Hamburg Bd. of Educ.*, 2 *N.J.A.R.* 283, 287 (Educ. 1980), *aff'd*, State Bd., 1981 *S.L.D.* 1533, *rev'd on other grounds*, *Rabinowitz v. New Jersey State Bd. of Educ.*, 550 *F. Supp.* 481 (D.N.J. 1982) (indicating that New Jersey requires local domicile, as opposed to mere residence, for a pupil to receive a free education). As such, at issue is whether A.MC. and J.MC. are entitled to a free education under *N.J.S.A.* 18A:38-1 as local domiciliaries in respondent's school district. In other words, a determination of the children's domicile is necessary in order to resolve the instant dispute.

N.J.S.A. 18A:38-1(a) provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." Petitioner claims that she and her children A.MC. and J.MC. are domiciliaries of Union, thus requiring this tribunal's determination in her favor. Respondent argues that petitioner and her children actually live in Newark, thereby precluding them from receiving a free education within the Union school district.

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).

"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." *In re Unanue*, 255 *N.J. Super.* 362, 374 (Law Div. 1991) (quoting *Kurilla v. Roth*, 132 *N.J.L.* 213, 215 (Sup. Ct. 1944)); *see also Mercadante, supra*, 111 *N.J. Super.* at 39. Thus, domicile is what is regarded as an individual's true and permanent home. *In re Jaffe*, 74 *N.J.* 86, 90-91 (1977). Intent is the touchstone of domicile, and the manifestation of a person's intent converts residence from a mere place in which a person lives to a domicile. *Benny, supra*, 20 *N.J.* at 251.

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). Thus, "the concept of 'domicile' may have different content and shades of meaning depending upon the context in which it is used." *In re Estate of Gillmore*, 101 *N.J. Super.* 77, 86-87 (App. Div.), *certif. denied*, 52 *N.J.* 175 (1968). Nevertheless, "[e]very person has a domicile at all times, and no person has more than one domicile at any one time." *Id.* at 87 (citation omitted). There are three possible ways by which an individual may acquire domicile: (1) through birth or place of origin; (2) through the choice of a person legally capable of choosing his or her domicile; or (3) through operation of law in the case of a person who lacks capacity to acquire a new domicile by choice. *Ibid.*

Since the instant case involves minor children who lack the capacity to choose their own domicile, this tribunal must look to the operation of law. Traditionally, the domicile of a child for school attendance purposes under Title 18A is that of the natural father. *Board of Educ., Little Egg Harbor Township v. Board of Educ. of Galloway Township*, 145 *N.J. Super.* 1, 12 (App. Div. 1975) (Morgan, J.A.D., dissenting) (citing *Mansfield Township Bd. of Educ. v. State Bd. of Educ.*, 101 *N.J.L.* 474 (Sup. Ct. 1925)), *rev'd per curiam, based on dissent below*, 71 *N.J.* 537 (1976); *V.R., supra*, 2 *N.J.A.R.*

283. Although the facts in *V.R.* are not on all fours with the instant matter, the discussion of the "traditional domicile concept" by Judge Lefelt is useful here:

> The law establishing an infant's domicile seems based on the rationale that an unemancipated person receives his or her custody, support and maintenance from the father, regardless of the child's physical location. Changing times should, therefore, affect the domicile law only when the factual situation presented undercuts this rationale.
>
> [*V.R., supra*, 2 *N.J.A.R.* at 286 (citations omitted).]

Since there is no allegation that A.M.'s two children reside with their father, the current dispute entails a determination as to whether petitioner's children live with A.M. in Union, rather than as respondent contends in Newark with petitioner's sister, brother-in-law and their child, D.M.

As noted, the question of domicile is one of fact and must be determined on a case-by-case basis. Thus, the facts of this matter must closely be considered in reaching a determination as to the actual domicile of A.M. and her children. The concept of domicile is not constant since it is designed to assure fairness in a given setting. Thus, "[i]ts ingredients therefore will vary, depending upon what is just and useful in a given context." *Worden v. Mercer County Bd. of Elections*, 61 *N.J.* 325, 349 (1972) (Weintraub, C.J., concurring). What is relevant here is a determination as to whether the children are actually living with their mother, A.M., in Union, or whether the family as a whole, including A.M., actually lives in Newark.

The burden in this matter rests with A.M., the petitioner, who must prove by a preponderance of the credible evidence that the children meet the eligibility requirements. Evidence is found to "preponderate" if it establishes the reasonable probability of the facts alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. *See, e.g., Loew v. Union Beach*, 56 *N.J. Super.* 93, 104 (App. Div.), *certif. denied*, 31 *N.J.* 75 (1959), *overruled on other*

grounds, 36 *N.J.* 487 (1962). "Preponderance" is not necessarily dependent on which party offers the most witnesses, but refers to the greater convincing power. *See State v. Lewis*, 67 *N.J.* 47 (1975). So too, a trier of fact may reject any testimony as inherently incredible or inconsistent either with other testimony and/or common experience. *See Congleton v. Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (App. Div. 1958). In other words, to be deemed credible, testimony must not only proceed from the mouth of a credible witness, but must be inherently credible in itself and be of such a nature as the common experience and observation of man can approve as likely or probable under particular circumstances. *See Spagnuolo v. Bonnet*, 16 *N.J.* 546 (1954); *State v. Taylor*, 38 *N.J. Super.* 6 (App. Div. 1955). Simply put, credibility is derived from an assessment of the rationality, internal consistency and manner in which testimony "hangs together" with other evidence. *See Carbo v. U.S.*, 314 *F.*2d 718 (9th Cir. 1963). In this case, in light of the disparate nature of the critical testimony, not everyone can be telling the truth.

Based upon my review and consideration of the testimony, the documentary evidence and my experience, I am compelled to conclude that petitioner's version of her family's living situation simply cannot be believed. Her testimony was inconsistent, unreliable and changed at various points to suit the situation. As such, it was not worthy of belief.

It is hard for me to believe that since, as A.M. admits, A.M.'s children stayed in Newark with her sister and brother-in-law during the week, and petitioner actually drove them there after school each day, petitioner did not also live in Newark with them. Petitioner admitted that her children often stayed in Newark with her sister and brother-in-law, who also drove them to the school bus in Union in the morning. Although A.M. attempted to establish that she brought her daughter to "Danielle's" at 5:30 a.m., this testimony also was inconsistent. In fact, she later conceded that actually it was her brother-in-law who took her daughter from Newark to the school bus in Union in the morning. It is difficult to believe that her six-year-old daughter lives with her in Union and is dropped off by her at a babysitter's at 5:30 a.m., while her son lived with her sister and brother-in-law in Newark. This is especially so in light of the fact that

petitioner consistently was observed by the investigators driving her son, daughter, and nephew to Newark after school on a number of occasions. Moreover, petitioner incredibly contended that she dropped her daughter off at "Danielle's" one day, and after her daughter became sick, A.M. traveled all the way from work in Basking Ridge back to Union just to walk J.MC. a short distance to her "aunt's house." This flies in the face of common experience. Clearly, either Danielle or her aunt (or mother) could have taken J.MC. from Danielle's the short distance to 45 M. Avenue. The notion that petitioner would drive back home from work just to take her daughter essentially across the street, only to then drive all the way back to work miles away, is absurd. Moreover, it is undisputed that both cars used to transport the children from Newark to Union to the bus in the morning by petitioner's brother-in-law, and to transport them from 45 M. Avenue in Union back to 20 A. Lane in Newark by petitioner in the afternoon, are registered to petitioner's sister and brother-in-law.

Although a number of documents admitted into evidence reflected that A.M. uses the 45 M. Avenue address as a location for receiving some mail (Exhibits P-2; P-3; R-3; R-6), neither singularly nor in combination did they prove that she actually lived there. First, a number of these documents did not even refer to the time period at issue. In fact, a number of them were mailed in 2004, subsequent to the investigation, and several contained a different floor as part of her address. Moreover, even though petitioner's mother (or aunt), father and a tenant allegedly reside at 45 M. Avenue, none were called to testify on her behalf to corroborate the fact of her residence. Further, neither her sister M.H., nor her brother-in-law D.M., nor her brother L.T. was called to corroborate her residence. No explanation for their absence was even offered. Thus, petitioner's case rises and falls on her and her tangential witnesses' credibility in the face of the Board's testimony.

In my view, it defies all reason and logic that there were over ten random surveillances of the residences at 45 M. Avenue in Union and at 20 A. Lane in Newark on regular school dates and on not even one of those occasions were the children ever observed leaving the M. Avenue premises to go to school, nor were they observed entering 45 M. Avenue upon returning from school. Rather, on every single occasion

when the Newark premises were observed, the children were seen leaving there at about 7:40 a.m. and being driven by petitioner's brother-in-law either to the bus stop in Union from which they would then be transported to school, or directly to school by car if they were too late to catch the bus. Moreover, after returning from school by bus, although they were walked to 45 M. Avenue, they never entered the premises, but were transported instead by petitioner to 20 A. Lane in Newark, where they entered the premises and remained overnight. These situations cannot reasonably be described as accidents or coincidence. Moreover, it is at odds with petitioner's assertion that she took her daughter at 5:30 a.m. to "Danielle's" house and Danielle put J.MC. on the school bus. Quite clearly, the two children were living in Newark with petitioner at petitioner's sister's house and were taken daily to Union to board the bus to school. The contrary testimony from A.M., uncorroborated by her mother, father, sister, brother-in-law or brother, some of whom purportedly resided at 45 M. Avenue, was substantially lacking in credibility. In *E.C. on behalf of minor, D.B. v. Board of Education of the Township of Union, Union County*, EDU 7229-02 (January 9, 2004), *adopted*, Commissioner (February 23, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>, *aff'd*, State Board (June 4, 2004) <http://www.nj.gov/njded/legal/index.html>, Administrative Law Judge Stephen G. Weiss pointed out that "[i]t does not matter that bills, notices, etc., had 375 Carnegie Place as E.C.'s address. Mail can be sent wherever the addressee directs." Here, not once in all the surveillances were the children ever observed leaving from Union to go to school. Yet, every time the address in Newark was surveyed, the children were seen leaving from there in the morning and driven to Union by petitioner's brother-in-law in time to get on the bus to go to school there, or if late were driven directly to school. Further, in the afternoon, they were observed being picked up at the bus stop and even though taken to 45 M. Avenue, they did not enter the premises, but instead were driven by petitioner to the Newark address, where they all stayed. In light of this evidence, the documentation simply does not support in any meaningful manner petitioner's allegation that she lives in Union.

The testimony of petitioner's witnesses was not believable either. First, although R.M. claimed that petitioner lived at 45 M. Avenue, he also stated that since she had night jobs and did not leave early in the morning, it was difficult for him to know when

465-04

OAL DKT. NO. EDU 6226-04
(ON REMAND EDU 2730-04)
AGENCY DKT. NO. 60-2/04

J.J., on behalf of minor children, K.G.J. and K.G.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, which was remanded to the Office of Administrative Law (OAL) for supplementation with respect to the amount of tuition claimed by the Board as a consequence of the ineligible attendance of petitioner's two children in its schools during the 2003-04 school year, and the Initial Decision of the OAL have been reviewed. Pursuant to the Certification of the Board's Attendance/Residency Officer, David Mikalauskas, petitioner's two children each attended District schools for 195 days, for a total of 390 days of ineligible attendance at a per diem rate of $51.76, for a total amount of tuition due and owing of $20,186.40.

Accordingly, the Initial Decision of the OAL is adopted. Petitioner is hereby directed to pay the Board of Education of the Township of Ewing $20,186.40 for the period of his two children's ineligible attendance in the Board's schools.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11/18/04

Date of Mailing: 11/18/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6226-04

(ON REMAND EDU 2730-04)

AGENCY DKT. NO. 60-2/04

J.J. O/B/O K.G.J. AND K.G.J.,

Petitioner,

v.

BOARD OF EDUCATION OF EWING TOWNSHIP, MERCER COUNTY,

Respondent.

J.J., petitioner, *pro se*

Jeffrey F. Belz, Esq., for respondent

Record Closed: September 24, 2004 Decided: October 12, 2004

BEFORE **DOUGLAS H. HURD,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Acting Commissioner of Education, on July 20, 2004, dismissed the petition of appeal with prejudice because the petitioner failed to appear at the scheduled hearing date and provided no explanation regarding the nonappearance. That petition was assigned docket number EDU 2730-04. The Acting Commissioner of Education's decision on July 20, 2004, also remanded the matter to address the counterclaim for tuition. The Acting Commissioner noted

that the record contained no affidavit of a responsible Board official attesting to the amount of tuition owed. The remanded issue was received by the Office of Administrative Law on August 3, 2004, and is addressed in this Initial Decision.

By certification dated September 24, 2004, David Mikalauskas, attendance and residency officer for the Board, certified to the amount of tuition owed by Petitioner. The certification is admitted into the record and provides reliable evidence attesting to the amount of tuition owed by Petitioner.

ORDER

Based on the foregoing, I hereby **ORDER** Petitioner to pay $20,186.40 to the Ewing Township Board 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 (45) 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 (13) 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, 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.

10-12-04

DATE

DOUGLAS H. HURD, ALJ

10-12-04

DATE

Mailed to Parties:

OCT 18 2004

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

464-04

AGENCY DKT. NO. 354-10/04

IN THE MATTER OF ALPHONSE A. DE MEO,	:	
BELLEVILLE BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission ("Commission") recommending that former Belleville Board of Education member Alphonse A. DeMeo be reprimanded for having violated, during his term of office as a Board member,[1] section *N.J.S.A.* 18A:12-24.1(b) of the School Ethics Act. Prior to expiration of the applicable regulatory time frame, Mr. DeMeo filed written comments for the Commissioner's consideration.

In his comments, Mr. DeMeo reiterates his arguments, made before the Commission, that reliance on mailing envelopes prepared by others is inappropriate in determining whether violations were committed by Mr. DeMeo, and that any conclusion holding actions of the type taken by Mr. DeMeo to constitute a violation of the School Ethics Act has the "potential for grave consequences," in that it implicates protected rights of free speech which board members retain as individuals notwithstanding their board membership; thus, in Mr. DeMeo's view, the Commissioner should not accept the Commission's conclusion that he violated *N.J.S.A.* 18A:12-24.1(b). Further, Mr. DeMeo urges that the recommended penalty of reprimand is "too harsh under the circumstances" and "will serve nothing further than to tarnish the good name and record of an individual who has dedicated himself to serving the public." (Respondent's Comments at 1-2)

[1] As noted in the Commission's decision at 2, Mr. DeMeo was not reelected to the Board at the April 2004 school election.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is not reviewable by the Commissioner herein. Only the Commission may determine whether a violation of the School Ethics Act occurred; the Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon the Commission's determination. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner finds that Mr. DeMeo's comments largely apply to the School Ethics Commission's underlying determination of violation, which the Commissioner may not disturb. With respect to the Commission's recommended penalty in light of the violation found, the Commissioner is satisfied that the Commission fully considered the nature of Mr. DeMeo's offense and the circumstances surrounding it. Therefore, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter.

Accordingly, IT IS ORDERED that Alphonse A. DeMeo be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11/17/04

Date of Mailing: 11/18/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
ALPHONSE A. DeMEO *BELLEVILLE BOARD OF EDUCATION* *WARREN COUNTY*	:	**Docket No. C09-04** **DECISION**

PROCEDURAL HISTORY

Complainant, Mario J. Pettineo, Jr., filed a complaint against Alphonse A. DeMeo, on February 17, 2004, alleging that Mr. DeMeo 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) when he endorsed a candidate for the Belleville Municipal Council through a mailing where the envelopes and letterhead bore his official title as President of the Belleville Board of Education (Board). On April 1, 2004, Greg Vitali, Esq., filed an answer on behalf of Mr. DeMeo after a ten-day extension of the time to file an answer denying any violation of the Act.

On May 18, 2004, the Commission notified both parties that the complaint had been scheduled for a hearing at the June 22, 2004 Commission meeting, and the parties were advised of their right to appear and present witnesses. The Commission heard the complaint at the June 22, 2004 Commission meeting. The complainant did not appear. The respondent appeared with his attorney and testified before the Commission. At the July 22, 2004 meeting, the Commission voted to find probable cause to credit the allegations that Mr. DeMeo violated N.J.S.A. 18A:12-24(b). However, the Commission voted to find no probable cause and dismissed the allegations that Mr. DeMeo violated N.J.S.A. 18A:12-24.1(e).

The Commission found that the material facts were not in dispute with respect to the issue upon which it found probable cause and, therefore, the Commission advised Mr. Vitali that it would decide the matter on the basis of written submissions. Mr. Vitali was invited to provide a written submission to the Commission within 30 days of the date of the probable cause decision to set forth why the Commission should not find Mr. DeMeo in violation of N.J.S.A. 18A:12-24(b) for mailing letters to members of the community endorsing a candidate for the Belleville Municipal Council with letterhead and envelopes that bore his official title as President of the Board in a manner that could mislead the recipients. Mr. Vitali was also told that his written submission should include the respondent's position on an appropriate sanction should the Commission determine that the Act was violated. Mr. Vitali submitted a timely response on August 6, 2004, arguing that Mr. DeMeo did not prepare the envelopes or the return address stamp for the mailings, that the contents of the letter do not suggest that the Board of Education is endorsing Mr. Kennedy, and that the letterhead provided factually accurate information that was not misleading. Since he concluded that Mr. DeMeo should not be found in

violation of N.J.S.A. 18A:12-24(b), he did not provide a position on the appropriate sanction should the Commission determine that the Act was violated.

FACTS

The Commission was able to discern the following facts based on the pleadings, documents submitted, the testimony presented, and the submission of Mr. Vitali in response to the Commission's probable cause determination.

At all times relevant to this complaint, Mr. DeMeo was President of the Board. He served as a Board member for six years and was not reelected to the Board in April 2004. Mr. DeMeo is also a part-time assistant public defender in the Belleville Municipal Court. During the November 2003 elections for the Belleville Municipal Council, Mr. DeMeo publicly endorsed a candidate named Kevin Kennedy through a mailing to the Belleville community. Mr. DeMeo did not prepare the envelopes or the return address stamps. The envelope bore Mr. DeMeo's official title, "President, Board of Education" under his name followed by his law office address. The letterhead of the letter that was sent bore the words "From the Desk of" in a light font. Those words were above and to the left of Mr. DeMeo's name "Alphonse A. DeMeo, Esq." The words "Board of Education President" appeared below the name in a regular size black font similar to the font in the letter. The fourth paragraph in the body of the letter follows:

> "As president of the Board of Education, I believe that Kevin will be able to work with the school district to solve some of the common problems shared by the Board of Education and the Council. Over the last year, the working relationship between the Board and the Council has improved dramatically. Based on my conversations and experience with the current candidates, it is my feeling that Kevin is the best candidate to continue this spirit of cooperation, or as Kevin put it '...finding common solutions for common problems'"

During the November 2003 elections, other Board members publicly endorsed the opposition candidate through the mailing of political flyers. On the political flyers, the Board members were listed along with other community leaders as endorsing the opposition candidate. There were also pictures on one of the flyers of two Board members along with four other pictures of various community leaders. The flyers contained short quotes from Board members along with quotes from various community leaders. The Board members' quotes were about the candidate and made no reference to the Board, such as the following quote by a Board member, "Tom Giblin represents the future of Essex County, not only Belleville but all of Essex County will benefit once he is in office."

During the June 22, 2004 Commission meeting, a Commission member asked Mr. DeMeo to explain his purpose in identifying his official position as Board president in the mailings. Mr. DeMeo responded that after the other Board members endorsed the opposing candidate and stated that they were Board members, Kevin Kennedy came to

him and asked him to issue something in response as a Board member. He issued the mailing upon the request of Mr. Kennedy. Mr. DeMeo also testified that there are two other individuals in Belleville with the same name and he used his official position as Board President to distinguish himself from the other two individuals.

Mr. Kennedy was elected to the Belleville Municipal Council in November 2003. Councilman Fuscaldo proposed an ordinance in December 2003 to raise the salaries of the Assistant Prosecutor, the Public Defender, and the Assistant Public Defender. On January 13, 2004, in the absence of Mr. Fuscaldo, Mr. Escott moved to adopt the salary ordinance and Kevin Kennedy voted in favor of the motion. The motion failed. Mr. Kennedy and Mr. Fuscaldo both certify that Mr. DeMeo never approached them for a raise.

ANALYSIS

The Commission found probable cause that Mr. DeMeo violated N.J.S.A. 18A:12-24(b) of the Act when he mailed letters to members of the community endorsing a candidate for the Belleville Municipal Council with letterhead and envelopes that bore his official title as President of the Board in a manner that could mislead the recipients.

N.J.S.A. 18A:12-24(b) provides:

> 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;

Since the allegations did not involve a situation involving employment or Mr. DeMeo's immediate family, the Commission considered whether Mr. DeMeo used his official position as a Board member to secure unwarranted privileges or advantages for himself or for Mr. Kennedy, the candidate he endorsed. The Commission notes that Mr. Kennedy voted in favor of an ordinance to raise the salary of the Assistant Public Defender, a position held by Mr. DeMeo. However, Mr. Kennedy certified that Mr. DeMeo never approached him for a raise and the motion never passed. Thus, there is no evidence that Mr. DeMeo used his position to secure an unwarranted privilege or advantage for himself. The Commission then considered whether Mr. DeMeo used his official position as a Board member to secure unwarranted privileges or advantages for Mr. Kennedy.

Mr. DeMeo admitted that he endorsed Mr. Kennedy in the November 2003 elections through a mailing to the Belleville community. Mr. Vitali argues, in his response to the Commission's probable cause determination, that Mr. DeMeo's endorsement of a political candidate is clearly an activity protected by the First Amendment of the Constitution. The Commission notes that Mr. DeMeo had a right to endorse Mr. Kennedy. However, in that endorsement, he must abide by the School Ethics Act; N.J.S.A. 18A:12-24(b) restricts a Board member from using his official position to secure unwarranted privileges, advantages or employment for others.

Mr. DeMeo testified that Mr. Kennedy came to him and asked for his endorsement in response to the endorsement of Mr. Kennedy's opponent by two other members of the Board. Mr. DeMeo indicated that he issued his endorsement and used his title as President of the Board in response to Mr. Kennedy's request. The Commission finds that Mr. DeMeo intended to use and did use his official position as President of the Board as a favor to Mr. Kennedy when he endorsed him in the November 2003 elections.

The Commission next determined whether Mr. DeMeo's use of his position through an endorsement secured an unwarranted privilege or advantage for Mr. Kennedy. The endorsement consisted of a mailing that included an envelope with an enclosed letter. The letterhead included the words "From the Desk of," which were aligned to the left and above Mr. DeMeo's name. The words were in a light, mostly white font, which was thinly outlined in black. Those words faded into the background, while the words "Belleville Board of Education President" stood out since they were centered and directly under Mr. DeMeo's name, in black ink and in the same font as the body of the letter. This type of a format, which emphasized Mr. DeMeo's official title of Board President, could reasonably lead a member of the public to believe that Mr.DeMeo was acting in his official position as Board President when he endorsed Mr. Kennedy in the body of the letter, especially given the nature of the endorsement and the return address on the envelope. When Mr. DeMeo in his official capacity as Board President, as opposed to his individual capacity, endorsed Mr. Kennedy, he attempted to use his official position to secure an unwarranted advantage for Mr. Kennedy in the election.

Mr. Vitali argues that the contents of the letter are written in the first person and thus no one could reasonably believe that the Board was endorsing Mr. Kennedy. Given the contents of the body of the letter, even though the letter is written in the first person, someone could reasonably believe that it is written in Mr. DeMeo's capacity as Board President, and in that capacity, he was endorsing Mr. Kennedy.

Mr. Vitali also argues that the letterhead was not misleading since it provided factually accurate information. He further argues that the recipient should not have been mislead since Mr. DeMeo signed the letter in his individual capacity with no notable mention of the Belleville Board of Education. The Commission agrees that the information in the letterhead was factually correct. However, the presentation of the information in the letterhead emphasized Mr. DeMeo's role as Board President. That coupled with the content of the letter and the nature of the return address was such that someone reading the letter could reasonably believe that the letter was written in Mr. DeMeo's official capacity as Board President. The fact that there was no notation of the Belleville Board of Education beneath Mr. DeMeo's signature does not compensate for the combined effect of the letterhead, the content of the letter and the nature of the return address on the envelope.

Mr. Vitali argues that, in the body of the letter, Mr. DeMeo identifies himself as the President of the Board for the purpose of informing the reader that he had the opportunity, in his capacity as Board President, to witness Mr. Kennedy in action first

hand. However, the statements in the letter do not provide any information regarding Mr. DeMeo's first hand experience, as Board President, with Mr. Kennedy. In the body of the letter, Mr. DeMeo states that he believes "that Kevin (Mr. Kennedy) will be able to work with the school district to solve some of the common problems shared by the Board of Education and the Council." He goes on to note that the working relationship between the Board and the Council has improved over the last year and that it was his feeling that "Kevin is the best candidate to continue this spirit of cooperation..." These statements relay his belief that Mr. Kennedy would work well with the Board and continue the recently evolved cooperation between the Board and Council. Because these statements refer directly to the Board in relationship to the Council and Mr. Kennedy's abilities in relation to the Board should he become a council member, someone reading the letter could reasonably believe that Mr. DeMeo's comments were made in his official capacity as Board President.

Mr. Vitali further argues that, since Mr. DeMeo did not prepare the envelopes or the return address stamp, he should not be found in violation of the Act on the basis of the actions of others. The envelope contains a return address that identifies Mr. DeMeo as an attorney and under his name the words "President, Board of Education" appear. A general member of the public may be more inclined to open an envelope containing a letter, which indicates that it is from the Board President rather than a political flyer from various community leaders. Even if Mr. DeMeo did not prepare the envelopes or the return address stamp, it was his intention for the endorsement to go out as a mailing. He prepared and signed the letter for the purpose of a mailing. It is immaterial whether he personally inserted the letters into the envelope and affixed the return address.

The totality of the endorsement including the design of the letterhead, the content of the letter, and the nature of the return address on the envelope, could lead someone reading the letter to reasonably assume that the endorsement was made by Mr. DeMeo in his official capacity as President of the Board. Therefore, the Commission finds that Mr. DeMeo attempted to use his position to give Mr. Kennedy an unwarranted privilege and an advantage in the November 2003 elections.

DECISION

For the reasons discussed above, the Commission finds that Alphonse A. DeMeo violated N.J.S.A. 18A:12-24(b) when he endorsed a candidate for the Belleville Municipal Council through a mailing of letters to members of the Belleville community where the letterhead, envelope and contents of the letter could mislead recipients to believe that the endorsement was made in Mr. DeMeo's official capacity as Board President. The Commission recommends that the Commissioner of Education impose a penalty of reprimand.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was

mailed to the parties, Mr. Vitali may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C09-04

Whereas, the School Ethics Commission has considered the pleadings and the response filed by the parties and the documents submitted in support thereof; and

Whereas, at its meeting of August 24, 2004 the Commission found that Alphonse A. DeMeo violated N.J.S.A. 18A:12-24(b) of the Act and recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, at its meeting of September 30, 2004, the Commission reviewed a draft decision prepared by its staff and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on September 30, 2004.

Lisa James-Beavers
Executive Director

PCG/LJB/MET/ethics/decisions/C09-04

476-04

OAL DKT. NO. EDU 8068-03
AGENCY DKT. NO. 337-9/03

DAVID M. SHERIDAN,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF PITMAN, GLOUCESTER COUNTY, ROBERT CAMPBELL, SUPERINTENDENT, ESTHER PACITTI, ASSISTANT SUPERINTENDENT, AND MICHELLE ROEMER, BOARD SECRETARY,	: COMMISSIONER OF EDUCATION : DECISION	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and the petitioner's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

The Board presents the following exceptions, *inter alia*, to the Initial Decision: (1) Petitioner at no time received a "distinguished" narrative on his teacher evaluations, notwithstanding that he was rated as "proficient"; (2) Inducting the additional 15 students into the National Honor Society (NHS) was not an error, but, rather, was required by the rules of the organization; (3) Petitioner was not, as the Administrative Law Judge (ALJ) observed, "the fall guy" in the situation, but was merely being held accountable for his actions; (4) The Board followed the proper procedures for the nonrenewal of a non-tenured teaching staff member, as per *N.J.S.A.* 18A:27-4.1(b); (5) Petitioner was advised to resign his position by his union, not by the Board, the Superintendent or anyone else; (6) The Superintendent did not recommend

petitioner for renewal and "[t]he Board of Education only in [the] most exceptional of circumstances" can override his recommendation; (7) The ALJ improperly substituted his judgment for that of the Board; (8) The Board neither "fired" petitioner, nor "terminated" him, as indicated in the Initial Decision at pages 13 and 14, respectively, but, instead, did not renew his teaching contract, as evidenced by the facts that petitioner worked until the last day of the 2002-2003 school year; and (9) Petitioner did not display the qualities and attributes of a professional, responsible teacher. (Board's Exceptions at 2-11)

In reply, petitioner affirms that the ALJ's findings, in large part, were based on uncontroverted evidence, and were fully supported by case law, as well as the ALJ's ability to determine the credibility of the witnesses and the "feel for the case." (Petitioner's Reply)[1]

Upon careful and independent review of the record in this matter, the Commissioner determines to modify the Initial Decision, as set forth below.

As the ALJ correctly notes, the review of a local board's decision to nonrenew a non-tenured staff member is guided *Dore v. Bedminster Twp. Bd. of Ed.*, 185 *N.J. Super.* 447 (App. Div. 1982). The court therein determined that, "absent constitutional constraints or *legislation affecting the tenure rights of teachers*, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board." *Dore, supra,* at 456 (emphasis added)

Notably, in none of the papers submitted by petitioner, neither initially as a *pro se* litigant, nor, later, by petitioner's counsel, does petitioner assert such a constitutional or legislative right, notwithstanding that the Petition of Appeal alleges that the Board made procedural errors in the course of its nonrenewal actions. Therefore, as the ALJ's Prehearing

[1] In his letter filed on November 12, 2004, petitioner's counsel indicates that he "will be submitting a more detailed response" to the Board's exceptions. However, inasmuch as the Board's exceptions, which were duly copied to petitioner's counsel, were dated November 3, 2004 and filed with the Bureau of Controversies and Disputes on November 5, 2004, further response beyond November 12, 2004 is prohibited by *N.J.A.C.* 1:1-18.4(d).

Order appropriately sets forth, the issues to be resolved herein were: whether petitioner was properly and timely notified by the district that it intended not to renew his teaching contract or position for the 2003-2004 school year and, if such notice was untimely or the district improperly "terminated" petitioner, what is the appropriate remedy? (Prehearing Order, January 6, 2004) In addition, even assuming, *arguendo,* that the ALJ reasonably deduced from this record that "Sheridan is asserting, in effect, his right pursuant to *N.J.S.A.* 18A:27-4.1(b),"[2] such a claim must fail for the reasons set forth below.

There appears to be no dispute that petitioner was duly notified on May 1, 2003 that his contract for the 2003-2004 school year would not be renewed. (Exhibit P-34) Thereafter, by letter dated May 2, 2003, petitioner requested a statement of reasons for the nonrenewal. (Exhibit P-35) The Superintendent responded in writing on May 6, 2003, setting forth the reason for the nonrenewal: "You have not met district professional performance expectations." (Exhibit P-37) To the extent petitioner claims that this statement is vague or otherwise improper, however, the Commissioner underscores that although a non-tenured teacher is entitled to a statement of reasons for the board's decision not to reemploy him, "the requirement that it provide such reasons does not limit its broad discretion in deciding whether to retain non-tenured teachers." *Guerriero v. Board of Education of the Borough of Glen Rock,* decided by the State Board of Education, February 5, 1986, slip. op. at 7 Furthermore, although a Board *should* provide a nonrenewed teacher with the *true* reasons for its decisions, if it fails to do so, there is "no authority to impose a penalty for a board's failure to provide accurate reasons

[2] Petitioner made the following legal arguments before the OAL: (1) That the Board breached his employment contract when it "terminated" him for reasons connected to his NHS activities, which were purely extracurricular and not included in his contract; (2) That the Board breached its obligation of good faith and fair dealing when it "terminated" him and accepted a "smear letter" written by the Superintendent prior to his informal appearance, yet denied petitioner the opportunity to show a videotape from his immediate supervisor at his informal appearance before the Board; and (3) That the Board violated petitioner's due process rights by denying him a fair and impartial hearing when it failed to comply with the requirement to notify him, in writing, within three days following the informal appearance, of the Board's determination, as per *N.J.A.C.* 6:3-4.2. (Petitioner's Post-Hearing Brief at pp. 7-19)

unless it is established that the real reasons for the board's action [are] in violation of constitutional or legislatively conferred rights.***" (*Id.*) (citation omitted) Here, even assuming the statement of reasons is insufficient or inaccurate, there simply has been no such showing by petitioner.

Following receipt of the statement of reasons, by letter dated May 5, 2003, petitioner requested a private hearing before the Board. (Exhibit P-36) The Superintendent informed petitioner by letter dated May 12, 2003 that the Board agreed to meet with him. (Exhibit P-38) Prior to that meeting, the Superintendent prepared a memorandum to Board members which addressed "rumors" that were circulating regarding petitioner's appearance scheduled for June 10, 2003. That memorandum also set forth the Superintendent's reasons for recommending nonrenewal of petitioner's contract, noting that there were complaints "from respected parents about his teaching" and further noting that "while perhaps 'proficient', [petitioner's teaching] is not up to the high academic standards that we hold for all professional staff members. ***"[3] (Exhibit P-39) Clearly, under these circumstances, because the Superintendent *did not* recommend the renewal of petitioner, petitioner's sole purpose for an informal appearance before the Board of Education could only be to attempt to convince the members of the board to offer him reemployment, which he failed to do. *Angelo Velasquez v. Board of Education of the Borough of Brielle, Monmouth County*, State Board, August 6, 1997; *N.J.S.A.* 18A:27-4.1(b); *N.J.A.C.* 6:3-4.2(c)

After petitioner's informal appearance before the Board on June 10, 2003, he was advised of the Board's decision not to overturn the Superintendent's recommendation to nonrenew him, albeit that such notice was not *yet* provided in writing. (Initial Decision at 6;

[3] The Commissioner acknowledges that petitioner disputes the truth of the statements made by the Superintendent in his memorandum to the Board. (Petitioner's Post-Hearing Brief at 16) However, the Commissioner relies on this memorandum, not for the veracity of the Superintendent's statements, but rather to show that: (1) the Superintendent did not recommend petitioner for renewal and (2) the reasons for the recommendation of nonrenewal are not prohibited by *Dore, supra*.

Petition of Appeal at paragraph 12) The next day, June 11, 2003, petitioner tendered his resignation. (Exhibit P-41) That letter of resignation was acknowledged by the Superintendent on June 17, 2003 (Exhibit P-42), and accepted by the Board at is meeting on July 15, 2003. (Exhibit P-43)[4] In this regard, the Commissioner recognizes that *N.J.A.C.* 6:3-4.2(i) provides:

> Within three days following the informal appearance, the board shall notify the affected teaching staff member, in writing, of its final determination. Such notification may be delegated by the board to its superintendent or board secretary.

Under these circumstances, however, where petitioner readily admits that he was timely advised by the Superintendent of the Board's decision subsequent to his informal appearance and where petitioner tendered his resignation *the day after* that appearance, the Commissioner declines to find that that the Board's failure to notify petitioner of its decision, in writing, within three days of the appearance, constitutes the "due process violation" that petitioner so urges. (Petitioner's Post-Hearing Brief at 15)[5]

Quite simply, even accepting that petitioner's nonrenewal was *solely and directly* attributable to the NHS controversy, and further accepting that the Superintendent's actions in connection with the controversy were tainted by "small town politics" (Initial Decision at 10), factual findings that are not wholly supported by even *petitioner's exhibits*,[6] the Commissioner

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[4] The Board's acceptance of petitioner's resignation may fairly be read as its "consent" to permit petitioner to resign from his employment, notwithstanding that the terms of his contract require that he provide the Board with 60 days' notice of intent to terminate the agreement. (Exhibit P-47) *See, Victoria Carrelle v. Bd. of Ed. of the Township of Bloomingdale, Essex County*, Commissioner Decision February 29, 2004.

[5] In this connection, the State Board has further instructed that "a non-tenured teacher does not have any protected interest in continued employment under the United States Constitution and, therefore, no right to due process protection under the Fourteenth Amendment. *Board of Regents of State Colleges et al. v. Roth,* 408 *U.S.* 564, 92 *S. Ct.* 2701 (1972). Nor do such teachers have a right to due process under the New Jersey Constitution. *Donaldson, supra.* ***" *Lydia Anderson v. State-operated School District of the City of Newark, Essex County,* State Board Decision, February 7, 2001, slip op. at 1-2.

[6] Notably, the record indicates that the Superintendent informed the Board of Education by memorandum dated January 7, 2003 that, following an extensive review of parental concerns, NHS publications and district guidelines, the district's NHS selection committee, notwithstanding its honorable intent, had *not* been following NHS guidelines. The Superintendent therein states, in pertinent part, "The mistake that was made was that the selection team arbitrarily set a cutoff based on scores reported by teaching staff members. The cutoff varied from year to

must conclude that, pursuant to *Dore, supra*, petitioner fails to state a claim which would warrant any relief, let alone, the relief he seeks, which is reinstatement. Indeed, even assuming, *arguendo,* that: (1) Petitioner had sufficiently pled the applicability of *N.J.S.A.* 18A:27-4.1(b) and (2) *Dore* permits such a statutory provision, which establishes procedural standards for the renewal or nonrenewal of non-tenured employees, to suffice as "*legislation affecting the tenure rights of teachers,*" *Dore, supra at* 456, petitioner has failed to demonstrate that the Board's actions violated this statute.[7]

Accordingly, the Petition of Appeal is dismissed.

IT IS SO ORDERED.[8]

COMMISSIONER OF EDUCATION

Date of Decision: 12/01/04

Date of Mailing: 12/01/04

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year. This gave the unfortunate perception that there was a quota placed on the number of students allowed to be in the NHS. The NHS guidelines indicate a specific cutoff which does not change from year to year and allows for any number of students to qualify to enter the NHS. This means that the number of inductees will vary from year to year.*** The arbitrary setting of this standard is clearly the mistake made by the committee but it must be pointed out that they were merely repeating a process that had been used for many years. At no point was there any intent to eliminate certain students from induction. There are students who, if the NHS guidelines had been followed, would have been admitted this year." (Exhibit P-17 at pp. 1-2) Indeed, later that month, Principal Grennor recommended amendments to the district's NHS selection guidelines, which included, *inter alia*, establishing "a consistent set of standards for academics and teacher evaluations." (Exhibit P-23)

Petitioner's exhibits also include a memorandum confirming a conference held on April 7, 2003 with petitioner, his representative and the Superintendent. The Superintendent therein noted that they discussed "aspects of [petitioner's] professional employment." He states, "I did discuss concerns with you about statements which you apparently made at a meeting of the National Honor Society. I also echoed concerns which had been expressed by parents regarding the use of sparksnote.com in testing." (Exhibit P-32)

[7] Having so ruled, the Commissioner determines that it is not necessary to reach the ALJ's finding that petitioner's resignation "lacked factual and legal intent" so as to effectively render it a nullity. (Initial Decision at 15)

[8] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8068-03
AGENCY DKT. 337-9/03

DAVID M. SHERIDAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF PITMAN, GLOUCESTER COUNTY, ROBERT CAMPBELL, SUPERINTENDENT, ESTHER PACITTI, ASSISTANT SUPERINTENDENT, AND MICHELLE ROEMER, BOARD SECRETARY,

Respondents.

Richard L. Press, Esq., for petitioner (Press and Taglialatella, attorneys)

Samuel H. Bullock, Esq., for respondents

Record Closed: October 8, 2004 Decided: October 18, 2004

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The New Jersey Department of Education, Bureau of Controversies and Disputes, received a complaint on September 3, 2003. David Sheridan, a non-tenured teaching staff

member, asserts that respondent Pitman Board of Education (PBOE, Board or District) and/or its agents, arbitrarily, improperly or unfairly refused to renew his teaching contract for the 2003-2004 school year. *N.J.S.A.* 18A:27-1 to 18A:27-11. The matter was transmitted to the Office of Administrative Law (OAL) on October 21, 2003. The undersigned was assigned to hear this matter pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing telephone conference was held on January 5, 2004. A plenary hearing was conducted on August 4, 2004. The evidentiary hearing concluded on that date. Post-hearing briefs were submitted, and the record closed on October 8, 2004.

SUMMARY OF RELEVANT FACTS

David Sheridan testified on his own behalf. Mr. Sheridan is fifty-three years old and currently unemployed. He lives in close proximity to his former employer, the PBOE. Sheridan graduated from Villanova University with a Bachelor of Science degree in education and English in 1972. He also attended Rowan University, formerly Glassboro State College, where he took courses towards a degree in administration. Sheridan possesses a New Jersey Department of Education certification as a teacher of English. He holds a similar certification from the Pennsylvania Department of Education, and is seeking certification from the Delaware Department of Education. Additionally, Mr. Sheridan served in the New Jersey and Pennsylvania Army National Guard during the period 1972 through 1978. (P-2; P-3).

In January 1974 Sheridan was employed by Conestoga High School in Berwyn, Pennsylvania. He was an instructor of Basic Communications/Writing, as well as a varsity girls' track coach. He also served as advisor to the variety and talent show. Starting in September 1975 Sheridan was employed by Williamstown High School. His area of instruction included basic language art skills for grades 9-12 and public speaking. He coached varsity boys' and girls' track.

In or around June 1978, Sheridan took a leave from teaching. Sheridan sought employment as a business professional. He operated a marketing and insurance company during the period 1978 through 1993.

In 1992 Sheridan decided to return to teaching. He initially accepted employment as a long-term substitute teacher for Glassboro High School. His area of instruction included English, Honors English, and Journalism. He resumed participating in extracurricular student services, including serving as yearbook advisor, assistant track coach and assistant cross country coach, and mentoring.

In September 1996 Sheridan was hired as a full-time teacher by Salem High School. His area of instruction included Advanced Placement Literature for grade 12, Honors English for grades 9 and 10, College Prep, Regular English, Public Speaking/Journalism, and HSPT I Studies. Sheridan also continued his extracurricular services, wherein he coached boys' varsity soccer, and boys' and girls' varsity track. He also served as a class advisor and chairman of the Student Intervention Referral Services. In 2000 he became a tenured teaching staff member.

During his employment at Salem High School, Sheridan developed a close relationship with Joel Grennor, the principal of Salem High School. In September 2000 Mr. Grennor left Salem High School and became the assistant principal of Pitman High School. During the ensuing months in 2000, Grennor encouraged Sheridan to seek employment with the PBOE. Grennor respected Sheridan's capabilities as an English teacher and coach. Grennor suggested that Sheridan follow his path to the PBOE school system. Grennor observed that Pitman High School had very few coaches that were also in-district teachers. Most of the coaches were recruited from outside the school district. Grennor opined that Sheridan's teaching skills, along with his substantial interest in extracurricular activities, including coaching, would serve Pitman High School well. Additionally, Sheridan resided within three miles of Pitman High School, whereas his commute to Salem High School was approximately thirty-five miles. Based upon Grennor's recommendation and the substantial reduction in commuting time, Sheridan sought employment with the PBOE. He was hired in January 2001.

While at Pitman High School, Sheridan's instructional area included Honors English for grade 10, Advanced Placement Language for grade 11, Communications Lab, Accelerated English for grades 10 and 11, and Standard English for grade 12. Sheridan also resumed his extracurricular services and was appointed as the girls' varsity soccer coach, boys' varsity track coach, National Honor Society advisor, Student Council advisor, and SAT Prep Course instructor. (*See* P-1, Summary of Educational Experience.)

The PBOE employed Sheridan from January 2001 through June 2003. He received ten teacher observations or teacher annual performance reports during his period of employment. (P-4 through P-13.) On the annual performance reports, a teacher can receive a performance level rating of 1) not applicable, 2) needs improvement, or 3) meets standards. The intermittent teacher observations are conducted two or three times during the academic year, and on the rating forms used for those observations a teacher receives marks of 1) not applicable, 2) unsatisfactory, 3) basic, or 4) proficient. In every instance, except for the teacher observation dated April 21, 2003 (P-13), Sheridan received the highest rating permitted on the evaluation forms (P-4 through P-12). As explained by Sheridan, performance appraisals must be conducted by staff members who hold supervisory positions. In Sheridan's case, the evaluations were conducted by Patricia Denholm; Principal Joel Grennor; Assistant Principal Jay Stillman; and John Ricketts.

On April 21, 2003, Sheridan received his first negative teacher observation report, which was prepared by assistant superintendent Esther Pacitti. Notably, this performance appraisal was conducted only a few days before the superintendent's decision not to renew Sheridan's teaching contract. The events preceding this evaluation period were turbulent and emotionally charged as a result of a controversy involving the National Honor Society (NHS). In addition to his extracurricular services as a boys' and girls' track, soccer and cross-country coach, Sheridan served as advisor to the NHS. The District's NHS consists of five voting teaching staff members, as well as an advisor, which was Sheridan. The school principal oversees the entire process. Sheridan explained that as advisor, he has no voting capacity and that the actual voting members make all final decisions. Sheridan became advisor to the NHS when his predecessor resigned or retired. Upon being hired by Pitman High School, he assumed the position of advisor to the NHS by default.

In his first year as advisor (school year 2001-2002), the selection of candidates for consideration to the NHS progressed smoothly. The NHS followed the same procedures that it had employed over the past several years in selecting candidates. Approximately twenty-two students were inducted into the NHS without controversy. The District's methodology for selection and induction consists of inviting any student whose grade point average is over 90% to submit an application for consideration. The committee, consisting of the five teaching staff

members, as well as others, initially reviews all of the applications. The committee then votes on which candidates should be nominated for consideration out of those candidates whose grade point average exceeds 90%. In addition to grades, the reviewing committee looks for extracurricular involvement, character, scholarship, leadership, and community service. Accordingly, grades, as well as these other criteria, are evaluated before a candidate is nominated. The final decision to nominate the respective candidates is solely the responsibility of the voting members of the committee. In other words, neither the principal nor Sheridan as counsel to the committee can vote on a candidate's selection.

During school year 2002-2003 a controversy ensued regarding the selection process. Parents of five children who were not selected to the NHS complained vigorously to the principal, superintendent and Board of Education. These parents directed a significant number of their complaints towards Sheridan, although he is not a voting member of the NHS committee. At the direction of Superintendent Campbell, the committee engaged in a reevaluation of the inductees to the NHS. Notably, the parental complaints and the superintendent's directions came well after the initial induction ceremony in December 2002. In other words, based upon the parental complaints, the superintendent had directed the committee to engage in an entire new induction process commencing in the spring of 2003. The committee found the superintendent's directive insulting to the NHS tradition and process. Nevertheless, the committee again reviewed all sixty of the initial NHS candidates. The committee reached the conclusion that the initial twenty-two inductees should remain and that no further candidates should be inducted. Superintendent Campbell, frustrated by the committee's action, directed that Principal Grennor take over the process and re-review the candidates himself. Moreover, Superintendent Campbell specifically stated that any student who was initially considered for induction into the National Honor Society and who filed a complaint and sought induction must be inducted. Ultimately, at the insistence of Superintendent Campbell, an additional fifteen students were inducted into the NHS and a second ceremony for these additional fifteen inductees was held in or around April or May 2003.

In February 2003, Principal Grennor had advised Sheridan that Superintendent Campbell was "gunning" to fire Sheridan as the "fall guy" for the controversy involving the NHS. Grennor attempted to negotiate a "deal" to save Sheridan's job. Grennor discussed the matter with Superintendent Campbell and requested that if Sheridan resigned as the NHS advisor and

resigned as a soccer, track and cross-country coach, he would be able to keep his teaching job. Superintendent Campbell advised Grennor that this resolution was agreeable. Accordingly, Principal Grennor advised Sheridan that his job was at risk because of the NHS confusion, but that he could save his job by stepping down or not seeking to hold these extracurricular positions in the upcoming 2003-2004 school year. Accordingly, Sheridan tendered his resignation as advisor to the Pitman High School Chapter of the National Honor Society effective February 13, 2003. (P-25.) However, Sheridan recalls that Principal Grennor was reluctant to accept his resignation effectively immediately. Both Grennor and Sheridan were unclear as to whether the resignation was effective immediately or effective at the end of the school year. Principal Grennor's reluctance to accept Sheridan's resignation was due, in part, to his belief that Sheridan had done nothing improper. In fact, Superintendent Campbell had issued a memorandum dated January 7, 2003, stating, "There is absolutely no evidence of any intent to discredit any students or any evidence of impropriety." (P-17.)

On April 10, 2003, Superintendent Campbell provided Sheridan with a *Rice* notice (P-33) indicating that the Board of Education intended to discuss Sheridan's employment at its meeting scheduled for April 22, 2003. On May 1, 2003, Superintendent Campbell dispatched a letter to Campbell advising as follows: "Please be advised that your contract for the 2003/2004 school year will not be renewed." (P-34.) On May 2, 2003, Sheridan requested notification of the reasons for the non-renewal of his teaching contract. (P-35.) On May 6, 2003, Superintendent Campbell responded by stating: "The reason is that you have not met district professional performance expectations." (P-37.) Subsequently, on May 12, 2003, Sheridan was advised that his request to appear before the Board of Education on June 10, 2003, was granted. (P-38.) Sheridan appeared before the Board of Education on that date, and after making his presentation to the Board, Sheridan was advised of the Board's decision. Superintendent Campbell advised Sheridan that the Board agreed with Campbell that Sheridan's teaching contract should not be renewed for the 2003-2004 school year. On June 11, 2003, Sheridan submitted his resignation to the superintendent and Board. Sheridan stated that, pursuant to the advice of his union representative, it would be to his benefit to resign rather than be deemed a non-renewed teacher. His resignation would benefit him in applying for other teaching positions. The union representative advised Sheridan that if he were not renewed, it would carry a stigma and possibly discourage other districts from employing him.

During cross-examination, the District raised two other events related to Sheridan's service. One involved girls' soccer practice. The senior girls' soccer team made the freshman girls perform a "traditional right of passage." They had to roll on the ground in front of the boys' soccer team and make silly comments. This was initiated exclusively by the senior soccer girls outside the presence of Sheridan. Sheridan did not condone it. When he was advised of the incident, he stopped it and authored a policy against student hazing. The girls also created, paid for and ordered their own soccer shirts. They copied a slogan from another high school girls' soccer team that stated, "We can do it in eighty minutes – in eleven positions." Some parents complained. Sheridan did not sanction, order or purchase the shirts. He directed the soccer members to have the shirts reprinted, even though they had been purchased with private student funding. Sheridan was not complicit in or disciplined for either of these events. There was no written proof offered identifying these incidents as problematic for Sheridan. They were not mentioned in any performance review. Sheridan noted that he created a new school policy against hazing. These issues were not raised on or before his contract non-renewal. These events were non-classroom student situations that teachers are called upon to address.

LEGAL ANALYSIS

A board of education has broad discretionary authority in regard to the granting of tenure. *Donaldson v. Board of Educ. of North Wildwood*, 65 *N.J.* 236, 240-41 (1974). A board's discretionary authority is not unlimited, and its action will be set aside if it was taken for arbitrary or capricious reasons. *Id.* at 247; *N.J.S.A.* 18A:27-4.1(b). A determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance, as there are many unrelated but equally valid reasons. *Donaldson, supra*, 65 *N.J.* at 241. Thus, evaluations of classroom performance are not necessarily the controlling factor. *Dore v. Bedminster Board of Educ.*, 185 *N.J. Super.* 447, 453-54 (App. Div. 1982).

A determination within a board's discretionary authority is arbitrary, capricious or unreasonable if it is without a rational basis or is induced by improper motives. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). A rational basis for a determination is lacking where the board's beliefs or assertions as to the underlying facts prove to be untrue, or if the facts are true, they do not warrant the board's conclusion or action. *Id.* at

296-97. The party challenging the board's action has the burden of proving unreasonableness. *Id.* at 297.

The transmittal of this matter from the Commissioner of Education states that this matter is to be reviewed under the limited standard applicable to non-tenured staff as set forth in the cases cited. The controlling case, and one of the cases referred to in the transmittal, is *Dore, supra*, 185 *N.J. Super.* 447. In that matter, the local board voted not to renew the contract of teacher Stephen Dore, resulting in the denial of tenure. Dore requested a statement of the reasons for the non-renewal and the Bedminster Board of Education informed him of failings in his teaching effectiveness, poor teaching methods, poor grading procedures, lack of a structured classroom, and lack of assessment of student progress. Significantly, these criticisms were not contained in Dore's formal evaluations. They were based on personal observations of board members and knowledge acquired through students' parents. Dore was granted an informal appearance before the board to rebut these assertions, but the board did not change its decision.

The Commissioner reversed the non-renewal decision because the reasons were not supported by the evaluations and no other reasons were given to explain the board's decision. However, the Commissioner rejected the argument that local boards are bound to predicate renewal decisions of non-tenured teaching staff members on evaluations conducted pursuant to the law and regulations.

The State Board reversed the Commissioner's decision and emphasized the considerable discretion afforded to local boards in employing teaching staff members. The State Board determined that the local board had sufficient information to support its decision not to reemploy Dore and its statement of reasons for doing so. It concluded that the local board's action was not so arbitrary and capricious as to warrant the extraordinary remedy of overriding the managerial prerogative of a local board and requiring it to employ a teacher it does not want on its staff.

The Appellate Division concluded that the State Board's decision was correct. It stated:

> The decision of the Commissioner recognized a local board's right to base its decision not to re-employ on matters outside of a teacher's evaluations due to a board's virtually unlimited discretion in hiring or renewing nontenured teachers.

[185 *N.J. Super.* at 453.]

The court went on to say:

> The State Board's decision properly recognized the board's right to reach its conclusion about a nontenured teacher on a broad base of input received from a variety of people, including members of the public, parents of students and a board member's own knowledge of a teacher even if that knowledge is acquired through having a child in the teacher's class.
>
> [*Id.* at 453-54.]

The court then referred to the *Donaldson* case, and indicated that in the language of that decision is a recognition by the Court that absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board. *Id.* at 455. The Commissioner also cites in the transmittal of this case *Anderson v. State-Operated School District of Newark*, State Board (February 7, 2001); *Kufel v. Union County Vocational-Technical School District*, 96 *N.J.A.R.*2d (EDU) 446; *and Pratt v. Board of Education of the Borough of Butler, Morris County*, State Board (January 6, 1999), in support of the limited nature of review for this matter.

Similarly, in *Guerriero v. Board of Education of Glen Rock*, State Board (February 5, 1985), *aff'd*, No. A-3316-85T6 (App. Div. 1986), the State Board held that under *Dore*, the only substantive ground that was available to contest the local board decision was a claim of deprivation of a constitutional or statutory right. In *Wise v. Board of Education of Trenton*, State Board (January 3, 2001) <http://www.nj.gov/njded/legal/sboe>, the State Board held that a district board has virtually unlimited discretion in hiring or non-renewing non-tenured teachers, citing the *Dore* case and quoting language therein. The Board, citing *Guerriero*, stated:

> Thus, where a non-tenured teacher challenges a district 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.
>
> [*Wise, supra*, <http://www.nj.gov/njded/legal/sboe> (emphasis added).]

In his petition (prepared *pro se*), Sheridan claims that the Board's actions were unfair, improper, inequitable and unethical. Sheridan is asserting, in effect, his right pursuant to *N.J.S.A.* 18A:27-4.1(b). It protects Sheridan from adverse actions that are arbitrary and capricious. The "legislatively conferred right" asserted by Sheridan provides, in part:

> 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.
>
> [*N.J.S.A.* 18A:27-4.1(b).]

Sheridan is entitled to have his appeal, and, consequently, the Board's decision not to grant him tenure, reviewed against the arbitrary and capricious standard, since he has been conferred a legislative right. *N.J.S.A.* 18A:27-4.1(b).

This matter has much more to do with small town politics than it has to do with fairly and impartially evaluating a probationary teacher. Sheridan was a tenured teacher at Salem High School. He has been teaching for approximately fourteen years in several different school systems. His teaching skills are not in question. He received ten evaluations during the period January 2001 to June 2003. Nine of those evaluations were excellent and one was average. Former principal Grennor testified that Sheridan was one of his top teaching staff members. He was a "go-to guy." He would fill in or substitute for other teachers on a minute's notice. He participated in numerous extracurricular sports and academic activities. He was dedicated and well liked by his peers and students. It is obvious from the testimony and documentary evidence that had Sheridan not been involved in the NHS, a job he inherited from his predecessor, his teaching contract would have been renewed in 2003-2004. The narrow issue, therefore, is whether a small town parental-political controversy, involving an extracurricular program, provides a sufficient basis not to renew a non-tenured teaching contract? If it does not form a

sufficient basis to terminate the contract, is the District's decision unreasonable, arbitrary and capricious?

It is a well-settled principle that policy, legislative and quasi-legislative determinations are committed to the judgment of local governmental bodies. *Riggs v. Long Beach Township*, 109 *N.J.* 601, 610-11 (1988); *United Advertising Corp. v. Metuchen*, 42 *N.J.* 1, 8 (1964). Such determinations enjoy a distinct presumption of validity, *First Peoples Bank of N.J. v. Medford Township*, 126 *N.J.* 413, 418 (1991); *Hutton Park Gardens v. West Orange Town Council*, 68 *N.J.* 543, 564 (1975), and will remain undisturbed absent a showing of arbitrary, capricious or unreasonable action on the part of the governmental agency. *Palamar Constr., Inc. v. Pennsauken Township*, 196 *N.J. Super.* 241, 250 (App. Div. 1983). These principles apply to policy determinations made by local boards of education. *See Parsippany-Troy Hills Educ. Ass'n v. Board of Educ. of Parsippany-Troy Hills*, 188 *N.J. Super.* 161, 167 (App. Div.), *certif. denied*, 94 *N.J.* 527 (1983); *Kopera, supra*, 60 *N.J. Super.* at 294; *Quinlan v. Board of Educ. of North Bergen*, 73 *N.J. Super.* 40 (App. Div. 1962); *Schinck v. Board of Educ. of Westwood Consol. Sch. Dist.*, 60 *N.J. Super.* 448 (App. Div. 1960).

In the law, "arbitrary" and "capricious" means having no rational basis. *Bicknell v. United States*, 422 *F.*2d 1055, 1057 (5th Cir. 1970). The terms "arbitrary" and "capricious" embrace a concept that emerges from the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution and operate to guarantee that acts of government will be grounded on established legal principles. *See Canty v. Board of Educ., City of New York*, 312 *F. Supp.* 254, 256 (D.C.N.Y. 1970). 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. *State v. Jones*, 401 *P.*2d 841, 842 (Wash. Sup. Ct. 1965). 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. *Kansas City Southern Ry. Co. v. Louisiana Public Service Comm'n*, 223 *So.*2d 132, 136 (La. Sup. Ct. 1969).

I **FIND** that the District's motivation and basis for firing Sheridan were not grounded in good-faith reasons involving teaching skills and performance. The evidence does not support the reason articulated by the District, which was that Sheridan had "not met district professional performance expectations." (P-37.) This is simply a vague catch-all phrase. The real motivation stemmed from a conflict with the superintendent and political pressure from influential parents over voluntary extracurricular activity with the NHS. The facts sufficiently support this conclusion. Sheridan was employed in January 2001. The teacher he replaced was the NHS advisor. Sheridan inherited this position, although it was a voluntary one. The District's NHS had preexisting bylaws, procedures and a core faculty membership. Sheridan was only an advisor to the NHS faculty, not a voting member. The NHS selection process was without controversy in 2001-2002. An investigation by the principal and superintendent confirmed that Sheridan and the voting members of the NHS followed the bylaws and procedures for school years 2001-2002 and 2002-2003. On January 21, 2003, Superintendent Campbell reported as follows:

> The intentions of the NHS selection committee, its advisor, and the high school administration are clearly honorable and **there is no evidence of any deliberate or malicious intent to harm students in any way**. In fact, the committee has spent many hours in this process, making every attempt to be fair and impartial. The selection committee used exactly the same format for selecting that has been used for many years. That format was apparently not correct when compared to the official NHS Handbook.
>
> [P-21 (emphasis added).]

In 2002-2003, approximately five parents complained about their children not getting nominated for or inducted into the NHS. This became the catalyst for Sheridan's termination. The parents were vocal and influential members of the community. Pressure was exerted on the Board and the superintendent to induct the children of these parents. An investigation of the admission process followed. It revealed that the NHS advisory staff and council did not violate any NHS standard or have improper motives. In fact, the investigation confirmed that the 2002-2003 nomination process followed the blueprint used by Pitman High School for numerous prior years. Nor was any favoritism found. Nevertheless, Superintendent Campbell and the Board were entrenched in a local controversy. Superintendent Campbell wanted the parents' complaints addressed and their children inducted, notwithstanding that it would violate the NHS

rules, criteria, and local traditions. The NHS had already inducted its 2002-2003 members in December 2002. The NHS staff re-reviewed the applicants, as directed by the superintendent. In the spring of 2003, the NHS staff found that its original list of inductees should not be disturbed. Of the five voting staff members, three tenured staff members voted against opening up the process and the two non-tenured members voted the way Superintendent Campbell wanted. Sheridan suggests that the non-tenured members were intimidated and feared retaliation. In accordance with the rules, Sheridan, in his capacity as advisor, did not vote. The superintendent's demand to induct more students failed by a 3-2 vote. The NHS faculty believed that opening up the admission process after the original candidates had already been inducted was disingenuous to the original inductees. It diluted the meaning and purpose of the NHS. The NHS would be transformed into a social club rather than an honor society. Parents of those students originally inducted in December 2002 objected to a reopened admission process for these reasons.

Superintendent Campbell did not take no for an answer. He met with Principal Grennor and directed that Principal Grennor take over the NHS admission process. His marching orders were to induct all students who reapplied to be admitted into the NHS. Moreover, Campbell told Grennor that he was going to fire Sheridan over this incident. Grennor tried to save Sheridan's job. He suggested to Campbell that Sheridan resign from the NHS and coaching. Subsequent to meeting with Campbell, Grennor indicated to Sheridan that his job was at risk because of the 2002-2003 NHS controversy. Campbell assigned Esther Pacitti, assistant superintendent, to perform Sheridan's last performance review. Not surprisingly, on April 21, 2003, Pacitti authored an average review of Sheridan. (P-13.) All other reviews were above average. This was approximately one week before Sheridan was terminated.

Sheridan resigned from the NHS on February 12, 2003. Grennor and Sheridan debated whether a resignation was the appropriate response. Sheridan's resignation from the NHS was loosely tendered. Sheridan continued to provide input to the NHS until the conclusion of the school year.

On June 10, 2003, the Board fired Sheridan based upon Campbell's recommendation. Sheridan requested reasons for his non-renewal. The reason was, "you have not met the district's professional performance standards." (P-37.) After the Board had already publicly met

and determined not to renew his contract, Sheridan submitted his resignation on June 11, 2003. (P-41.) This was done for cosmetic reasons. Sheridan's union advisor suggested that if he resigned, it would make obtaining future employment easier than if Sheridan was fired. Sheridan has a family and children. He was in his early fifties. He was very concerned about the ability to earn a living. Therefore, by resigning after having already been fired, Sheridan tried to put the best face on a dire situation.

Once the Board had officially terminated Sheridan on June 10, 2003, the legal significance of his resignation diminished. The Commissioner has held that a tenured employee cannot be terminated by resignation until the school board accepts that resignation. *Kozak v. Board of Educ., Waterford Township*, 1976 *S.L.D.* 633. There was evidence offered that the Board accepted Sheridan's resignation on July 15, 2003. (P-43). On this basis, the Board urges that it followed all of the procedural requirements necessary to terminate petitioner. But, it was the arbitrary and capricious actions of the Board that generated Sheridan's resignation. Thus, the legal significance of Sheridan's resignation is analogous to a constructive discharge. In *Daniels v. Mutual Life Ins. Co.*, 340 *N.J. Super.* 11, 17-18 (App. Div. 2001), the court described a constructive discharge:

> A constructive discharge occurs when the employer has imposed upon an employee working conditions "so intolerable that a reasonable person subject to them would resign." *Muench v. Township of Haddon*, 255 *N.J. Super.* 288, 302, 605 *A.*2d 242 (App. Div. 1992). Thus, in a constructive discharge situation, a violation occurs at the point where a reasonable employee is compelled to resign due to the employer's action. At that point, the employer has engaged in a retaliatory action. The employee cannot change the intolerable conditions imposed by the employer by demonstrating loyalty or excellent work performance. The employer cannot rescind a constructive discharge. The harm has been done when the employee feels compelled to resign. In short, in an actual termination situation, the retaliatory action which starts the running of the period of limitations is the separation from work. In a constructive discharge situation, the retaliatory action is the creation of intolerable conditions which a reasonable employee cannot accept. The conditions become intolerable when the employee tenders his or her resignation. Thus, by definition, the act of discrimination cannot occur any later than the date of resignation.

Therefore, I **FIND** petitioner's resignation was triggered by the District's improper actions. It was tendered after the Board voted to terminate petitioner. The purpose of the *ex post facto* resignation was to improve his hiring prospects. It was the result of duress or panic. Petitioner's age, family and future employment become a pressing concern. Sheridan's written resignation was intended as a means to offset his non-renewal and did not serve as a formal resignation. Thus, it lacked factual and legal intent. *McAleer v. Jersey City Incinerator Auth.*, 79 *N.J. Super.* 142, 147 (App. Div. 1963). Finally, Sheridan appealed the Board's June 10, 2003, decision on September 5, 2003. The Board did not assert as an affirmative defense, Sheridan's resignation.

Having reviewed the panoply of documents and testimony surrounding the NHS controversy, it is impossible not to conclude that Sheridan was the "fall guy" for this incident. There was no other plausible reason to terminate Sheridan. The District's stated reason that Sheridan "did not meet the district's professional performance standards" is not supported in the record. He had outstanding reviews. Sheridan displayed all of the qualities and attributes of a professional and responsible teacher. His extracurricular involvement was exemplary. He was well liked and rated very high by his supervising staff. Prior to the Board's June 10, 2003, decision, Robert Eck, English Department chairman, wrote:

> I am writing this letter to oppose the decision not to rehire Mr. David Sheridan as an English teacher at Pitman High School. I have been the English Department Chairperson since September, and in that time I have been able to assess and observe Mr. Sheridan to be a competent teacher of English. Although I have never had the opportunity to observe Mr. Sheridan in a classroom setting, I can assure you that he has adhered to the curriculum of the Pitman School District. He has used innovative techniques in his classroom, and has provided his students with the opportunity to utilize the most recent technological advances.
>
> Not only has Mr. Sheridan satisfactorily achieved in the classroom, but he has also helped in the SRA process as well. He is an accurate scorer of holistically scored essays which are an important part of the SRA process. He also teaches a section of the SAT Prep class, and I have heard no complaints about his inability to teach that class. He has developed a rapport with his students, and seems to interact well with them. In short, I am certain that Mr. David Sheridan possesses the skills necessary for success in the classroom. Once again, I urge that he be rehired.

[P-45.]

This ALJ is mindful that the Board's decision not to renew a teaching contract need not be grounded in unsatisfactory performance reviews. *Donaldson, supra*, 65 *N.J.* at 241. Nevertheless, the decision must be rationally based and not induced by improper motives. *Kopera, supra*, 60 *N.J. Super.* at 294. The testimony of the school principal, the comments from the English Department chairman, and the ten performance reviews confirm 1) that Sheridan was a qualified, experienced and professional teacher, and 2) that he was caught in the crossfire of a political controversy involving the NHS, an extracurricular activity. The probationary period must be utilized to review a teacher's skills. His skills were not lacking in any respect. Therefore, I **FIND** the June 10, 2003, decision of the Board to be unreasonable, arbitrary and capricious.

There must be some minimal due process reserved for non-tenured teachers. While school boards have virtually unlimited discretion in hiring and renewing non-tenured teacher contracts, *Dore, supra*, 185 *N.J. Super.* 447, the Legislature did not cloak school boards with complete, unbridled authority to dismiss non-tenured teaching staff members for frivolous reasons. There remains some limited right of review for a non-tenured teacher. The Board's decision must meet the standards set by the Legislature. *N.J.S.A.* 18A:27-4.1(b). School boards must exercise their discretion honestly and in due consideration of the relevant factors. And, when the school board's action conflicts with the legislation, and is a product of improper motive or is otherwise arbitrary and capricious, it must be overturned. I so **CONCLUDE**.

ORDER

Based upon the foregoing, it is **ORDERED** that petitioner, David M. Sheridan be reinstated to his position as a teacher for the Borough of Pitman, Board of Education. It is further **ORDERED** that petitioner receive back pay, benefits and all other emoluments, including tenure, if otherwise eligible for same, subject to mitigation from other earnings.

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 (45) 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 (13) 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, 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.

10-18-04 — DATE

W. J. Miller — **W. TODD MILLER**, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10-19-04
DATE

Mailed to Parties:

OCT 25 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sd

EXHIBITS

For Petitioner:

P-1 Education Experience (1 page)

P-2 Résumé of David M. Sheridan (1 page)

P-3 Department of Education State Board of Examiners Certificate (1 page)

P-4 Teacher Annual Performance Report, April 18, 2001 (3 pages)

P-5 Teacher Observation Form, May 3, 2001 (4 pages)

P-6 Teacher Observation Form, March 14,2001 (4 pages)

P-7 Teacher Annual Performance Report, June 7, 2002 (3 pages)

P-8 Teacher Observation Form, March 1, 2002 (4 pages)

P-9 Teacher Observation Form, October 11, 2001 (4 pages)

P-10 Teacher Annual Performance Report, March 31, 2003 (4 pages)

P-11 Teacher Observation Form, March 17, 2003 (4 pages)

P-12 Teacher Observation Form, January 15, 2003 (4 pages)

P-13 Teacher Observation Form, April 21, 2003 (5 pages)

P-14 Minutes of December 2002 Board of Education Meeting (2 pages)

P-15 Memorandum from Bob Campbell to Joel Grennor, December 11, 2002 (1 page)

P-16 Memo from J. Grennor to Dr. Campbell, January 2, 2003 (2 pages)

P-17 Memo from Bob Campbell to All Board Members, January 7, 2003 (4 pages)

P-18 Draft Letter from J. B. Grennor to Dr. & Mrs. Campbell, January 7, 2003 (2 pages)

P-19 Letter from Robert B. Campbell, Ed.D., to Judy Midgley-Rozanski, January 14, 2003 (1 page)

P-20 Confidential Letter to Dr. Campbell, author unknown, January 13, 2003 (1 page)

P-20 National Honor Society Excerpts from Constitution (3 pages, page is blank)

P-21 Report of Robert B. Campbell, Ed.D., January 21, 2003 (2 pages)

P-22 Memo from Bob Campbell to Joel Grennor, January 22, 2003 (1 page)

P-23 Memo from J. Grennor to Dr. Campbell, January 30, 2003 (2 pages)

P-24 Memo from J. Grennor to Dr. Campbell, January 31, 2003 (1 page)

P-25 Resignation as Advisor to the Pitman High School Chapter of the National Honor Society of David M. Sheridan to Mr. Joel Grennor, Principal, February 12, 2003 (1 page)

P-26 Letter of Barbara Van Kirk to Dr. Robert Campbell, March 8, 2003 (2 pages)

P-27 Letter of Jesse Van Kirk to Dr. Robert Campbell, March 10, 2003 (2 pages)

P-28 Memo from J. Stillman to Mr. David Sheridan, May 1, 2003 (1 page)

P-29 Memo from Bob Campbell to All Board Members, May 1, 2003 (1 page)

P-30 Memo from David Sheridan to Dr. Robert Campbell, March 13, 2003 (1 page)

P-31 Memo from Bob Campbell to Dave Sheridan, March 26, 2003 (1 page)

P-32 Memo from Robert B. Campbell, Ed.D., to David Sheridan, April 7, 2003 (1 page)

P-33 Letter from Robert B. Campbell, Ed.D., to Mr. Sheridan, April 10, 2003 (1 page)

P-34 Letter from Robert B. Campbell, Ed.D., to Mr. David Sheridan, May 1, 2003 (1 page)

P-35 Letter from David M. Sheridan to Dr. Robert Campbell, May 2, 2003 (1 page)

P-36 Letter from David Sheridan to Dr. Robert Campbell, May 5, 2003 (1 page)

P-37 Letter from Robert B. Campbell, Ed.D., to Mr. David Sheridan, May 6, 2003 (1 page)

P-38 Letter from Robert B. Campbell, Ed.D., to Mr. David Sheridan, May 12, 2003 (1 page)

P-39 Memo from Bob Campbell to All Board Members, May 29, 2003 (2 pages)

P-40 Letter from Robert B. Campbell, Ed.D., to Mr. Sheridan, June 4, 2003 (1 page)

P-41 Resignation of David M. Sheridan to Pitman Board of Education, June 11, 2003 (1 page)

P-42 Letter from Robert B. Campbell, Ed.D., to Mr. David Sheridan, June 17, 2003, 1 page)

P-43 Letter from Robert B. Campbell, Ed.D., to Mr. David Sheridan, July 16, 2003, 1 page)

P-44 Memo from J. Stillman to Mr. David Sheridan, April 8, 2003 (1 page)

P-45 Letter from Robert Eck to To Whom it May Concern, June 6, 2003 (1 page)

P-46 Statement of Mary Kline to the Board of Education, June 10, 2003 (only first page provided); letter of Warren Swartwood to Pitman Board of Education, June 5, 2003 (1 page); Letter to Pitman Board of Education from Mr. and Mrs. W. S.

Jones, June 5, 2003 (2 pages); Letter to Pitman Board of Education from James and Judy Grob, undated (1 page); Letter of Susan B. Champion to Pitman Board of Education, June 8, 2003 (1 page); and *Courier-Post* article, October 6, 2002 (1 page)

P-47 Petitioner's Employment Contract, August 5, 2002 (submitted post-hearing-by consent)

For Respondents:

R-1 Letter from David M. Sheridan, May 30, 2003 (1 page)

Joint Exhibits:

None

WITNESSES

For Petitioner:

David M. Sheridan

Joel Grennor

For Respondents:

None

#477-04

OAL DKT. NO. EDU 7169-04
AGENCY DKT. NO. 138-4/04

L.C., on behalf of minor children, Y.C. and S.C.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4. The Board did not file reply exceptions.

On exception, petitioner urges the Commissioner to reject the Initial Decision, contending that Board counsel and the Board's witness made dishonest, deceitful statements, and that she has met the requisite burden of proof for demonstrating her children's entitlement to attend school in the Board's district. (Petitioner's Exceptions at 2-3) In support of these contentions, petitioner references appended "sustaining credentials" consisting of copies of an April 20, 2004 log for petitioner's home fax, showing that several pages were sent to the Board's fax number on that date ("P-1"); an envelope from the Board's attorney addressed to Petitioner at her fiancé's apartment in Newark, marked "Return to Sender" ("P-2"); a copy of the Board's Answer to the Petition of Appeal ("P-3"); a June 2004 envelope from the Board's attorney addressed to Petitioner at her mother's Orange apartment ("P-4"); the Board's final notice of ineligibility for Y.C. ("P-5"); the Board's February 3, 2004 notice of district-wide school re-

registration ("P-6"); a completed Landlord/Owner Affidavit from the Orange Township Public Schools, dated August 11, 2004 and notarized on August 28, 2004, purporting to show that petitioner and her children reside at her mother's apartment in Orange ("P-7"); a current auto insurance card issued in March 2004 ("P-8"), a current vehicle registration issued in March 2004, and a current driver's license issued in November 2003 ("P-9"), all listing petitioner's address as her mother's apartment in Orange; petitioner's voting record, listing her address as her mother's apartment in Orange and showing her to have last voted in 2002 ("P-10"); an August 11, 2004 phone bill for the Orange apartment, in her mother's name ("P-11"); an undated photograph of the mailbox for the Orange apartment, showing petitioner's name taped on the box along with her mother's ("P-12"); a July 2004 utility bill for the Newark apartment addressed to petitioner's fiancé ("P-13"); an undated memorandum from the "management" of the Newark apartment complex noting that apartment 4B is leased to petitioner's cousin and 4K to petitioner's fiancé ("P-14"); and a November 3, 2004 letter from Noverlys R. Dominguez of Realty Management Systems, noting "slight confusion" with respect to her conversation with someone at the school district office regarding verification of the occupants of the Orange apartment and advising that the "main account holder" on the apartment was petitioner's mother but that petitioner and her children also reside there ("P-15").

It must be stated at the outset that applicable procedural rules preclude consideration of petitioner's documents, in that all but one of them ("P-15") were brought to the record for the first time as attachments to petitioner's post-hearing brief, not as evidence to be presented and assessed at hearing in accordance with *N.J.A.C.* 1:1-15.1 *et seq.* Because they were submitted in this manner, neither the Administrative Law Judge (ALJ) nor the Board attorney had the opportunity to question petitioner about the documents, nor to assess their

relevance or establish their validity; indeed, consistent with OAL rules, the record shows the ALJ to have expressly rejected petitioner's labeling of her documents as "Exhibits P-1 through P-14," not only omitting them from the Initial Decision's list of exhibits, but actually striking the "P-" designation from each. Moreover, even granting that the ALJ might have, in light of petitioner's *pro se* status, construed her submissions as a motion to reopen the record pursuant to *N.J.A.C.* 1:1-18.5(c), petitioner offered the ALJ no reason whatsoever, let alone the "extraordinary circumstances" required by rule, as to why these documents—all but one of which, the undated "P-14," unquestionably pre-date the hearing—could not have been produced there; instead, she simply appended the documents to her brief. The remaining document, "P-15," is dated several weeks subsequent to the Initial Decision and presented to the Commissioner contrary to the clear proscription, at *N.J.A.C.* 1:1-18.4(c), against introducing new evidence through exceptions; just as at the OAL, petitioner offered no explanation as to why her documents were not produced at hearing, nor any reason why "P-15" could not have been timely procured and introduced.[1]

Notwithstanding the above, the Commissioner finds that no purpose would be served by rejecting petitioner's exceptions on procedural grounds and omitting any consideration whatsoever of her proffered documents, or by remanding this matter to the OAL so as to protract proceedings still further. Rather, the Commissioner finds that, even assuming the authenticity of the documents and granting every favorable inference to petitioner—both concessions solely for purposes of this discussion[2]—petitioner has not met her burden of establishing domicile in the

[1] In this regard, the Commissioner notes that petitioner has been given numerous opportunities, beginning in early April 2004, to present documentary proof of her claim of residency and that she did not appear at the Board hearing convened to assess that claim (Board's Answer; Exhibit R-3). Additionally, she received a two-week extension within which to make her post-hearing submission, so that she could consult legal counsel. (Letter of September 23, 2004, from petitioner to ALJ; letter of September 24, 2004 from Board to ALJ; letter of September 27, 2004 from ALJ to parties)

[2] The Commissioner notes that "P-7," "P-12" and "P-14" in particular appear suspect on their face, while "P-15" would appear to require both authentication and elaboration in light of other testimony and evidence submitted in this matter.

Board's district. Petitioner may not merely produce a handful of documents from the regulatory list of acceptable proofs and expect a finding of domicile without regard to the existence of compelling evidence to the contrary and a finding by the ALJ as the trier of fact, *N.J.S.A.* 52:14B-10(c), that petitioner was not credible in her testimony; at most, all petitioner's documents might prove is that she did at one time live at the Orange apartment, and that she still maintains some official attachments there. Neither of these conclusions is inconsistent with the ALJ's finding that petitioner is now domiciled with her fiancé in Newark along with her children. Similarly, those of petitioner's "exhibits" provided in an apparent attempt to undermine the credibility of the Board's witness and impugn the truthfulness of its attorney do not suffice for this purpose.

Accordingly, the Commissioner adopts the Initial Decision of the OAL, finding that Y.C. and S.C. are ineligible to attend school in the Orange Township School District and directing petitioner to remit tuition in the amount of $24,286.00 for the 2003-04 school year plus, $68.26 per child per diem for the period from September 1, 2004 to the date of their removal, as his final decision in this matter.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 12/01/04
Date of Mailing: 12/01/04

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7169-04
AGENCY DKT. NO. 138-4/04

L.C., ON BEHALF OF MINOR CHILDREN,
Y.C. AND S.C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,
Respondent.

L.C, parent of Y.C. and S.C., petitioner, *pro se*

Chandra Rainey Cole, Esq., for respondent (Love & Randall, attorneys)

Record Closed: October 12, 2004 Decided: October 20, 2004

BEFORE **LESLIE Z. CELENTANO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner L.C. challenges the determination made by respondent Board of Education of City of Orange ("Board" or "District") that minor children Y.C. and S.C. were not domiciled in the district and thus where not entitled to a free public education in the district. The Board has counterclaimed for tuition.

The matter was transmitted to the Office of Administrative Law (OAL) on July 6, 2004, 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 to -13. A hearing was held on August 30, 2004, and a deadline of September 27, 2004, was set for post-hearing submissions. Thereafter, petitioner requested a one-month extension of the deadline for post hearing submissions which was denied, however a two week extension was granted. The parties were advised by correspondence dated September 27, 2004, that the deadline for post-hearing submissions had been extended to October 12, 2004, and on that date the record closed.

TESTIMONY

Carlos Hawkins

Testifying for the district was Carlos Hawkins who is employed by the Orange Board of Education as the Attendance Officer at the middle school. He has been so employed for three years and his duties include all student attendance issues. Hawkins testified that if he suspects a student does not live in the district, he conducts an investigation, including a home visit, a five-day notice to the parent for proof of residency to be submitted, and telephone calls to the home. He may also attempt to contact someone else in the family. On April 6, 2004, the principal of the middle school, Dr. Gayles, advised Hawkins that Y.C. had indicated he lives in Newark. At the time Y.C. was thirteen or fourteen years old and was in eighth grade. Y.C. told Dr. Gayles that he lives at 10 Osborne Terrace in Newark. Y.C. also indicated at the time that his grandmother lives at 466 Highland Avenue in Orange, and gave Hawkins his telephone number in Newark. As a result of the information provided by Y.C. on April 6, 2004, an investigation was commenced. Hawkins' investigation revealed that the telephone number provided by Y.C. as his home number is listed to L. Calloway at 10 Osborne Terrace, Newark, New Jersey.

Hawkins testified that on April 6, 2004, he sent a letter to petitioner at 466 Highland Avenue (R-1) advising that L.C. was to contact the school within five days or her children would be dropped from the register. L.C. was advised to bring in three proofs of residency.

After an intervening spring break, on April 20, 2004, a Notice of Final Ineligibility was issued (R-2). Thereafter, petitioner appeared at the school and indicated that she had never received the April 6 letter (R-1). Hawkins asked L.T. for a copy of her lease and two utility bills or bank statements to verify her residency and indicated that petitioner never provided any of these documents.

Hawkins testified that he visited 466 Highland Avenue, apartment 309 in Orange before sending the April 6 letter to petitioner and after tracing petitioner's telephone number to the Newark address. There was no answer at the apartment at 9:15 p.m. when Hawkins was on his way home from his night job. Hawkins' survey of the area revealed no mailbox with petitioner's name on it. Hawkins also telephoned the realty group that manages the 466 Highland Avenue property and spoke to Noverlyn in the management office, who indicated that the particular apartment is in the name of Carol Bell and that it is a one-bedroom apartment in which no one other than Ms. Bell resides. Noverlyn advised Mr. Hawkins that there is no lease on file.

Hawkins visited the Newark address on either June 1 or 2, 2004, between 11:00 a.m. and 1:00 p.m. while on his lunch break. He took five pictures of the doorbell with the name L. Calloway. He also spoke to four teenagers, aged 14 to 16 who were outside the building, and who indicated that Y.C. resides in the building and also has a younger sister.

Hawkins indicated that a residency hearing was held on June 3, 2004, however petitioner did not appear for that hearing and a finding of no residency was sustained. The letter notifying petitioner of the hearing was unclaimed from 466 Highland Avenue, Orange, New Jersey.

Hawkins testified that Y.C. was never excluded from school.

L.C.

Petitioner testified that her son Y.C. has been referred to the Child Study Team for evaluations. She testified that she asked the District what she needed to provide to prove

her residency and testified that on April 21, 2004, she gave a package to the District.[1] Petitioner also testified that the residency questions coincided with her request for the referral of Y.C. to the Child Study Team in February.

On cross-examination L.C. testified that her fiancé, who is her daughter's father, resides at 10 Osborne Terrace. She indicated that the utility bills were in his name at that address. When asked why her name was on the doorbell, petitioner testified that her fiancé could not get a phone bill in his own name so the bill was placed in her name. She stated that her name is on the mailbox so that the phone bill can be received there. She also testified that her cousin resides in the same building and her cousin's first initial is "S." L.C. testified that her fiancé and his daughter reside in the apartment and that she is there two to three times a week, although some weeks she is there every day. She indicated that her children go there if she is working late and stay there sometimes. She testified that her children's clothes are at the 466 Highland Avenue address in Orange however they have some clothes in Newark as well, and that they "spend summers there". L.C. indicated that she has lived with her mother since approximately 1987 at the Highland Avenue address in Orange, but that she goes back and forth between the two residences on weekends and during vacations. She indicated that she is never at 10 Osborne Terrace for long periods of time. L.C. also testified that she never advised the telephone company that she lives at 10 Osborne Terrace and indicated that they never asked her where she lives or for her address. L.C. stated that when her fiancé applied for telephone service he did not want to pay his overdue balance and so the new phone line was put in her name. Petitioner also testified that on April 21st, the date of the Final Ineligibility Letter, her son was excluded from school and did not attend that day.

FACTUAL DISCUSSION

Based upon consideration of the totality of the evidence presented, both testimonial and documentary, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following **FACTS** in this case.

[1] None of the documents purportedly given to the district on that date were provided at the hearing.

1. Petitioner has two children who have attended district schools, Y.C. who was an eighth grade student at Orange Middle School during the 2003-04 school year and S.C. who was a second grade student during the 2003-04 school year.

2. On April 6, 2004, the principal of Orange Middle School, Dr. Gayles had occasion to speak with Y.C. regarding an incident that had occurred at the school. During his conversation with Dr. Gayles, Y.C. indicated that he did not live at 466 Highland Avenue in Orange, New Jersey, rather he stated that he resides at 10 Osborne Terrace in Newark, New Jersey. Dr. Gayles revealed this information to Carlos Hawkins, the Attendance Officer for Orange Middle School and asked that he investigate the information provided by Y.C.

3. Mr. Hawkins telephoned the number contained within the school files for Y.C. Y.C. advised Hawkins that the number on file was not his home phone number and provided a second number to Hawkins. Further investigation revealed that the telephone number provided by Y.C. was the telephone number at 10 Osborne Terrace, Newark, New Jersey.

4. The district then advised L.C. by letter dated April 6, 2004, that as it appeared L.C. was no longer residing in the district, adequate proof of residency was to be provided within 5 days. No response to that letter (R-1) was received by the district.

5. Hawkins visited the address in Newark provided by Y.C. as his home address and observed the name of L.C. next to one of the doorbells. During that visit Hawkins also spoke to four teenagers who were outside of the building and who indicated that Y.C. lives in the building and has a younger sister.

6. Hawkins visited the Orange address at 466 Highland Avenue and found no indication that petitioner or her children reside there. Hawkins telephoned

the management company and was advised that the apartment in question, number 309, is a one bedroom apartment. The management company had no knowledge of L.C. or her children occupying the premises.

7. On April 20, 2004, a Notice of Ineligibility (R-2) was hand-delivered to petitioner at the Orange Middle School.

LEGAL DISCUSSION AND CONCLUSION

The Board has asserted that Y.C. and S.C. were not domiciled within the district during the 2003-2004 school year and, consequently, are not entitled to a free public education in Orange.

N.J.S.A. 18A:38-1 provides that the public schools of a district are free to persons domiciled within the district who are over five and under twenty years of age. 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 more than one residence but only one domicile, which is that place that the person regards as his or her true and permanent home. *Board of Educ. of Middle Township, Cape May County v. K.K.*, 93 *N.J.A.R.*2d (EDU) 461.

In a proceeding such as this, the parent has the burden of proving by a preponderance of the evidence that the children meet the eligibility requirements. Here, L.C. has failed to meet that burden. Petitioner offered nothing more than an unsupported assertion that she is domiciled in Orange, with her two children, in a one bedroom apartment leased by her mother, and that therefore her children are entitled to a free public education in the district. Petitioner's testimony was implausible at best and thoroughly unconvincing. She provided no documentary or testimonial evidence at the hearing to indicate residency.

Based upon the undisputed facts and circumstances, I **FIND** that Y.C. and S.C. are not domiciled within the district, and therefore do not meet the requirements set forth

in *N.J.S.A.* 18A:38-1(a). I therefore **CONCLUDE** that Y.C. and S.C. are not entitled to a free public education in the Orange school district. I further **CONCLUDE** that the tuition costs set forth by respondent are uncontradicted. Therefore petitioner is assessed tuition in the based amount of $24,286.00 for the 2003-2004 school year, and at a per diem rate of $68.26 per child for the period of September 1, 2004 to the date of removal from respondent's school district.

ORDER

It is hereby **ORDERED** that petitioner's appeal of respondent's determination is **DISMISSED**. It is further **ORDERED** that Y.C. and S.C. are ineligible for attendance in respondent's school district. It is further **ORDERED** that petitioner be assessed tuition costs as set forth above for the period of Y.C. and S.C.'s ineligible attendance in respondent's 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 (45) 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. deceiving

Within thirteen (13) 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, 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, 2004
DATE

LESLIE Z. CELENTANO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10-20-04
DATE

Mailed to Parties:

OCT 21 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

Witnesses

For Petitioner:

L.C.

For Respondent:

Carlos Hawkins, Attendance Officer

Exhibits

For Petitioner:

P-1 Petition of Appeal dated April 21, 2004

For Respondent:

R-1 Letter from Carlos Hawkins to L.C., dated April 6, 2004

R-2 Notice of Final Ineligibility, dated April 20, 2004

R-3 Letter from Chandra Rainey Cole, Esq. to L.C., dated May 24, 2004

478-04SEC

AGENCY DKT. NO. 386-10/04

IN THE MATTER OF REGINALD DAVIS, :
EAST ORANGE BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION
ESSEX COUNTY. : DECISION

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty against the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25, and/or an annual financial disclosure statement, as required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2004 for school officials in office since January 30, 2004, or 30 days from swearing-in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on August 20, 2004, indicating that if the completed statement was not filed by September 10, 2004, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 17, 2004 directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official filed the completed disclosure statement thereafter; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official did not provide any reason why he failed to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 26, 2004 to recommend a censure of the above-named school official in light of his failure to respond to the Commission's letter before the September 10, 2004 deadline, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated October 28, 2004 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending censure; and

Whereas, no response was received from the above-named school official; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and finds that the Commission's recommendation is inconsistent with the penalty recommended in previous matters of this nature with substantially similar facts, (*See, e.g., In the Matter of Denise Irvin-Johnson, Willingboro Township Board of Education, Burlington County*, decided by the Commissioner February 11, 2004 and *In the Matter of Joel Pabon, Sr., Perth Amboy Board of Education,*

Middlesex County, decided by the Commissioner February 5, 2004, where the Commission recommended, and the Commissioner concurred, that where a school official completed and submitted the required disclosure statement after the issuance of an Order to Show Cause, but did not provide *any* reasons for failure to comply within the requirement under *N.J.S.A.* 18A:12-25 and 26, the appropriate penalty was a reprimand); and

Whereas, the penalty of reprimand has additionally been recommended and imposed under circumstances where noncompliance with the filing requirement was egregious, (*See*, e.g., *In the Matter of Beverly Evenson, Willingboro Township Board of Education, Burlington Township,* decided by the Commissioner December 22, 2003 and *In the Matter of Lynel Dunkins, Gateway Charter School, Hudson County,* decided by the Commissioner December 22, 2003, where the Commission recommended, and the Commissioner concurred, that where a school official did not complete the required disclosure statement after the issuance of an Order to Show Cause and did not provide any reasons for failure to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26, the school official was suspended until such disclosure statement was filed and automatically removed from the Board if he/she failed to file the required statement within 30 days, but was reprimanded if he/she filed the necessary statement prior to the filing date of the Commissioner's decision); and

Whereas, the School Ethics Commission did not articulate its reasoning in recommending the imposition of the more severe penalty of censure in this instance; and

Whereas, the Commissioner, in the absence of such explanation, cannot concur with the Commission's recommendation and, instead, determines that a reprimand is the proper penalty in that it is consistent with the penalty imposed in prior matters of this nature, and

Whereas, the Commissioner nevertheless admonishes the school official for his/her failure to timely file the requisite statement in that such delay has caused administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named Board member be reprimanded as a school official found to have violated the School Ethics Act.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/1/04

Date of Mailing: 12/1/04

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

479-04R

479-04

OAL DKT. NOS. EDU 7674-04 AND
EDU 1083-03 (ON REMAND)
AGENCY DKT. NO. 68-4/99

KATHLEEN M. TEMPLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/01/04

Date of Mailing: 12/01/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07674-04

EDU 01083-03 (**ON REMAND**)

AGENCY DKT. NO. 68-4/99

KATHLEEN M. TEMPLE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,

Gregory T. Syrek, Esq., for petitioner

Jack Gillman, Esq., for respondent (Law Offices of Joseph J. Ryglicki, attorneys)

Record Closed: October 7, 2004 Decided: October 14, 2004

BEFORE **CAROL I. COHEN**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on January 9, 2003 for determination as a contested case. A hearing was scheduled for September 24, 2003, which was adjourned by the respondent's attorney because of the unavailability of a witness. A hearing was rescheduled for March 10, 2004.

On the date of the hearing, the parties were able to resolve the matter. On May 4, 2004, the parties submitted the attached Settlement Agreement. On July 13, 2004 the

Commissioner of Education filed a decision remanding the matter to the Office of Administrative Law (OAL) based on the fact that neither the file nor the Settlement Agreement contained a copy of the Board's resolution approving the settlement and designating individuals to sign the agreement on its behalf. In addition, the agreement was not signed by the Board attorney. A telephone conference was scheduled for September 10, 2004 to discuss the remand. The settlement was revised and a Board Resolution attached, which complied with the Remand Order. The attached Settlement Agreement indicates the terms of the agreement. Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signature of the parties and/or 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 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 (45) 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.

10/14/04
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

10-22-04
DATE

M. Kathleen Duncan/CA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 27 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2004 OCT -7 A 8:56

AGREEMENT

This Agreement is made by and between Kathleen Temple ("Temple", who resides at 514 Madison Street, Apt. 211, Hoboken, New Jersey 07030, and the Hoboken Board of Education ("Board"), with its offices at 1114 Clinton Street, Hoboken, New Jersey 07030-3201. In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is herby acknowledged, the undersigned state:

WHEREAS, Temple filed a Verified Petition with the Commissioner of Education alleging that she had suffered a work-related injury and that the Board had charged her sick days for her thirty-one (31) absences in violation of *N.J.S.A.* 18A:30-2.1; and,

WHEREAS, the Board filed an Answer denying the substantive allegations raised in the petition; and,

WHEREAS, the underlying Workers' Compensation proceeding between the parties was resolved by the issuance of an Order Approving Settlement on January 8, 2002; and,

WHEREAS, in lieu of further processing this matter, the parties desire to enter into an agreement amicably resolving the issues in dispute,

IT IS on this 6th day of October, 2004, agreed that:

1. The Board will restore to Temple's sick leave bank a total of twenty (20) sick days. The remaining eleven (11) days will not be restored.

2. The petition in this matter bearing OAL Docket No. EDU 1083-03N and Agency Ref. No. 68-4/99 shall be dismissed with prejudice.

3. The parties have entered into this Agreement solely to compromise disputed claims. It is understood that neither the execution of this Agreement nor any other action taken by either party in connection with this settlement constitutes an admission as to the merits of the underlying claims, defenses and legal issues raised by either party.

4. Temple acknowledges that she has been advised of her right to consult with an attorney or representative of her own choosing prior to signing this Agreement, and has done so, and that she signs this Agreement as her own voluntary act and deed, and that she fully understands the duties and obligations enumerated herein.

5. The undersigned representatives of the Board hereby acknowledge that they agree to the terms and conditions of this Agreement and have the authority to bind the Board to its terms.

6. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

7. The parties shall be bound by the terms and conditions of This Agreement, finding it to be in the best interests of the public, consistent with public policy, fair and equitable under all circumstances surrounding this matter.

8. Both parties acknowledge that their agreement to dismiss the petition is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approval is not given, this Agreement and all of the stipulations, releases and acknowledgements shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement.

9. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Gregory T. Syrek, Esq.
Counsel for Petitioner
Dated:

Kathleen Temple

Dated:

HOBOKEN BOARD OF EDUCATION

Jack Gillman

By: Patrick Gagliardi

Jack Gillman, Esq.
Attorney for Respondent
Dated: 9/15/04

Patrick Gagliardi
Superintendent

Dated: Sept. 21, 2004

7. The parties shall be bound by the terms and conditions of This Agreement, finding it to be in the best interests of the public, consistent with public policy, fair and equitable under all circumstances surrounding this matter.

8. Both parties acknowledge that their agreement to dismiss the petition is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approval is not given, this Agreement and all of the stipulations, releases and acknowledgements shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement.

9. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Gregory T. Syrek, Esq.
Counsel for Petitioner
Dated: 9/20/04

Kathleen Temple
Dated: September 15, 2004

HOBOKEN BOARD OF EDUCATION

Jack Gillman, Esq.
Attorney for Respondent
Dated:

By:_____

Dated:

RESOLVED, that the Superintendent of Schools and Special Counsel have resolved an Administrative Law proceeding commenced against the District by Kathleen Temple. By her petition, Ms. Temple sought to restore 31 days to her sick bank on the basis that the sick days were the result of a work related injury. Both parties were willing to compromise to avoid the costs and uncertainty of a hearing. It has been agreed that 20 days will be restored to the sick bank. The balance of 11 days will not be restored. The Office of the Commissioner seeks a Board resolution approving the settlement.

The above is a true copy of a resolution approved by the Hoboken Board of Education at the Stated Session held on Tuesday, August 31, 2004.

Anthony M. Cirko
School Business Administrator/
Board Secretary

480-04

#480-04SEC

AGENCY DKT. NO. 383-10/04

IN THE MATTER OF ARTHUR WRIGHT, :

EAST ORANGE BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

ESSEX COUNTY. : DECISION

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty against the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2004 for school officials in office since January 30, 2004, or 30 days from swearing-in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on August 20, 2004, indicating that if the completed statement was not filed by September 10, 2004, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 17, 2004 directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official filed the completed disclosure statement thereafter; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official did not provide an answer to the Order or any reason why he failed to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 26, 2004 to recommend censure of the above-named school official in light of his failure to respond to the Commission's reminder letter before the September 10, 2004 deadline, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated October 28, 2004 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending censure; and

Whereas, no comments were received from the above-named school official; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and finds that the Commission's recommendation is inconsistent with the penalty recommended in previous matters of this nature with substantially similar facts, (*See, e.g., In the Matter of Denise Irvin-Johnson, Willingboro Township Board of Education, Burlington County*, decided by the Commissioner

February 11, 2004 and *In the Matter of Joel Pabon, Sr., Perth Amboy Board of Education, Middlesex County*, decided by the Commissioner February 5, 2004, where the Commission recommended, and the Commissioner concurred, that where a school official completed and submitted the required disclosure statement after the issuance of an Order to Show Cause, but did not provide *any* reasons for failure to comply within the requirement under *N.J.S.A.* 18A:12-25 and 26, the appropriate penalty was a reprimand); and

Whereas, the penalty of reprimand has additionally been recommended and imposed under circumstances where noncompliance with the filing requirement was egregious, (*See, e.g., In the Matter of Beverly Evenson, Willingboro Township Board of Education, Burlington Township,* decided by the Commissioner December 22, 2003 and *In the Matter of Lynel Dunkins, Gateway Charter School, Hudson County,* decided by the Commissioner December 22, 2003, where the Commission recommended, and the Commissioner concurred, that where a school official did not complete the required disclosure statement after the issuance of an Order to Show Cause and did not provide any reasons for failure to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26, the school official was suspended until such disclosure statement was filed and automatically removed from the Board if he/she failed to file the required statement within 30 days, but was reprimanded if he/she filed the necessary statement prior to the filing date of the Commissioner's decision); and

Whereas, the School Ethics Commission did not articulate its reasoning in recommending the imposition of the more severe penalty of censure in this instance; and

Whereas, the Commissioner, in the absence of such explanation, cannot concur with the Commission's recommendation and, instead, determines that a reprimand is the proper penalty in that it is consistent with the penalty imposed in prior matters of this nature, and

Whereas, the Commissioner nevertheless admonishes the school official for his/her failure to timely file the requisite statement in that such delay has caused administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named school official be reprimanded as a school official found to have violated the School Ethics Act.*



COMMISSIONER OF EDUCATION

Date of Decision: 12/01/04

Date of Mailing: 12/01/04

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

481-04

OAL DKT. NO. EDU 2868-04
AGENCY DKT. NO. 120-4/04

M.N., on behalf of minor child, D.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his full and independent review, the Commissioner, under the particular circumstances existing here, concurs with the Administrative Law Judge's disposition of this matter.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons articulated therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/01/04

Date of Mailing: 12/01/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2868-04

AGENCY REF NO. 120-4/04

M.N., ON BEHALF OF MINOR CHILD, D.B.,

Petitioner,

v.

EAST BRUNSWICK TOWNSHIP BOARD OF EDUCATION,

Respondent.

M.N., petitioner, *pro se*

Robin T. McMahon, Esq., for respondent East Brunswick Township Board of Education

Record Closed: September 10, 2004 Decided: October 25, 2004

BEFORE **DANIEL B. MCKEOWN,** ALJ, (t/a)

INTRODUCTION

Under date of April 2, 2004, M.N., who is identified as the "petitioner" in this matter, filed a Pro Se Residency Appeal with the Commissioner of Education by which she claims D.B., who is a minor child of 15 years of age, is her godchild. She further claims D.B. resides with her in East Brunswick and is entitled to attend the East Brunswick public school district under *N.J.S.A.* 38-1 but that school officials refuse to

allow his attendance. The East Brunswick Township Board of Education (Board) filed an Answer to the Appeal on April 12, 2004 and included a counterclaim for tuition due in the amount of $9,018 from D.B.'s parents for the unlawful attendance by D.B. in its schools between November 2003 and June 2004. While according to an affidavit filed by Board counsel's secretary, proof of service of the counterclaim was made upon the parents no other filings in this matter were served upon them. Other than an indirect allegation by the board that the identified petitioner, M.N., is party to an unlawful criminal conspiracy and seeks authorization from the Commissioner to refer the matter to the Middlesex County Prosecutor for further proceedings, the Board seeks no other relief from M.N. The Board requests tuition solely from the D.B.'s parents, "jointly and severally".

The Commissioner of Education transferred the matter to the Office of Administrative Law Office as a contested case pursuant to *N.J.S.A.* 52:14B-1 to B-15 and *N.J.S.A.* 52:14F-1 to F-13. After notice to petitioner, M.N., a hearing was scheduled for August 27, 2004. Despite notice being mailed petitioner by the Office of Administrative Law, she failed to appear at the scheduled hearing. The hearing proceeded in the absence of petitioner and solely on the Board's counterclaim for a tuition claim against the parents.

The conclusions are reached in this initial decision that petitioner failed to establish the truth of the claim that D.B. is eligible for a free education at the Board's schools under the criteria at *N.J.S.A.* 18A:38-1 but that a judgment cannot be entered here against mother without a separate petition, with proper notice, being filed against her.

FACTS

A preponderance of credible evidence in this record establishes the following facts. On November 11, 2003, D.B.'s mother, L.B., filed a form dated entitled *Affidavit of Temporary Residence* with the East Brunswick Board of Education to establish eligibility D.B. to attend a its school under *N.J.S.A.* 18A:38-1. Mother attested that her

family, including her son, D.B., was temporarily residing with petitioner M.N. in East Brunswick until she and her family found a residence "in area". It appears that mother and father do not live together. Mother asserts she lives with M.N.; father resides in Monmouth Junction, which is part of the South Brunswick school district. As proof of her family living with M.N. in East Brunswick, mother submitted to the Board a letter from M.N., a utility bill, a telephone bill, and a bank statement all in M.N.'s name, who does indeed reside in East Brunswick.

The Board advised mother on December 16, 2003 that her request to enroll her son, D.B., in its schools was defective and additional evidence was necessary to establish domicility or residency at the street address where M.N. resides. The Board attached examples of the kinds of proof necessary to enroll D.B. Mother did submit on January 5, 2004 a letter addressed to her regarding her financial aid awards to attend Middlesex County Community College at the street address in East Brunswick. It is noted that D.B. was allowed to attend the Board's school during this entire process of application.

It appears that on January 13, 2004 an anonymous telephone call was made to the guidance office at the Board's school stating that D.B. actually resides in South Brunswick, and is driven to East Brunswick every day to be dropped off at school. On January 14, 2004, the Board notified mother that due to lack of submitted documentation that either she or her son D.B. were resident in the district, he is not entitled to a free education in its schools. The notice was sent to father's Monmouth Junction address. On January 17, 2004 mother submitted a bank statement in her name and listing the East Brunswick address of petitioner as her address. Another anonymous telephone call from mother's office was made to the Board's guidance office on February 10, 2004 reporting that mother lives in Monmouth Junction, not East Brunswick, and that another child of hers attends South Brunswick schools.

A memorandum dated April 13, 2004 from the principal of the Monmouth Junction School to the assistant superintendent of the Board's schools reports that

mother's daughter does indeed attend the Monmouth Junction elementary school for the entire 2003-2004 academic year.

An application for a hearing in New Jersey Superior Court, Family Division, signed by petitioner M.N. seeking custody of D.B. so that he could attend the East Brunswick schools until his residence is established in East Brunswick. M.N. identifies herself as Godmother, and asserts she has held that status for the past three months. There is no explanation in this record what petitioner M.N. intends to convey by claiming the status of 'Godmother', but three months before February 2004 is when the initial application to allow D.B. into the Board's school was filed by mother. The application itself appears to be countersigned by a probation officer.

On March 24, 2004 the Board , in a letter addressed to the East Brunswick address of petitioner, advised mother that it determined her son, D.B. was not eligible to attend its schools free of charge because of insufficient documentation to establish parental domicility in East Brunswick, that contradictory information was submitted by petitioner M.N. and mother regarding the district of residence, and a specific address in Monmouth Junction continues to be used as the address of record for D.B. and mother. The Board asserts that that petitioner M.N. listed mother's address in the application filed in Superior Court on February 13, 2004 Monmouth Junction, not with her in East Brunswick. Nevertheless, D.B. continued to attend the East Brunswick schools because petitioner filed the instant appeal before the Commissioner of Education on April 2, 2004. There is in the record an Order signed by Barbara C. Stolte, JSC, granting petitioner M.N. "residential" custody of D.B. until he completes high school.

After the appeal was filed, the Board received anonymous telephone calls on April 21 and April 27 reporting that D.B. lives in South Brunswick but was expelled from that school for misconduct South Brunswick and that his father drives him to and from East Brunswick, and that both mother and D.B. live in South Brunswick. Documents submitted by the Board in this case do support as fact that D.B. was suspended 10 days from South Brunswick in May 2003 for vandalism; that he was arrested in May 2003 for

initiating a fire alarm in the South Brunswick school; that h had had an argument with petitioner M.N. who would no longer allow mother or D.B. to list her address as theirs; and, that while D.B. lived in her house between November 2003 and May 14, 2004 petitioner M.N. he was no longer invited to do so because of an incident. D.B. was enrolled at the Middlesex County Vocational Technical High School for 2004-2005.

Finally, the Board submitted a certification from its Business Administrator/Board Secretary who calculates that based on the per pupil cost in East Brunswick, together with the number of days D.B. attended its school without being eligible, mother owes it $5911.80 for attendance between through May 31, 2004 or $6613.20 for attendance through June 18, 2004, the end of the academic year.

DISCUSSION

N.J.S.A. 18A:38-1 provides in part:

> 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;
>
> 1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child . . .
>
> 2) If the superintendent . . . 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 . . . the superintendent . . . may apply to the board of education for the removal of the child. The parent of 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 . . . 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 . . . and shall have the burden of proof

> by a preponderance of credible evidence that the child is eligible for a free education . . . If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district...

It is recognized that *N.J.S.A.* 18A: 38-2 allows for free attendance at school by nonresidents placed in the home of another person who is resident in the district. In this case, there is a court order for "residential" custody for the sole purpose of allowing D.B. to attend East Brunswick schools even though his mother has not established residence in the district. That is not, in my view, the intent of the *N.J.S.A.* 18A:8-2 but, and despite what I may have stated at hearing, the jurisdiction of Superior Court must be recognized. Even though the evidence fails to establish residency in East Brunswick for purposes of D.B.'s free attendance at the Board's school, and even though there may be some indication mother and petitioner M.N. stretched the truth by claiming mother and D.B. live with petitioner in East Brunswick, the order of a judge of New Jersey Superior Court must be acknowledged.

But even if there were no such order and mother was found to have failed in her burden of proof, and the conclusion reached that D.B. attended the Board's school improperly, tuition cannot be awarded against the parent because mother is in this case by being named in the Board's counterclaim. The Office of Administrative Law does not engage in third party practice. Mother did not file the petition; M.N. did. M.N. is not a named guardian in the case. A separate petition, with proper notice to mother, would have to be filed against mother in order for the Board to be awarded tuition against her.

Accordingly, and despite the failure of mother to appear at hearing or petitioner herself to appear at hearing, the counterclaim against mother must be and is **DISMISSED WITHOUT 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 (45) 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 (13) 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, 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 25, 2004
DATE

DANIEL B. MC KEOWN, ALJ (t/a)

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10-25-04
DATE

OCT 29 2004
DATE

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/lam

DOCUMENTS IN EVIDENCE

R-1 through R-17 Board's Documents

482-04

482-04SEC

AGENCY DKT. NO. 380-10/04

IN THE MATTER OF GLEN WILSON,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty against the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2004 for school officials in office since January 30, 2004, or 30 days from swearing-in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on August 20, 2004, indicating that if the completed statement was not filed by September 10, 2004, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 17, 2004 directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statements; and

Whereas, the above-named school official filed the completed disclosure statement thereafter; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official did not provide the Commission with an Answer to the Order or any reason why he failed to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 26, 2004 to recommend censure of the above-named school official in light of his failure to respond to the Commission's reminder letter before the September 10, 2004 deadline and for failure to provide an Answer to the Order, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated October 28, 2004 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending censure; and

Whereas, no comments were received from the above-named school official; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and finds that the Commission's recommendation is inconsistent with the penalty recommended in previous matters of this nature with substantially similar facts, (*See, e.g., In the Matter of Denise Irvin-Johnson, Willingboro*

Township Board of Education, Burlington County, decided by the Commissioner February 11, 2004 and *In the Matter of Joel Pabon, Sr., Perth Amboy Board of Education, Middlesex County*, decided by the Commissioner February 5, 2004, where the Commission recommended, and the Commissioner concurred, that where a school official completed and submitted the required disclosure statement after the issuance of an Order to Show Cause, but did not provide *any* reasons for failure to comply within the requirement under *N.J.S.A.* 18A:12-25 and 26, the appropriate penalty was a reprimand); and

Whereas, the penalty of reprimand has additionally been recommended and imposed under circumstances where noncompliance with the filing requirement was egregious, (*See, e.g., In the Matter of Beverly Evenson, Willingboro Township Board of Education, Burlington Township,* decided by the Commissioner December 22, 2003 and *In the Matter of Lynel Dunkins, Gateway Charter School, Hudson County,* decided by the Commissioner December 22, 2003, where the Commission recommended, and the Commissioner concurred, that where a school official did not complete the required disclosure statement after the issuance of an Order to Show Cause and did not provide any reasons for failure to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26, the school official was suspended until such disclosure statement was filed and automatically removed from the Board if he/she failed to file the required statement within 30 days, but was reprimanded if he/she filed the necessary statement prior to the filing date of the Commissioner's decision); and

Whereas, the School Ethics Commission did not articulate its reasoning in recommending the imposition of the more severe penalty of censure in this instance; and

Whereas, the Commissioner, in the absence of such explanation, cannot concur with the Commission's recommendation and, instead, determines that a reprimand is the proper penalty in that it is consistent with the penalty imposed in prior matters of this nature, and

Whereas, the Commissioner nevertheless admonishes the school official for his/her failure to timely file the requisite statement in that such delay has caused administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named school official be reprimanded as a school official found to have violated the School Ethics Act.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/01/04

Date of Mailing: 12/02/04

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

483-04SEC

AGENCY DKT. NO. 384-10/04

IN THE MATTER OF WILLIAM PEREZ,	:	
LEAP ACADEMY BOARD OF TRUSTEES,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty against the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2004 for school officials in office since January 30, 2004, or 30 days from swearing-in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on August 25, 2004, indicating that if the completed statement was not filed by September 10, 2004, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 17, 2004 directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official filed the completed disclosure statement thereafter; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official did not provide an answer to the Order or any reason why he failed to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 26, 2004 to recommend censure of the above-named school official in light of his failure to respond to the Commission's reminder letter before the September 10, 2004 deadline, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated October 28, 2004 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending censure; and

Whereas, no comments were received from the above-named school official; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and finds that the Commission's recommendation is inconsistent with the penalty recommended in previous matters of this nature with substantially similar facts, (*See, e.g., In the Matter of Denise Irvin-Johnson, Willingboro Township Board of Education, Burlington County,* decided by the Commissioner

February 11, 2004 and *In the Matter of Joel Pabon, Sr., Perth Amboy Board of Education, Middlesex County*, decided by the Commissioner February 5, 2004, where the Commission recommended, and the Commissioner concurred, that where a school official completed and submitted the required disclosure statement after the issuance of an Order to Show Cause, but did not provide *any* reasons for failure to comply within the requirement under *N.J.S.A.* 18A:12-25 and 26, the appropriate penalty was a reprimand); and

Whereas, the penalty of reprimand has additionally been recommended and imposed under circumstances where noncompliance with the filing requirement was egregious, (*See, e.g., In the Matter of Beverly Evenson, Willingboro Township Board of Education, Burlington Township,* decided by the Commissioner December 22, 2003 and *In the Matter of Lynel Dunkins, Gateway Charter School, Hudson County,* decided by the Commissioner December 22, 2003, where the Commission recommended, and the Commissioner concurred, that where a school official did not complete the required disclosure statement after the issuance of an Order to Show Cause and did not provide any reasons for failure to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26, the school official was suspended until such disclosure statement was filed and automatically removed from the Board if he/she failed to file the required statement within 30 days, but was reprimanded if he/she filed the necessary statement prior to the filing date of the Commissioner's decision); and

Whereas, the School Ethics Commission did not articulate its reasoning in recommending the imposition of the more severe penalty of censure in this instance; and

Whereas, the Commissioner, in the absence of such explanation, cannot concur with the Commission's recommendation and, instead, determines that a reprimand is the proper penalty in that it is consistent with the penalty imposed in prior matters of this nature, and

Whereas, the Commissioner nevertheless admonishes the school official for his/her failure to timely file the requisite statement in that such delay has caused administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named school official be reprimanded as a school official found to have violated the School Ethics Act.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/01/04

Date of Mailing: 12/02/04

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

484-04

#484-04

OAL DKT. NO. EDU 6588-03
AGENCY DKT. NO. 287-8/03

ROBIN SKIDMORE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Primary exceptions of both parties and reply exceptions of the Board, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching his determination herein.[1]

Petitioner excepts solely to that portion of the Initial Decision which found the 60-day termination clause applicable and, notwithstanding the renewal of petitioner's contract pursuant to *N.J.S.A.* 18A:27-10 through 12, permitted the Board to terminate her employment. In this regard, petitioner again contends, as she did below, that acceptance of this outcome operates to frustrate the clear language and intent of the renewal/nonrenewal statutes and she, therefore, urges that "the provisions of *N.J.S.A.* 18A:27-10 through 12 should apply here to the exclusion of the termination provision." (Petitioner's Exceptions at 1-2)

[1] It is noted that during the course of the Commissioner's review of the instant recommended Initial Decision, Melissa R. Vance, Esq. filed a motion to participate in this matter, on behalf of the New Jersey Association of School Administrators. Although there is regulatory authorization for an individual or entity to intervene in a case prior to its initial transmission to the OAL (*N.J.A.C.* 6A:3-1.8), or during hearing of the matter at the OAL (*N.J.A.C.* 1:1-16.1), there is no such authority for intervention at this late stage in the proceedings. Counsel's motion, therefore, was denied.

December 1, 2004

The Board's exceptions charge that the Administrative Law Judge (ALJ) erred in his factual interpretation and application of law in holding that the Board failed to notify petitioner of the nonrenewal of her contract as required by *N.J.S.A.* 18A:27-10(b). In so finding, it avers, he failed to recognize that when petitioner received the final copy of her year-end evaluation on May 7, 2003, indicating that the Superintendent recommended nonrenewal of her employment, her contract was, pursuant to *N.J.S.A.* 18A:27-4.1(b), deemed nonrenewed. (Board's Exceptions at 1) The Board proffers that the "crux" of the ALJ's analysis in this regard is that the Board failed to take "formal" action to accept the Superintendent's recommendation of nonrenewal of petitioner's employment and did not inform petitioner whether it was accepting or rejecting the Superintendent's recommendation. What such an analysis fails to recognize, it avers, is that the Board is not legally required to take such actions. (*Id.* at 6) Specifically, it advances:

> *N.J.S.A.* 18A:27-10 states that on or before May 15 of each year non-tenured teachers must receive either a written offer of a contract for employment or a written notice from the chief school administrator (*i.e.* the superintendent; *see N.J.A.C.* 6:3-2.1) that such employment will not be offered. A non-tenured teacher who is not recommended for renewal by the chief school administrator is deemed non-renewed. *N.J.S.A.* 18A:27-4.1(b). Thus, once a non-tenured teacher is notified that the chief school administrator has recommended non-renewal, that teacher's contract is deemed non-renewed by operation of law.
>
> Upon receiving notification that the teacher's contract will not be renewed, the teacher may request in writing a statement of reasons for non-renewal from the board of education. *See N.J.S.A.* 18A:27-4.1(b) and *N.J.A.C.* 6:3-3-4.2. *See also N.J.S.A.* 18A:27-3.2. After requesting and receiving the statement of reasons, the teacher may request in writing an informal appearance before the board of education, whereby the teacher can present witnesses in support of renewal. *Id.* The board of education is required to notify a teacher of its final determination only after the teacher has requested and participated in the informal appearance known as a *Donaldson* hearing. *N.J.A.C.* 6:3-4.2 *See also Donaldson v.*

> *Board of Education of North Wildwood*, 65 *N.J.* 236 (1974). The board of education is not required to notify the teacher of non-renewal if the teacher never requests and participates in a *Donaldson* hearing. If a *Donaldson* hearing is not requested, once the teacher is notified that the chief school administrator has recommended non-renewal of the teacher's contract, that teacher, as a matter of law, is on notice that the teacher's contract will not be renewed since a chief school administrator's recommendation of non-renewal is deemed non-renewal. Additionally, regardless of whether or not the teacher requests a *Donaldson* hearing, the board of education is never required to take formal action to accept or reject the chief school administrator's recommendation of non-renewal. *See Velasquez v. Board of Education of the Borough of Brielle*, EDU #8276-95 (State Board of Ed., April 4, 1996).
> (Board's Exceptions at 6-7)

Applying this law to the facts of this matter, the Board submits the following: On March 14, 2003 petitioner was shown a copy of her year-end evaluation which indicated that non-renewal was recommended. She received a *Rice* notice[2] advising her that on March 18, 2003 the Board would be discussing her employment and petitioner attended this meeting. On May 7, 2003, petitioner received the final copy of her year-end evaluation, signed by the Superintendent, which stated that her nonrenewal was recommended. Notwithstanding that the ALJ properly recognized, it avers, that petitioner received notice that the Superintendent recommended non-renewal of her contract, he "failed to recognize that as of May 7, 2003, by operation of law, [petitioner] knew that her contract would not be renewed since a non-tenured teacher who is **not recommended** for renewal by the Superintendent is **deemed non-renewed** pursuant to *N.J.S.A.* 18A:27-4.1(b)." (Board's Exceptions at 7) (emphasis in text) The Board further asserts, while the ALJ was correct in stating that, irrespective of the Superintendent's

[2] If a board of education intends to discuss the nonrenewal of specific employees for performance or other reasons, it must issue a *Rice* notice to those employees. This requirement, which derives its name from *Rice v. Union Co. Regional High School Board. Of Education*, 155 *N.J. Super.* 64 (App. Div. 1977), *cert. den.* 76 *N.J.* 238 (1978) is not to be confused with a *Donaldson* hearing, which a non-tenured teaching staff member may request in writing, pursuant to *N.J.S.A.* 18A:27-3.2, subsequent to requesting and receiving a written statement of reasons for his/her non-reemployment.

recommendation, the Board could still offer re-employment to an individual recommended for nonrenewal, if that individual can convince the Board that he or she deserves a contract, the facts of this matter belie such a result here as this petitioner neither requested a statement of reasons for her nonrenewal nor did she request a *Donaldson* hearing with the Board, prerequisites to a written Board response indicating acceptance or rejection of the Superintendent's recommendation. Thus, the Board argues, contrary to the conclusion of the ALJ, under the applicable statute, the Board is never required to take any "formal" action to accept or reject the Superintendent's recommendation of nonrenewal. In fact, it proffers, the only time the Board would be required to take any action whatsoever with respect to the nonrenewal of petitioner's employment is if petitioner, upon receipt of notice of the recommendation of her nonrenewal by the Superintendent, had requested a statement of reasons and a *Donaldson* hearing, whereupon the Board would have been required to notify her of its decision in writing. (Board's Exceptions at 7-8) The Board, therefore, urges reversal of the ALJ's decision.

Upon his full and independent review of the record, Initial Decision and the parties' exception arguments, finding the Board's exception discussion of the applicable law and legal principles applicable to the factual circumstances here to be correct, the Commissioner is compelled to reject the Initial Decision.

Initially, the Commissioner rejects the ALJ's discussion and analysis, on pages 6-12 of his decision, with respect to the method or sufficiency of petitioner's notice of nonrenewal, the Board's failure to take action to formally nonrenew her contract and the chief school administrator's underlying role in the nonrenewal process. The Commissioner concludes that the ALJ's misinterpretation of the applicable statutes may, to some extent, be attributable to his

reliance on case law supporting his analysis which predated the creation/amendment of these statutory provisions in 1995.

The Commissioner observes that on June 19, 1995 the Governor signed into law P.L 1995, c. 125 (*N.J.S.A.* 18A:27-4.1), a new provision intended to clarify the role of chief school administrators in employment decisions. This law, often referred to as the "Rotondo Bill," was enacted in response to a decision of the New Jersey Superior Court, Appellate Division, *Rotondo v. Carlstadt-East Rutherford Regional High School District*, 276 *N.J. Super.* 36 (App. Div. 1994), which had the effect of rendering uncertain the role of these individuals in such decisions. Section a. of this new provision addressed the **appointment, transfer or removal** of employees and specifies:

> A board of education shall appoint, transfer or remove[3] 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.

Section b. of this law deals specifically with the **renewal/nonrenewal** of non-tenured employees and specifies:

> 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

[3] It is noted that the term "removal," in the context of this provision, means dismissal by virtue of tenure charges for a tenured individual or termination of a non-tenured employee's contract during the course of its term. This term is wholly distinguishable from nonrenewal which is explicitly addressed in section b. of this provision.

> 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. **The chief school administrator shall notify the officer or employee of the nonrenewal**, pursuant, where applicable, to the provisions of section 1 P.L. 1971, c.436 (C.18A:27-10). (emphasis supplied)

Also on June 19, 1995, *N.J.S.A.* 18A:27-10 was amended to reflect the above new addition to the law. Prior to amendment, *N.J.S.A.* 18A:27-10 specified:

> 1. On or before May 15 in each year, **every board of education** in this State **shall give to each nontenured teaching staff member** continuously employed by it since the preceding September 30 either
>
> a. A written offer of a contract for employment for the next succeeding school year providing for at least the same terms and conditions of employment but with such increase in salary as may be required by law or policies of the board of education, or
>
> b. A written notice that such employment will not be offered.

Subsequent to amendment, this provision, in pertinent part, specifies:

> 1. On or before May 15 in each year, each nontenured 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 school 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 supplied)

Thus, the Commissioner concludes that, with the advent of *N.J.S.A.* 18A:27-4.1 in June 1995, the process for the **renewal** of a non-tenured employee's contract is: Prior to May 15, 1) the

superintendent must recommend to the board that the employee be renewed; 2) the board must vote by a recorded roll majority vote of its full membership to renew the employee (the board may reject the superintendent's recommendation and decline to renew the employee, as long as it does not act in an arbitrary or capricious manner); and 3) the board must notify the employee of reemployment pursuant to *N.J.S.A.* 18A:27-10. In contrast, the procedure for **nonrenewal** is: Prior to May 15, 1) the superintendent must inform the board of his decision not to renew the employee; 2) the superintendent must provide the board with reasons for his nonrenewal recommendation; and 3) the superintendent must notify the employee, in writing, of the nonrenewal decision. The employee is then deemed nonrenewed by operation of law, and no formal board action is required.

With the requirements of the applicable law clearly in mind, the Commissioner finds, under the circumstances existing here, a conclusion that petitioner's contract of employment was not timely and appropriately nonrenewed is untenable. Rather, he finds and concludes that the facts in this matter confirm that the procedures dictated by the above applicable statute for the nonrenewal of non-tenured teaching staff members were followed and that petitioner's employment with the Board was appropriately terminated, by operation of law, as of June 30, 2003. To the extent petitioner may be challenging the Superintendent's notice to her via a signed, written evaluation form as insufficient to satisfy *N.J.S.A.* 18A:27-10, the Commissioner disagrees. As recognized by the ALJ, "[t]he primary purpose of [*N.J.S.A.* 18A:27-10] is to provide teachers with timely notice when they are not going to be reemployed so that they may seek other employment." (citation omitted) Initial Decision at 6. Although *N.J.S.A.* 18A:27-10 does not address the type of written notice which would constitute

"adequate" notice, guidance in this regard may be gleaned from the Supreme Court in *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572 wherein the Court stated:

> [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. (citations omitted) at 587

Here, the notice received by petitioner from the Superintendent on May 7, 2003 was unambiguous and unconditional in light of the clear language of *N.J.S.A.* 18A:27-4.1(b). At this point in time, petitioner could have no question as to her employment status. Because she chose not to exercise her statutory right to request a statement of reasons for her nonrenewal and a subsequent informal meeting with the Board to attempt to persuade them to overturn the Superintendent's recommendation, the Commissioner finds and determines that petitioner received the full measure of the process due her.

Finally, given the Commissioner's determination on the underlying merits of this matter as outlined above, he finds it unnecessary to reach to the ALJ's discussion of the procedural question of untimeliness or the propriety of the Board's subsequent termination of petitioner pursuant to the 60-day termination provision of her employment contract.

Accordingly, the Initial Decision of the OAL is rejected. Summary decision is granted to the Board and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 12/01/04

Date of Mailing: 12/02/04

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

489-04

489-04

OAL DKT. NO. EDU 11518-03
AGENCY DKT. NO. 403-11/03

IN THE MATTER OF THE TENURE	:	
HEARING OF DEBORAH ROBINSON,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
ESSEX COUNTY.	:	

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 a thorough review of this matter, the Commissioner concurs that, in light of respondent's resignation from the District and her retirement on an ordinary disability pension, there is no basis upon which this matter can be ordered to proceed and it is, therefore, dismissed as moot. The Commissioner also agrees that petitioner has no obligation to notify the Board of Examiners of respondent's resignation and retirement. As set forth by the Administrative Law Judge, excessive absenteeism charges alone, without accusations of conduct unbecoming or wrongdoing, generally do not concern the State Board of Examiners. Moreover, the code provision which provides for the chief school administrator of a district to notify the State Board of Examiners whenever a teacher retires or resigns prior to adjudication of tenure proceedings, *N.J.A.C.* 6A:9-17.4,[1] applies only in cases involving allegations of criminal conduct or conduct unbecoming a teaching staff member.

[1] It is noted that *N.J.A.C.* 6:11-3.5, to which the ALJ refers, was repealed effective January 20, 2004 and re-codified at *N.J.A.C.* 6A:9-17.4.

Accordingly, the Initial Decision dismissing the within tenure charges as moot is adopted for the reasons set forth therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/1/04

Date of Mailing: 12/3/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11518-03
AGENCY DKT. NO. 403-11/03

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Petitioner,

v.

DEBORAH ROBINSON,

Respondent

Charlotte Kitler, General Counsel, for Petitioner
(Jersey City Board of Education)

Nancy I. Oxfeld, Esq., for Respondent
(Oxfeld Cohen, PC, attorneys)

Record Closed: September 13, 2004 Decided: October 27, 2004

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

This matter involves tenure charges filed against Deborah Robinson (Respondent), a tenured teaching staff member employed by the Board of Education of the Jersey City School District (Petitioner). The charges were certified by the State District Superintendent of the Jersey City School District and filed with the Commissioner of Education pursuant to *N.J.S.A.* 18A: 6-11. Petitioner charged Respondent with chronic and excessive absenteeism, which had adversely affected her ability to continuously teach, and affected

the students' ability to benefit from a continuous learning experience. Respondent's salary increment was withheld four times and ultimately she was terminated.

PROCEDURAL HISTORY

This matter was transferred to the Office of Administrative Law on December 8, 2003 as a contested case pursuant to *N.J.S.A.* 52:14F-1 to F-13. An In-Person Pre-Hearing occurred on January 7, 2004, a telephonic status conference was held on March 29, 2004, a *de novo* hearing commenced on May 18, 2004 at the Administrative Law Court, 33 Washington Street, Newark, New Jersey. At the completion of hearing, exhibits appearing in the Appendix were marked and the record remained open for the purpose of counsel ordering transcripts and preparing briefs. Thereafter, on September 13, 2004 and prior to the date an Administrative Decision was due, a letter was received at the Office of Administrative Law from General Counsel for the Jersey City Board of Education, which advised that Respondent had submitted her letter of resignation. Respondent's resignation letter and Petitioner's letter accepting the resignation have been included with the exhibits appearing in the Appendix. The parties contend that the tenure charges before the Administrative Law Court became moot upon the Court's receipt of documentation regarding Respondent's resignation.

ISSUES

The issues to be resolved in this matter regarding the Board and Superintendent of the State-Operated School District of Jersey City charges against a tenured teacher for alleged excessive absenteeism, resulting in a determination that withholding of salary increments and termination of employment is warranted, are:

(1) Whether the charges are supported by evidence, which establishes probable cause?

(2) Whether there are reasons for the alleged chronic and excessive absences, which could be considered good cause(s) or reasons for excused absences?

SUMMARY OF UNDISPUTED FACTS

The facts are undisputed regarding Respondent's chronic and excessive absenteeism. She has worked for the Jersey City School District since November 3, 1980. Respondent's attendance record commencing in 1995 and performance reports commencing in 1997 are undisputed. **(Exhibits P-1 thru P-27).**

Respondent alleges that an illness prevents her from maintaining a satisfactory attendance record. Her illness and the legitimacy of it are undisputed.

The arguments and case law regarding the validity of the grounds for dismissal of a tenured teacher for excessive absenteeism, even where excessive excused absences exist, has been established. In this case the impact of the inability for continuum of instruction was given every consideration and procedural guidelines required by the State Commissioner of Education and the local Board of Education were followed.

After the Administrative hearing on the instant matter, the Respondent resigned her teaching position. **(Exhibit R-1).** Petitioner thereafter accepted the letter of resignation. **(Exhibit P-28).** Both counsel contend that upon Petitioner's acceptance of Respondent's resignation letter, a decision on the merits of the tenure charges before the Administrative Law Court would be "moot".

LEGAL DISCUSSION AND CONCLUSIONS

Respondent, Deborah Robinson, resigned her teaching position with the State Operated School District of Jersey City, effective November 1, 2004, and has retired from teaching. Her letter of resignation indicates that she is retiring on an ordinary

disability pension. Both Petitioner and Respondent contend that the tenure charges brought to remove her from a tenured teaching position are therefore moot and should be dismissed.

An issue is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy since there remains no conflict between the parties. *In re Conroy*, 190 *N.J.* Super. 453, 458 (App. Div. 1983); *Barshatky v. Freehold Regional High School Board of Education,* 95 NJAR.2d (EDU) 71. The courts and the Commissioner of Education usually refuse to review questions, which become academic prior to the issuance of a decision, due to a reluctance to render a legal decision in the abstract and a desire to conserve Judicial and/or Administrative resources. In re *Conroy, supra., Carolyn Henry v. Board of Education of the City Wildwood,* 1975 S.L.D. 1. The relief sought by Petitioner in the tenure charges filed with the Commissioner requesting the removal of Respondent from her tenured teaching position, can no longer be granted. The Commissioner has on many occasions approved settlements in tenure cases involving only inefficiency charges as consistent with the public policies articulated in *Cardonick v. Board of Education of the Borough of Brooklawn,* EDU 7093-81, 7094-81 and 100-82. Further, the charges against Respondent do not present novel issues such that a decision on the merits would further clarify the body of law concerning excessive absenteeism and inability to perform duty charges. The tenure charges contain no allegations of wrongdoing or misconduct, which might nevertheless require determination by the Commissioner of Education for the imposition of a sanction or reprimand.

Any determination on the merits in this matter, however, would be totally irrelevant to the payment of salary and the accrual of additional pension credit, since no provision exists for repayment upon a determination adverse to the teacher. Likewise, *N.J.A.C.* 17:3-4.1(f), a regulation adopted by the Board of Trustees of the Teachers' Pension and Annuity Fund, provides:

> A member under 62 years of age will receive service credit for that base salary received during the period of his suspension in which he is awaiting a determination by the Commissioner of Education as provided under *N.J.S.A.* 18A: 6-14. (sic) Service credit will not be granted for such salary after the first of the month following his attainment of age 62 when that salary will no longer be covered by Social Security.

Regardless of any determination on the merits, Respondent is entitled to receive service credit in the Teachers' Pension and Annuity Fund for the monies paid pursuant to *N.J.S.A.* 18A: 6-14 up until her 62nd birthday, and not thereafter. A decision on the merits would have no impact on either salary payments or pension credit, and therefore neither of those factors provides any reason for determining a moot case.

Excessive absenteeism charges, standing alone without accusations of wrongdoing or conduct unbecoming are not generally something which concerns the State Board of Examiners. This is apparent from the provisions of *N.J.A.C.* 6:11-3.5, a regulation governing teacher certification which reads:

> In cases in which teaching staff members accused of misdemeanors, crimes or conduct unbecoming which might warrant revocation or suspension, resign or retire from their positions, either before tenure proceedings have been brought or prior to the conclusion of such proceedings, it shall be the responsibility of the chief school administrator of that district to notify the State Board of Examiners of the alleged conduct pursuant to *N.J.A.C.* 6:11-3.6(a)(2). Should the Board of Examiners issue an Order to Show Cause, it shall be the responsibility of the district, which reported the conduct to cooperate with the Board of Examiners in ascertaining and presenting the facts underlying such allegations.

Accordingly, in cases such as the present where the charges are inefficiency due to absenteeism, Petitioner has no obligation to notify the Board of Examiners of Respondent's resignation and retirement. Respondent is retiring on an ordinary disability pension and has retired from the teaching profession. Routinely the courts dismiss moot cases even after extensive litigation at the trial and appellate levels when

there is no compelling reason to issue a decision. See, e.g., *Oxfeld* v. *New Jersey State Board of Examiners of Education,* 68 *N.J.* 301 (1975), *Degnan v. Curcio*, 87 *N.J.* 372 (1981).

Exceptions to the "mootness doctrine" which may warrant the issuance of a decision on the merits do not exist in this matter. Accordingly, I **CONCLUDE** that the request of Respondent and Petitioner for dismissal of the charges is appropriate.

ORDER

Respondent's resignation validly terminated her employment with the Petitioner and rendered the tenure charges by Petitioner moot. Therefore it is **ORDERED** that Respondent's 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 (45) 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 (13) 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, 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 27, 2004
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10/27/04
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 28 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

Petitioner's Witnesses:
Rubano Flavio, Assistant Superintendent State
Operated School District of the City of Jersey City

Christine Myrlak, Principal Public School #34 Jersey City

Respondent's Witnesses:
NONE.

EXHIBITS

Petitioner:

P-1 Attendance Record 1995 -1996
P-2 Attendance Record 1996 -1997
P-3 Attendance Record 1997 -1998
P-4 Attendance Record 1998 -1999
P-5 Attendance Record 1999 - 2000
P-6 Attendance Record 2000 - 2001
P-7 Attendance Record 2001 - 2002
P-8 Attendance Record 2002 - 2003
P-9 Increment Withholding Letter 1999 - 2000
P-10 Increment Withholding Letter 2000 - 2001
P-11 Increment Withholding Letter 2002 - 2003
P-12 Increment Withholding Letter 2003 - 2004
P-13 Notice of Intention To Withhold Increment 1996-1997
P-14 Performance Report May 6, 1997
P-15 Performance Report June 1, 1998
P-16 Performance Report May 21, 1999
P-17 Warning Letter Calling-in Late September 17, 1999
P-18 Performance Report April 14, 2000
P-19 Performance Report May 15, 2001
P-20 Request for Leave Document March 8, 2002
P-21 Request For Status of Leave March 13, 2002
P-22 Request To Review Attendance Record April 8, 2002
P-23 Performance Report April 25, 2002
P-24 Performance Report June 3, 2002
P-25 Request To Review Attendance Record November 27, 2002
P-26 Warning Letter Calling-in Late May 12, 2003
P-27 Warning Letter Calling-in Late January 3, 2003
P-28 Petitioner's Letter Accepting Respondent's Retirement September 2, 2004

For Respondent:

R-1 Respondent's Letter of Resignation August 18, 2004

OAL DKT. NO. EDU 11799-03
AGENCY DKT. NO. 389-10/03

A.M., on behalf of minor children, Z.M. AND J.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge that petitioner, who did not appear for the hearing in this matter, has failed to carry his burden of proof that his two children were entitled to a free education in the Bayonne School District for the 2002-03 and 2003-04 school years. The Commissioner further agrees with the grant of the Board's counterclaim for tuition in the amount of $7,554.40 for the 2002-03 school year and $20,300.40 for the 2003-04 school year, for a total of $27,854.80 tuition for the days of Z.M.'s and J.M.'s ineligible attendance in school in the Bayonne School District.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/01/04

Date of Mailing: 12/02/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4 1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11799-03
AGENCY DKT. NO. 389-10/03

A.M., ON BEHALF OF MINOR CHILDREN, Z.M. & J.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

Respondent.

No appearance, for petitioner

Robert J. Merryman,, Esq., for respondent (Appruzzese, McDermott, Mastro & Murphy, attorneys)

Record closed: October 15, 2004 Decided: October 26, 2004

BEFORE **ROBERT J. GIORDANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, A.M., appealed the determination by respondent, Board of Education of the City of Bayonne (Board/District), that his minor children Z.M. and J.M. were not entitled to a free public education in the District. Petitioner filed a petition of appeal with the Commissioner of Education on October 29, 2003, claiming that the minor children were entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1. Respondent

filed an answer, affirmative defenses and counterclaim for tuition with the Commissioner of Education on November 19, 2003.

On December 26, 2003, the Department of Education transmitted the matter to the Office of Administrative Law for a hearing as a contested case. The matter was assigned to the undersigned on January 20, 2004, and a hearing was scheduled for February 27, 2004. After several adjournments[1], the matter was rescheduled for hearing on June 11, 2004. At the hearing, the parties entered into a tentative settlement. The terms of the tentative settlement were placed on the record, and the parties were directed to submit a written agreement signed by the parties.

Counsel for the respondent advised the undersigned by telephone on July 16, 2004, that the petitioner had not returned the signed agreement prepared by counsel. As such, the parties were advised by letter dated July 20, 2004, that the matter would be relisted for hearing on October 14, 2004. In the event the parties had not submitted the signed agreement to the undersigned by that date, the matter would be heard. On October 14, 2004, the counsel for the respondent appeared. There was no appearance or explanation for nonappearance by the petitioner. The respondent moved for a dismissal of the petitioner's appeal, and a default on the counterclaim of the respondent. The undersigned permitted the submission of ex parte proofs as to the tuition due.

As there was no appearance by the petitioner and no contact from the petitioner within 24 hours of the hearing, the record closed on October 15, 2004.

STATEMENT OF THE ISSUE

Whether the respondent is entitled to tuition reimbursement for the attendance of the two minor children, Z.M. and J.M.

[1] The matter was scheduled for hearing on March 26, 2004. The request by petitioner for an adjournment was denied. Nonetheless, he failed to appear. The matter was rescheduled for hearing on May 12, 2004. Again the petitioner failed to appear. A telephone call to the petitioner confirmed to him that the matter would be again adjourned. The matter was rescheduled for a peremptory hearing date of June 11, 2004.

FACTUAL DISCUSSION

On the scheduled hearing date, the petitioner failed to appear or otherwise contact the undersigned as to the reason for his failure to appear. As such, the application by the respondent, to offer evidence ex parte was granted. The respondent proffered evidence regarding the attendance of the two minor children, Z.M. and J.M., in the Bayonne School, District, as well as the cost of tuition per pupil for each of the school years in question. *N.J.A.C.* 1:1-14.4(c).

William Bodayle, the supervisor of the attendance department, testified on behalf of the respondent. He testified that Z.M. was enrolled in the Bayonne School District on November 1, 2002 (R-1). Z.M. attended Bayonne High School from November 2002 through June 2003 for a total of 140 school days. Bodayle testified that the per diem cost per pupil for the 2002-2003 school year was $53.96.

Bodayle testified that J.M. was enrolled in the District on August 27, 2003. (R-2). Both Z.M. and J.M. attended Bayonne High School from September 2003 to June 2004 for a total of 180 school days. He testified that the per diem cost per pupil for the 2003-2004 school year was $56.39.

Petitioner, the father of the two minor children, resided in Jersey City during the period of enrollment of the children in the Bayonne School District. The petitioner, who was divorced from the mother of the minor children, had residential custody. Bodayle testified that no tuition has been paid for either of the two minor children for the period of enrollment in the Bayonne School District.

FINDINGS OF FACT

Based on the undisputed testimonial and documentary evidence, I make the following **FINDINGS** of **FACT**:

1. At all relevant times, the petitioner, A.M. was a resident of Jersey City, New Jersey. He is the father of and residential custodian of his two minor children, Z.M. and J.M.

2. Z.M. attended Bayonne High School for 140 days during the 2002-2003 school year.

3. The per diem cost of education in the Bayonne School District for the 2002-2003 school year was $53.96.

4. The cost of tuition for Z.M. for the 2002-2003 school year is $7,554.40.

5. Z.M. attended Bayonne High School for 180 days during the 2003-2004 school year.

6. The per diem cost of education in the Bayonne School District for the 2003-2004 school year was $56.39.

7. The cost of tuition for Z.M. for the 2003-2004 school year is $10,150.20.

8. J.M. attended Bayonne High School for 180 days during the 2003-2004 school year.

9. The cost of tuition for J.M. for the 2003-2004 school year is $10,150.20.

LEGAL DISCUSSION

The Administrative Procedure Rules provide general guidance for the conduct of a hearing. Specifically, in the event of a failure by a party to appear for the hearing, the appearing party may request an initial decision on the merits and request permission to present ex parte proofs. In appropriate cases, the judge may enter an initial decision on the merits based on the ex parte proofs. *N.J.A.C.* 1:1-14.4(c). *New Jersey Real Estate Commission v. Grennor*, 92 *N.J.A.R. 2d* (REC) 29.

The State of New Jersey provides that "public schools shall be free to ... any child who is domiciled within the school district." *N.J.S.A.* 18A:38-1(a). The domicile of a minor child generally follows that of his parents. *See V.R. on behalf of A.R. v. Bd. of Ed. of Hamburg*, 2 *N.J.A.R.* 283, 286. There are circumstances under which the child is not residing with the parent, and may be in the home of another who is domiciled in the school district. Under the appropriate circumstances, the resident, parent or guardian will not be charged tuition. If the situation does not comport with the requirements of *N.J.S.A.* 18A:38-1, the resident, parent or guardian may be assessed tuition for the period of ineligible attendance in the school district. In such case, the district may collect tuition from the resident, parent or guardian. The statute states in pertinent part:

> If in the judgment of the commissioner the evidence does not support the claim of the [resident, parent or guardian] he shall assess the [resident, parent or guardian] 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. Nothing shall preclude a board from collecting tuition from the resident, parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner;
> [*N.J.S.A.* 18A:38-1(b) (2)]

CONCLUSIONS

In the instant matter, the initial determination was whether to admit ex parte proofs regarding the tuition due and owing. Considering the protracted nature of the matter, and the numerous adjournments in the case, the undersigned determined that there was good cause for the offer of ex parte proofs. The petitioner had been granted several adjournments to address circumstances whereby he would be able to offer evidence of a change in the guardianship of the two minor children. He failed to appear on several occasions, resulting in the rescheduling of the matter. When he did appear on June 11, 2004, the matter was tentatively settled between the parties. Not having received the signed settlement agreement from the parties, the undersigned rescheduled the matter for hearing, advising both parties of the new date by letter dated July 20, 2004. The petitioner failed to appear at that time. Based on the

circumstances and history of the matter, I **CONCLUDE** that the offer of ex parte proofs was appropriate.

The undisputed evidence establishes that the petitioner was at all relevant times a resident of Jersey City. As such, and with no evidence to the contrary, I **CONCLUDE** that his two minor children, Z.M. and J.M., both were properly domiciled in Jersey City. Z.M. was ineligible for attendance free of charge at the Bayonne School District for the school years 2002-2003 and 2003-2004. J.M. was ineligible for attendance free of charge in the Bayonne School District for the school year 2003-2004.

I therefore **CONCLUDE** form the evidence adduced regarding tuition costs, that the tuition due and owing from the petitioner to the Bayonne School District is $7,554.40 for the 2002-2003 school year, and $20,300.40 for the 2003-2004 school year, for a total tuition charge of $27,854.80.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the appeal of the petitioner is and shall be **DISMISSED**. It is further **ORDERED** that the petitioner is and shall be directed to pay tuition in the total amount of $27,854.80 for the ineligible attendance of his two minor children in the respondent 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 (45) 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 (13) 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, 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.

10/26/04
DATE

Robert J. Giordano
ROBERT J. GIORDANO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10/26/04
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 27 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

cr

APPENDIX

WITNESS

For Respondent:

William Bodayle

EXHIBITS

For Respondent:

R-1 Bayonne School District Registration Form dated November 1. 2002

R-2 Bayonne School District Registration Form dated August 27, 2003

490-04

#490-04SEC

AGENCY DKT. NO. 379-10/04

IN THE MATTER OF RALPH BURKE, III	:	
WOODBINE SCHOOL DISTRICT,	:	COMMISSIONER OF EDUCATION
CAPE MAY COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty against the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25 and/or an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2004 for school officials in office since January 30, 2004, or 30 days from swearing-in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on August 20, 2004, indicating that if the completed statement was not filed by September 10, 2004, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 17, 2004 directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statements; and

Whereas, the above-named school official filed the completed disclosure statement thereafter; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official provided the Commission with an Answer to the Order wherein he stated that he had recently overcome several critical personal and family crises; and

Whereas, the Commission voted on October 26, 2004 to recommend reprimand of the above-named school official in light of his failure to respond to the Commission's reminder letter before the September 10, 2004 deadline, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated October 28, 2004 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending reprimand; and

Whereas, no comments were received from the above-named school official; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission, and further admonishes the school official for his failure to timely file the requisite statement, in that such delay has caused administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named Board member be reprimanded as a school official found to have violated the School Ethics Act.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/01/04

Date of Mailing: 12/03/04

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

491-04

AGENCY DKT. NO. 385-10/04

IN THE MATTER OF ROBERT S. BANKS,	:	
PAULSBORO BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
GLOUCESTER COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty against the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25, and/or an annual financial disclosure statement, as required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2004 for school officials in office since January 30, 2004, or 30 days from swearing-in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on August 20, 2004, indicating that if the completed statement was not filed by September 10, 2004, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 17, 2004 directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official filed the completed disclosure statement thereafter; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official submitted a letter wherein he stated that the Commission's reminder letter, dated August 20, 2004, was sent to the Paulsboro High School, that he did not receive it until September 13, 2004, and that he filed the disclosure statements the next day; and

Whereas, the Commission voted on October 26, 2004 to recommend a reprimand of the above-named school official in light of his failure to respond to the Commission's letter before the September 10, 2004 deadline, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated October 28, 2004 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending reprimand; and

Whereas, no response was received from the above-named school official; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission, and further admonishes the school official for his

failure to timely file the requisite statement, in that such delay has caused administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named Board member be reprimanded as a school official found to have violated the School Ethics Act.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/01/04

Date of Mailing: 12/03/04

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

492-04

492-04SEC

AGENCY DKT. NO. 382-10/04

IN THE MATTER OF HADREN W. SIMMONS, :
EAST ORANGE COMMUNITY CHARTER :
SCHOOL BOARD OF TRUSTEES, :
ESSEX COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty against the above-named school official for failure to file a personal/relative disclosure statement, pursuant to *N.J.S.A.* 18A:12-25, and/or an annual financial disclosure statement, as required by *N.J.S.A.* 18A:12-26;

Whereas, the deadline to file these disclosure statements was April 30, 2004 for school officials in office since January 30, 2004, or 30 days from swearing-in or start of service for newly elected or appointed board members and administrators; and

Whereas, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office, as required by the Act; and

Whereas, the Commission sent a reminder letter to the above-named school official on August 20, 2004, indicating that if the completed statement was not filed by September 10, 2004, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.5(j), the Commission issued an Order on September 17, 2004 directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the necessary statement(s); and

Whereas, the above-named school official filed the completed disclosure statement thereafter, and responded to the Commission's Order with a letter explaining that he had inadvertently overlooked his obligation due to unusually heavy demands in family, business and board membership matters; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the above-referenced school official provided reasons why he failed to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 26, 2004 to recommend reprimand of the above-named school official in light of his failure to respond to the Commission's reminder letter before the September 10, 2004 deadline, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated October 28, 2004 from the School Ethics Commission, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending reprimand; and

Whereas, no response was received from the above-named school official; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission, and further admonishes the school official for his

failure to timely file the requisite statement, in that such delay has caused administrative and adjudicative time to be wasted by local, county and state education officials; now therefore

IT IS ORDERED that the above-named Board member be reprimanded as a school official found to have violated the School Ethics Act.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/01/04

Date of Mailing: 12/03/04

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

493-04

OAL DKT. NO. EDU 9577-03
AGENCY DKT. NO. 276-8/03

P.P. AND A.P., on behalf of minor children, A.P., D.P. AND R.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/01/04

Date of Mailing: 12/06/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9577-03

AGENCY DKT. NO.: 276-8/03

P.P. AND A.P. o/b/o MINOR CHILDREN, A.P., D.P. and R.P.

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

Nelson C Monteiro, Esq., for petitioner
(Law Offices of Nelson C. Monteiro, attorneys)

Kirk C. Nelson, Jr., Esq., for respondent
(Law Offices of Kick C. Nelson, Jr., attorneys)

Record Closed: October 13, 2004 Decided: October 29, 2004

BEFORE **MUMTAZ BARI BROWN**, ALJ:

On October 10, 2003 this 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 and heard on October 13, 2004. During the hearing, the parties agreed to settle the matter. A Stipulation of Settlement indicating the terms of settlement was signed by the parties and a copy is attached hereto.

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 (45) 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 29, 2004
DATE

MUMTAZ BARI BROWN, ALJ

Receipt Acknowledged:

11-5-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 12 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cdr

Board of Education
Elizabeth, New Jersey

Excerpt from the minutes of the meeting of October 14, 2004

Kirk Nelson, Esq., reported residency case of student residing in Hillside and attending school in Elizabeth. Mr. Nelson requested authorization to accept recommendation of the Court to settle with the family to reimburse the Elizabeth School District $3,000.00 and close the case.

A motion was made by Mr. Fajardo, seconded by Mr. Cedeno, to accept the recommendation of the Court.

The motion was carried by the following vote:

Affirmative: Messrs. Cedeno, Fajardo, Miss Hawkins, Dr. Proctor, Mr. Whelan, Pastor Burgos – 6

Abstention: Mr. Da Silva – 1

Negative: None

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD October 14, 2004

Linda G. King
Secretary-School Business Administrator

PAUL PEDRUSO AND
AUREA PEDRUSO
PETITIONERS

v.

ELIZABETH BOARD OF EDUCATION ("EBOE")
RESPONDENTS

OAL DKT NO. EDU 09577-2003N

SETTLEMENT AGREEMENT

WHEREAS, THE ABOVE PARTIES HAVE REACHED AN AGREEMENT WITH REGARD TO THE MATTER AT BAR, IT IS HEREBY AGREED AS FOLLOWS:

1. THE PETITIONERS SHALL PAY TO THE EBOE THE AMOUNT OF $3,000.00. SAID AMOUNT SHALL BE PAID MONTHLY IN THE AMOUNT OF $250., COMMENCING NOVEMBER, 2004 AND THEREAFTER ON THE FIRST OF EACH MONTH.

2. SHOULD THE PETITIONERS NOT PAY SAID AMOUNT BY THE 10TH OF ANY MONTH THEY SHALL BE DECLARED IN DEFAULT. SHOULD THE DECLARED PETITIONERS BE IN DEFAULT THEN THEY SHALL BE PUT ON NOTICE, AS WELL AS THEIR ATTORNEY, NELSON C. MONTEIRO, ESQ. SHOULD THE DEFAULT NOT BE CURED WITHIN 10 DAYS A JUDGMENT SHALL ENTER AGAINST THE PETITIONERS IN THE AMOUNT OF $10,000.00.

3. PETITIONERS REPRESENT THAT THEY ARE IN THE PROCESS OF OBTAINING A DIVORCE (FILED IN THE UNION COUTY SUPERIOR CT DKT FM-20-0076-0 AND THAT THEY HAVE REACHED AN AGREEMENT WHICH HAS BEEN REDUCED TO A WRITING. THE AGREEMENT STATES IN PART THAT

PAUL
~~AUREA~~ PEDROSO will convey his interest in the property located at 1404 Lower Rd in Elizabeth to his wife, Aurea Pedroso.

It is Aurea Pedroso's intention ~~to~~ thereafter to reside ~~at said~~ with her children at said residence with the children being domiciled in Elizabeth and continuing their public school education in Eliz.

4. Within one year of this date the petitioners shall supply to the EBOE documentary proof, including but not limited to a deed, which evidences said conveyance + Final Judgment of Divorce

5. This agreement shall be subject to final approval by the EBOE.

x Paul Pedroso

PAUL PEDROSO, PETITIONER

Anna Pedroso

ANNA PEDROSO, PETITIONER

DATED: 10/13/04

NELSON C. MONTEIRO
ATTORNEY FOR PETITIONER

KIRK C. NELSON, III
ATTORNEY FOR ELIZABETH
BOARD OF EDUCATION

495-04

OAL DKT. NO. EDU 2447-04
AGENCY DKT. NO. 118-3/04

B.B., on behalf of minor child, B.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BORDENTOWN REGIONAL SCHOOL DISTRICT,[1] BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Exceptions were submitted by the Board in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

In its exceptions, the Board contends that, although the Administrative Law Judge (ALJ) correctly relied on *Kopera, supra*, in citing the legal standard to be applied in reviewing the actions of a local school board, he erred in applying that standard. (Board's Exceptions at 1) The Board avers that the ALJ's conclusion, that the penalty imposed by the Board was inappropriate, and thus, arbitrary, capricious and unreasonable because there was a lack of evidence that B.B. prevented other students from learning or presented a danger to the safety of students and staff, is not supported by case law or the evidence presented at hearing. (*Id.* at 2) In support of its contention, the Board submits that, as stated in the Student Handbook, the three-day, in-school suspension imposed on B.B. has punitive, remedial and counseling components

[1] The Bordentown Regional School District is incorrectly identified in the Initial Decision case caption as the "Burlington" Regional School District.

and allows students to both maintain their academic progress and to modify unacceptable behavior. (*Ibid.*)

The Board reasons that it is hard to imagine how the ALJ concluded that the imposition of a three-day, in-school suspension was arbitrary and capricious given his finding that B.B.: 1) was grossly disrespectful toward a member of the teaching staff; 2) violated the school's discipline plan with conduct constituting willful disobedience and open defiance of a teacher; and 3) violated the Student Code of Conduct which prohibits obscene, vulgar and profane expressions. (*Ibid.*) The Board, therefore, concludes that the ALJ exceeded his authority when he impermissibly substituted his judgment for that of the Board, and it urges that the ALJ's determination rescinding B.B.'s three-day, in-school suspension should be reversed. (*Ibid.*)

Upon careful and independent review of the record in this matter, and mindful that the ALJ's credibility determinations are entitled to the Commissioner's deference, *N.J.S.A.* 52:14B-10(c), the Commissioner concurs with the ALJ's finding that B.B. used profane language and was disrespectful to Mr. Misselhorn, and that B.B. disobeyed Ms. Misselhorn's demand to B.B. to get away from C.D. Moreover, the Commissioner concurs with the ALJ's conclusion that B.B. demonstrated willful disobedience and open defiance of the authority of a teacher in violation of the school's discipline plan, and that she also violated the Student Code of Conduct, which prohibits vulgar and profane expressions of any kind.

The Commissioner does not agree, however, with the ALJ's conclusion that the Board acted in an arbitrary, capricious or unreasonable manner in regard to establishing the penalty for B.B.'s infractions or that the penalty assessed by the Board, three days of in-school suspension (Exhibit R-7), should be modified because "respondent's action was not based upon a finding that B.B. prevented other students from learning or that B.B. represented a danger to the safety of the students and the staff of Bordentown Regional High School – the ground the

respondent established in its Student/Parent Handbook for imposing a suspension." (Initial Decision at 7) As fully explicated in the Initial Decision, it is well established that when a board acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be upset useless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable.

As set forth by the ALJ, the section of the Student/Parent Handbook entitled "Suspension" states that "[a] student excluded from the classroom has demonstrated that he/she has prevented other students from learning or represents a danger to the safety of the other students and to the staff of Bordentown Regional High School." (Exhibit R-2, at 19) The Commissioner observes that section entitled "In-School Suspension" additionally states, however, that "[i]n-school suspension will allow students who have demonstrated behavior that disrupts the educational process of others, yet does not warrant removal from school, to have that behavior modified" (*ibid.*) and lists "[r]efusing to follow the directive of an administrator" and "[i]ntention to violate the rights and dignity of another student or staff member (for example, racial slurs)" as examples of infractions where in-school suspension may be imposed. (*Id.* at 19-20)

Given the Board's responsibility to maintain control and to ensure an atmosphere conducive to learning for all its students, the Commissioner cannot conclude that B.B.'s physical reaction to C.D.[2] and her willful disobedience, open defiance of authority, and use of inappropriate, hostile language towards a teacher were not disruptive of the educational process of others, notwithstanding that the incident herein occurred in the cafeteria. Instead, the Commissioner finds the Board's decision to impose a three-day, in-school suspension on B.B. is consistent with its obligation to create a learning environment where students and staff are not

[2] The Commissioner notes that B.B. claims she reacted towards C.D. as she did because he stole her purse and used some of her money, a situation which should have been taken to the supervising school official, rather than handling the situation in the manner she did.

physically accosted or subjected to profanity. Moreover, the Commissioner finds that the penalty imposed by the Board is in accordance with the grounds established in its Student/Parent Handbook for the imposition of such suspension.

Additionally, the Commissioner points out that B.B. has seven prior disciplines on her disciplinary record, five of which were for inappropriate behavior. B.B. was disciplined once for "being disruptive," once for calling another student "bitch," twice for being disrespectful on the school bus and once for throwing trash in the cafeteria. As set forth in the District's Parent/Student Handbook, in-school suspension has punitive, remedial and counseling components and is designed to allow suspended students to maintain their academic progress while modifying unacceptable behavior. Given the unacceptable behavior exhibited by B.B. in this incident, as well as B.B.'s prior record of discipline for unacceptable behavior, the Commissioner concludes that the Board did not act in an arbitrary, capricious or unreasonable manner in imposing the penalty of a three-day, in-school suspension on B.B. in an effort both to punish her for her unacceptable behavior in this incident and to address her pattern of unacceptable behavior.

Accordingly, for the reasons expressed herein, the Commissioner concludes that the Board did not act in an arbitrary, capricious or unreasonable manner in imposing a three-day, in-school suspension on B.B. The Board's action will, therefore, not be disturbed. The within petition is hereby dismissed.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/6/04

Date of Mailing: 12/6/04

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2447-04

AGENCY DKT. NO. 118-3/04

B.B. on behalf of B.B.,

Petitioner,

v.

BURLINGTON REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent.

B.B., petitioner, *pro se*

Frank P. Cavallo, Jr., Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: July 13, 2004 Decided: October 22, 2004

BEFORE **ANTHONY T. BRUNO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals the 3 day suspension from classes imposed against her daughter, B.B., for alleged willful disobedience, use of profanity, disrespect to teacher, insubordination,

harassment, and inappropriate behavior on March 3, 2004 (ExhibitR-1). B.B. denies the factual basis of the charges.

On April 4, 2004 petitioner's application for emergent relief enjoining the enforcement of disciplinary action pending appeal 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.* 52:14F-1 to -13. The hearing of oral argument on petitioner's request was scheduled for May 12, 2004. Because petitioner filed no certification or affidavits in support of her motion and the respondent [BOE] represented that there would be no suspension until a final decision was entered, the request for emergent relief was denied, the matter converted into a plenary hearing, and the hearing scheduled for July 13, 2004.

The matter was heard on July 13 at Mercerville, New Jersey. Witnesses who testified and exhibits admitted into evidence are listed in the Appendix. The hearing record closed on July 13, 2004

FACTUAL CONSIDERATIONS

This matter arises from events which occurred at the Bordentown Regional High School Cafeteria on March 3, 2004 during the lunch period of the junior class. David Misselhorn, a teacher of health, physical education and driver training at the high school, was on lunchroom duty monitoring cafeteria activity in general, and especially, student behavior on the cafeteria line. Misselhorn testified that he observed C.D., a male student, getting change from the lunchroom aide at a cash register. B.B. was behind C.D. and had her arms and hands around C.D.'s back and was addressing C.D. in a "loud and boisterous" manner. B.B. was "flailing" her arms and hands, reaching around C.D.'s body, "almost hugging" C.D. Misselhorn testified that he considered B.B.'s body-to-body contact with C.D. to be "inappropriate touching." B.B. was trying to grab the money C.D. held in his hand. Misselhorn did not see a handbag or wallet in the vicinity of C.D. and B.B. Misselhorn told B.B. 3 times to stop. Misselhorn testified that B.B. next put her hand up, stopped grabbing at C.D., and told Misselhorn, "get the fuck out of my face." B.B. walked away protesting in a "loud and boisterous" manner, obviously "very angry."

B.B. testified that C.D. had purchased a soft drink at a vending machine, brought the drink to the table where B.B. was seated, then C.D. left to get his lunch. When C.D. returned to the table he noticed that someone had drank some of his drink. C.D. took B.B.'s purse, took the wallet from the purse leaving the purse on a railing, and told a $5 bill from B.B.'s wallet. B.B. put her hands around C.D. to get the $5 bill back. Misselhorn told B.B. to stop and B.B. stopped. When C.D. did not return B.B.'s purse and money, B.B. again put her arms around C.D. C.D.'s girlfriend, D.M., then approached C.D. and B.B., and B.B. told D.M., "get out of my face."

B.B.'s sister (also B.B.) was in the cafeteria when the incident in question occurred. B.B. testified that C.D. saw D.M. sip at C.D.'s drink. C.D. then demanded B.B. buy a new drink. B.B. watched C.D. and her sister as they entered the food line. C.D. held B.B.'s purse, removed a wallet from the purse, and money from the wallet. Misselhorn was behind C.D. and B.B. in line.

ANALYSIS AND CONCLUSION

The Student Behavior Referral form completed by Misselhorn (Exhibit R-1) lists six reasons for referring B.B. for discipline. Two of the reasons relate to B.B.'s interaction with C.D. The remaining four reasons arise from Misselhorn's attempts to separate B.B. from C.D. Based upon the hearing record I **CONCLUDE** that the charges of "harassment" and "inappropriate behavior" must be dismissed.

Respondent did not contradict B.B.'s testimony that C.D. took B.B.'s purse, removed B.B.'s wallet from the purse, and extracted money from the purse. Respondent totally ignored not only C.D.'s explanations of the incident, but also the charge of B.B. that C.D. pilfered money and other personal property from B.B. Respondent does not address whether it disciplined C.D. for "taking, or attempting to take, personal property from another pupil by force or fear," a violation of item six of the School Discipline Plan set out on page 18 of the school's Student/Parent Handbook (Exhibit R-2). Respondent's refusal to consider C.D.'s conduct not only deprives B.B. of reliance upon mitigating factors for her initial conduct, it also makes a farce of the "Philosophy" of respondent for effective discipline. In the Pupil Discipline Handbook states, "effective discipline is synonymous with effective instruction" and

"maintaining good discipline is a necessary precondition to establishing a school or classroom climate that is conducive to learning" I question what B.B. and her lunchroom friends learned from Misselhorn's selectively enforcing the School Discipline Plan.

By ignoring C.D.'s larceny Misselhorn became oblivious to the reason for B.B.'s intuitive reaction to C.D.'s conduct. Had another teacher taken Misselhorn's wallet and was removing currency from the wallet, I am very confident that Misselhorn would have reacted at least as physically as B.B. did as she reacted to C.D. I am also very confident that Misselhorn also would have resented the characterization of his recovery efforts as sexual in nature. I Conclude that Misselhorn's determination that B.B.'s reaction was harassment – defined in the Student/Parent Handbook as "inappropriate behavior of a sexual nature . . . " – was arbitrary, unreasonable and capricious, an opinion not justified by his testimony.

My conclusions relative to B.B.'s reaction to Misselhorn are quite different. I Conclude that B.B. disobeyed Misselhorn's command to leave C.D. alone and was disrespectful to Misselhorn when B.B. profanely told Misselhorn to "get the fuck out of her face." Misselhorn's testimony concerning the incident giving rise to the charges in this matter is disputed as untrue by the testimony of B.B. Therefore, it is my obligation and responsibility to weigh the credibility of the witnesses in order to make a factual findings. Credibility is the value that a fact finder gives to the testimony of a witness. The word contemplates an overall assessment of a witness's story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. *Carbo v. United States,* 314 *F. 2d* 718 (9th Cir. 1963). The term has been defined as testimony which must proceed from the mouth of the credible witness and must be such as our common experience, knowledge, and common observation can accept as probable under the circumstances. *State v. Taylor*, 38 *N.J. Super. 6, 24 (App. Div. 1955); See, also, Gilson v. Gilson*, 116 *N.J. Eq.* 556, 560 (E. & A. 1934). A fact finder is expected to base decisions of credibility on his or her common sense, which is also referred to as intuition or experience. *Barnes v. United States*, 412 *U.S.* 837 (1973). 37 *L.Ed 2d* 380. I find that Misselhorn's account of his confrontation with B.B. "hangs together" more readily that the testimony of B.B. B.B.'s sister was, in her words, "2 or 3 tables away from Misselhorn and B.B. and did not hear the conversation of B.B. and Misselhorn.

Having concluded that B.B. was profane and disrespectful to Misselhorn and disobeyed Misselhorn's demand to get away from C.D., I **CONCLUDE** that B.B. violated the school's discipline plan with conduct constituting "Continued and willful disobedience" and "open defiance of the authority of any teacher . . .". I further **CONCLUDE** that B.B. violated the Student Code of Conduct which prohibits "obscene vulgar, and profane expressions of any kind. . .".

B.B.'s disciplinary record (Exhibit R-3) discloses seven prior disciplines. As a freshman B.B. was twice reported for attendance violations and once for being "disruptive." In her sophomore year B.B. had a dress code violation and a citation for calling another student a "bitch." The two disciplines in B.B.'s junior year included "horse play" and disrespectful behavior on the school bus, and, one month before the March 3 incident, a trash throwing incident in the cafeteria. B.B. was "warned" after both junior year disciplines and advised after the cafeteria episode that the "next incident will result in C.D." (presumably "central detention").

Referring again to Bordentown Regional High School Student/Parent Handbook (Exhibit R-2), "Suspension," "exclusion from the classroom", is a serious consequence (page 19). The Handbook further states, "A student excluded from the classroom has demonstrated that he/she has prevented other students from learning or represents a danger to the safety of the other students and staff of Bordentown Regional High School."

In assessing the propriety of a suspension, the scope of review of the Commissioner of Education is circumscribed. As noted by Administrative Law Judge Metzger in *M.G. v. Monmouth Regional High School Board of Education*, 91 *N.J.A.R.* 2d (EDU) 38, 40, *aff'd in part, rev'd in part*, State Bd. of Educ., 92 *N.J.A.R.* 2d (EDU) 364: "[The Board's] decisions in this matter carry a presumption of validity and [it is the] petitioners who must show that the actions taken were arbitrary and unreasonable, if they are to be disturbed." In adopting the administrative law judge's decision, the Commissioner of Education likewise noted the limited scope of review:

> . . . it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of

> their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards.
>
> [91 *N.J.A.R.2d* (EDU) at 42, quoting *Boult v. Bd. Of Educ., City of Passaic*, 1939-49, *S.L.D.* 7, 13 (1946) *aff'd,* State Board of Education (Sept. 13, 1946), *aff'd* 135 *N.J.L.* 329 (Sup. Ct. 1947), *aff'd*, 136 *N.J.L.* 521 (E. & A. 1948).]

There are many judicial decisions expressing the same concepts, such as *Quinlan v. Board of Education of North Bergen Township*, 73 *N.J. Super.* 40, 46-47 (App. Div. 1962); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 294 (App. Div. 1960); *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd*, 46 *N.J.* 581 (1966); and *Boyle v. Ritti*, 175 *N.J. Super.* 158, 166 (App. Div. 1980). In *Boyle*, the court declared:

> It is well established that a presumption of reasonableness attaches to the action of an administrative agency and the party who challenges the validity of that action has the burden of showing that it was arbitrary, unreasonable or capricious. . . . Also, where the administrative record discloses a reasonable basis for findings and accordant administrative action, [the reviewing court's] duty is ordinarily to uphold such action.
>
> [175 *N.J. Super.* At 166 (citations omitted).]

Based upon the foregoing, it is clear that in a matter such as this, the burden of proof is on the petitioners, and the legal standard to be applied is that an action of a local school board that lies within the area of its discretionary powers may not be upset, unless patently arbitrary, without rational basis, or induced by improper motives, *Kopera, supra*, 60 *N.J. Super.* at 294. Mere disagreement, if any, with the Board is insufficient legal grounds for substituting one's own judgment for that of the Board. The Board must first be found to have arbitrary, capricious or unreasonable for reversal or modification to occur. *Se K.L. v. Bd. Of Educ. Of Matawan/Aberdeen High Sch. Dist.*, 91 *N.J.A.R.* 2d (EDU)74. The rationale for this deference to local boards of education appears to be twofold: (1) the ability of the local board of education as the fact-finder in the first instance to see and hear the witnesses and to determine credibility, and

(2) the expertise of the local board with respect to its knowledge of local conditions and circumstances.

Respondent's notification to B.B.'s parents that B.B. was to be suspended (Exhibit R-4) states, "This action [the suspension] was necessitated by the fact that B. was grossly disrespectful towards a member of our teaching staff by directing profanity at that faculty member." I agree with that finding of fact, however, I cannot agree with the penalty imposed. The respondent's action was not based upon a finding that B.B. prevented other students from learning or that B.B. represented a danger to the safety of the students and the staff of Bordentown Regional High School – the grounds the respondent established in its Student/Parent Handbook for imposing a suspension. For this reason I **CONCLUDE** that the action taken by the respondent was arbitrary, capricious and unreasonable and must be modified in accordance with respondent's policies set forth in its Student/Parent Handbook; namely, central detention.

ORDER

Accordingly it is **ORDERED** that the three day suspension imposed upon B.B. for gross disrespect toward a faulty member is Rescinded. It is further **ORDERED** that B.B. shall be subject to the discipline provided in respondent's Student/Parent Handbook for gross disrespect and profanity directed at a faculty member.

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 (45) 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 (13) 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, 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 22, 2004
DATE

Anthony T. Bruno
ANTHONY T. BRUNO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10/22/04
DATE

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 27 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

/cad

APPENDIX

WITNESSES

For the petitioner:

B.B. (student)

B.B. (sister)

For the Respondent:

David C. Misselhorn

Robert S. Walden

Frederick S. D'Antoni

EXHIBITS

For the Petitioner:

P-1 Handwritten statement of D.M.

P-2 Handwritten statement of S.R.

P-3 Handwritten statement of Beth Boccanfusco

P-4 Group statement with 24 signatures

P-5 Handwritten of D.M.

P-6 Handwritten statement of A.G.

P-7 Handwritten statement of Heather Coup

P-8 Handwritten statement of C.D.

P-9 Handwritten statement of S.G.

P-10 Handwritten statement of B.W.

For the Respondent:

R-1 Discipline referral

R-2 Pupil Discipline Handbook

R-3 Discipline referrals printouts (7)

R-4 Letter: Walden to Mr. And Mrs. B. (3/8/04)

R-5 Letter: D'Antoni to Mrs. B.B. (3/10/04)

R-6 Letter of recognition for Misselhorn (5/21/04)

R-7 Letter: Polomano to Mrs. B. (3/17/04)

R-8 Drawing of floor plan of cafeteria showing locations of dining tables, vending machines, doors into and out of serving areas, and cash register stations

496-04R

OAL DKT. NOS. EDU 5994-04 AND
1084-03 ON REMAND
AGENCY DKT. NO. 327-10/02

J.S., on behalf of minor child, C.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CALDWELL-WEST CALDWELL, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/08/04

Date of Mailing: 12/08/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5994-04
AGENCY DKT. NO. 327-10/02

(EDU 1084-03 ON REMAND)

J.S. ON BEHALF OF C.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CALDWELL-WEST CALDWELL, ESSEX COUNTY,

Respondent.

Stephen J. Christiano, Esq., for petitioner

Joseph A. DeFuria, Esq., for respondent (Gaccione, Pomaco & Beck, attorneys)

Record Closed: October 28, 2004 Decided: November 3, 2004

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

This matter involves an appeal by petitioner J.S. on behalf of C.S. from a residency determination by respondent Board of Education of the Township of Caldwell-West Caldwell (the "Board"). Petitioner filed a Petition of Appeal on October 16, 2002 and the Board filed an Answer and Counterclaim on November 15, 2002,. The Department of Education subsequently transmitted the matter to the Office of Administrative Law (OAL) where, on January 9, 2003, it was filed under Docket No. EDU 1084-03 for determination as a contested case. The matter was scheduled to be heard on December 8, 2003. Counsel for the parties appeared at the OAL on December 8, 2003 and engaged in discussions toward an amicable resolution of the matter. Under

setting forth the terms of agreement and submitted a certified copy of the minutes of the executive session of the Board on January 5, 2004 relating to this matter, which the undersigned received on March 18, 2004.

On March 22, 2004 the undersigned issued an Initial Decision approving the aforesaid settlement. In a Decision dated May 7, 2004, the Commissioner of Education (the Commissioner) remanded the matter to the OAL for revision of the Stipulation of Settlement. Specifically, the Commissioner observed that the Board attorney did not sign the Settlement Agreement, and no resolution was supplied approving the settlement and designating the Board President to sign the agreement on the Board's behalf. The matter was remanded to the OAL where, on June 24, 2004, it was filed under Docket No. EDU 5994-04. The matter was assigned to the undersigned on July 26, 2004. The undersigned held telephone status conferences with counsel for the respective parties on August 23 and October 1, 2004. On October 28, 2004, the undersigned received a letter from counsel for the Board, dated October 27, 2004, enclosing the attached revised Stipulation of Settlement, which includes the signature of the Board attorney. The correspondence also forwarded the attached certified copy of the minutes of the regular public monthly meeting of the Board on October 11, 2004 reflecting that a resolution was adopted approving and accepting the Stipulation of Settlement and authorizing the Board President to sign the Stipulation of Settlement on the Board's behalf.

Having reviewed the record and the terms of the settlement, I **FIND** that the attached Stipulation of Settlement and certified minutes address the concerns set forth in the Commissioner's Decision remanding the matter to the OAL. I further **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 the 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.

OAL DKT. NO. EDU 5994-04

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 (45) 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 3, 2004
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

11-12-04
DATE

M. Kathleen Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 15 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

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Christiano and Christiano
49 Mt. Pleasant Avenue
West Orange, NJ 07052
(973) 736-1636
Attorneys for Petitioner

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
OAL DOCKET NO. EDU 1084-03

J.S., ON BEHALF OF MINOR CHILD, C.S.,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF CALDWELL-WEST CALDWELL, ESSEX COUNTY,

Respondent.

STIPULATION OF SETTLEMENT

The parties having amicably adjusted the differences between them, it is hereby stipulated as follows:

1. Petitioner withdraws his petition of appeal.
2. Respondent withdraws its counterclaim.
3. Petitioner and his wife shall apply for custody of C.S. as soon as possible.
4. Respondent shall be advised of the custody determination regarding C.S. as soon as possible..

The parties reserve their rights to initiate actions for prospective relief.

. . This settlement is subject to approval by the Commissioner of Education.

7. This stipulation of settlement constitutes the entire agreement of and understanding between the parties.

Dated: December 11, 2003

James Sayers, Petitioner

BOARD OF EDUCATION OF
CALDWELL-WEST CALDWELL

By: _____
President

ATTEST: _____
Secretary

GACCIONE, POMACO & MALANGA
Attorneys for Respondent

By: _____
FRANK POMACO

BOARD OF EDUCATION CALDWELL-WEST CALDWELL

HARRISON SCHOOL BUILDING
Gray Street, West Caldwell, New Jersey 07006

RONALD P. SKOPAK
BOARD SECRETARY – BUSINESS ADMINISTRATOR

TELEPHONE 973-228-3360

RESOLUTION

BOARD OF EDUCATION, CALDWELL/WEST CALDWELL
REGULAR PUBLIC MONTHLY MEETING, OCTOBER 11, 2004
HARRISON CONFERENCE ROOM, GRAY STREET, WEST CALDWELL

Mr. McCann moved; Mrs. Hansen seconded, a motion to approve the following Resolution:

BE IT RESOLVED, that the Stipulation of Settlement in the matter of J.S. on behalf of minor child, C.S., under OAL Docket No. EDU 1084-03, is hereby approved and accepted by the Board of Education,

IT IS FURTHER RESOLVED, that the Board President is hereby authorized to sign the Stipulation of Settlement on behalf of the Board of Education.

ROLL CALL: Ayes – Mmes. Hansen, McNish, Messrs. Black, McCann, Mrs. Davidson

Noes – None

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CERTIFIED TO BE A TRUE COPY OF THE MINUTES OF THE REGULAR PUBLIC MONTHLY MEETING OF THE BOARD OF EDUCATION HELD AT THE DATE, TIME AND PLACE ABOVE WRITTEN

Ronald P. Skopak
Board Secretary/Business Administrator

/Resolu

#497-04SEC

AGENCY DKT. NO. 409-11/04

IN THE MATTER OF YESSENIA RIOS,	:	
MARION P. THOMAS CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES, ESSEX COUNTY.	:	DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, *N.J.S.A.* 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was appointed to the Marion P. Thomas Charter School Board of Trustees in April 2003; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board of trustee members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 3, 2003 and February 3, 2004; and

Whereas, the NJSBA conducted seven training sessions between April 2003 and March 2004 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 26, 2004, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the above-named Board member replied that she had been unable to attend training due to personal family matters, but that she would attend the October 2004 training session; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its October 26, 2004 meeting, that she had the right to attend, that she could be found in violation of the School Ethics Act, and that she could receive a penalty up to removal; and

Whereas, the above-named Board member registered for the October 2004 training but did not attend that training session; and

Whereas, the Commission has found that this failure to attend board member training from April 2003 until October 2004 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, at its meeting on October 26, 2004, the Commission voted to recommend that all charter school board of trustee members who had failed to attend the October training be suspended from the board until such time as they attended training; and

Whereas, on November 18, 2004, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on her behalf submitted comments; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and finds the Commission's recommendation is inconsistent with the penalty recommended in previous matters of this nature with substantially similar facts, , wherein the Commission recommended, and the Commissioner concurred, that charter school board of trustee members who had failed to attend the requisite training well in excess of one year from their election to the Board should be: 1) suspended from office; 2) remain suspended pending completion of the requisite training; and, 3) summarily removed from office in the event they failed to complete the training session in January of the next year (*See, e.g., In the Matter of John Frohling, Learning Community Charter School Board of Trustees, Hudson County,* decided by the Commissioner December 22, 2003; *In the Matter of Veronica Sutton, Jersey City Community Charter School Board of Trustees, Hudson County,* decided by the Commissioner December 22, 2003; and *In the Matter of Wentford Gaines, Jersey City Community Charter School, Board of Trustees, Hudson County,* decided by the Commissioner December 23, 2003); and

Whereas, the School Ethics Commission did not articulate its reasons for not recommending the removal, absent attendance at a training session by a date certain, of Board of trustee members who had not attended training by October 2004; and

Whereas, the Commissioner, in the absence of such explanation, cannot concur with the Commission's recommendation and, instead, determines that immediate suspension, with subsequent removal if training is not completed by the date specified, is the proper penalty in this matter based upon the penalty imposed in prior matters of this nature; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing date of this decision and shall remain suspended pending completion of the

requisite training; provided, however, that, in the event she fails to complete one of the two training sessions offered in January 2005, the above-named Board member shall be summarily removed from office as of January 30, 2005.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/09/04

Date of Mailing: 12/09/04

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
YESENIA RIOS,	:	**DECISION ON TRAINING**
Marion P. Thomas Charter School	:	
Board of Trustees	:	**DOCKET NO. T34-04**
Essex County	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-23.1 provides that all of the provisions of the School Ethics Act are applicable to charter school administrators and members of the board of trustees; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Yesenia Rios was newly appointed in April 2003 to the Marion P. Thomas Charter School Board of Trustees and, therefore, had until April 2004 to complete the training requirement; and

WHEREAS, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board of trustee members who have failed to register for or attend an orientation and did mail such correspondence to Ms. Ruiz on December 3, 2003, and February 3, 2004; and

WHEREAS, the NJSBA conducted seven training sessions between April 2003 and March 2004 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the Commission issued an Order on May 26, 2004, directing Yesenia Rios to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Rios replied that, due to personal family matters, she had been unable to attend training, but that she would attend the October 2004 training; and

WHEREAS, the Commission notified Ms. Rios that the Commission would discuss this matter at its October 26, 2004 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Ms. Rios registered for the October 2004 training, but did not attend that training session; and

WHEREAS, at its October 26, 2004 meeting, the Commission voted to suspend until such time as they attended training all charter school trustees who had failed to attend the October training; and

WHEREAS, Ms. Rios has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2003 to October 2004 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension until such time as she attends training;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Yesenia Rios violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until such time as she attends training.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: November 18, 2004

I certify that the within Decision
was authorized by the School Ethics
Commission.

Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

OAL DKT. NO. EDU 11428-03
AGENCY DKT. NO. 361-9/03

JODI BERKOWITZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the parties' submissions on exception, have been reviewed.

In her exceptions, petitioner urges the Commissioner to reject the analysis and conclusion of the Administrative Law Judge (ALJ). She argues:

> Petitioner was forced to request a leave without pay because she had run out of sick days. The respondent requires employees who have run out of sick days to request a leave of absence and grants such a leave *without pay*. Petitioner was not on a long-term leave of absence, such as someone on a maternity leave. She worked until early June, 2003. As stated in petitioner's initial brief, she is paid on a yearly basis. She is paid an annual salary which is distributed in twenty equal installments over the course of a ten (10) month school year (N.J.S.A. 18A:27-6). The number of working days varies as to each such installment period, but the amount paid does not vary. The only exception is when a deduction of salary is required by virtue of an unauthorized absence on a day when work is scheduled. Therefore, petitioner requests that her pay be docked only for the days that she should have been at work and not for the entire month of June because her contract ran to June 30, 2003. The ALJ notes that, "If the school year had to be extended through June 30, 2003, the teachers would have been required to work until then." (Initial Decision, page 6). However, that did not occur. In fact, as stated in the Stipulation of Facts, the last day of work for petitioner for the 2002-2003 school year was June 24, 2003. In spite of that fact, respondent withheld petitioner's full pay of June 30, 2003***even though she only missed seven days of work during that pay period.***
>
> (Petitioner's Exceptions at 1-2, emphasis in text)

In reply, the Board of Education (Board) counters that petitioner's insistence on using the word "docked" (which has disciplinary connotations) is misplaced, and that the ALJ did, in fact, understand the issue correctly. It objects to petitioner's claim that she was "forced" to take unpaid leave, when in fact she exercised an option provided to employees in order to protect their pension and job status, and further disagrees with Petitioner's salary distribution argument, contending that where an employee does not work a full year and takes an *unpaid* leave, his or her salary distribution will be different from that of employees working a full year. The Board then states:

> ***[Petitioner] argues that her contract ran through June 30, 2003 and, therefore, she should be paid for the days after the work year ended, after June 24, 2003, as the school year was not extended past June 24, and other teachers were not required to work after that date. However, unlike other employees who were paid through June 30, the Board could not have required her to work had the school year been extended because she was on leave.
>
> [Petitioner] also argues that because the school year was not extended, it is insignificant that had the school year been extended through June 30, 2003, that teachers would have been required to work. However, it is significant because such an extension is always real in school districts and had it occurred, [petitioner], unlike other teachers, could not have been required to work because she made herself unavailable.*** [Petitioner] requested unpaid leave from June 16, 2003 through June 30, 2003. The Board agrees with the ALJ that she received exactly what she requested. [Petitioner] is not entitled to pay for a period in which she was unavailable to work and placed on an unpaid leave. (Board's Reply at 1-3)

Upon careful review and consideration, and consistent with his recent decision in the matter of *Christine Cuthbertson v. Board of Education of the City of Elizabeth, Union County,* decided November 3, 2004, and with his decision in *Dawn Rodriguez v. Board of Education of the City of Elizabeth, Union County,* decided concurrently with the instant matter, the Commissioner concurs with the ALJ that petitioner is not entitled to the relief she seeks. However petitioner attempts to characterize her situation, the fact remains that the

days for which she asks "not to be docked" occurred at a time during which she was on a *pre-arranged leave of absence*, unpaid because she had exhausted all of her accumulated leave. Petitioner's status from June 16 onward by its very nature precluded any entitlement to or expectation of pay for the duration of her leave, which extended through the remainder of the school year (June 30); it is of no import whatsoever that events transpired so that active teachers, *i.e.,* those not on leave, were not required to report to work on three days falling within the unpaid leave period. In effect, with respect to the days at issue, petitioner is demanding that the Board treat her as an employee not on leave, which she clearly was not. *Cuthbertson, supra*

Accordingly, for the reasons expressed therein and above, the Initial Decision of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/09/04
Date of Mailing: 12/09/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11428-03
AGENCY DKT. NO. 361-9/03

JODI BERKOWITZ,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH,
Respondent.

Mary J. Hammer, Esq., for petitioner (Bucceri and Pincus, attorneys)

Mary E. Hennessy-Shotter, Esq., for respondent (The Murray Law Firm, attorneys)

Record Closed: October 12, 2004 Decided: October 29, 2004

BEFORE **LESLIE Z. CELENTANO,** ALJ:

PROCEDURAL HISTORY

On September 30, 2003, Jodi Berkowitz filed a Verified Petition with the Commissioner of Education (Commissioner) alleging that respondent, the Board of Education of the City of Elizabeth, Union County (Board), did not pay her the salary she was owed for end of the 2002-2003 school year, in violation of *N.J.S.A.* 18A:30-6. On

October 20, 2003, the Board filed its answer and affirmative defenses. On December 2, 2003, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) 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.

After telephone conferences with the parties, it was determined that the hearing in this matter could proceed upon the papers. The parties submitted a joint stipulation of facts and exhibits, together with briefs in support of their positions. Following receipt of final submissions and a status telephone conference, the record was closed.

STIPULATION OF FACTS

The parties stipulated the following facts:

1. Petitioner, Jodi Berkowitz, was employed by the respondent Board, as a teacher for the 2002-2003 school year.

2. Petitioner's contract for the 2002-2003 school year required her to be able to perform services from September 1, 2002 to June 30, 2003.

3. Petitioner's annual salary for the 2002-2003 school year was $50,685.

4. As of June 13, 2003, petitioner had exhausted her sick, personal and family illness days for the 2002-2003 school year.

5. The collective bargaining agreement between the Elizabeth Education Association and the Elizabeth Board of Education permits employees to take unpaid extended leaves of absences for prolonged illness or injury.

6. Petitioner was advised by Human Resources staff that she should request a leave of absence because she had exhausted her sick leave.

7. Petitioner requested, and was granted, a medical leave of absence beginning on June 16, 2003. The leave of absence was without pay.

8. The original 2002-2003 school calendar scheduled school to begin for all staff on September 4, 2002, and end on June 18, 2003.

9. The calendar was extended to June 24, 2003, to make up for instruction days missed due to emergency closings throughout the year.

10. The last day of work for petitioner for the 2002-2003 school year was June 24, 2003.

11. Petitioner missed seven (7) days of work during her unpaid leave of absence in June 2003 on the following dates: June 16, 17, 18, 19, 20, 23, 24, 2003.

12. Petitioner is paid bi-monthly on the 15th and 30th of the month.

13. Respondent withheld petitioner's June 30, 2003 pay of $2,534.25 (gross) because of her unpaid leave of absence which commenced June 16, 2003.

14. Petitioner's payroll record for the 2002-2003 school year is stipulated into the record.

THE APPLICABLE LAW

This appeal is based upon the provisions of *N.J.S.A.* 18A:30-6, Prolonged absence beyond sick leave, which states:

> When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case. A day's salary is defined as 1/200 of the annual salary.

Sick leave is defined in *N.J.S.A.* 18A:30-1 as follows:

> Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household.

In *Board of Educ. of Piscataway v. Piscataway Maint. and Custodial Ass'n*, 152 *N.J. Super.* 235, 244 (App. Div. 1977), the Court held that the payment of salary for prolonged absence beyond a sick leave period is clearly a matter within the Board's discretion to determine on a case-by-case basis; and is a statutory managerial prerogative that the Board can not bargain away.

> Our concern is over the payment of salary, in whole or in part, for prolonged absence beyond the allowable annual or accumulated sick leave. As to such payment, the controlling statute, *N.J.S.A.* 18A:30-6, plainly leaves the matter to the discretion of the local board of education, which may pay any such person each day's salary, less the pay or estimated cost of a substitute, for such length of time as may be determined by the board of education in each individual case.
>
> [*Id.* at 246.]

ARGUMENTS OF THE PARTIES

Petitioner urges that she did not have to work from June 24 to June 30, 2003, because no teachers were required to work during that period and, therefore, she should have received a paycheck on June 30, 2003 and simply been docked for those days which she missed through June 24, the last day of school and the last day that any teacher worked. This is despite the fact that she requested and received prior approval for, unpaid sick leave through June 30, 2003. Petitioner seeks to recover three days' salary, or $760.27, for the difference between the final paycheck she claims she is owed and the seven (7) days during that pay period that she concedes she should be docked for, prior to the end of the actual work year on June 24, 2003. The amount of recovery sought is not in dispute.

Respondent replies that petitioner requested unpaid leave through June 30, 2003. The school year was originally scheduled to end on June 18, 2003, but had to be extended because of emergency closings during the year. Although no teacher was called upon to work after June 24, 2003, had the school year been extended further because of closings, petitioner would not have been available for work because of her approved unpaid leave. The Board further points out that, if she were absent on an approved unpaid leave at any other time during the school year, she would not have been paid for snow days and holidays during her leave period even though these were non-work days; at most, her leave time might have been extended. Respondent further states that petitioner never requested that her paid sick leave benefits be extended past June 24, 2003, pursuant to *N.J.S.A.* 18A:30-6.

Petitioner cites *Oteri v. Board of Education of the Borough of Magnolia*, 1980 *S.L.D.* 954, in support of her application for reimbursement of salary until the end of June. In the *Oteri* case, the petitioner, a teacher, was not on a requested unpaid leave, during the final days of the school year but was merely out sick. The Magnolia Board withheld her salary for the period from June 15 through June 30, when school was not in session, on the grounds that she had received benefits from a private insurance carrier based upon her absence from work due to illness. Oteri argued that the final days of the school year are no different from other days of the year, such as holidays, when absent teachers are not required to work, and, therefore, she should be paid for them. The administrative law judge who held the hearing determined under the circumstances of that case that Oteri could not be denied salary through June 30 for the reasons expressed by the Magnolia Board. His Initial Decision was affirmed by the Commissioner and the State Board of Education.

Respondent argues that *Oteri* is distinguishable from the present matter since Oteri neither requested nor received an unpaid leave of absence as petitioner did. The Board did not pay petitioner for the remainder of June 2003 because she requested unpaid leave in advance through June 30, 2003. As a result, petitioner, unlike Oteri, made herself unavailable to work during the final days of her contract year. The

analysis in *Oteri* of payment for snow days and holidays is irrelevant to the present matter because the instant case deals with a requested and approved unpaid leave. The circumstances are distinguishable.

Petitioner suggests that the Board required her to request the leave of absence since she had exhausted all of her paid leave time. However, as respondent points out, had she not done so she would have been absent without permission which could have caused her to lose her job and jeopardized her status for pension purposes.

The Board states that all leaves granted run until the return date for the employee or the last date of their contract. No employees on unpaid maternity leave were paid for holidays and vacations as other, active, employees were. None of them were paid after the last day of school because of their leave status. Petitioner should not be treated any differently than these employees.

FINDINGS OF FACT AND CONCLUSIONS

Based upon the stipulated facts, the documentary evidence and the briefs of the parties, I **FIND** the following facts:

1. Petitioner requested and was granted a medical unpaid leave of absence from June 16 through June 30, 2003.

2. The school year was supposed to end on June 18, 2003, but teachers were required to work through June 24 to make up for days missed on account of weather. If the school year had to be extended through June 30, 2003, the teachers would have been required to work until then.

3. Petitioner was not available to work after June 24, 2003, because she was on sick leave. The Board could not have required her attendance under any circumstances.

4. Petitioner says that her final pay period was the last two full weeks of June and she is not asking to be paid for June 30, 2003. She claims that she should not

have been docked for June 25, 26 and 27, 2003, because none of the other teachers had to work on those three days.

5. Petitioner received exactly what she requested when she sought her unpaid leave of absence. She had every reason to know from the outset that she would not be paid for the remainder of her contract year because that is precisely what she asked for.

6. The Board has no obligation to treat her any differently than it treats other teachers in similar circumstances.

7. There is no equitable reason to require the Board to pay petitioner for June 25, 26, and 27, 2003.

I, therefore, **CONCLUDE** that it was reasonable, not arbitrary and capricious, for the Board to deny petitioner's request to be paid for June 25, 26 and 27, 2003, because she was on a requested unpaid leave at the time. The petitioner can not circumvent the provisions of *N.J.S.A.* 18A:30-6 by characterizing discretionary payments as "docking."

ORDER

Accordingly, it is **ORDERED** that the Board's decision not to pay petitioner for June 25, 26 and 27, 2003, is hereby **AFFIRMED** and the petition herein 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 (45) 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 (13) 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, 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 29, 2004
DATE

LESLIE Z. CELENTANO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10/29/04
DATE

Mailed to Parties:

NOV 05 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

499-04

OAL DKT. NO. EDU 11297-03
AGENCY DKT. NO. 366-10/03

DAWN M. RODRIGUEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and petitioner's submission on exception, have been reviewed.

In her exceptions, petitioner urges the Commissioner to reject the analysis and conclusion of the Administrative Law Judge (ALJ). She argues:

> Petitioner was forced to request a leave without pay because she had run out of sick days. The respondent requires employees who have run out of sick days to request a leave of absence and grants such a leave *without pay*. Petitioner was not on a long-term leave of absence, such as someone on a maternity leave. She worked until early June, 2003. As stated in petitioner's initial brief, she is paid on a yearly basis. She is paid an annual salary which is distributed in twenty equal installments over the course of a ten (10) month school year (N.J.S.A. 18A:27-6). The number of working days varies as to each such installment period, but the amount paid does not vary. The only exception is when a deduction of salary is required by virtue of an unauthorized absence on a day when work is scheduled. Therefore, petitioner requests that her pay be docked only for the days that she should have been at work and not for the entire month of June because her contract ran to June 30, 2003. The ALJ notes that, "If the school year had to be extended through June 30, 2003, the teachers would have been required to work until then." (Initial Decision, page 6). However, that did not occur. In fact, as stated in the Stipulation of Facts, the last day of work for petitioner for the 2002-2003 school year was June 24, 2003. In spite of that fact, respondent withheld petitioner's full pay of June 30, 2003***even though she only missed seven days of work during that pay period.***
>
> (Petitioner's Exceptions at 1-2, emphasis in text)

Upon careful review and consideration, and consistent with his recent decision in *Christine Cuthbertson v. Board of Education of the City of Elizabeth, Union County,* decided November 3, 2004, and with his decision in *Jodi Berkowitz v. Board of Education of the City of Elizabeth, Union County,* decided concurrently with the instant matter, the Commissioner agrees with the ALJ that petitioner is not entitled to the relief she seeks. However petitioner attempts to characterize her situation, the fact remains that the days for which she asks "not to be docked" occurred at a time during which she was on a *pre-arranged leave of absence,* unpaid because she had exhausted all of her accumulated leave. Petitioner's status from June 16 onward by its very nature precluded any entitlement to or expectation of pay for the duration of her leave, which extended through the remainder of the school year (June 30); it is of no import whatsoever that events transpired so that active teachers, *i.e.,* those not on leave, were not required to report to work on three days falling within the unpaid leave period. In effect, with respect to the days at issue, petitioner is demanding that the Board treat her as an employee not on leave, which she clearly was not. *Cuthbertson, supra*

Accordingly, for the reasons expressed therein and above, the Initial Decision of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 12/09/04

Date of Mailing: 12/09/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11297-03
AGENCY DKT. NO. 366-10/03

DAWN M. RODRIGUEZ,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH,
Respondent.

Mary J. Hammer, Esq., for petitioner (Bucceri and Pincus, attorneys)

Mary E. Hennessy-Shotter, Esq., for respondent (The Murray Law Firm, attorneys)

Record Closed: October 12, 2004 Decided: October 29, 2004

BEFORE **LESLIE Z. CELENTANO,** ALJ:

PROCEDURAL HISTORY

On October 1, 2003, Dawn M. Rodriguez filed a Verified Petition with the Commissioner of Education (Commissioner) alleging that respondent, the Board of Education of the City of Elizabeth, Union County (Board), did not pay her the salary she was owed for end of the 2002-2003 school year, in violation of *N.J.S.A.* 18A:30-6. On

October 21, 2003, the Board filed its answer and affirmative defenses. On November 21, 2003, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) 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.

After telephone conferences with the parties, it was determined that the hearing in this matter could proceed upon the papers. The parties submitted a joint stipulation of facts and exhibits, together with briefs in support of their positions. Following receipt of final submissions and a status telephone conference, the record was closed.

STIPULATION OF FACTS

The parties stipulated the following **FACTS**:

1. Petitioner, Dawn M. Rodriguez, was employed by the respondent Board, as a classroom assistant for the 2002-2003 school year.

2. Petitioner's annual salary for the 2002-2003 school year was $10,555.

3. As of June 10, 2003, petitioner had exhausted her sick, personal and family illness days for the 2002-2003 school year.

4. The collective bargaining agreement between the Elizabeth Education Association and the Elizabeth Board of Education permits employees to take unpaid extended leaves of absences for prolonged illness or injury.

5. Petitioner was advised by Human Resources staff that she should request a leave of absence because she had exhausted her sick days.

6. Petitioner requested, and was granted, a medical leave of absence from June 11, 2003 to June 30, 2003. The leave of absence was without pay.

7. The original 2002-2003 school calendar scheduled school to begin for all staff on September 4, 2002, and end on June 18, 2003.

8. The calendar was extended to June 24, 2003, to make up for instruction days missed due to emergency closings throughout the year.

9. The last day of work for petitioner for the 2002-2003 school year was June 24, 2003.

10. Petitioner missed ten (10) days of work during her unpaid leave of absence in June 2003 on the following dates: June 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 2003.

11. Respondent withheld $153.34 from petitioner's June 15, 2003 pay (gross) and also withheld petitioner's June 30, 2003 pay of $527.75 (gross) because of her absences.

12. Petitioner's payroll record for the 2002-2003 school year is stipulated into the record.

THE APPLICABLE LAW

This appeal is based upon the provisions of *N.J.S.A.* 18A:30-6, Prolonged absence beyond sick leave, which states:

> When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case. A day's salary is defined as 1/200 of the annual salary.

Sick leave is defined in *N.J.S.A.* 18A:30-1 as follows:

> Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's

> medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household.

In *Board of Educ. of Piscataway v. Piscataway Maint. and Custodial Ass'n*, 152 *N.J. Super.* 235, 244 (App. Div. 1977), the Court held that the payment of salary for prolonged absence beyond a sick leave period is clearly a matter within the Board's discretion to determine on a case-by-case basis; and is a statutory managerial prerogative that the Board can not bargain away.

> Our concern is over the payment of salary, in whole or in part, for prolonged absence beyond the allowable annual or accumulated sick leave. As to such payment, the controlling statute, *N.J.S.A.* 18A:30-6, plainly leaves the matter to the discretion of the local board of education, which may pay any such person each day's salary, less the pay or estimated cost of a substitute, for such length of time as may be determined by the board of education in each individual case.
>
> [*Id.* at 246.]

ARGUMENTS OF THE PARTIES

Petitioner urges that she did not have to work from June 24 to June 30, 2003, because no teachers or assistants were required to work during that period and, therefore, she should have received a paycheck on June 30, 2003 and simply been docked for those days which she missed through June 24, the last day of school and the last day that any teacher or assistant worked. This is despite the fact that she requested and received prior approval for, unpaid sick leave through June 30, 2003. Petitioner seeks to recover three days' salary, or $158.50, for the difference between the final paycheck she claims she is owed and the seven (7) days during that pay period that she concedes she should be docked for, prior to the end of the actual work year on June 24, 2003. The amount of recovery sought is not in dispute.

Respondent replies that petitioner requested unpaid leave through June 30, 2003. The school year was originally scheduled to end on June 18, 2003, but had to be

extended because of emergency closings during the year. Although no teacher or assistant was called upon to work after June 24, 2003, had the school year been extended further because of closings, petitioner would not have been available for work because of her approved unpaid leave. The Board further points out that, if she were absent on an approved unpaid leave at any other time during the school year, she would not have been paid for snow days and holidays during her leave period even though these were non-work days; at most, her leave time might have been extended. Respondent further states that petitioner never requested that her paid sick leave benefits be extended past June 24, 2003, pursuant to *N.J.S.A.* 18A:30-6.

Petitioner cites *Oteri v. Board of Education of the Borough of Magnolia*, 1980 *S.L.D.* 954, in support of her application for reimbursement of salary until the end of June. In the *Oteri* case, the petitioner, a teacher, was not on a requested unpaid leave, during the final days of the school year but was merely out sick. The Magnolia Board withheld her salary for the period from June 15 through June 30, when school was not in session, on the grounds that she had received benefits from a private insurance carrier based upon her absence from work due to illness. Oteri argued that the final days of the school year are no different from other days of the year, such as holidays, when absent teachers are not required to work, and, therefore, she should be paid for them. The administrative law judge who held the hearing determined under the circumstances of that case that Oteri could not be denied salary through June 30 for the reasons expressed by the Magnolia Board. His Initial Decision was affirmed by the Commissioner and the State Board of Education.

Respondent argues that *Oteri* is distinguishable from the present matter since Oteri neither requested nor received an unpaid leave of absence as petitioner did. The Board did not pay petitioner for the remainder of June 2003 because she requested unpaid leave in advance through June 30, 2003. As a result, petitioner, unlike Oteri, made herself unavailable to work during the final days of her contract year. The analysis in *Oteri* of payment for snow days and holidays is irrelevant to the present matter because the instant case deals with a requested and approved unpaid leave. The circumstances are distinguishable.

Petitioner suggests that the Board required her to request the leave of absence since she had exhausted all of her paid leave time. However, as respondent points out, had she not done so she would have been absent without permission which could have caused her to lose her job and jeopardized her status for pension purposes.

The Board states that all leaves granted run until the return date for the employee or the last date of their contract. No employees on unpaid maternity leave were paid for holidays and vacations as other, active, employees were. None of them were paid after the last day of school because of their leave status. Petitioner should not be treated any differently than these employees.

FINDINGS OF FACT AND CONCLUSIONS

Based upon the stipulated facts, the documentary evidence and the briefs of the parties, I **FIND** the following facts:

1. Petitioner requested and was granted a medical unpaid leave of absence from June 11 through June 30, 2003.

2. The school year was supposed to end on June 18, 2003, but teachers and assistants were required to work through June 24 to make up for days missed on account of weather. If the school year had to be extended through June 30, 2003, the employees would have been required to work until then.

3. Petitioner was not available to work after June 24, 2003, because she was on sick leave. The Board could not have required her attendance under any circumstances.

4. Petitioner says that her final pay period was the last two full weeks of June and she is not asking to be paid for June 30, 2003. She claims that she should not have been docked for June 25, 26 and 27, 2003, because none of the other employees had to work on those three days.

5. Petitioner received exactly what she requested when she sought her unpaid leave of absence. She had every reason to know from the outset that she would not be paid for the remainder of her contract year because that is precisely what she asked for.

6. The Board has no obligation to treat her any differently than it treats other employees in similar circumstances.

7. There is no equitable reason to require the Board to pay petitioner for June 25, 26, and 27, 2003.

I, therefore, **CONCLUDE** that it was reasonable, not arbitrary and capricious, for the Board to deny petitioner's request to be paid for June 25, 26 and 27, 2003, because she was on a requested unpaid leave at the time. The petitioner can not circumvent the provisions of *N.J.S.A.* 18A:30-6 by characterizing discretionary payments as "docking."

ORDER

Accordingly, it is **ORDERED** that the Board's decision not to pay petitioner for June 25, 26 and 27, 2003, is hereby **AFFIRMED** and the petition herein 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 (45) 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 (13) 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, 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 29, 2004
DATE

LESLIE Z. CELENTANO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10/29/04
DATE

Mailed to Parties:

NOV 05 2004
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

AGENCY DKT NO. #399-11/04

IN THE MATTER OF GEDDZAIDU RUIZ,	:	
WOODBINE BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CAPE MAY COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty against the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33; and

Whereas ample notice was provided to the above-named Board member of the requirement and opportunities to attend such training sessions; and

Whereas, on April 30, 2004, the Commission issued an Order to Show Cause why the above-named Board member had not attended training; and

Whereas, the above-named Board member replied to the Order to Show Cause, stating that she could not attend training due to childcare issues and nursing problems with her son; and

Whereas, the Commission voted on July 27, 2004 to extend the opportunity for the above-named Board member to attend training until October 2004, but if she failed to attend such training, the Commission would recommend to the Commissioner that she be removed from the Board; and

Whereas, the above-named Board member registered for the October 2004 training session, but did not attend; and

Whereas, the Commission voted on October 26, 2004 to remove all local district school board members who had failed to attend the October training pursuant to extensions granted them by prior vote of the Commission; and

Whereas, the Commission memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29, and further advised the above-named Board member of her opportunity to submit to the Commissioner exceptions to the penalty recommended by said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is removed from office as of the filing date of this decision.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/09/04

Date of Mailing: 12/09/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

502-04

OAL DKT. NO. EDU 746-04
AGENCY DKT. NO. 66-2/04

LORI LAFRENNIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the President of the Pleasantville Board of Education signed the Settlement Agreement on behalf of the Board. In that neither the file nor the Settlement Agreement contains a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf, and the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within Settlement Agreement.

Moreover, the Commissioner observes that the settlement included with the Initial Decision sets forth terms that appear to have been effectuated prior to approval of the settlement by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. The ALJ and the parties are cautioned against effectuating terms of a settlement agreement in a controverted matter that has been duly transmitted to the OAL prior to its submission to, and approval by, the Commissioner.

Additionally, Item Number (c) refers to a "Stipulation and Order of Dismissal with Prejudice attached to this Agreement as Exhibit A." Although an original of a Stipulation of Dismissal with Prejudice, presumably the "Exhibit A" document to which Item Number (c) refers, is contained in the record, the Initial Decision/Settlement provided by the OAL does not contain a copy of this document nor any document identified as "Exhibit A."

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/10/04

Date of Mailing: 12/10/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 746-04
AGENCY DKT. NO. 66-2/04

LORI LAFRENNIE,
Petitioner,
v.
CITY OF PLEASANTVILLE BOARD OF EDUCATION, ATLANTIC COUNTY,
Respondent.

Tobin G. Nelson, Esq., for petitioner

Avis Bishop-Thompson, Esq., for respondent (DeCotiis, Fitzpatrick, Cole & Wisler, LLP, attorneys)

Record Closed: October 28, 2004 Decided: November 15, 2004

BEFORE **BRUCE M. GORMAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 24, 2004, 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, 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 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 (45) 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.

11/15/04
DATE

, ALJ

Receipt Acknowledged:

11-18-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 19 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

RECEIVED
2004 OCT 28 A 10:19

RESIGNATION FROM EMPLOYMENT SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Resignation from Employment, Settlement Agreement and General Release (the "Agreement"), is entered into this ____ day of September, 2004, by and between Lori LaFrennie ("Ms. LaFrennie") and the Pleasantville Board of Education, Atlantic County (the "Board") (collectively, the "Parties"). For purposes of this Agreement, the term the "Board" shall mean and include the Pleasantville Board of Education, its elected representatives, agents, employees, insurers and attorneys, and all of their predecessors and successors (all in both their official and individual capacities). The term "Ms. LaFrennie" shall mean and include Lori LaFrennie and any and all of her executors, administrators, successors, assigns, agents and representatives. This Agreement constitutes the complete and final settlement of any and all disputes arising from or relating to Ms. LaFrennie's employment by the Board, the termination of her employment and any claims or actions she has brought or could have brought against the Board.

W I T N E S S E T H:

WHEREAS, Ms. LaFrennie filed an administrative action against the Board in the Office of Administrative Law (the "OAL"), entitled Lori LaFrennie vs. The Pleasantville Board of Education, Atlantic County, Docket No. EDUOR 0076-2004S, Agency Ref. No., 66-2/04 (the "Administrative Action"); and

WHEREAS, the Parties desire to enter into this Agreement to fully and finally resolve and dismiss with prejudice Ms. LaFrennie's Administrative Action and to fully and finally settle and resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which Ms. LaFrennie may have against the Board; and

WHEREAS, Ms. LaFrennie acknowledges and agrees that the payment provided for herein is provided as consideration for this Agreement to voluntarily dismiss, waive and withdraw the Administrative Action and any and all claims, complaints, charges, administrative actions and civil actions of any kind against the Board;

NOW, THEREFORE, in consideration of the promises and mutual covenants contained in this Agreement, the Parties hereby agree as follows:

1. (a) In consideration for Ms. LaFrennie's execution of this Agreement and the promises and covenants contained herein, the Board commits that it shall issue and remit to Tobin G. Nilsen, Esq. (Ms. LaFrennie's "Counsel") a check payable to Lori LaFrennie, in the gross amount of forty thousand two hundred forty-five dollars ($40,245), less applicable statutory deductions and withholding taxes which represents her contractual salary for the 2003-2004 year. The salary payment will also be mitigated by the $9,000

earned by Ms. LaFrennie during the 2003-2004 years supported by appropriate documentation. The Board will report the salary payment to the taxing authorities via an IRS Form 1099. The check will be sent to Ms. LaFrennie's Counsel after (i) this Agreement is executed and the Stipulation of Dismissal with Prejudice attached to this Agreement as Exhibit A is signed by the Parties and filed with the Court;(ii) the seven-day revocation period referred to in Paragraph 11 has expired and (iii) documentation is provided evidencing earnings of $9,000.

(b) The Board commits that it shall issue and remit to Mr. Nilsen a check payable to Lori LaFrennie and Tobin G. Nilsen, Esq. in the gross amount of fourteen thousand six hundred fifty-seven dollars and fifty cents ($14,657.50) which represents her contractual benefits for the 2003-2004 year. The Board will report the salary payment to the taxing authorities via an IRS Form 1099. The check will be sent to Ms. LaFrennie's Counsel after (i) this Agreement is executed and the Stipulation of Dismissal with Prejudice attached to this Agreement as Exhibit A is signed by the Parties and filed with the Court and (ii) the seven-day revocation period referred to in paragraph 11 has expired.

(c) In the event that it is subsequently determined that Ms. LaFrennie owes any employment taxes with respect to this payment, Ms. LaFrennie expressly acknowledges and agrees that she and/or her heirs, executors, administrators and assigns, and not the Board, will be responsible for the payment of any such taxes, liabilities, payments or costs, interest and penalties. Ms. LaFrennie agrees to indemnify and hold harmless the Board to the full extent of any such taxes, liabilities, payments or costs, interest and penalties, which may be assessed against the Board in connection with any payment made to or on behalf of Ms. LaFrennie hereunder.

2. Ms. LaFrennie, for the consideration given by the Board as set forth above, which she acknowledges is adequate and satisfactory to her, hereby commits as follows:

(a) Ms. LaFrennie agrees that by signing this Agreement she is irrevocably resigning her employment with the Board effective upon the execution of this Agreement.

(b) Ms. LaFrennie irrevocably and unconditionally remises, releases, waives and forever discharges the Board from any and all manner of liabilities, actions, causes of action, contracts, agreements, promises, claims and demands of any kind or nature whatsoever, in law or equity, whether known or unknown, which Ms. LaFrennie has ever had or now has against the Board including, but not limited to, claims arising out of or relating to or arising from or in connection with her employment with the Board, the resignation of her employment, compensation and/or benefits with the Board and the Administrative Action. Ms. LaFrennie further understands and agrees that this Agreement shall act as a complete bar to any claim, demand or action of any

kind whatsoever which could be or could have been brought by her and which seeks personal, equitable or monetary relief for her against the Board, including, but not limited to: any claims of wrongful discharge; breach of express or implied contract; fraud; discrimination; retaliation; wages; benefits; other compensation; misrepresentation; defamation; liability in negligence or tort; and claims of any kind which may be brought in any court of law or equity or an administrative agency; claims for arbitration in any forum; the U.S. Constitution, as amended; the Constitution of the State of New Jersey; Title VII of the U.S. Civil Rights Act of 1964, as amended; the U.S. Age Discrimination in Employment Act of 1967; the U.S. Americans with Disabilities Act; the U.S. Age Discrimination in Employment Act; the U.S. Employment Retirement Income Security Act; the U.S. Fair Labor Standards Act; the United States Family and Medical Leave Act; the New Jersey Family Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Department of Personnel; and any other federal, state or local law, regulation or ordinance relating to employment; related torts; and employment discrimination; employee benefits; collective bargaining agreement; and the termination of employment and any other claim arising from or relating to Ms. LaFrennie's employment. Ms. LaFrennie understands that she is not releasing any claims she may have to enforce the provisions of this Agreement. This release covers both claims that Ms. LaFrennie knows about and those she may not know about, except for claims (i) that may arise after the date Ms. LaFrennie executes this Agreement; (ii) for a breach of this Agreement; or (iii) with respect to any benefits in which Ms. LaFrennie has a vested interest under the terms and conditions of any of the Board's employee benefit plans. Ms. LaFrennie further agrees not to file a lawsuit or administrative claim or demand for arbitration to assert any of the claims she has given up, released or waived. Any substantial or material breach of this Agreement shall entitle the non-breaching party to an injunction to remedy the breach and an award of reasonable attorney's fees, other professional fees, costs and expenses incurred to remedy and defend against said breach.

(c) Ms. LaFrennie agrees to dismiss with prejudice the Administrative Action. In that regard, Ms. LaFrennie's Counsel, in accordance with the New Jersey Rules of Administrative Practice, shall, simultaneous with the execution of this Agreement, execute the Stipulation and Order of Dismissal With Prejudice attached to this Agreement as Exhibit A, dismissing the case with prejudice for the reason of the settlement reached by the Parties. It is acknowledged and understood by Ms. LaFrennie that any and all rights and obligations set forth in this Agreement are conditioned completely and entirely upon the Court's dismissal of the Administrative Action with prejudice.

(d) Ms. LaFrennie agrees to withdraw fully and finally and to dismiss with prejudice any and all administrative, state or federal court actions, which have been filed by her against the Board which have not already been closed or otherwise terminated. Ms. LaFrennie will ask each agency or court with which she has filed an action to enter an order, without appearance by

either Party, withdrawing and dismissing the action with prejudice. Any such orders shall be attached to and become a part of this Agreement. It is acknowledged and understood by Ms. LaFrennie that any and all obligations set forth in this Agreement are conditioned completely and entirely upon the withdrawal and dismissal with prejudice of any and all administrative, state and federal court actions.

(e) Ms. LaFrennie agrees that she will not talk about, discuss or consult with, advise, counsel or otherwise cooperate with or assist any employees or former employees of the Board in the pursuit of any legal or administrative action(s) against the Board, including, but not limited to, any action(s) in connection with any matters relating to her employment or the termination of her employment, unless compelled to do so by court order or lawful subpoena. Ms. LaFrennie further agrees that she will not participate, directly or indirectly, as a party, witness or otherwise, in any action at law, proceeding in equity or in any administrative proceeding in which the Board or Board personnel are Parties, unless compelled to do so by force of law.

(f) Ms. LaFrennie acknowledges and agrees that other than the consideration provided for herein, she is not entitled to and will not receive any additional compensation or benefits of any kind from the Board and that no representations have been made to her regarding any such additional compensation or benefits. Nothing in this Agreement is intended to or should be construed to affect Ms. LaFrennie's receipt of the benefits in which she is vested or to which she is entitled under the Board's current pension, disability and/or other vested plans or policies.

3. Ms. LaFrennie agrees to maintain the confidentiality of, and refrain from disclosing, making public, or discussing in any way whatsoever, the terms and conditions of this Agreement. Notwithstanding the foregoing, it is understood that as the sole exception to this Confidentiality Provision, Ms. LaFrennie may discuss or disclose this Agreement (i) with her immediate family; (ii) with her attorney(s) or tax advisor(s); and (iii) in response to inquiries from, any governmental, regulatory or self-regulatory body or agency with jurisdiction over the activities Ms. LaFrennie or the Board.

4. (a) Ms. LaFrennie agrees that she shall not issue any communication, written, verbal or otherwise, that disparages, criticizes or otherwise reflects adversely upon the Board or which encourages any adverse action, provided that Ms. LaFrennie is permitted to testify truthfully under oath pursuant to a subpoena.

(b) With respect to any inquiries regarding Ms. LaFrennie, the Board shall have responsibility only as provided below or only insofar as Mr. LaFrennie has directed inquiries to Mr. Skender T. Avrami, or his successor, of the Board's Human Resources Department. If any inquiries are made to Dr. Gail D. Brooks, Dr. Brooks will direct those inquiries to Mr. Avrami, or his successors,

they will be responded to with a neutral reference consisting of Ms. LaFrennie's name, dates of employment and position held while employed with the Board.

5. This Agreement is not and shall not in any way be deemed to constitute an admission or evidence of any wrongdoing or liability on the part of the Board, nor of any violation of any federal, state or local statute, rule, regulation or principle of common law or equity. Rather, this Agreement constitutes the good faith settlement and release of disputed claims, and it is acknowledged and agreed by the Parties that this Agreement is being entered into by the Parties solely to avoid the burden, expense, delay and uncertainties of further litigation and to fully and finally resolve, settle and dismiss with prejudice, any and all claims of any kind whatsoever, whether known or unknown, which Ms. LaFrennie has ever had or now has against the Board arising out of or relating to his employment with the Board, the termination of her employment, her compensation and benefits with the Board or the Administrative Action. The Board expressly denies any wrongdoing of any kind in regard to Ms. LaFrennie's employment, the termination of her employment, her compensation and benefits with the Board and the Administrative Action.

6. This Agreement may not be changed orally and no modification, amendment or waiver of any provision contained in this Agreement, or any future representation, promise or condition in connection with the subject matter of this Agreement shall be binding upon any party hereto unless made in writing and signed by such party.

7. This Agreement contains the entire agreement and complete settlement between the Parties and supersedes any and all previous agreements of any kind whatsoever between them, whether written or oral. All prior and contemporaneous discussions and negotiations have been and are merged and integrated into, and are superseded by, this Agreement. This is an integrated document.

8. In the event that any provision of this Agreement or the application thereof should be held to be void, voidable, unlawful or, for any reason, unenforceable, the remaining portion shall remain in full force and effect, and, to that end, the provisions of this Agreement are declared to be severable.

This Agreement is made and entered into, and shall be subject to, governed by and interpreted in accordance with the laws of the state of New Jersey and shall be fully enforceable in the courts of that state, without regard to principles of conflict of laws. The Parties agree that any suit, action or other legal proceeding arising out of this Agreement shall be brought in Superior Court for the State of New Jersey, County of Atlantic.

9. Ms. LaFrennie and her Counsel agree that Ms. LaFrennie is responsible for her own attorneys' fees and costs incurred in connection with the Administrative Action and her claims against the Board and warrant that

both Ms. LaFrennie and her Counsel waives and release any claims against the Board for attorneys' fees and costs, statutory or otherwise, related in any way to the matters covered by this Agreement, and covenant not to sue or otherwise proceed against the Board with respect to any such claims for attorneys' fees and/or costs. By signing this Agreement, Ms. LaFrennie and her Counsel affirm that they are waiving and releasing any claims they may have against the Board for attorneys' fees.

10. Ms. LaFrennie agrees that neither this Agreement nor any portion hereof is assignable. Ms. LaFrennie represents, warrants and covenants that she has not previously assigned or transferred, or purported to assign or transfer, to any individual or entity, any of the rights, claims, demands or causes of action being released herein, and agrees that no such assignment or transfer may occur without a written consent executed by the Board, and any attempt to do so shall be void.

11. Ms. LaFrennie certifies that she has read the terms of this Agreement, they have been explained to her by an attorney of her choice and that she understands them in full. The execution hereof by Ms. LaFrennie shall indicate that this Agreement conforms to Ms. LaFrennie's understandings and is acceptable to her as a final agreement. It is further understood and agreed that Ms. LaFrennie has been advised of the opportunity to consult with counsel of his choice and that she has been given a reasonable and sufficient period of time of no less than twenty-one (21) days in which to consider and return this document. It is further agreed and understood that, upon Ms. LaFrennie's execution and return of this Agreement, she is thereafter permitted to revoke the Agreement at any time during a period of seven (7) days. To be effective, the revocation must be in writing and hand-delivered or telecopied to counsel for the Board within the seven (7) day period.

WHEREFORE, intending to be legally bound, the Parties have agreed to the aforesaid terms and indicate their agreement by signing below.

PLEASE READ CAREFULLY. THIS AGREEMENT IS A LEGAL DOCUMENT AND INCLUDES A RELEASE OF ALL KNOWN AND UNKNOWN CLAIMS, INCLUDING, WITHOUT LIMITATION, ALL CLAIMS ARISING UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT, THE AMERICANS WITH DISABILITIES ACT, TITLE VII OF THE ADMINISTRATIVE RIGHTS ACT OF 1964, THE EQUAL PAY ACT, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT, THE FAIR LABOR STANDARDS ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT, THE NEW JERSEY LAW AGAINST DISCRIMINATION, THE NEW JERSEY CONSCIENTIOUS EMPLOYEE PROTECTION ACT, STATE AND FEDERAL FAMILY LEAVE LAWS, STATE AND FEDERAL WAGE AND HOUR LAWS AND ANY OTHER FEDERAL, STATE, LOCAL OR COMMON LAW CLAIM.

BY SIGNING THIS AGREEMENT MS. LAFRENNIE ACKNOWLEDGES AND AFFIRMS THAT SHE IS COMPETENT, THAT SHE HAS BEEN AFFORDED A TIME PERIOD OF NO LESS THAN 21 DAYS TO REVIEW AND CONSIDER THIS AGREEMENT AND HAS BEEN ADVISED TO DO SO WITH AN ATTORNEY OF HER CHOICE, THAT SHE HAS READ AND UNDERSTANDS AND ACCEPTS THIS DOCUMENT AS FULLY AND FINALLY WAIVING AND RELEASING ANY AND ALL CLAIMS, DEMANDS, DISPUTES AND ANY DIFFERENCES OF ANY KIND WHATSOEVER WHICH SHE MAY HAVE HAD OR NOW HAS AGAINST EMPLOYER ARISING OUT OF OR RELATING TO HER EMPLOYMENT WITH EMPLOYER, THE TERMINATION OF HER EMPLOYMENT, HER COMPENSATION AND BENEFITS WITH THE BOARD, THE ADMINISTRATIVE ACTION, OR OTHERWISE, THAT NO REPRESENTATIONS, PROMISES, OR INDUCEMENTS HAVE BEEN MADE TO HER EXCEPT AS SET FORTH IN THIS AGREEMENT, AND THAT SHE HAS SIGNED THESE DOCUMENTS FREELY AND VOLUNTARILY, INTENDING TO BE LEGALLY BOUND BY ITS TERMS, AND WITH FULL UNDERSTANDING OF ITS CONSEQUENCES.

AGREED AND ACCEPTED:

Lori LaFrennie Date: 9/14/04

Subscribed and sworn to before me
this 15 day of September 2004.

Notary Public

KIM A. BOLTON
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 3/11/2008

I hereby acknowledge and affirm that I have full authority to act on behalf of and to bind the Board to the terms set forth in this Agreement.

Jerome Page, Board President Date:

Witness:

Helene E. McBride

Helene McBride, CPA
Business Administrator/
Board Secretary

503-04 SEC

AGENCY DKT. NO. 411-11/04

IN THE MATTER OF SANTIAGO	:	COMMISSIONER OF EDUCATION
PANIAGUA, NEW HORIZONS	:	DECISION
CHARTER SCHOOL, ESSEX COUNTY.	:	
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, *N.J.S.A.* 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was appointed to the Charter School Board of Trustees in April 2003; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board of trustee members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 3, 2003 and February 3, 2004; and

Whereas, the NJSBA conducted seven training sessions between April 2003 and March 2004 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 26, 2004, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the above-named Board member did not reply to the order; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its October 26, 2004 meeting, that he had the right to attend, that he could be found in violation of the School Ethics Act, and that he could receive a penalty up to removal; and

Whereas, the above-named Board member registered for the October 2004 training session but did not attend; and

Whereas, the Commission has found that this failure to attend board member training from April 2003 until October 2004 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, at its meeting on October 26, 2004, the Commission voted to recommend that all charter school board of trustee members who had failed to attend the October training be suspended from the board until such time as they attended training; and

Whereas, on November 18, 2004, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on his behalf submitted comments; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and finds the Commission's recommendation is inconsistent with the penalty recommended in previous matters of this nature with substantially similar facts, wherein the Commission recommended, and the Commissioner concurred, that charter school board of trustee members who had failed to attend the requisite training well in excess of one year from their election to the Board should be: 1) suspended from office; 2) remain suspended pending completion of the requisite training; and, 3) summarily removed from office in the event they failed to complete the training session in January of the next year (*See, e.g., In the Matter of John Frohling, Learning Community Charter School Board of Trustees, Hudson County,* decided by the Commissioner December 22, 2003; *In the Matter of Veronica Sutton, Jersey City Community Charter School Board of Trustees, Hudson County*, decided by the Commissioner December 22, 2003; and *In the Matter of Wentford Gaines, Jersey City Community Charter School, Board of Trustees, Hudson County*, decided by the Commissioner December 23, 2003); and

Whereas, the School Ethics Commission did not articulate its reasons for not recommending the removal, absent attendance at a training session by a date certain, of board of trustee members who had not attended training by October 2004; and

Whereas, the Commissioner, in the absence of such explanation, cannot concur with the Commission's recommendation and, instead, determines that immediate suspension, with subsequent removal if training is not completed by the date specified, is the proper penalty in this matter based upon the penalty imposed in prior matters of this nature; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing date of this decision and shall remain suspended pending completion of the requisite training; provided, however, that, in the event he fails to complete one of the two training sessions offered in January 2005, the above-named Board member shall be summarily removed from office as of January 30, 2005.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/10/04

Date of Mailing: 12/10/04

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DECISION**
SANTIAGO PANIAGUA,	:	**ON TRAINING**
New Horizons Community	:	
Charter School Board of Trustees	:	**DOCKET NO. T35-04**
Essex County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-23.1 provides that all of the provisions of the School Ethics Act are applicable to charter school administrators and members of the board of trustees; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Santiago Paniagua was newly appointed in April 2003 to the New Horizons Community Charter School Board of Trustees and, therefore, had until April 2004 to complete the training requirement; and

WHEREAS, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board of trustee members who have failed to register for or attend an orientation and did mail such correspondence to Mr. Paniagua on December 3, 2003, and February 3, 2004; and

WHEREAS, the NJSBA conducted seven training sessions between April 2003 and March 2004 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the Commission issued an Order on May 26, 2004, via registered mail, directing Santiago Paniagua to Show Cause why he had not attended training up until that time; and

WHEREAS, the registered mail was returned as unclaimed to the Commission and on June 23, 2004 the Commission again issued the Order via regular mail; and

WHEREAS, Mr. Paniagua did not reply; and

WHEREAS, the Commission notified Mr. Paniagua that the Commission would discuss this matter at its October 26, 2004 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Mr. Paniagua registered for the October 2004 training, but did not attend that training session; and

WHEREAS, at its October 26, 2004 meeting, the Commission voted to suspend until such time as they attended training all charter school trustees who had failed to attend the October training; and

WHEREAS, Mr. Paniagua has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that his failure to attend board member training from April 2003 to October 2004 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension until such time as he attends training;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Santiago Paniagua violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until such time as she attends training.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: November 18, 2004

I certify that the within Decision
was authorized by the School Ethics
Commission.

Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview

Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/resolutions/T12-04

504-04

504-04

OAL DKT. NO EDU 8061-03
AGENCY DKT. NO. 53-2/03

IN THE MATTER OF THE TENURE	:	
HEARING OF DARIN McDONALD,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF CAMDEN, CAMDEN COUNTY.	:	DECISION
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/13/04

Date of Mailing: 12/13/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8061-03
AGENCY DKT. NO. 53-2/03

IN THE MATTER OF THE TENURE HEARING OF DARIN McDONALD, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY

Harold George, Esq., for petitioner (Sumners & George, attorneys)

Keith Waldman, Esq., for respondent (Seilkoff & Cohen, attorneys)

Record Closed: November 15, 2004 Decided: November 17, 2004

BEFORE **ANA C. VISCOMI**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 21, 2003, 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 hearing in this matter commenced on February 3, 2004. At the first mutually amenable continued hearing date, October 5, 2004, the parties participated in settlement discussion with the undersigned Administrative Law Judge (ALJ). As a result, the parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is 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 **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.

Within thirteen (13) 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, 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, 2004
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

Receipt Acknowledged:

11-29-04
DATE

M. Kathleen Dunscom
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 30 2004

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/tmp

RECEIVED
2004 NOV 15 A 11: 18
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SUMNERS & GEORGE, PC
849 W. State St.
P.O. Box 630
Trenton, NJ 08604
Attorneys for
Board of Education of the
City of Camden

SELIKOFF & COHEN, P.A.
307 Fellowship Rd., Suite 314
Mt. Laurel, NJ 08054-1233
(856) 778-6055
Attorneys for Respondent,
Darin B. McDonald

IN THE MATTER OF THE TENURE HEARING OF DARIN McDONALD, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DOCKET NO. EDUTH 08061-2003S
AGENCY REF. NO. 53-2/03

JOINT REQUEST FOR APPROVAL OF SETTLEMENT, INCLUDING WITHDRAWAL OF TENURE CHARGES

INTRODUCTION

Counsel for the Board of Education of the City of Camden ("BOARD") and counsel for its tenured employee Darin McDonald ("McDONALD") join in moving for an order declaring that the Settlement Agreement between the parties, attached hereto as Exhibit A, meets the requirements of In re *Cardonick*, 1990 *S.L.D.* 842 (1983), as incorporated in *N.J.A.C.* 1:1-19.1, recommending that the Settlement Agreement be approved by the Commissioner of Education, and on condition that the Commissioner approves without modification the Settlement Agreement attached hereto as Exhibit A, ordering that the Settlement Agreement be implemented, and that the tenure charges filed by the BOARD be withdrawn and this matter dismissed with prejudice.

PROCEDURAL STATEMENT

This matter arises out of charges certified by the BOARD to the Commissioner on February 6, 2003 against a tenured teaching staff member on grounds of unbecoming conduct and inefficiency. The tenure charges were transmitted to the Office of Administrative Law ("OAL") as a contested case on May 9, 2003. A hearing concerning the BOARD's tenure charges commenced before the Honorable Judge Ana C. Viscomi on February 3, 2004, and continued on October 5, 2004. On October 5, 2004, counsel informed Judge Viscomi that the parties had reached a tentative settlement agreement. Although the material terms of the settlement were placed upon the record, the settlement was expressly conditioned upon the drafting of mutually satisfactory settlement documents to be submitted for approval by the Camden Board of Education, for review by the Governor pursuant to Municipal Rehabilitation and Economic Recovery Act, *N.J.S.A.* 52:27BBB-64 and by the Commissioner so that the tenure charges might be withdrawn.

The parties have agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that, among other terms, McDONALD will be suspended without pay for thirty (30) days, will participate in treatment in a 30-day in-patient substance abuse and rehabilitation program, will agree to submit to drug testing on a random basis for a two year period, and, that should he test positive for drug use during that two year period, he will be subject to termination of tenure in accordance with the principles articulated by the Commissioner in *In re Yanniello*, CD 203-95 (Jun. 12, 1995), *aff'd.* S.B. 78-95 (Jan. 8, 1997), *aff'd* App. Div. Dkt. No. A-3482-96T1 (Apr. 2, 1998)(unreported) (Commissioner ruled employee and local school board may enter into binding return to work agreement providing for second chance and, under terms of agreement, Commissioner rejected employee's claim to "third strike" under New Jersey Law Against Discrimination). In exchange for these and other terms, once McDONALD provides the BOARD with proof of treatment (on or after December 15, 2004), the BOARD will reinstate McDONALD to a position consistent with his certification as a teacher at the salary step to which he would have been assigned had the tenure charges not been brought against him.

The parties have further agreed under the terms of the Settlement Agreement attache hereto as Exhibit A that the BOARD's withholding of his increments for the 2004-05 school year will be a permanent increment withholding, subject to the BOARD's ability to restore the increments in its sole discretion at a future date as is its prerogative under *Probst v. Haddonfield Bd. of Ed.*, 127 *N.J.* 518 (1992).

The parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that conditioned upon the Commissioner's approval of the Settlement Agreement without modification, the tenure charges against McDONALD shall be withdrawn and dismissed with prejudice. Furthermore, should the Commissioner fail to approve the Settlement Agreement attached hereto as Exhibit A without modification, the parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet his objections.

THE JUSTIFICATION FOR WITHDRAWAL OF TENURE CHARGES

As to the charge of unbecoming conduct, the BOARD's justification for withdrawal of the charge includes the existence of a controverted factual record, the existence of extraordinar mitigating circumstances, and the BOARD's commitment to the letter and spirit of the handicap accommodation requirements of the New Jersey Law Against Discrimination, *N.J.S.A.* 10-5-1 *et seq.* as previously adopted by the Commissioner in *In re Yanniello, supra,* and as affirmed by the Appellate Division in that case. As to the charges of inefficiency (termed "neglect of duty" and "insubordination"), the BOARD's justification for withdrawal of the charges is that a genuine question exists as to whether the BOARD should have provided the procedure and notice required by *N.J.A.C.* 6A:3-5.1. The BOARD's decision to request the withdrawal of the charges is further reinforced by the fact that the BOARD has had an opportunity to fully investigate and assess the allegations and confer with witnesses during the discovery phase, and in preparation for hearing, and that the BOARD conducted a detailed and full independent investigation of the allegations an the BOARD obtained all relevant information and documentation. It is for these reasons and the reasons expressed in the recitals of the Settlement Agreement that the BOARD has decided to withdraw the charges upon approval of this settlement by the Commissioner.

CONCLUSION

The Settlement Agreement was negotiated between counsel after certain facts became known during the course of discovery and preparation for hearing. Counsel, as well as McDONALD and the BOARD which unanimously approved it, are satisfied with the Settlement Agreement and believe that it fulfills the public interest with respect to these matters. For the reasons outlined above, and for good cause shown, this tribunal should conclude that the Settlement Agreement meets the requirements of *N.J.A.C.* 1:1-19.1, recommend that the Settlement Agreement be adopted without modification by the Commissioner, order that the Settlement Agreement be implemented on condition that it is so approved, and therefore upon such approval dismiss with prejudice the tenure charges in this matter.

Respectfully submitted,

SUMNERS & GEORGE
Attorneys for Board of Education of the City of Camden

BY: _____
HAROLD GEORGE

Dated: 10-28-04

SELIKOFF & COHEN, P.A.
Attorneys for Darin McDonald

BY: _____
KEITH WALDMAN

EXHIBIT A

SETTLEMENT AGREEMENT REGARDING ACTIONS PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Board of Education of the City of Camden ("BOARD") and its tenured employee Darin McDonald ("McDONALD").

WHEREAS, McDONALD has been continuously employed by the BOARD as a teacher of elementary art since January 1, 1995; and

WHEREAS, on February 6, 2003 the BOARD certified tenure charges against McDONALD to the Commissioner under the Tenure Employees Hearing Law, which charges were captioned:

> **IN THE MATTER OF THE TENURE HEARING OF DARIN MCDONALD, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY.**
>
> OAL DKT NO. EDUTH 08061-2003S
> AGENCY REF. NO. 53-2/03;

WHEREAS, McDONALD filed an answer contesting the tenure charges;

WHEREAS, hearing of the consolidated proceeding began on February 3, 2004, and continued on October 5, 2004;

WHEREAS, due to the fact that the criminal charges at issue in this matter which serve as the basis for the Charge No. 1 arise from a controverted factual record and resulted in a guilty plea in Camden Municipal Court as to a disorderly persons offense that does not constitute grounds for disqualification from employment, that does not result in automatic forfeiture and that is not a conviction which, in and of itself, constitutes unbecoming conduct. Specifically, the Camden Municipal Court plea was not based upon any proof that McDONALD at any time possessed or used any controlled dangerous substance;

WHEREAS, genuine questions of law and fact exist as to whether the BOARD should have provided the procedure and notice required by *N.J.A.C.* 6A:3-5.1 before bringing Charges No. 2 and 3 (charges of inefficiency termed "neglect of duty" and "insubordination");

WHEREAS, the parties acknowledge that a number of serious mitigating factors exist including the live birth and death of McDONALD's daughter, Tatyanna Dianna McDonald in 2000, the ensuing dissolution of McDONALD's marriage and an incident in which McDONALD was struck in the head with a brick by a student at the workplace and the parties further recognize that none of these circumstances are likely to recur in the future;

WHEREAS, the parties acknowledge and recognize the BOARD's commitment to the letter and spirit of the handicap accommodation provisions of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, as previously adopted by the Commissioner in *In re Yaniello*, CD 203-95 (Jun. 12, 1995), *aff'd.* S.B. 78-95 (Jan. 8, 1997), *aff'd* App. Div. Dkt. No. A-3482-96T1 (Apr. 2, 1998)(unreported). More specifically, the BOARD recognizes that under the New Jersey Law Against Discrimination, an employer is required to consider the possibility of reasonable accommodation before firing an employee with disabilities. Likewise, McDONALD recognizes that notwithstanding BOARD's obligation to provide reasonable accommodation to an employee w disabilities, the employee must still be capable of performing his duties, including but not limite to maintaining sobriety and having a satisfactory record of attendance and that, consistent with *Yaniello*, *supra,* the BOARD may lawfully hold McDONALD to the terms of a return to work agreement;

WHEREAS, the BOARD and McDONALD have each retained independent counsel of their own choosing, and have been advised of their respective rights and responsibilities under the Tenure Employees' Hearing Law and the New Jersey Law Against Discrimination; and

WHEREAS, notwithstanding BOARD's right to pursue the tenure charges before the Commissioner and McDONALD's right to contest such charges and be afforded full procedural due process under the Tenure Employees' Hearing Law, the parties have knowingly, intelligently, and voluntarily agreed to waive such rights.

NOW THEREFORE, the matters in dispute having been amicably adjusted by and between the parties, it is hereby stipulated and agreed as follows:

1. The above recitals are repeated and made a part of this Settlement Agreement by reference;

2. The BOARD will seek the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, ask the Commissioner to allow the tenure charges against McDONALD to be withdrawn and dismissed with prejudice;

3. Should the Commissioner fail to approve this Settlement Agreement without modification, the parties have agreed to make every reasonable effort to reform this Settlement Agreement to meet any objections. In the event that such reformation is not possible, this Settlement Agreement will become null and void, the parties will return to the status quo as it existed before this Settlement Agreement was drafted, the matter will be listed for a tenure hearing and the parties agree, in advance that neither the settlement, this Settlement Agreement, the Joint Request for Approval of Settlement, nor any representations of fact set forth in the settlement, this Settlement Agreement or the Joint Request for Approval of Settlement will be admissible for any purpose in the hearing or any appeals arising therefrom.

4. McDonald's suspension with pay will continue until November 14, 2004. Commencing on November 15, 2004, the BOARD will suspend McDONALD for thirty (30) days without pay;

5. Commencing on or before November 15, 2004, McDONALD will attend an in-patient program for substance abuse and rehabilitation at a reputable facility for a minimum of thirty (30) days. McDONALD may choose the facility subject to the approval of the Superintendent of Schools; such approval will not be unreasonably withheld. The BOARD will maintain health benefits for McDONALD in accordance with the terms of the current collectively negotiated agreement to enable McDONALD to have the health coverage in place to facilitate his attendance. McDONALD will be responsible for all co-pays and deductibles;

6. As early as December 15, 2004, upon completion of the treatment program and upon McDONALD's providing the BOARD with proof of treatment, the BOARD will reinstate McDONALD to a position consistent with his certification as a teacher. The BOARD may assign McDONALD at an elementary school of the BOARD's choice.

7. For a period of two years from the full and final execution of this agreement by McDONALD and the BOARD, McDONALD consents in advance to submit to blood testing upon request by the BOARD or its administrators for the presence of controlled dangerous substance ("CDS") in his body. Blood testing is to take place at a licensed, BOARD-designated hospital, laboratory or clinic utilizing a split sample method, with the sample to be split into three parts. In the event that the first part of the sample tests positive utilizing the then-current standards accepted by the United States Department of Transportation, the BOARD may immediately suspend McDONALD in accordance with *N.J.S.A.* 18A:6-10, *et seq.*, and the second part of the sample will

be forwarded promptly and directly by the licensed, BOARD-designated hospital, laboratory c clinic to a facility operated by Quest Diagnostics or its successor by merger or acquisition (which McDONALD agrees, in advance, is an independent laboratory of his choice). McDONALD will pay for the analysis of the second part of the sample. In the event that the second part of the sample tests positive, it will be considered as a violation of this agreement by McDONALD . In the event that the second part of the sample tests negative, the third part will be tested by Laboratory Corporation of America or its successor by merger or acquisition at the expense of the BOARD. The third test shall be conclusive. In the event that the third part of the sample tests positive, it will be considered as a violation of this agreement by McDONALD. In the event of a violation of this agreement by McDONALD , following the principles articulated in *Yaniello*, McDONALD acknowledges that he will be subject to the termination of his employment and tenure and he will not be enitiled to a "third strike."

8. In addition to the 30-day suspension without pay as outlined in ¶ 4 above, McDONALD also agrees to an additional 30-day loss of pay to be effectuated by the reduction of his salary for the remainder of the 2004-2005 school year to a prorated salary 125/155 of his full salary. The BOARD will pay McDONALD this pro-rated salary on both pay days in October and, following his return from suspension, commencing on the December 15, 2004 pay day or upon his presentation of proof of treatment (whichever is later) and continuing through the end of the 2004-05 school year.

9. McDONALD acknowledges that the BOARD's withholding of his increments for the 2004-2005 school year are and will be permanent increment withholdings. Provided, however, that nothing prevents the BOARD from restoring the increments at some time in the future pursuant to its discretionary power as acknowledged in *Probst v. Haddonfield Bd. of Ed.*, 127 *N.J.* 518 (1992).

10. Commencing in September of 2005, the BOARD will resume paying McDONALD his full salary on a non-prorated basis. Commencing on September 2005, McDONALD will be placed at Step 10 of the BA+30 column of the guide. The BOARD acknowledges that McDONALD claims to have earned his Masters degree and, providing that McDONALD can provide the BOARD with proof that he has, in fact, received this degree, commencing on September 2005, McDONALD will be placed at Step 10 of the MA column of the guide.

11. Within 2 weeks of December 15, 2004 or within 2 weeks of McDONALD's return to work following December 15, 2004 (whichever is later), McDONALD and the principal at the school to which he will be assigned will jointly prepare a Professional Improvement Plan ("PIP") with the express goal of limiting lateness and absenteeism. The PIP may provide for enhanced sick leave verification and will provide for disciplinary action in the event that McDONALD's absenteeism from December 15, 2004 through the end of the 2004-05 exceeds the maximum absenteeism rates established by the Education Laws. Nothing in this Settlement Agreement is intended to in any way limit McDONALD's rights arising under the Family Medical Leave Act or the New Jersey Family Leave Act.

12. McDONALD agrees that he has been fairly and adequately represented and advised at all stages of these proceedings, that he is fully satisfied with the services of counsel and that he is voluntarily and without coercion with a full understanding of his rights and the ramifications of this Settlement Agreement entering into it on his own accord. McDONALD fully understands that this Settlement Agreement is subject to the approval of the Commissioner of Education.

13. The signatory for the BOARD acknowledges that the BOARD has ratified this Settlement Agreement at a duly-noticed meeting and that the Governor of the State of New Jersey has indicated that he will not exercise his right to veto this Settlement Agreement pursuant to the Municipal Rehabilitation and Economic Recovery Act, *N.J.S.A.* 52:27BBB-64.

14. The parties further agree in consideration of this Settlement Agreement that if it is approved by the Commissioner, that they will not assert in any judicial or administrative proceeding that any statements concerning the reasons they believe this settlement is not inconsistent with the public's interest are admissions, admissions against interest or competent evidence of any fact.

DATED:

SUMNERS & GEORGE
Attorneys for
Board of Education of the
City of Camden

BY: _____
HAROLD GEORGE

_____
DARIN McDONALD

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

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Attorneys for Respondent,
Darin B. McDonald

IN THE MATTER OF THE TENURE HEARING OF DARIN McDONALD, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DOCKET NO. EDUTH 08061-2003S
AGENCY REF. NO. 53-2/03

JOINT REQUEST FOR APPROVAL OF SETTLEMENT, INCLUDING WITHDRAWAL OF TENURE CHARGES

INTRODUCTION

Counsel for the Board of Education of the City of Camden ("BOARD") and counsel for its tenured employee Darin McDonald ("McDONALD") join in moving for an order declaring that the Settlement Agreement between the parties, attached hereto as Exhibit A, meets the requirements of In re *Cardonick*, 1990 *S.L.D.* 842 (1983), as incorporated in *N.J.A.C.* 1:1-19.1, recommending that the Settlement Agreement be approved by the Commissioner of Education, and on condition that the Commissioner approves without modification the Settlement Agreement attached hereto as Exhibit A, ordering that the Settlement Agreement be implemented, and that the tenure charges filed by the BOARD be withdrawn and this matter dismissed with prejudice.

PROCEDURAL STATEMENT

This matter arises out of charges certified by the BOARD to the Commissioner on February 6, 2003 against a tenured teaching staff member on grounds of unbecoming conduct and inefficiency. The tenure charges were transmitted to the Office of Administrative Law ("OAL") as a contested case on May 9, 2003. A hearing concerning the BOARD's tenure charges commenced before the Honorable Judge Ana C. Viscomi on February 3, 2004, and continued on October 5, 2004. On October 5, 2004, counsel informed Judge Viscomi that the parties had reached a tentative settlement agreement. Although the material terms of the settlement were placed upon the record, the settlement was expressly conditioned upon the drafting of mutually satisfactory settlement documents to be submitted for approval by the Camden Board of Education, for review by the Governor pursuant to Municipal Rehabilitation and Economic Recovery Act, *N.J.S.A.* 52:27BBB-64 and by the Commissioner so that the tenure charges might be withdrawn.

The parties have agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that, among other terms, McDONALD will be suspended without pay for thirty (30) days, will participate in treatment in a 30-day in-patient substance abuse and rehabilitation program, will agree to submit to drug testing on a random basis for a two year period, and, that should he test positive for drug use during that two year period, he will be subject to termination of tenure in accordance with the principles articulated by the Commissioner in *In re Yanniello*, CD 203-95 (Jun. 12, 1995), *aff'd.* S.B. 78-95 (Jan. 8, 1997), *aff'd* App. Div. Dkt. No. A-3482-96T1 (Apr. 2, 1998)(unreported) (Commissioner ruled employee and local school board may enter into binding return to work agreement providing for second chance and, under terms of agreement, Commissioner rejected employee's claim to "third strike" under New Jersey Law Against Discrimination). In exchange for these and other terms, once McDONALD provides the BOARD with proof of treatment (on or after December 15, 2004), the BOARD will reinstate McDONALD to a position consistent with his certification as a teacher at the salary step to which he would have been assigned had the tenure charges not been brought against him.

The parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that the BOARD's withholding of his increments for the 2004-05 school year will be a permanent increment withholding, subject to the BOARD's ability to restore the increments in its sole discretion at a future date as is its prerogative under *Probst v. Haddonfield Bd. of Ed.*, 127 *N.J.* 518 (1992).

The parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that conditioned upon the Commissioner's approval of the Settlement Agreement without modification, the tenure charges against McDONALD shall be withdrawn and dismissed with prejudice. Furthermore, should the Commissioner fail to approve the Settlement Agreement attached hereto as Exhibit A without modification, the parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet his objections.

THE JUSTIFICATION FOR WITHDRAWAL OF TENURE CHARGES

As to the charge of unbecoming conduct, the BOARD's justification for withdrawal of the charge includes the existence of a controverted factual record, the existence of extraordinary mitigating circumstances, and the BOARD's commitment to the letter and spirit of the handicap accommodation requirements of the New Jersey Law Against Discrimination, *N.J.S.A.* 10-5-1 *et seq.* as previously adopted by the Commissioner in *In re Yanniello, supra,* and as affirmed by the Appellate Division in that case. As to the charges of inefficiency (termed "neglect of duty" and "insubordination"), the BOARD's justification for withdrawal of the charges is that a genuine question exists as to whether the BOARD should have provided the procedure and notice required by *N.J.A.C.* 6A:3-5.1. The BOARD's decision to request the withdrawal of the charges is further reinforced by the fact that the BOARD has had an opportunity to fully investigate and assess the allegations and confer with witnesses during the discovery phase, and in preparation for hearing, and that the BOARD conducted a detailed and full independent investigation of the allegations an the BOARD obtained all relevant information and documentation. It is for these reasons and the reasons expressed in the recitals of the Settlement Agreement that the BOARD has decided to withdraw the charges upon approval of this settlement by the Commissioner.

CONCLUSION

The Settlement Agreement was negotiated between counsel after certain facts became known during the course of discovery and preparation for hearing. Counsel, as well as McDONALD and the BOARD which unanimously approved it, are satisfied with the Settlement Agreement and believe that it fulfills the public interest with respect to these matters. For the reasons outlined above, and for good cause shown, this tribunal should conclude that the Settlement Agreement meets the requirements of *N.J.A.C.* 1:1-19.1, recommend that the Settlement Agreement be adopted without modification by the Commissioner, order that the Settlement Agreement be implemented on condition that it is so approved, and therefore upon such approval dismiss with prejudice the tenure charges in this matter.

Respectfully submitted,

SUMNERS & GEORGE
Attorneys for Board of Education of the City of Camden

BY: _____
HAROLD GEORGE

Dated: 10-28-04

SELIKOFF & COHEN, P.A.
Attorneys for Darin McDonald

BY: _____
KEITH WALDMAN

EXHIBIT A

SETTLEMENT AGREEMENT REGARDING ACTIONS PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Board of Education of the City of Camden ("BOARD") and its tenured employee Darin McDonald ("McDONALD").

WHEREAS, McDONALD has been continuously employed by the BOARD as a teacher of elementary art since January 1, 1995; and

WHEREAS, on February 6, 2003 the BOARD certified tenure charges against McDONALD to the Commissioner under the Tenure Employees Hearing Law, which charges were captioned:

> **IN THE MATTER OF THE TENURE HEARING OF DARIN MCDONALD, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY.**
>
> OAL DKT NO. EDUTH 08061-2003S
> AGENCY REF. NO. 53-2/03;

WHEREAS, McDONALD filed an answer contesting the tenure charges;

WHEREAS, hearing of the consolidated proceeding began on February 3, 2004, and continued on October 5, 2004;

WHEREAS, due to the fact that the criminal charges at issue in this matter which serve as the basis for the Charge No. 1 arise from a controverted factual record and resulted in a guilty plea in Camden Municipal Court as to a disorderly persons offense that does not constitute grounds for disqualification from employment, that does not result in automatic forfeiture and that is not a conviction which, in and of itself, constitutes unbecoming conduct. Specifically, the Camden Municipal Court plea was not based upon any proof that McDONALD at any time possessed or used any controlled dangerous substance;

WHEREAS, genuine questions of law and fact exist as to whether the BOARD should have provided the procedure and notice required by *N.J.A.C.* 6A:3-5.1 before bringing Charges No. 2 and 3 (charges of inefficiency termed "neglect of duty" and "insubordination");

WHEREAS, the parties acknowledge that a number of serious mitigating factors exist including the live birth and death of McDONALD's daughter, Tatyanna Dianna McDonald in 2000, the ensuing dissolution of McDONALD's marriage and an incident in which McDONALD was struck in the head with a brick by a student at the workplace and the parties further recognize that none of these circumstances are likely to recur in the future;

WHEREAS, the parties acknowledge and recognize the BOARD's commitment to the letter and spirit of the handicap accommodation provisions of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, as previously adopted by the Commissioner in *In re Yaniello*, CD 203-95 (Jun. 12, 1995), *aff'd.* S.B. 78-95 (Jan. 8, 1997), *aff'd* App. Div. Dkt. No. A-3482-96T1 (Apr. 2, 1998)(unreported). More specifically, the BOARD recognizes that under the New Jersey Law Against Discrimination, an employer is required to consider the possibility of reasonable accommodation before firing an employee with disabilities. Likewise, McDONALD recognizes that notwithstanding BOARD's obligation to provide reasonable accommodation to an employee with disabilities, the employee must still be capable of performing his duties, including but not limited to maintaining sobriety and having a satisfactory record of attendance and that, consistent with *Yaniello*, *supra,* the BOARD may lawfully hold McDONALD to the terms of a return to work agreement;

WHEREAS, the BOARD and McDONALD have each retained independent counsel of their own choosing, and have been advised of their respective rights and responsibilities under the Tenure Employees' Hearing Law and the New Jersey Law Against Discrimination; and

WHEREAS, notwithstanding BOARD's right to pursue the tenure charges before the Commissioner and McDONALD's right to contest such charges and be afforded full procedural due process under the Tenure Employees' Hearing Law, the parties have knowingly, intelligently, and voluntarily agreed to waive such rights.

NOW THEREFORE, the matters in dispute having been amicably adjusted by and between the parties, it is hereby stipulated and agreed as follows:

1. The above recitals are repeated and made a part of this Settlement Agreement by reference;

2. The BOARD will seek the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, ask the Commissioner to allow the tenure charges against McDONALD to be withdrawn and dismissed with prejudice;

3. Should the Commissioner fail to approve this Settlement Agreement without modification, the parties have agreed to make every reasonable effort to reform this Settlement Agreement to meet any objections. In the event that such reformation is not possible, this Settlement Agreement will become null and void, the parties will return to the status quo as it existed before this Settlement Agreement was drafted, the matter will be listed for a tenure hearing and the parties agree, in advance that neither the settlement, this Settlement Agreement, the Joint Request for Approval of Settlement, nor any representations of fact set forth in the settlement, this Settlement Agreement or the Joint Request for Approval of Settlement will be admissible for any purpose in the hearing or any appeals arising therefrom.

4. McDonald's suspension with pay will continue until November 14, 2004. Commencing on November 15, 2004, the BOARD will suspend McDONALD for thirty (30) days without pay;

5. Commencing on or before November 15, 2004, McDONALD will attend an in-patient program for substance abuse and rehabilitation at a reputable facility for a minimum of thirty (30) days. McDONALD may choose the facility subject to the approval of the Superintendent of Schools; such approval will not be unreasonably withheld. The BOARD will maintain health benefits for McDONALD in accordance with the terms of the current collectively negotiated agreement to enable McDONALD to have the health coverage in place to facilitate his attendance. McDONALD will be responsible for all co-pays and deductibles;

6. As early as December 15, 2004, upon completion of the treatment program and upon McDONALD's providing the BOARD with proof of treatment, the BOARD will reinstate McDONALD to a position consistent with his certification as a teacher. The BOARD may assign McDONALD at an elementary school of the BOARD's choice.

7. For a period of two years from the full and final execution of this agreement by McDONALD and the BOARD, McDONALD consents in advance to submit to blood testing upon request by the BOARD or its administrators for the presence of controlled dangerous substance ("CDS") in his body. Blood testing is to take place at a licensed, BOARD-designated hospital, laboratory or clinic utilizing a split sample method, with the sample to be split into three parts. In the event that the first part of the sample tests positive utilizing the then-current standards accepted by the United States Department of Transportation, the BOARD may immediately suspend McDONALD in accordance with *N.J.S.A.* 18A:6-10, *et seq.*, and the second part of the sample will

be forwarded promptly and directly by the licensed, BOARD-designated hospital, laboratory or clinic to a facility operated by Quest Diagnostics or its successor by merger or acquisition (which McDONALD agrees, in advance, is an independent laboratory of his choice). McDONALD will pay for the analysis of the second part of the sample. In the event that the second part of the sample tests positive, it will be considered as a violation of this agreement by McDONALD . In the event that the second part of the sample tests negative, the third part will be tested by Laboratory Corporation of America or its successor by merger or acquisition at the expense of the BOARD. The third test shall be conclusive. In the event that the third part of the sample tests positive, it will be considered as a violation of this agreement by McDONALD. In the event of a violation of this agreement by McDONALD , following the principles articulated in *Yaniello*, McDONALD acknowledges that he will be subject to the termination of his employment and tenure and he will not be enititled to a "third strike."

8. In addition to the 30-day suspension without pay as outlined in ¶ 4 above, McDONALD also agrees to an additional 30-day loss of pay to be effectuated by the reduction of his salary for the remainder of the 2004-2005 school year to a prorated salary 125/155 of his full salary. The BOARD will pay McDONALD this pro-rated salary on both pay days in October and, following his return from suspension, commencing on the December 15, 2004 pay day or upon his presentation of proof of treatment (whichever is later) and continuing through the end of the 2004-05 school year.

9. McDONALD acknowledges that the BOARD's withholding of his increments for the 2004-2005 school year are and will be permanent increment withholdings. Provided, however, that nothing prevents the BOARD from restoring the increments at some time in the future pursuant to its discretionary power as acknowledged in *Probst v. Haddonfield Bd. of Ed.*, 127 *N.J.* 518 (1992).

10. Commencing in September of 2005, the BOARD will resume paying McDONALD his full salary on a non-prorated basis. Commencing on September 2005, McDONALD will be placed at Step 10 of the BA+30 column of the guide. The BOARD acknowledges that McDONALD claims to have earned his Masters degree and, providing that McDONALD can provide the BOARD with proof that he has, in fact, received this degree, commencing on September 2005, McDONALD will be placed at Step 10 of the MA column of the guide.

11. Within 2 weeks of December 15, 2004 or within 2 weeks of McDONALD's return to work following December 15, 2004 (whichever is later), McDONALD and the principal at the school to which he will be assigned will jointly prepare a Professional Improvement Plan ("PIP") with the express goal of limiting lateness and absenteeism. The PIP may provide for enhanced sick leave verification and will provide for disciplinary action in the event that McDONALD's absenteeism from December 15, 2004 through the end of the 2004-05 exceeds the maximum absenteeism rates established by the Education Laws. Nothing in this Settlement Agreement is intended to in any way limit McDONALD's rights arising under the Family Medical Leave Act or the New Jersey Family Leave Act.

12. McDONALD agrees that he has been fairly and adequately represented and advised at all stages of these proceedings, that he is fully satisfied with the services of counsel and that he is voluntarily and without coercion with a full understanding of his rights and the ramifications of this Settlement Agreement entering into it on his own accord. McDONALD fully understands that this Settlement Agreement is subject to the approval of the Commissioner of Education.

13. The signatory for the BOARD acknowledges that the BOARD has ratified this Settlement Agreement at a duly-noticed meeting and that the Governor of the State of New Jersey has indicated that he will not exercise his right to veto this Settlement Agreement pursuant to the Municipal Rehabilitation and Economic Recovery Act, *N.J.S.A.* 52:27BBB-64.

14. The parties further agree in consideration of this Settlement Agreement that if it is approved by the Commissioner, that they will not assert in any judicial or administrative proceeding that any statements concerning the reasons they believe this settlement is not inconsistent with the public's interest are admissions, admissions against interest or competent evidence of any fact.

DATED:

SUMNERS & GEORGE
Attorneys for
Board of Education of the
City of Camden

BY: _____
HAROLD GEORGE

_____
DARIN McDONALD

508-04

508-04SEC

AGENCY DKT. NO.: 407-11/04

IN THE MATTER OF XIOMA TORRES,	:	
MARIA L. VARISCO-ROGERS CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, ESSEX COUNTY,	:	DECISION
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, *N.J.S.A.* 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was appointed to the Charter School Board of Trustees in April 2003; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board of trustee members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 3, 2003 and February 3, 2004; and

Whereas, the NJSBA conducted seven training sessions between April 2003 and March 2004 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 26, 2004, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the above-named Board member did not reply to the order; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its October 26, 2004 meeting, that she had the right to attend, that she could be found in violation of the School Ethics Act, and that she could receive a penalty up to removal; and

Whereas, the above-named Board member registered for the October 2004 training but did not attend that training session; and

Whereas, the Commission has found that this failure to attend board member training from April 2003 until October 2004 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, at its meeting on October 26, 2004, the Commission voted to recommend that all charter school board of trustee members who had failed to attend the October training be suspended from the board until such time as they attended training; and

Whereas, on November 18, 2004, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on her behalf submitted comments; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and finds the Commission's recommendation is inconsistent with the penalty recommended in previous matters of this nature

with substantially similar facts, wherein the Commission recommended, and the Commissioner concurred, that charter school board of trustee members who had failed to attend the requisite training well in excess of one year from their election to the Board should be: 1) suspended from office; 2) remain suspended pending completion of the requisite training; and, 3) summarily removed from office in the event they failed to complete the training session in January of the next year (*See, e.g., In the Matter of John Frohling, Learning Community Charter School Board of Trustees, Hudson County,* decided by the Commissioner December 22, 2003; *In the Matter of Veronica Sutton, Jersey City Community Charter School Board of Trustees, Hudson County*, decided by the Commissioner December 22, 2003; and *In the Matter of Wentford Gaines, Jersey City Community Charter School, Board of Trustees, Hudson County*, decided by the Commissioner December 23, 2003); and

Whereas, the School Ethics Commission did not articulate its reasons for not recommending the removal, absent attendance at a training session by a date certain, of Board of trustee members who had not attended training by October 2004; and

Whereas, the Commissioner, in the absence of such explanation, cannot concur with the Commission's recommendation and, instead, determines that immediate suspension, with subsequent removal if training is not completed by the date specified, is the proper penalty in this matter based upon the penalty imposed in prior matters of this nature; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing date of this decision and shall remain suspended pending completion of the requisite training; provided, however, that, in the event she fails to complete one of the two

training sessions offered in January 2005, the above-named Board member shall be summarily removed from office as of January 30, 2005.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/13/04

Date of Mailing: 12/14/04

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DECISION**
XIOMA TORRES,	:	**ON TRAINING**
Maria L. Varisco-Rogers CS	:	
Board of Trustees	:	**DOCKET NO. T48-04**
Essex County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-23.1 provides that all of the provisions of the School Ethics Act are applicable to charter school administrators and members of the board of trustees; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Xioma Torres was newly appointed in April 2003 to the Maria L. Varisco-Rogers Charter School Board of Trustees and, therefore, had until April 2004 to complete the training requirement; and

WHEREAS, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board of trustee members who have failed to register for or attend an orientation and did mail such correspondence to Ms. Torres on December 3, 2003, and February 3, 2004; and

WHEREAS, the NJSBA conducted seven training sessions between April 2003 and March 2004 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the Commission issued an Order on June 1, 2004, directing Xioma Torres to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Torres did not reply to the Order; and

WHEREAS, the Commission notified Ms. Torres that the Commission would discuss this matter at its October 26, 2004 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Ms. Torres registered for the October 2004 training, but did not attend that training session; and

WHEREAS, at its October 26, 2004 meeting, the Commission voted to suspend until such time as they attended training all charter school trustees who had failed to attend the October training; and

WHEREAS, Ms. Torres has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2003 to October 2004 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension until such time as she attends training;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Xioma Torres violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until such time as she attends training.

Paul C Garbarini 11/18

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: November 18, 2004

I certify that the within Decision
was authorized by the School Ethics
Commission.

Lisa James-Beavers

Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

507-04

AGENCY DKT. NO. 410-11/04

IN THE MATTER OF JEANETTE GRAHAM,	:	
GREATER NEWARK ACADEMY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, BOARD OF TRUSTEES,	:	DECISION
ESSEX COUNTY.	:	
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, *N.J.S.A.* 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was appointed to the Charter School Board of Trustees in April 2003; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board of trustee members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 3, 2003 and February 3, 2004; and

Whereas, the NJSBA conducted seven training sessions between April 2003 and March 2004 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 26, 2004, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the registered mail having been returned as unclaimed, on June 23, 2004, the Commission again issued the Order to Show Cause by regular mail; and

Whereas, the above-named Board member responded to the order by letter stating that she was unaware of the order because she had not received it by registered mail; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its October 26, 2004 meeting, that she had the right to attend, that she could be found in violation of the School Ethics Act, and that she could receive a penalty up to removal; and

Whereas, the above-named Board member registered for the October 2004 training but did not attend that training session; and

Whereas, the Commission has found that this failure to attend board member training from April 2003 until October 2004 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, at its meeting on October 26, 2004, the Commission voted to recommend that all charter school board of trustee members who had failed to attend the October training be suspended from the board until such time as they attended training; and

Whereas, on November 18, 2004, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on her behalf submitted comments; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and finds the Commission's recommendation is inconsistent with the penalty recommended in previous matters of this nature with substantially similar facts, wherein the Commission recommended, and the Commissioner concurred, that charter school board of trustee members who had failed to attend the requisite training well in excess of one year from their election to the Board should be: 1) suspended from office; 2) remain suspended pending completion of the requisite training; and, 3) summarily removed from office in the event they failed to complete the training session in January of the next year (*See, e.g., In the Matter of John Frohling, Learning Community Charter School Board of Trustees, Hudson County,* decided by the Commissioner December 22, 2003; *In the Matter of Veronica Sutton, Jersey City Community Charter School Board of Trustees, Hudson County*, decided by the Commissioner December 22, 2003; and *In the Matter of Wentford Gaines, Jersey City Community Charter School, Board of Trustees, Hudson County*, decided by the Commissioner December 23, 2003); and

Whereas, the School Ethics Commission did not articulate its reasons for not recommending the removal, absent attendance at a training session by a date certain, of Board of trustee members who had not attended training by October 2004; and

Whereas, the Commissioner, in the absence of such explanation, cannot concur with the Commission's recommendation and, instead, determines that immediate suspension, with subsequent removal if training is not completed by the date specified, is the proper penalty in this matter based upon the penalty imposed in prior matters of this nature; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing date of this decision and shall remain suspended pending completion of the

requisite training; provided, however, that, in the event she fails to complete one of the two training sessions offered in January 2005, the above-named Board member shall be summarily removed from office as of January 30, 2005.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/13/04

Date of Mailing: 12/14/04

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DECISION**
JEANNETTE GRAHAM,	:	**ON TRAINING**
Greater Newark Academy	:	
Charter School Board of Trustees	:	**DOCKET NO. T37-04**
Essex County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-23.1 provides that all of the provisions of the School Ethics Act are applicable to charter school administrators and members of the board of trustees; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Jeannette Graham was newly appointed in April 2003 to the Greater Newark Academy Charter School Board of Trustees and, therefore, had until April 2004 to complete the training requirement; and

WHEREAS, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board of trustee members who have failed to register for or attend an orientation and did mail such correspondence to Ms. Graham on December 3, 2003, and February 3, 2004; and

WHEREAS, the NJSBA conducted seven training sessions between April 2003 and March 2004 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the Commission issued an Order on May 26, 2004, via registered mail, directing Jeannette Graham to Show Cause why she had not attended training up until that time; and

WHEREAS, the registered mail was returned as unclaimed to the Commission and on June 23, 2004 the Commission again issued the Order via regular mail; and

WHEREAS, Ms. Graham replied that she was unaware of the Order because she had not received it via registered mail; and

WHEREAS, the Commission notified Ms. Graham that the Commission would discuss this matter at its October 26, 2004 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Ms. Graham registered for the October 2004 training, but did not attend that training session; and

WHEREAS, at its October 26, 2004 meeting, the Commission voted to suspend until such time as they attended training all charter school trustees who had failed to attend the October training; and

WHEREAS, Ms. Graham has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2003 to October 2004 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension until such time as she attends training;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Jeanette Graham violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until such time as she attends training.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: November 18, 2004

I certify that the within Decision
was authorized by the School Ethics
Commission.

Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the

Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/resolutions/T12-04

509-04

509-04SEC

AGENCY DKT. NO.: 408-11/04

IN THE MATTER OF DORIS MASON-GRIFFIN, :
EMILY FISHER SCHOOL OF ADVANCED : COMMISSIONER OF EDUCATION
STUDIES CHARTER SCHOOL, : DECISION
BOARD OF TRUSTEES, MERCER COUNTY. :
_____:

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend a penalty for the above-named Board member for failure to attend the board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, *N.J.S.A.* 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain skills and knowledge necessary to serve as a school board member; and

Whereas, the above-named Board member was appointed to the Charter School Board of Trustees in April 2003; and

Whereas, the New Jersey School Boards Association (NJSBA) mails correspondence to all new board of trustee members who have failed to register for or attend training and did mail such correspondence to the above-named Board member on December 3, 2003 and February 3, 2004; and

Whereas, the NJSBA conducted seven training sessions between April 2003 and March 2004 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 26, 2004, the Commission, via certified mail, issued to the above-named Board member an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the above-named Board member did not reply to the order; and

Whereas, the Commission notified the above-named Board member that it would discuss this matter at its October 26, 2004 meeting, that she had the right to attend, that she could be found in violation of the School Ethics Act, and that she could receive a penalty up to removal; and

Whereas, the above-named Board member registered for the October 2004 training but did not attend that training session; and

Whereas, the Commission has found that this failure to attend board member training from April 2003 until October 2004 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, at its meeting on October 26, 2004, the Commission voted to recommend that all charter school board of trustee members who had failed to attend the October training be suspended from the board until such time as they attended training; and

Whereas, on November 18, 2004, the above-named Board member was afforded an opportunity to submit written comments on the recommended sanction to the Commissioner; and

Whereas, neither the above-named Board member nor anyone on her behalf submitted comments; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and finds the Commission's recommendation is inconsistent with the penalty recommended in previous matters of this nature

with substantially similar facts, wherein the Commission recommended, and the Commissioner concurred, that charter school board of trustee members who had failed to attend the requisite training well in excess of one year from their election to the Board should be: 1) suspended from office; 2) remain suspended pending completion of the requisite training; and, 3) summarily removed from office in the event they failed to complete the training session in January of the next year (*See, e.g., In the Matter of John Frohling, Learning Community Charter School Board of Trustees, Hudson County,* decided by the Commissioner December 22, 2003; *In the Matter of Veronica Sutton, Jersey City Community Charter School Board of Trustees, Hudson County*, decided by the Commissioner December 22, 2003; and *In the Matter of Wentford Gaines, Jersey City Community Charter School, Board of Trustees, Hudson County*, decided by the Commissioner December 23, 2003); and

Whereas, the School Ethics Commission did not articulate its reasons for not recommending the removal, absent attendance at a training session by a date certain, of Board of trustee members who had not attended training by October 2004; and

Whereas, the Commissioner, in the absence of such explanation, cannot concur with the Commission's recommendation and, instead, determines that immediate suspension, with subsequent removal if training is not completed by the date specified, is the proper penalty in this matter based upon the penalty imposed in prior matters of this nature; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing date of this decision and shall remain suspended pending completion of the requisite training; provided, however, that, in the event she fails to complete one of the two

training sessions offered in January 2005, the above-named Board member shall be summarily removed from office as of January 30, 2005.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/13/04

Date of Mailing: 12/14/04

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

#510-04

OAL DKT. NO. EDU 1147-99
AGENCY DKT. NO. 546-12/98
STATE BOARD NO. 12-01

BOARD OF EDUCATION OF THE TOWNSHIP OF MINE HILL, MORRIS COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY,	:	
RESPONDENT	:	

For the Petitioner: Paul H. Green, Esq., (Schwartz Simon Edelstein Celso & Kessler)

For Respondent: Lester Aron, Esq., (Sills Cummis Radin Tischman Epstein & Gross)

This matter is considered on remand from the State Board of Education for the purpose of identifying the criteria which should apply to applications for withdrawal from sending/receiving relationships at the elementary school level formed pursuant to *N.J.S.A.* 18A:38-8. That statute provides:

> The board of education of any school district having the necessary accommodations may receive, or may be required to receive by order of the state board, pupils from another district not having sufficient accommodations, at rates of tuition fixed as in this article provided.

Noting that, in contrast to those high school level relationships formed under *N.J.S.A.* 18A:38-11, the Legislature has not established any statutory criteria for withdrawal from

elementary sending/receiving relationships formed pursuant to *N.J.S.A.* 18A:38-8, the State Board reversed the Commissioner's determination that the criteria set forth in *N.J.S.A.* 18A:38-13[1] were applicable to sending/receiving relationships at the elementary level and remanded the within matter for articulation of applicable criteria and for review under the appropriate standard.

Following the issuance of the State Board's decision, the parties were afforded an opportunity to propose the components of the applicable standard. Both filed briefs proposing standards upon remand on February 26, 2003. Each then replied to the other's submission. When the Appellate Division issued its opinion on May 15, 2003, in *In the Matter of the Petition for Authorization to Conduct a Referendum on the Withdrawal of North Haledon Sch. Dist. from the Passaic County Manchester Reg'l High Sch. Dist., 363 N.J.Super.* 130 (App. Div. 2003), the parties were offered an opportunity to submit additional commentary. Respondent Board of Education of the Town of Dover (Dover) filed a supplemental letter memorandum, dated June 16, 2003. Thereafter, the parties were advised that the Department of Education had filed a memorandum with the Supreme Court supporting North Haledon's petition for certification and that the within matter would be held in abeyance pending a determination from the Supreme Court. After the Court issued its decision in *North Haledon* on August 11, 2004 (*In re Petition*

[1] *N.J.S.A.* 18A:38-13, the statute which governs applications to the Commissioner for change of designation or allocation and apportionment of pupils to high schools, provides in pertinent part, ". . . [t]he commissioner shall make equitable determinations based upon consideration of all 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. The commissioner shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom."

for Authorization, 181 *N.J.* 161 (2004), each party filed a supplemental memorandum in September 2004.

In its brief proposing standards upon remand, Dover urges the adoption of the same criteria as those set forth in *N.J.S.A.* 18A:38-13, not because they are statutorily required, but because they reflect the public policy of this State:

> Here, the State Board has made it clear that the standards contained in *N.J.S.A.* 18A:38-13 do not apply as a matter of law. That is understandable in light of the precise statutory language. Nonetheless, there is nothing which prevents the Commissioner from creating as his own the same standards to apply to an elementary sending/receiving relationship if he believes that they are appropriate, even though not obligatory.
>
> The New Jersey Supreme Court has recognized the logic of such an approach where a Court is looking to apply public policy in circumstances where there are statutes which parallel but don't directly govern a factual matter. In its decision of *Carr v. Carr*, 120 *N.J.* 336 (1990), the Court held that
>
> > [i]n the exercise of their common-law jurisdiction, courts should seek to effectuate sound public policy and mold the law to embody the societal values that are exemplified by such public policy. In this process, courts should be responsive to legislation as expressive of public policy, which can serve to shape and add content to the common law, even though such legislative expressions may not be directly applicable or binding in the given matter. * * *
>
> Carr, 120 *N.J.* at 350 (emphasis added) (internal citations omitted). (Dover brief at 7)

Dover points to the statement of the Supreme Court in *Booker v. Board of Education of the City of Plainfield,* 45 *N.J.* 161 (1965) as further evidence that it is both the public policy and the law of this State to treat younger children with no less care than older children when it comes to the issue of integration.

> In a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in

> multiracial and multi-cultural communities and the earlier they do so the better. It is during the formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stressed democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority. *Booker*, 45 *N.J.* at 170-71 (emphasis added).

Dover then concludes that the articulated standards compel the conclusion that permitting Mine Hill to withdraw would, as previously determined by the ALJ and the Commissioner, result in a substantial negative impact on the racial balance in both districts. Even without considering that thirty-two percent of the students graduating from Mine Hill's elementary school do not go on to Dover Middle School, in every year projected by Dover's experts, who were credited by the ALJ, the effect of the actual withdrawal would be a 7-8 percent reduction annually in white students at Dover Middle School. Dover also suggests that the substantial percentage of students who do not attend Dover Middle School after elementary school in Mine Hill, together with the fact that, at the time the within petition was filed, three of the seven Board members in Mine Hill sent their students to private school after they completed elementary school, is evidence that the petitioner is racially motivated.

Petitioner, the Board of Education of the Borough of Mine Hill (Mine Hill), in its brief on remand, argues that there are significant differences between elementary and secondary pupils and programs, such that an identical standard is not necessary. It urges adoption of "an equitable balancing test weighing the financial and educational implications of the proposed withdrawal, giving due weight to the sending district's

right to educate its own pupils." (Mine Hill brief at 3.) In support of this standard, Mine Hill cites, as did the State Board, *Board of Education of the Township of Haddon v. Board of Education of the Borough of Collingswood,* 1966 *S.L.D.* 207, wherein the hearing officer pointed out that the statute is silent as to the continuance of such relationships at the elementary school level, in contrast to the provisions which the Legislature has established for such relationships at the high school level. The Commissioner permitted the withdrawal, finding no financial hardship would result and the withdrawal would not be contrary to the educational interests of the pupils involved. In advocating for a balancing test, Mine Hill recognizes that such an approach could not be applied under *N.J.S.A.* 18A:38-13:

> In fact, even under *N.J.S.A.* 18A:38-13, the State Board had applied a balancing test prior to the Appellate Division's decision in *Englewood Cliffs Bd. of Educ. v. Englewood Bd. of Educ.*, 257 *N.J. Super.* 413 (App. Div. 1992), *aff'd substantially on o.b.,* 132 *N.J.* 327 (1993), *cert. denied.* 510 *U.S.* 991, 114 *S. Ct.* 547 (1993). The State Board held that under the statute:
>
> > . . . the Commissioner must make equitable determinations based upon consideration of all the circumstances, including those which the statute requires to be addressed in the feasibility study. While requiring that termination be granted where there will be no substantial negative impact, the terms of the statute do not mandate that the negative impact, even a substantial negative impact, will result. Thus, termination may be granted where negative impact will result in some area but such impact is outweighed by the benefits that will result from the change sought. (emphasis in text)
>
> *Board of Education of the Borough of Merchantville, Camden County v. Board of Education of the Borough of Haddonfield, Camden County*, State Bd. of Educ., #78-89 (Sept. 7, 1990) at page 4 of slip opinion.
>
> The Appellate Division, in its decision in *Englewood Cliffs v. Englewood, supra*, 257 *N.J. Super.* at 462, held to the contrary; since the Commissioner is required to review an application with respect to a high school sending-receiving relationship in accordance with the requirements of *N.J.S.A.* 18A:38-13, that ruling is binding on the Commissioner and the State Board of

> Education. But, as the State Board has implicitly recognized, there is no basis for applying the high school standard to analysis of an elementary level severance request. In his prior decision, the Commissioner held that
>
> > . . . the only rational approach to deciding identical, important educational issues is to impose uniform standards, irrespective of the grade level involved, and, therefore, the Commissioner directs that the requirements contained in *N.J.S.A.* 18A:38-13 are applicable here. (Commissioner's decision at 74).
>
> Had the State Board been in agreement with this position, it could have simply affirmed the Commissioner's decision. The State Board of Education's decision rejected such an approach, requiring instead a careful individualized consideration of those circumstances in which elementary level severance should be permitted. Mine Hill's brief at 6-7. [2]

In balancing the equities, Mine Hill concludes that any impact on pupil ethnic/racial diversity resulting from withdrawing Mine Hill's seventh and eighth grade students from Dover Middle School is insufficient to outweigh Mine Hill's right to educate its own elementary pupils. Mine Hill asserts that analysis under such a balancing test would not prohibit severance since, although Mine Hill is less diverse than Dover, its student population is by no means homogeneous. It distinguishes the within matter from the facts in *Englewood Cliffs, supra,* by denying that there is any indication of racial motivation herein, noting that its high school students attend Dover high school and will continue to do so.

In the letter memoranda submitted by Dover following issuance of the opinions by the Appellate Division and the Supreme Court in the *North Haledon* case, Dover notes that in the absence of a specific articulation of racial impact as a standard in *N.J.S.A.* 18A:13-56, the statute governing withdrawal from a regional school district, the court concluded: 1) maintenance of a diverse student

population is a critical element in the delivery of a thorough and efficient education; 2) the present racial and ethnic composition of the student body, as well as trends in the student population are valid factors to be considered by a board of review in considering the effect of the proposed withdrawal and the granting or withholding of permission to present the issues to the voters; and, 3) the immediate 9% diminution of the white population and the projected racial and ethnic imbalance in the near future cannot be characterized as insubstantial or negligible. Indeed, the court found, the 9% loss in the white population is a substantial negative impact. Dover continues:

> In the *Mine Hill v. Dover* dispute there are no statutory standards available upon which the Commissioner can rely. In the *Manchester Regional* there are specific statutory standards, none of which include the issue of racial balance. One could argue, that where there are stated criteria and racial balance is not one of them, then that standard is specifically not applicable because the legislature could have included it if it had so intended. Arguably, therefore, the consideration of race in the context of this effort to withdraw from a limited purpose regional school district would be even less likely to be subject to the consideration of race then (*sic*) would be a withdrawal from an elementary sending/receiving relationship where there are no specified standards in the statutes.
>
> Nonetheless, the Appellate Division had no problem identifying the State's public policy strongly supporting the concept of racial balance in our schools as a critical component to the maintenance of a thorough and efficient education. In fact, it specifically directs the educational policy makers to consider the issue of racial balance when it makes decisions involving the separation of school districts. In overturning the Board of Review's conclusion that a nine percent drop in the white population was not significant, the Appellate Division stated: "This finding is out of step with the recognized public policy of this state which seeks to promote equal educational opportunity and to avoid the adverse effect of racial and ethnic imbalance in schools, and which requires educational policy makers to anticipate imbalance and to take action to blunt perceived demographic

[2] Although Mine Hill initially suggested that the record should be supplemented with up-dated information, it later reconsidered and advised that supplementation was not necessary.

trends which will lead to racial or ethnic imbalance."(Dover's letter memorandum, June 16, 2003, at 3-4)

Following *North Haledon*, Dover argues, it is settled that race must be considered in any petition to withdraw regardless of the grade level, and accordingly, race must be incorporated into the standard adopted by the Commissioner attendant to Mine Hill's request to withdraw. The Court, it notes, did not rely on any specific statute in reaching its conclusion in *North Haledon*, and rather, recognized that there is an "abhorrence of discrimination and segregation in the public schools [in New Jersey]" and that there are countless benefits to be derived from interacting with diverse populations. Dover urges that this reasoning cannot be, and was not, limited to any specific grade level, and, in fact, race should be emphasized even more in the younger grades where students have a greater opportunity to benefit from interaction with diverse populations for the remainder of their lives. If this standard did not apply to elementary withdrawals, it would continue the tradition of "[paying] lip service to the idea of diversity in our schools" criticized by the Court. *North Haledon*, 181 *N.J.* at 179. As such, Dover concludes, whatever standard the Commissioner adopts in connection with the State Board's remand, it must include the racial impact of withdrawal as a primary consideration. (Dover's letter memorandum, September 14, 2004, at 5-6)

Mine Hill takes the position that the *North Haledon* decision, which it describes as being of very limited application, does not prevent the severance it seeks herein. Recognizing that racial imbalance is a factor which must be taken into account, it argues that, under the circumstances of this case, the impact of severance is not sufficient to override Mine Hill's right to educate its own seventh and eighth graders. Mine Hill

describes the impact as "modest" and asserts that it is offset by the fact that the students will commence attendance in Dover at ninth grade, unlike the situation in *North Haledon* where the students would have been lost to the district for all grades of instruction. This case is also distinguishable from *North Haledon*, it asserts, because in this case the Mine Hill population is not homogeneous; Mine Hill's student population is more diverse, it asserts, and the demographic trend is in the direction of an increase in that diversity.

Having carefully considered the suggestions, positions and arguments of the parties, the Commissioner concludes 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. In this regard, the Commissioner again specifically rejects Mine Hill's suggestion that elementary level severance requests should be reviewed on some less restrictive standard than is required for all other severance request matters. Although Mine Hill has argued that there are significant differences between elementary school students and high school students which warrant such a standard, no such differences have been articulated by Mine Hill, nor has any standard been offered other than replacement of the high school statute's "substantial negative impact" with a "weighing" of the statutorily enumerated factors against a "district's right to educate its own children." The Commissioner has previously determined, and Mine Hill does not appear to dispute, that severance could not occur in an elementary relationship if it were found to result in financial hardship or damage to the educational interests of pupils, *Haddon, supra.* The Commissioner finds this standard, which is tantamount to the statuory high school standard of "no substantial negative impact" in these areas, essential

for the maintenance of a thorough and efficient system of public education regardless of the grade level of the schools in question.

With respect to racial composition, there can be no question that where a negative impact is shown, severance cannot be granted. As a threshold reference, the remarks of Justice Jacobs in *Booker, supra,* quoted hereinabove, merit repeating:

> In a society such as ours, it is not enough that the 3 R's are being taught properly, for there are other vital considerations. The children must learn to respect and live with one another in multiracial and multicultural communities and the earlier they do so, the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs.

While the Legislature specifically recognized the importance of race/ethnicity as a factor in evaluating requests for severance of sending/receiving relationships at the high school level, this factor is perhaps even more significant at the elementary school level when students are most impressionable. As noted by the Appellate Division in *Englewood Cliffs, supra*, 257 *N.J. Super.* 413, 452-453, "when children of all races learn to live with and respect each other in school at an early age, education is enhanced and the groundwork is laid for future participation of all in the mainstream of human affairs."

The Commissioner can find no reason for analyzing requests for severance of sending/receiving relationships at the elementary level any differently than other such requests involving high school relationships when it comes to matters of race/ethnicity. In so holding, the Commissioner recognizes this conclusion is not required by statute, but rather determines that it is compelled by common sense and the New Jersey Constitution. The same logic which caused the Appellate Division in *North Haledon* to focus on Article

VIII, Sect. 4, para. 1[3] of the New Jersey Constitution in conjunction with considering the effect of the proposed withdrawal upon the educational and financial condition of the withdrawing and remaining districts requires consideration of the impact of withdrawal on racial and ethnic balance in both districts in determining whether to permit severance of any sending/receiving relationship.

In the *North Haledon* case the Court reviewed the decision of a Board of Review to permit a referendum in order to determine whether or not North Haledon should remain part of the limited purpose regional school district. The Board of Review, despite acknowledging the fact that the intended withdrawal would have the adverse effect of reducing the white population in the regional district by nine percent, had determined that the change was not significant enough to prevent the holding of a referendum. The Appellate Division rejected the Board's finding that the nine percent loss would have a negligible impact on the regional high school district, stating:

> This finding is out of step with the recognized public policy of the state which seeks to promote equal, educational opportunity and to avoid the adverse effects of racial and ethnic imbalance in schools, and which requires education policy-makers to anticipate imbalance and to take action to blunt perceived demographic trends which will lead to racial or ethnic imbalance. 363 *N.J.Super.* at 139.

Relying upon *Jenkins v. Township of Morris Sch. Dist.*, 58 *N.J.* 483 (1971), *Booker, supra,* and *Englewood Cliffs*, *supra*, the Appellate Division required the Commissioner and the State Board to exercise their powers to prevent racial imbalance in the schools

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[3] Known as the Education Clause, or the Thorough and Efficient Provision, Article VIII, Section 4, para. 1 states:

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.

and to refrain from actions that exacerbate racial imbalance. The Supreme Court, recognizing that "racial balance and education are 'different sides of the same coin,'" rejected *North Haledon's* argument that the principles of *Booker, Jenkins,* and *Englewood* are limited to "white flight" contexts or *de facto* segregation and concluded that, notwithstanding the absence of any racial motivation, North Haledon's withdrawal would deny the benefits of the educational opportunity offered by a diverse student body to both the students remaining at Manchester Regional and to the students from North Haledon. Likewise, in the present matter, although the Commissioner rejects Dover's suggestion that Mine Hill's request for withdrawal is racially motivated as not supported by the evidence, nevertheless the impact of withdrawal on racial and ethnic balance in both Mine Hill and Dover must be a factor in considering the request. *North Haledon*, although not controlling, is instructive for two reasons: 1) It establishes that substantial negative impact on racial balance is an inherent factor in any determination regarding termination of relationships, and 2) it considers a nine percent decrease in the white population "substantial." Here, as with factors constituting "any other reason" in the context of de-regionalizing, each factor, educational quality, finances and diversity, implicates the State's constitutional obligation for the maintenance of a thorough and efficient education.

Given the foregoing conclusions, there is no need to revisit or reanalyze the evidence in the record herein, which is discussed extensively in the Commissioner's 2001 decision. The factual findings of its proposed severance decision preclude acceptance of Mine Hill's description of the racial/ethnic impact as "modest." The Commissioner therefore reiterates the conclusion previously reached in 2001 that, although it had not

been established that there would be a substantial negative financial impact or a substantial negative impact on educational programming, the substantial negative impact on the racial balance in both districts and, consequently on the quality of education in both districts, precludes granting the severance request. [4]

Accordingly, for the foregoing reasons and those expressed in the analysis of the facts in the 2001 Commissioner decision, Mine Hill's application for severance of its sending/receiving relationship with respect to its seventh and eighth grade middle school students is hereby denied and this matter is hereby returned to the State Board which has retained jurisdiction.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/15/04

Date of Mailing: 12/15/04

[4] Even if an equitable balancing test such as that suggested by Mine Hill were to be adopted, the withdrawal requested by Mine Hill could not be approved; *North Haledon* makes clear that if the substantial negative impact is in the racial/ethnic category, it cannot be outweighed.

#511-04

511-04

OAL DKT. NO. EDU 320-04
AGENCY DKT. NO. 439-11/03

BEVERLY ANN SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/16/04

Date of Mailing: 12/16/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 320-04
AGENCY REF. NO. 439-11/03

BEVERLY ANN SMITH,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

Kathleen Cerisano, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)
Thomas W. Sumners, Jr., Esq., for respondent (Sumners, George & Dortch, attorneys)

Record Closed: September 17, 2004 Decided: September 20, 2004

BEFORE **DONALD J. STEIN,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 26, 2004 for determination under *N.J.S.A.* 39:5-30 *et seq.*, and 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.*

The parties have agreed to a settlement and have prepared an agreement, marked as J-1 indicating the terms thereof, which is attached and fully incorporated herein.

an annual salary of $70,340.00, consisting of a base salary of $68,140.00 and longevity of $2,200.00.

7. On or about December 1, 2003, Petitioner was reassigned to the 10.5 month position of Crisis Intervention Counselor.

8. If Petitioner had remained in the 12 month position of Crisis Intervention Counselor during the 2003-04 school year, she would have earned the gross amount of $13,654.00 for the months of July and August 2003.

9. The Board has agreed to settle this dispute with Petitioner by paying to her the sum of $13,654.00, less standard and ordinary deductions. In making this agreement, and executing this Stipulation of Settlement, the Board is not admitting to, and this shall not be deemed to be, an admission of any wrongdoing on the part of the Board. Furthermore, this Stipulation shall not constitute a limitation, restriction, or waiver of any defenses that the Board may have had to the within matter.

10. This award shall be made to the Petitioner within thirty (30) days following the execution of this agreement and approval of its terms by action of the Board.

11. The parties agree that Petitioner shall pay the employee's share of any pension contributions to the Teachers' Pension and Annuity Fund for the period from July 1, 2003 through June 30, 2004, based upon the additional compensation of $13,654.00. The parties also agreed that the employer shall not be liable for the employee's share of pension contributions for this additional compensation and the State will contribute the employer's share of pension contributions if it agrees to do so. If the State does not contribute the employer's share of pension contributions, the Board shall contribute the employer's share of such contributions.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

12. The parties agree that neither party is responsible for the payment of the other party's attorneys' fees in connection with this dispute.

13. The Petitioner shall withdraw the Petition of Appeal presently pending before the Office of Administrative Law and the Commissioner of Education, with prejudice, when the Petitioner's counsel receives notice and documentation that the Board has approved the terms and conditions of this settlement.

14. This Settlement Agreement resolves any and all claims by the Petitioner arising from the Board's abolishment of her 12 month position as Crisis Intervention Counselor, effective July 1, 2003, and regarding her allegations that the Board acted unlawfully in abolishing her position and reducing her compensation.

15. This Stipulation contains all the terms of the agreement between the parties and cannot be modified or changed unless both parties agree to do so in writing. In the event, however, that this Stipulation requires some modification to facilitate its acceptance by the Teachers' Pension and Annuity Fund and its approval by the Commissioner of Education, the parties agree to make such modification in a timely fashion in order to effectuate the intent of the parties as stipulated herein.

Beverly Ann Smith

BEVERLY ANN SMITH, Petitioner

Dated: Aug. 18, 2004

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN, P.C.
Attorneys for Petitioner

By: Kathleen Naprstek Cerisano

Kathleen Naprstek Cerisano, Esq.

Dated: 8/25/04

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

SUMNERS GEORGE, P.C.
Attorneys for Respondent

By: Thomas W. Sumners
Thomas W. Sumners, Jr., Esq.

Dated: 9/13/04

513-04

OAL DKT. NO. EDU 7061-01
AGENCY DKT. NO. 280-7/01

BECTON EDUCATION ASSOCIATION, SCOTT B. SIGMON AND JANICE WEHRLE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions and the Board's reply thereto, filed in accordance with *N.J.A.C.* 1:1-18.4, were duly considered by the Commissioner in making his determination herein.

In their exceptions, petitioners reiterate the same arguments advanced below, claiming that:

1) There was not a true reduction in force within the meaning of *N.J.S.A.* 18A:28-9 in that there was an increased need for child study team services, rather than a decrease, and that work was not eliminated, but merely transferred to another provider in a manner circumventing tenure status contrary to *Viemeister, supra,* which prohibits such transfer of duties (Petitioners' Exceptions at 1-2);

2) The Commissioner's decisions in *Trigani, supra,* and *Anders, supra,* are a misinterpretation and overbroad application of the Appellate Division decision in *Vicenzino, supra*, and are flawed in their analysis in that they ignore the specific language of the applicable statutory and regulatory mandates regarding child study teams (*id.* at 5-10); and

3) "[T]he anticipated savings did not come to pass and that any alleged savings do not justify the abrogation of tenure rights" (*id.* at 10).

In response, the Board avers that the Initial Decision was factually sound, legally supported and correctly recognized the propriety of the reduction in force. (Board's Reply at 1) The Board further submits that the *Vicenzino* decision was appropriately applied to this case and in prior decisions. (*Id.* at 3)

Upon a thorough and independent review of the record, the Initial Decision, petitioners' exceptions and the Board's reply thereto, the Commissioner has determined to adopt the Initial Decision in this matter granting the Board's motion for summary decision and dismissing the within petition with prejudice. In so concluding, the Commissioner rejects the arguments set forth in petitioners' exceptions, which were previously advanced before the Administrative Law Judge (ALJ) and thoroughly considered and addressed in the Initial Decision, and notes his concurrence with the well-reasoned analysis and conclusions of law articulated by the ALJ.

Accordingly, the Initial Decision in this matter is hereby adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/20/04

Date of Mailing: 12/20/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 7061-01

AGENCY DKT. NO. 280-7/01

BECTON EDUCATION ASSOCIATION, SCOTT B. SIGMON AND JANICE WEHRLE,

Petitioners,

v.

BOARD OF EDUCATION OF CARLSTADT-EAST RUTHERFORD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,

Respondent.

Gregory T. Syrek, Esq., for petitioners (Bucceri & Pincus, attorneys)

Joanne Butler, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: August 5, 2004 Decided: November 3, 2004

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

STATEMENT OF THE CASE

Petitioners Scott Sigmon and Janice Wehrle are former members of respondent's Child Study Team (CST) and were employed as a School Psychologist and a Learning Disabilities Teacher/Consultant, respectively. Petitioners allege that respondent violated their tenure rights when it eliminated their positions and contracted with the South Bergen Jointure Commission (SBJC) for the provision of basic CST services for the District's students.

PROCEDURAL HISTORY

Petitioner Becton Education Association (the Association) is the recognized collective bargaining representative of the certified and non-certified staff employed by the Board of Education of Carlstadt-East Rutherford Regional School District (the Board). On or about July 13, 2001, the Association, Scott Sigmon and Janice Wehrle filed a Verified Petition with the Commissioner of Education (the Commissioner) seeking reinstatement of the individual petitioners to their tenure positions with back pay and benefits. Petitioners allege that the Board's termination of petitioners Sigmon and Wehrle violated their tenure rights and constituted an invalid reduction in force. Petitioners further claim that the Board's actions were arbitrary, capricious and unreasonable in that the termination of petitioners' tenured employment for economy and efficiency was not factually supported. It is also averred that the Board's subcontracting arrangement with the SBJC contravenes *N.J.S.A.* 18A:46-5.1 and *N.J.A.C.* 6A:14-3.1. On or about July 30, 2001, the Board filed a Response to the Verified Petition.

The Department of Education (the Department) transmitted the matter to the Office of Administrative Law where, on August 6, 2001, it was filed for determination as a contested case. The matter was initially assigned to Administrative Law Judge Michael L. Ravin. Following Judge Ravin's appointment to the New Jersey Superior Court, the matter was reassigned to Administrative Law Judge William S. Jeremiah. On March 31, 2003, the matter was assigned to the undersigned for disposition. The undersigned held telephone status conferences with counsel on April 16, May 12, May 29, June 27 and August 4, 2003. The hearing was scheduled for December 1, 2 and 3, 2003. Prior to the hearing, counsel for the parties agreed that the dispute involved questions of law that should be decided on cross-motions for summary decision. Toward this end, the parties submitted "Joint Stipulations of Fact" with attached exhibits and subsequently filed respective cross-motions for summary decision. Petitioners filed a brief in support of their position. The Board submitted a brief, a reply brief and an Affidavit of the Board Secretary/School Business Administrator, Nicholas Annitti. Oral argument on the motion was held on May 3, 2004. Thereafter, the parties submitted supplemental submissions and the record was closed on August 5, 2004.[1]

[1]An Order was entered extending the time within which to file this Initial Decision.

FINDINGS OF FACT

The facts relevant to the issues presented are not in dispute. Based upon a review of the Joint Stipulations of Fact, the attached exhibits, coupled with the Affidavit of Nicholas Annitti, which petitioners did not contest through the submission of an opposing affidavit, I **FIND** the following undisputed **FACTS**:

The Board is charged with the responsibility to provide suitable facilities and programs of education for all handicapped children. Consistent with this requirement, the Board is responsible to provide for basic CST services. Prior to the 2001-2002 school year, petitioners Dr. Scott Sigmon and Janice Wehrle were tenured members of the Board's basic CST.

Petitioner Sigmon was employed by the Board as a Psychologist and provided psychological services for disabled students at Becton Regional High School. Petitioner Sigmon was employed as a 3/5 (.6) employee, working Monday, Tuesday and Wednesday 11:00 a.m. to 3:00 p.m. and Thursday 8:00 a.m. to 3:00 p.m.

Petitioner Wehrle was employed by the Board as a Learning Disabilities Teacher/Consultant (LDTC) and provided services for disabled students at Becton Regional High School. Petitioner Wehrle was employed as a 3/5 (.6) employee, working Monday, Tuesday and Wednesday 8:00 a.m. to 12:00 noon and Thursday 8:00 a.m. to 3:00 p.m.

Ms. Kellie Berkoff, who was not tenured and is not a petitioner in this matter, was employed by the Board as a Social Worker and provided services for disabled students at Becton Regional High School. Ms. Berkoff was employed as a 3/5 (.6) employee, working Wednesday, Thursday and Friday 8:00 a.m. to 3:00 p.m.

Had Dr. Sigmon, Ms. Wehrle and Ms. Berkoff continued to work their 3/5 (.6) work schedules during the 2001-2002 school year, Dr. Sigmon's salary would have been $52,704, plus $675 longevity. His benefits would have been worth $4,169. Ms. Wehrle's salary would have been $49,318, with benefits worth $10,639. Ms. Berkoff's salary would

have been $31,640, with benefits worth $4,169. The total anticipated cost of the Board's 3/5 CST for the 2001-2002 school year would have been $153,314.

The Board considered entering a contract with the SBJC to maintain a 3/5 basic CST during the 2001-2002 school year. The Board also considered obtaining other services (speech therapist and transition counselor) from the SBJC, which services are not at issue in this case. The Board received a proposal from the SBJC for the basic CST (3/5 positions for Psychologist, LDTC and Social Worker), with two examples of anticipated costs ($108,000 and $101,493), depending upon the level of experience of the individuals assigned to the Board. The anticipated savings to the District for the 3/5 services equaled approximately $51,821.

By letters dated April 5, 2001, the District's Superintendent, Dr. Samuel Feldman, notified petitioners Sigmon and Wehrle that the Board may take action at its public meeting on April 11, 2001, which may affect their employment status in the District. At its April 16, 2001 public meeting, the Board voted to eliminate Dr. Sigmon's, Ms. Wehrle's and Ms. Berkoff's positions, not to offer them employment contracts for the 2001-2002 school year, "due to contracting out of Child Study Team services for reasons of economy and efficiency." By letters dated April 17, 2001, Dr. Feldman notified petitioners Sigmon and Wehrle that they were not offered employment contracts for the 2001-2002 school year due to the Board's contracting out of the services for reasons of economy and efficiency.

In May 2001, the Board entered into contracts with the SBJC for the 2001-2002 school year pursuant to which the SBJC would supply, and the Board would pay, the costs of a School Psychologist, Social Worker and LDTC working three days per week. The precise costs of such services were "to be determined." The Board also entered into agreements for the provision of a speech therapist and a transition counselor for the 2001-2002 school year. On August 22, 2001, the Board approved a contract with the SBJC to provide CST services for the 2001-2002 school year at a cost of approximately $108,000.

The anticipated SBJC 2001-2002 (3/5) salaries were as follows: School Psychologist, $32,590.04; LDTC, $37,830.81; and Social Worker, $33,123.21. Use of the

SBJC's 3/5 basic CST, rather than maintaining its own 3/5 team, was anticipated to result in a savings to the Board of $49,769.94.

Based upon the savings for the 3/5 CST from the SBJC, compared to 3/5 for Dr. Sigmon, Ms. Wehrle and Ms. Berkoff, Dr. Feldman recommended, and on September 19, 2001 the Board authorized, changing the use of the SBJC's CST as follows: 5/5 for the Psychologist, 5/5 for the LDTC and 1/5 for the Social Worker. On September 19, 2001, the Board voted to "concur with the actions of the Superintendent in employing the services of the South Bergen Jointure Commission for Child Study Team services for the 2001-2002 scull (*sic*) year in the amount of $128,410. This includes the services of a full-time LTD-C (sic) and School Psychologist and a 1/5 FTE School Social Worker."

The 5/5, 5/5 and 1/5 costs for the SBJC employees for the 2001-2002 school year were $129,543.15 and were attributed as follows: School Psychologist Dr. Annarella Valdivia, $54,316.73; LDTC Nancy Epstein, $63,051.35; and School Social Worker Tricia Smith, $12,175.07. The 3/5 salary of the SBJC social worker actually providing services during the 2001-2002 school year would have been $36,525.21.

The cost of the SBJC's 5/5, 5/5, 1/5 basic CST was $23,770.85 less than the cost of maintaining the Board's 3/5 team. The SBJC team provided two more days of service (*i.e.,* 2 more days from the Psychologist, 2 more days from the LDTC and 2 less days from the Social Worker). Dr. Valdivia and Ms. Epstein worked full days on Monday, Tuesday, Wednesday, Thursday and Friday. Ms. Smith worked a full day on Wednesday. Dr. Valdivia, Ms. Epstein and Ms. Smith were employed by the SBJC and supervised by Dr. Joseph Cardella and Ms. Mary Sosnowski, who are administrators employed by the SBJC.

Had the Board's CST worked full-time during the 2001-2002 school year, their full-time (5/5) salaries would have been as follows: Dr. Sigmon $87,840, plus longevity stipend of $675 and plus benefits worth $4,169; Ms. Wehrle $82,196, plus benefits worth $10,639; and Ms Berkoff $52,735, plus benefits worth $3,169. Had Ms. Berkoff worked only part-time (1/5), her salary would have been $10,547, plus possible benefits worth $4,169. If Ms. Berkoff had not received benefits, the total cost of the Board's 5/5, 5/5, 1/5

CST would have been $196,066 for the 2001-2002 school year.[2] The Board saved, at a minimum, $66,522.85 utilizing the SBJC's 5/5, 5/5, 1/5 team, rather than petitioners (as 5/5) and Ms. Berkoff (as 1/5) employees.

During the 2001-2002 school year, no employee of the Board performed the duties previously performed by petitioners. The District had approximately 70 to 80 classified students enrolled for the 2001-2002 school year. The Board's decision to terminate petitioners' positions and to contract with the SBJC for basic CST services has had no adverse impact on the program needs of the District for special education services. The contractual relationship between the Board and the SBJC for the provision of CST services was renewed for the 2002-2003 and 2003-2004 school years.[3]

On or around May 15, 2001, petitioners sent a written request to the Department to conduct a complaint investigation. Petitioners maintained that the Board had terminated all CST positions for the 2001-2002 school year and contracted with an agency that was noncompliant with State and/or federal statutes and/or regulations in providing special education services. The Office of Special Education Programs (OSEP) investigated whether the District was contracting with an appropriate agency to provide full CST services. The OSEP issued a Complaint Investigation Report dated May 21, 2001, which quoted the provisions of *N.J.A.C.* 6A:14-5.1(a) and found the District to be compliant. More particularly, the OSEP made the following findings of fact:

> 1. Document review confirmed that child study team positions were eliminated "for reasons of economy and efficiency" on April 16, 2001.

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[2]Although Paragraph 23 of the Joint Stipulations of Fact submitted by the parties states that the total cost of the Board's 5/5, 5/5, 1/5 CST would have been $196,066 for the 2001-2002 school year or $191,897 if Ms. Berkoff had not received benefits, this appears to be an error. The sum of the salaries and benefits stipulated by the parties in Paragraph 22 of the Joint Stipulations and as further set forth on Exhibit A to the Joint Stipulations reveals that the cited $196,066 figure reflects the costs if Ms. Berkoff had not received benefits. Similarly, while the Affidavit of Nicholas Annitti provides that the Board saved $66,522.85 (or, at a minimum, $62,353.85 if Ms. Berkoff did not receive benefits), this calculation is predicated on the above figures stated in the Joint Stipulations.

[3]The contracts between the Board and the SBJC dated May 2001 reflect that the Board is to provide timely notification if the services shall not be continued in the following school year. *See* Exhibits G, H and I attached to the Joint Stipulations of Fact.

> 2. District personnel stated the district is contracting with the South Bergen County Jointure Commission to maintain child study team services. The district will have approximately 70-80 classified students enrolled for the 2001-2002 school year and will maintain a 3/5 child study team which will be available during the summer months to provide services.[4]

The OSEP concluded: "The district is contracting with a jointure commission to provide full child study team services. Therefore, the district is determined to be compliant."[5]

ISSUES PRESENTED

The pivotal issues presented concern (1) whether respondent may lawfully eliminate all of the positions on its own basic CST and contract with the SBJC to provide such services and (2) whether, in so doing, respondent violated petitioners' tenure rights. Also in issue is whether respondent's actions were arbitrary, capricious and unreasonable under the circumstances.

LEGAL DISCUSSION

The Summary Decision Standard

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, R.* 4:46-2. The summary judgment procedure is designed to provide a "prompt" and "inexpensive" method of disposing of a case, which does present any genuine issue of material fact requiring disposition at a hearing. *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. To defeat the motion the non-moving party must "come forward with evidence that creates

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[4]The record does not disclose whether there would be any increase in costs attributable to services during the summer months.

[5]Petitioner Sigmon filed a contractual grievance challenging the Board's actions in eliminating in-house CST services and ending his employment. The Board denied his grievance on June 13, 2001. A request to arbitrate this dispute is pending and has been held in abeyance pending the outcome of the present action.

a 'genuine issue as to any material fact challenged.'" *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520, 529 (1995) (citations omitted). *See N.J.A.C.* 1:1-12.5(b). Disputed issues of fact that are immaterial or of an insubstantial nature will not suffice. *Brill, supra,* 142 *N.J.* at 529. The New Jersey Supreme Court has instructed:

> [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'. . . . Credibility determinations will continue to be made by jury and not the judge. 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. . . .
>
> [*Brill, supra,* 142 *N.J.* at 540.] (citations omitted.)

In the instant case, the parties have stipulated to the majority of the facts relevant to the issues presented. There are no material facts in dispute and the matter is ripe for summary disposition. The crux of the impasse between the parties implicates issues of law amenable to resolution without an evidentiary hearing.

Reduction in Force

It is beyond debate that tenured employees, such as petitioners, are entitled to certain statutory protections. A tenured employee shall not be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct or other just cause, and then only after compliance with dictated hearing requirements. *N.J.S.A.* 18A:6-10; *N.J.S.A.* 18A:28-5. Equally settled is the ability of a board of education to effectuate a reduction in force for reasons of economy and efficiency. The controlling statute directs:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.
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> [*N.J.S.A.* 18A:28-9.]

The courts have consistently recognized that a "[r]eduction in force (RIF), whether of tenured or nontenured teachers, if done for reasons of economy, is entirely within the authority of the board." *Maywood Bd. of Educ. v. Maywood Educ. Assoc.,* 168 *N.J. Super.* 45, 55 (App. Div. 1979), *certif. denied,* 81 *N.J.* 292 (1979). *See Jamison v. Morris School Dist. Bd. of Educ.,* 198 *N.J. Super.* 411, 414-415 (App. Div. 1985); *Klinger v. Cranbury Twp. Bd. of Educ.,* 190 *N.J. Super.* 354, 357 (App. Div. 1982), *certif. denied,* 93 *N.J.* 277 (1983). The New Jersey Supreme Court has guided that "[t]he determination to reduce the teaching force by abolishing positions need not eliminate the services that may be related to those positions." *Impey v. Borough of Shrewsbury Bd. of Educ.,* 273 *N.J. Super.* 429 (App. Div. 1994), *aff'd,* 142 *N.J.* 388, 399 (1995). *See Klinger, supra,* 190 *N.J. Super.* at 357.

Special Education Requirements

A board of education is charged with the statutory "duty . . . to provide suitable facilities and programs of education" for all handicapped children. *N.J.S.A.* 18A:46-13. In furtherance of this objective, *N.J.S.A.* 18A:46-5.1 states that "[e]ach board of education and State operated program shall separately or jointly with one or more boards of education or State agencies provide for basic child study team services." The basic CST must consist of a school psychologist, a learning disability teacher consultant and a school social worker. *Ibid.*

A district board of education has "considerable latitude in providing essential educational services." *Impey, supra,* 142 *N.J.* at 392. A board may discharge its responsibility to provide facilities and programs of special education in a myriad of different ways. *Ibid. See N.J.S.A.* 18A:46-14. By statute, "[t]he facilities and programs of education required" for handicapped pupils may be provided by "[a] jointure commission program." *N.J.S.A.* 18A:46-14d. Similarly, the "general requirements" of the special education regulations governing the provision of "educational and related services" explicitly sanction agreements between a district board of education and a jointure commission for CST services:

> Each district board of education, independently or through joint agreements, shall employ child study teams, speech correctionists or speech-language specialists

and other school personnel in numbers sufficient to ensure provision of required programs and services pursuant to this chapter.

1. Joint agreements for child study team services may be entered into with local education agencies including other local school districts, educational services commissions, jointure commissions and county special services school districts.

[*N.J.A.C.* 6A:14-5.1(a)1.] (emphasis added.)

The Legislature has authorized the creation of a jointure commission. "[T]he purpose of a jointure commission is to provide educational facilities and programs for handicapped children." *Colantoni v. Twp. of Long Hill Bd. of Educ.,* 329 *N.J. Super.* 545, 551 (App. Div. 2000). A jointure commission is established "[w]hen two or more boards of education determine to carry out jointly by agreement the duties imposed upon them in regard to the education and training of disabled pupils, and counseling, inclusionary, and child study team services for . . . disabled pupils. . . ." *N.J.S.A.* 18A:46-25. Local boards may establish a jointure commission "for the purpose of providing such services" in accordance with the rules and regulations of the State Board and with the approval of the Commissioner. *Ibid.* In the present context, no controversy exists that a jointure commission has been established in Bergen County, *i.e.*, the SBJC, and the Board contracted with that jointure commission to provide CST services during the years in issue.

The special education regulations also provide that "[a]ll child study team members shall be employees of a district board of education, have an identifiable, apportioned time commitment to the local school district and shall be available during the hours students are in attendance." *N.J.A.C.* 6A:14-3.1(b).

The Parties' Positions

Petitioners challenge that the Board effectuated a valid reduction in force. Petitioners assert that "the Board's action was not a reduction of force in the true sense of the phrase" in that "there appears to have been an increase in the amount of work performed by the School Psychologist and LDTC for the 2001-2002 school year" and "[w]ork was not eliminated but merely transferred to another provider, the South Bergen Jointure Commission." Petitioners further argue that the arrangement between the Board

and the SBJC is inconsistent with the applicable statutes and regulations, which "do not support turning over all employment and authority to a subcontractor." Finally, it is urged that "a review of the cost projections, estimates, contracts, *etc.,* reveals that the anticipated savings did not come to pass and that any alleged savings do not justify the abrogation of tenure rights." Simply put, the Board maintains that it undertook a valid reduction in force and its arrangement with the SBJC does not contravene any statutory or regulatory standard governing the provision of basic CST services.

The Decisional Law

The courts and the Commissioner have addressed arguments similar to those advanced by the petitioners in this matter. In support of their stance, petitioners principally rely upon the decisions rendered in *Viemeister v. Prospect Park Bd. of Educ.,* 5 *N.J. Super.* 215 (App. Div 1949), *Cochran, et al v. Watchung Hills Regional High School Bd. of Educ.,* 1985 *S.L.D.* 1878 (State Board of Educ.), *aff'd,* No. A-2327-85 (App. Div. December 22, 1986), and *Elson v. Hudson County Area Vocational-Technical Schools Bd. of Educ.,* 96 *N.J.A.R.* 2d (EDU) 229. A review of the cited decisions, along with other court and administrative decisions implicating issues analogous to those raised in the present case, is instructive.

In *Viemeister,* the Board of Education of the Borough of Prospect Park abolished the position of principal, terminated the services of the principal who had acquired tenure and assigned his duties to an 8th grade teacher whose new position was called "teaching principal." The Appellate Division affirmed the decision of the State Board upholding the principal's reinstatement. In so ruling, the Court stated that "[t]he fact that the formal resolutions adopted by the Board speak in terms of abolition of the position of principal and creation of a new position of 'teaching principal,' which finds no recognition in the tenure statutes, does not appear to be significant." *Viemeister, supra,* 5 *N.J. Super.* at 218. Instead, "[w]e look to the substance rather than the form and, in substance, the principalship was continued but transferred to [the newly appointed "teaching principal"]". *Ibid.*

Cochran involved action by a local board, which reduced its CST team composed of tenured members to half time and contracted with the Somerset County Educational

Services Commission for the provision of CST services, including some of the services previously performed by the petitioners. Citing the requirements then codified in *N.J.A.C.* 6:28-1.3(a), the State Board stated that the basic CST was "expected to be employees of the local board of education." *Cochran, supra,* 1985 *S.L.D.* at 1880.[6] The State Board further noted that *N.J.A.C.* 6:28-1.3(f) authorized outside contractors "in limited circumstances" with prior approval of the County Superintendent and "only for the purpose of supplementing existing team members." *Id.* at 1880-1881.[7] Finding that the board's action fell within the prohibition of *Viemeister* in that its "intention was not an actual abolishment of positions, but a mere reorganization and transfer of duties to a less expensive provider," the State Board upheld the determinations of the Commissioner and the administrative law judge voiding the reduction in force as violative of the petitioners' tenure rights. *Id.* at 1881.[8]

In *Elson,* the Commissioner agreed with the administrative law judge's conclusion that the local board violated the tenure rights of a school psychologist on the CST whose services were terminated as a result of a reduction in force. The board subsequently contracted certain services, including those of the CST psychologist, to an outside private CST. Predicated on the then provisions of *N.J.A.C.* 6:28-5.1(c), the administrative law judge observed that "[o]nly specified services may be contracted." *Elson, supra,* 96 *N.J.A.R.* 2d (EDU) at 234. Additionally, the administrative law judge stated that "[a] local board cannot subcontract the services of its child study team to outside individuals" and, while "[a] board may supplement such services..., this situation presupposes an existing team with members who are employed by the district." *Ibid.* The contracted services

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[6]The State Board referred to the 1982 version of the New Jersey Administrative Code. As quoted in the administrative law judge's decision, *N.J.A.C.* 6:28-1.3(a) provided that "[a]ll members of the basic child study team shall be employees of the local board of education. . . ." 1983 *S.L.D.* 953, 957 (emphasis added.) As previously noted, the language now incorporated in *N.J.A.C.* 6A:14-3.1(b) states that "[a]ll child study team members shall be employees of a district board of education. . . ." (emphasis added.)

[7]*N.J.A.C.* 6:28-1.3(f), as cited in the administrative law judge's decision in *Cochran* (1983 *S..L.D.* at 958), provided:

> Prior approval by the Office of the County Superintendent of Schools and the Bureau of Special Education and Pupil Personnel Services shall be obtained for the purchase by any local school district of services of eligible, approved diagnostic clinics; agencies; or professionals in private practice representing a basic child study team discipline to supplement members of the basic child study team. When such approval is granted to a local school district for the purchase of external diagnostic or professional services, the local school district's basic child study team shall develop and coordinate the appropriate individualized education program.

[8]The Appellate Division affirmed the State Board's determination in an unpublished decision. *See* No. A-2327-85 (App. Div. December 22, 1986).

were determined not to constitute supplemental independent CST evaluations and/or CST diagnostic services contrary to *N.J.A.C.* 6:28-5.1(c)(1)(i). *Id.* at 236. The administrative law judge further reasoned that the facts were akin to those presented in *Cochran* and distinguishable from *Impey* (addressed below) "in which the court found broad statutory and regulatory authority for a local board to enter and to join agreements with the other school districts for the provision of special education services." *Id.* at 235.

In this regard, the Appellate Division in *Impey* held that a board of education has the statutory authority to contract with an Education Services Commission (ESC) to provide speech correction services. It rejected the contention that *Viemeister* precluded the local board from abolishing the position of a tenured speech correctionist and contracting with the ESC of Monmouth County to provide equivalent speech correction services as a cost saving measure. The Court found that "a facility or program of special education provided by an ESC, such as speech correctional services, is a '[j]oint facilit[y]...provided by agreement between one or more school districts' within the intent of *N.J.S.A.* 18A:46-14(c), as well as an 'educational service' authorized pursuant to rules of the State Board within the intent of *N.J.S.A.* 18A:6-5.1(a)," and that "the State Board's rules expressly authorize a local school district to contract with an ESC to provide educational services for communication to handicapped pupils." *Impey, supra,* 273 *N.J. Super.* at 432- 433. As to the employee's contention that even if the board had the authority to contract with an ESC to provide educational services for handicapped pupils it violated her tenure rights, Judge Skillman disagreed:

> The Board's decision to contract with an ESC to provide the speech correction services previously performed by appellant eliminated the need for the position of speech correctionist within the district. Moreover, appellant stipulated that the Board would save more than $12,000 per year by contracting with an ESC to provide these services. Therefore, we are satisfied that the Board properly abolished appellant's position of speech correctionist 'for reasons of economy' and thus did not violate her tenure rights....
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> The Board's decision to contract with an ESC to provide speech correction services is significantly different from the administrative action involved in *Viemeister* . . . in which a local board abolished the position of school principal, terminated the incumbent, and established a position of 'teaching principal' which it appointed one of the school's teachers to fill. . . .
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> [W]hile *Viemeister* involved the re-titling of the position of principal in order to remove a tenured incumbent, this case involves a statutorily authorized administrative change in the method of providing an educational service for the sole purpose of saving money.

> In sum, a local board has the authority both to contract with an ESC to provide educational services for the handicapped and to abolish a teaching position 'for reasons of economy.' We are satisfied that the Board's decision to contract with the Monmouth County ESC to provide speech correction services and its consequent abolition of appellant's tenured position constituted a proper exercise of these statutory powers.
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> [*Id.* at 434-435.]

The Supreme Court concurred with the Appellate Division's determination. In its words, the "enactments clearly authorize a local board of education to enter into a contract with an educational services commission to obtain speech correction services for its eligible pupils." 142 *N.J.* at 396. The Court rejected the claim alleging a violation of the employee's statutory tenure rights finding that "[t]he board acted in good faith and complied with *N.J.S.A.* 18A:28-9 in reducing the number of employees within the district for reasons of economy." *Id.* at 400. The Court noted that the subcontracting agreement with the ESC had no adverse impact on the program needs of the school district. *Id.* at 399. It also found that "[c]learly, the Board's decision to abolish the speech correctionist position held by petitioner, and to contract for the speech correction services with the Monmouth County ESC, has resulted in a more economical delivery of those services in the district." *Id.* at 399-400. Further observed was the absence of any indication that the services to be rendered by the ESC were in any way inadequate or did not conform with the standards authorized by the Commissioner. *Ibid.* Although the petitioner in *Impey,* similar to the petitioners in this case, claimed that her replacement by the ESC consisting of non-district personnel violated the requirement embodied at *N.J.A.C.* 6:28-3.1(b) (providing that "[a]ll members of the child study team shall be employees of a district board of education"), the Supreme Court did not address the impact of the regulation. Rather, the Court noted that "the ALJ, Commissioner, and State Board of Education determined that petitioner, who served a K through 8 school, was not a member of the basic child study team referred to in *N.J.A.C.* 6:28-3.1." *Id.* at 395.

More recently, in *Vicenzino v. Bedminster Twp. Bd. of Educ.,* 312 *N.J. Super.* 243 (App. Div. 1998) the Appellate Division affirmed action by the Commissioner directing the Bedminster Board to reinstate a tenured social worker. The Appellate Division concluded that the district could not eliminate petitioner's social worker position while maintaining a CST and contract with the Hunterdon Educational Services Commission (ESC) to provide services undertaken by the former employee. More particularly, the Court held

that "where a school district elects to maintain its own Child Study Team (CST), the school social worker must be an employee of the district." *Id.* at 244.

The Appellate Division affirmed the employee's reinstatement essentially for the reasons set forth in the administrative law judge's decision. There, Administrative Law Judge Masin reviewed many of the same cases cited by the petitioners in this matter and, as quoted by the Appellate Division, explained:

> Under the provisions of the statute which both mandates the maintenance and the composition of CST's, a board of education is not required to employ its own CST, but may provide for CST services in a multi-district arrangement so long as identifiable apportionment of time and responsibilities to the districts involved is provided. However, where a board has provided its own CST, and then seeks to change the arrangements for the provision of such services, examination of the several decisions discussed herein demonstrates that the particular facts of each case have played a significant role in the conclusions reached as to legality of the modifications. Factors which appear to be important may include such matters as whether the termination of the petitioner and the abolition of the petitioner's position eliminated all of the persons in the district filling that position [*i.e., Cochran*], or whether the district continues to employ a full basic CST even after the RIF, or whether the abolition is of all positions on the basic team and the contract entered into provides for all CST services to be performed by employees of a board of education operating for a multi-district group, or only of one of the basic positions with the other two positions continuing to be filled by employees of the individual board which abolished the position (as in the present matter), or whether the contract services were with a public entity such as a multi-district cooperative or ESC [*i.e., Impey*] or with a private group [*i.e., Elson*], and whether the extent of the work performed by the outside contractor is minimal or involves significant amounts of work. In the present matter, the certification of Ms. Vicenzino indicates that she was the sole social worker employed by the district, and it appears that all of the needed social histories which she prepared as a portion of her CST work were contracted out and that none would be performed by a board employee, as the CST-related social histories which the ESC contractor is to perform constitute all of the social histories anticipated for the district's special education needs for the coming year. The contract was awarded to an ESC.
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> While it is quite conceivable that *Impey's* support for legitimate, good faith economic based decisions involving the abolition of positions and the contracting of work with the expectation of savings could be extended to permit such actions in regard to the members of the basic CST, as the regulations now stand, in those instances where a district chooses to maintain its own CST the school social worker, the school psychologist and the LDTC must be employees of the district and cannot be outside contractors.
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> [*Vicenzino, supra,* 312 *N.J. Super* at 249-250.] (internal references omitted.)[9]

[9] *See Vicenzino,* 97 *N.J.A.R.* 2d (EDU) 356, *adopted,* Comm'r. 97 *N.J.A.R.* 2d (EDU) 361, *aff'd,* State Board, 97 *N.J.A.R.* 2d (EDU) 565.

The Appellate Division agreed with Judge Masin's conclusions stating:

> The local board of education is required to provide special educational services for handicapped pupils. *N.J.S.A.* 18A:46-5. The basic CST 'shall consists of a school psychologist, a learning disability teacher and a school social worker.' *N.J.S.A.* 18A:46-5.1. The board of education is authorized to undertake programs 'separately or jointly with one or more boards of education or State agencies [to] provide for basic child study team services.' *N.J.S.A.* 18A:46-5.1. The regulations of the Commissioner and the State Board of Education implementing the statutory authority for a CST expressly provide that 'all members of the [CST] shall be employees of a district board of education ...' *N.J.A.C.* 6:28-3.1(b). Further, approved clinics and agencies may be used by the board of education to supplement existing services in defined areas. *N.J.A.C.* 6:28-5.1(c).
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> Interpreting these requirements in *pari materia* with a district board of education's authority to eliminate a position for economic reasons, under *N.J.S.A.* 18A:28-9, we conclude that where a board establishes a CST with employees of the district, the board may not eliminate one of those positions and contract out for those services. To be sure, if the Board were in good faith to eliminate the CST for reasons of economy and instead, 'join with one or more boards of education or State agencies [to] provide for basic [CST] services,' under *N.J.S.A.* 18A:46-5.1, that would be an appropriate decision to make. In that event, the board of education would have complied with *N.J.S.A.* 18A:46-5.1 and *N.J.S.A.* 18A:28-9.
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> However, so long as the board elects to maintain its own CST, consistent with *N.J.A.C.* 6:28-3.1(b), each basic member, consisting of psychologists, learning disability specialists, and social workers, 'shall be employees of a district board of education.' Consequently, the board's decision to abolish petitioner's social worker position while maintaining the CST and contracting outside to replace petitioner's position, did not comply with *N.J.A.C.* 6:28-3.1.
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> [*Id.* at 250-251.] (emphasis added.)

Although the Appellate Division's language in *Vicenzino* addressing the elimination of all positions on the CST is technically dicta in that the Bedminster Board had not taken such action,[10] the Commissioner subsequently has reached a similar conclusion. *See Anders, et al v. Lakewood Twp. Bd. of Educ. and Monmouth-Ocean Educ. Services Comm.,* EDU 6329-99 and EDU 6330-99, Partial Initial Decision (November 16, 2000), *adopted*, Comm'r. (January 2, 2001) <http://lawlibrary.rutgers.edu/oal/search.html>; *Trigani, et al. v. Borough of Monmouth Beach Bd. of Education* and *Bd. of Educ. of the Monmouth-Ocean Educational Services*

[10]Judge Masin also observed in *Vicenzino* that "the law would permit Bedminster to abolish its CST entirely if it entered into a proper multi-district arrangement for such services. . . ." 97 *N.J.A.R.* 2d (EDU) at 360.

Commission, EDU 8644-00 and 8645-00, Initial Decision (October 11, 2002), *adopted*, Comm'r (December 2, 2002) <http://lawlibrary.rutgers.edu/oal/search.html>.

In *Anders,* the Commissioner adopted the decision of Administrative Law Judge Duncan dismissing the petitioners' claim that the Lakewood Board of Education violated their tenure rights by eliminating petitioners' social worker, LDTC and psychologist positions on the CST and entering into a contract with the Monmouth-Ocean Educational Services Commission to provide basic CST services to the district's students. The Commissioner found "the ALJ's reliance upon the court's language in *Vicenzino, supra,* appropriate in reaching the determination that a local board of education which acts in good faith to eliminate its CST(s) for reasons of economy may join with one or more boards of education or State agencies to provide basic CST services, including an ESC . . . ." The Commissioner was not persuaded by the petitioners' argument that the administrative law judge erred in reaching this determination because an ESC is neither a board of education nor a State agency. After quoting the "clear[ ]" language of *N.J.A.C.* 6A:14-5.1(a)1, the Commissioner articulated his full agreement with the administrative law judge's analysis and conclusion that:

> Definitionally, however, an educational services commission is a public agency established pursuant to provisions of State statute when five or more boards of education in any county or in any two or more counties and the Commissioner seek and receive permission from the State Board of Education to establish such a commission. *N.J.S.A.* 18A:6-52. Educational services commissions are established specifically for the purpose of providing to public school districts 'such educational and administrative services as may be authorized pursuant to rules of the State Board of Education.' *N.J.S.A.* 18A:6-51. If there had been any question concerning the authorization of boards of education to provide basic child study team services through an educational services commission, that question was definitively resolved with the adoption in 1998 of the State Board Rule *N.J.A.C.* 6A:14-5.l....

The Commissioner also rejected the petitioners' contention that *N.J.A.C.* 6A:14-5.1(a) "permits only the contracting of *supplemental* CST services" (emphasis in original). Rather, as the Commissioner observed, "[u]nlike *N.J.A.C.* 6A:14-5.1(c)1ii, which permits a board of education to subcontract with private clinics and agencies for provision of CST services to public school students only to *supplement* the local district services, there is nothing set forth in *N.J.A.C.* 6A:14-5.1(a) which would similarly limit joint

agreements by boards of education for CST services." (emphasis in original.) The Commissioner further concurred with the administrative law judge's determination that:

> In the within matter the tenured positions have, in fact, been eliminated. No employee of the Lakewood Board of Education is performing the duties previously performed by the tenured child study team members. The Board has opted for reasons of economy to provide basic child study team services through a statutorily and regulatory authorized administrative change in the method of providing those services. At some point in the future Lakewood may determine to again provide basic child study team services with board employees, and should that happen, the tenured petitioners in the within matter will be entitled to their tenured protections from the employment list. (footnote omitted.)

Similarly, in *Trigani, supra*, the administrative law judge denied relief to the petitioners, who were formerly employed by the Monmouth Beach Board of Education as a tenured psychologist, social worker and speech therapist. The board terminated the petitioners' employment for economic reasons and entered into a contract with the Monmouth-Ocean Educational Services Commission to provide CST services. In holding that the respondents were entitled to summary decision, the Commissioner concluded that, as aptly stated by the administrative law judge, "[t]he accumulated case law, culminating in *Anders,* which is on point with the circumstances of both the instant consolidated cases, leads only to the conclusion . . . that petitioners have not been unlawfully terminated from their positions. . . ."

CONCLUSIONS OF LAW

Against this backdrop, the facts of the within matter parallel those presented in *Anders* and *Trigani.* Succinctly stated, the comprehensive and well-reasoned analysis that led to the conclusions reached in those cases applies with equal force to petitioners' claims. Petitioners have offered no additional factual evidence warranting a different result. In addition, the undersigned is not persuaded by petitioners' contention that the cited Commissioner decisions are "flawed in their analysis in that they ignore the specific language of the applicable statutory and regulatory mandates governing child study teams."

A review of the applicable statutes and regulations supports the type of arrangement undertaken by the Board in this case. The statutory provisions expressly authorize a district board of education to provide for basic CST services "separately or

jointly with one or more boards of educations or State agencies. . . ." *N.J.S.A.* 18A:46-5.1. Toward fulfilling its statutory mission, the facilities and programs of education required for handicapped pupils may be provided by a jointure commission. *N.J.S.A.* 18A:46-14d. Consistent with the statutory directives, the Board entered into a contract with the SBJC, a public entity approved by the Commissioner to provide CST services. *See Miller v. Klagholz and Twp. of New Hanover Bd. of Education,* State Board Number 93-96 (where the State Board stated that *"N.J.S.A.* 18A:46-5.1 provides the authority under which district boards must provide basic child study team services, and the terms of that statute require that such services must be provided through its own employees, in combination with another board of education, or by another public entity.") (emphasis supplied.) Indeed, any question concerning the authorization of a board of education to provide basic CST services through a jointure commission has been squarely answered with the adoption of *N.J.A.C.* 6A:14-5.1(a)1. *See Anders, supra.*

The decisions rendered in *Cochran* and *Elson*, which were decided before the promulgation of *N.J.A.C.* 6A:14-5.1(a)1 and, as to *Elson*, involved a private entity, do not compel a different conclusion. Nor does the undersigned embrace petitioners' argument that the language of *N.J.S.A.* 18A:46.5.1 is limited to "the sharing of services by school districts in which child study team members would be in the joint districts at different times" and does not authorize a local board to provide basic CST services solely through a jointure commission. And, the plain language of *N.J.A.C.* 6A:14-5.1(a) does not support petitioners' stance that the Board must employ CSTs directly.

Although *N.J.A.C.* 6A:14-3.1(b) specifies that all CST members "shall be employees of a district board of education," the regulation must be read in a manner that comports with the statutory provisions of *N.J.S.A.* 18A:46-5.1 (which allows basic CST services to be provided "jointly with one or more boards of educations or State agencies"), *N.J.S.A.* 18A:46-14d (which authorizes the required facilities and programs of education for handicapped students to be provided by a jointure commission), and *N.J.S.A.* 18A:46-25 (which permits a jointure commission to provide CST services). The statutory and regulatory framework does not limit joint agreements with a local education agency, including a jointure commission, for CST services only to supplement services provided by district employees. *Contrast N.J.A.C.* 6A:14-5.1(c)1ii. The decisional law culminating in *Anders* and *Trigani* further supports the conclusion

that, although a district board of education may not eliminate the position of one CST member while maintaining its own CST, the board may abolish its entire CST and enter into a proper multi-district arrangement for such services, such as the arrangement in issue. The undersigned concurs with the administrative law judge's observation in *Anders* that the statutory and regulatory provisions would be rendered meaningless if districts which originally opted to employ their own CST members were required to continue that arrangement until each tenured member of the team either resigned or retired. Plainly, the purpose of *N.J.A.C.* 6A:14-3.1(b) was not to provide tenure protection to basic CST members over and above that provided by statute. Rather, the probable intendment of the regulation was to ensure that basic CST services would be provided by public employees of one local education agency in order to avoid supervisory and management difficulties which may be presented by a "split team." *See Anders, supra; Vicenzino, supra,* 97 *N.J.A.R.* 2d (EDU) at 360.

Apart from this, the record does not reveal that the SBJC has taken over or assumed the operation of the Board's special education program versus simply providing specific educational services. The Board continues to be legally responsible for its special education program and retains the authority to discontinue the SBJC's services. Further bereft from the record is any evidence suggesting that the services rendered by the SBJC are inadequate or do not conform with the standards authorized by the Commissioner. Indeed, the evidence reveals that the challenged arrangement has had no adverse impact on the program needs of the District for special education services.

Based upon the foregoing, I **CONCLUDE** that a board of education possesses the authority to contract with a jointure commission for the provision of CST services. I further **CONCLUDE** that the Board's agreement with the SBJC for basic CST services does not run afoul of the statutory and regulatory requirements governing special education services.[11]

I further **CONCLUDE** that the Board conducted a valid reduction in force pursuant to *N.J.S.A.* 18A:28-9 and its actions did not violate petitioners' tenure rights.

[11]As previously noted, the OSEP also concluded that the District's arrangement with the SBJC to provide full CST services complied with the statutes and regulations governing the provision of special education services.

Clearly, the Board has the power to engage in a reduction in force pursuant to *N.J.S.A.* 18A:28-9 for reasons of economy and efficiency. This would permit the elimination of petitioners' positions notwithstanding their tenured status.

Here, petitioners' positions have, in fact, been eliminated. In contrast to the circumstances in *Viemeister,* no Board employee is performing the duties previously undertaken by the tenured CST members. The record supports that the Board acted in good faith in abolishing petitioners' positions based upon permissible economic concerns. In other words, the Board opted to provide basic CST services through a statutorily and regulatory authorized administrative change in the method of providing those services for the purpose of saving money. That the cost numbers changed and the Board did not know the specific amount of money it would save at the time it contracted with the SBJC (which was dependent upon the persons assigned to the SBJC's CST) do not impugn the action taken. In short, what was known to the Board when it took the action it did was that there would be a substantial savings. Beyond this, the conceived plan to save money ultimately attained that purpose. The arrangement with the SBJC has resulted in a more economical delivery of CST services in the District. During the 2001-2002 school year, the Board saved over $23,000 from the use of the SBJC's 5/5, 5/5, 1/5 CST arrangement, rather than maintaining its own 3/5 team, and also received two more days of service from the SBJC. It would have cost the Board over $60,000 more had the petitioners provided the same 5/5, 5/5, 1/5 services.

In sum, based upon the foregoing facts and authorities cited, I **CONCLUDE** that the Board did not unlawfully terminate petitioners and its contract with the SBJC complies with the statutory and regulatory requirements. Inasmuch as the Board acted within the scope of its authority and pursuant to applicable statutes and regulations, its actions cannot be viewed as arbitrary, capricious or unreasonable.[12]

[12]Should the Board choose in the future to again provide CST services through its own employees, petitioners' statutory tenure and seniority rights would be triggered.

ORDER

I **ORDER** that respondent's Motion for Summary Decision be and hereby is **GRANTED.** I further **ORDER** that petitioners' Motion for Summary Decision be and hereby is **DENIED**. I further **ORDER** that the Verified Petition filed on petitioners' behalf 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 (45) 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 (13) 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, 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 3, 2004
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

November 3, 2004
DATE

Mailed to Parties:

NOV 05 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Joint Exhibits:

Joint Stipulations of Facts with attached Exhibits A through N

For Petitioner:

None

For Respondent:

Affidavit of Nicholas Annitti

514-04

OAL DKT. NO. EDU 9604-03
AGENCY DKT. NO. 301-8/03

A.B., on behalf of minor children, K.B. AND A.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MADISON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this matter and the Amended Initial Decision[1] of the Office of Administrative Law have been reviewed. Exceptions filed by each party were considered by the Commissioner in making the determination herein.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge that petitioner was not and is not homeless, nor has she been domiciled in the Madison School District since July 2001. Accordingly, the Commissioner finds that petitioner has failed in her burden of establishing that her two children were entitled to a free education in the Madison School District for the 2001-02, 2002-03 and 2003-04 school years. The Commissioner further agrees with the grant of the Board's counterclaim for tuition for the 2001-02, 2002-03 and 2003-04 school years as required

[1] The Initial Decision, issued on October 15, 2004, was replaced by an Amended Initial Decision, which was issued on November 23, 2004.

by the August 10, 2004 Order of the Superior Court of New Jersey, Law Division, Morris County.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED. [2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/21/04

Date of Mailing: 12/21/04

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4 1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMENDED INITIAL DECISION
OAL DKT. NO. EDU 09604-03
AGENCY DKT. NO. 301-8/03

A.B. ON BEHALF OF MINOR CHILDREN, K.B. AND A.B.,

Petitioner/Appellant,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MADISON, MORRIS COUNTY

Respondent.

A.B., Petitioner *pro se*

Vito Gagliardi, Jr., Esq., for Respondent
(Porzio, Bromberg and Newman, PC)

Record Closed: September 8, 2004 **Decided:** October 15, 2004

BEFORE SANDRA ANN ROBINSON, ALJ:

STATEMENT OF THE CASE

Petitioner (A.B.) contests the Respondent's (Madison Board of Education) determination that her two children K.B. and A.B., are not school district resident's and therefore not entitled to a free public education in the Respondent's district schools or in "out-of-district" educational facilities paid for by Respondent's district. Petitioner also alleges homelessness in solidification of her residency argument. Respondent seeks reimbursement of $ 253,730.29 plus costs and fees for educational services provided to Petitioner's children, for the period Petitioner no longer resided in Madison and failed to qualify for the homelessness exception under *N.J.A.C.* 18A: 38-1 and *N.J.A.C.* 6A: 28-2 ... a free public education will be provided to any student between the ages of 5 and 20 who is: " The child of a parent or guardian who moves to another district as a result of being homeless."

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on October 16, 2003, as a contested case pursuant to *N.J.S.A.* 52:14B-1 to B-15 and *N.J.S.A.* 52:14F-1 to F-13. A pre-hearing conference was scheduled for February 13, 2004, but was adjourned due to Respondent's counsel's conflict with an appearance on a District X proceeding. *De novo* hearing dates were scheduled for June 24 and July 14, 2004. The June 24, 2004 hearing was adjourned due to the unavailability of Respondent's counsel. On June 25, 2004 Respondent submitted a Motion for Summary Decision to OAL. The motion for Summary Decision was held in abeyance pending the outcome of the De Novo hearing. Petitioner appearing *pro se* contends via written correspondence that a major factual issue exists in that her residency continues in Madison due to homelessness and also that her right to a hearing should not be forfeitable during her continued search and need for legal representation. Case status conferences were scheduled for July 27, 2004 and August 4, 2004. The hearing dates were on July 14 and August 16, 2004. The request for a Summary Decision was denied. The record remained open until completion of the review of the Private Investigation Report and the review of the surveillance Video Tape, which was entered into evidence by Respondent with the support of testimony from the Investigator; the record was closed on September 8, 2004.

BURDEN OF PROOF

Pursuant to *N.J.S.A.* 18A: 38-1, the challenger to a Board's decision to deny a free public education within its district has the burden to prove to the Commission of Education by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in the statute. The statute also provides that no child shall be denied admission while the proceeding is pending before the Commissioner and in the event the child is currently enrolled in the district, the student shall not be removed from school while the proceedings are continuing. If, however, in the judgment of the Commissioner, the evidence does not support the claim of the resident, he/she

shall assess the resident tuition for the student, prorated to the time of the student's ineligible attendance in the school district.

As a result of the law cited above, the burden rests on the Petitioner by a preponderance of the evidence to show that domicile did in fact exist in the district in which the child attended school.

UNDISPUTED FACTS

1. The Madison Board of Education is a body politic of the State of New Jersey charged with operating the public schools in the Borough of Madison, New Jersey;

2. Pursuant to *N.J.S.A.* 18A: 38-1, the Board is obligated to provide a free public education to all children between the ages of 5 and 20 years of age who are domiciled in the Borough of Madison;

3. Petitioner is a resident of the state of New Jersey, and has two minor children, K.B. and A.B.;

4. Petitioner was previously domiciled in the Borough of Madison and, as a result, the Board provided a free public education to her children;

5. K.B. and A.B. are both eligible to receive special education and related services, and have been placed in out-of-district residential placements located in southern New Jersey and Pennsylvania by the Division of Youth and Family Services;

6. The Board has paid tuition necessary to place KB. and A.B. in the out-of-district residential placements;

7. Petitioner has not lived in the Borough of Madison since July 31, 2001. Notwithstanding that fact, **the Board has provided a free public education to Petitioner's children during the 2001-2002, 2002-2003 and 2003-2004 school years**

based upon her representation that she has been homeless since that time;

8. Petitioner has resided, and continues to reside since August 2001, at 6415 Liberty Avenue, Apartment 0-5, North Bergen, New Jersey, during the 2001-2002, 2002-2003 and 2003-2004 school years;

9. Since 2002, Petitioners driver's license and registration for her Mercedes Benz and Chevy Blazer have listed 6415 Liberty Avenue, Apartment G-5, North Bergen, New Jersey as her permanent address;

10. Petitioner admits via public recitation and documentation that she spends several nights each week and keeps her two vehicles and personal belongings at 6415 Liberty Avenue, Apartment G-5, North Bergen, New Jersey;

11. Petitioner uses Post Office Box 1265, in Madison, New Jersey, as her mailing address for Respondent to send school related correspondence;

12. On August 12, 2003 at a meeting of the Madison Board of Education, after an executive session hearing, Respondent's Board unanimously voted on a resolution to disenroll K.B. and AB. from the Madison Public Schools;

13. Petitioner appealed the residency determination on August 25, 2003;

14. Respondent filed a Complaint, dated October 22, 2003, against Petitioner in Morris County, Superior Court, Law Division to recover the costs of educating her children, on the grounds that her misrepresentations to the Board constituted racketeering in violation of *NJ.S.A.* 2C: 41-1b, fraud and equitable fraud.

15. Petitioner failed to answer the Civil Complaint and a default was entered against Petitioner on December 26,2003.

16. Respondent served Petitioner on January 19, 2004 with a request for discovery,

pursuant to *N.J.A.*C. 1: 6A-I 0.1. Petitioner has never produced responses to discovery requests.

17. Petitioner sought free legal assistance and was denied free service because of Petitioner's inability to prove financial need or to otherwise qualify for pro bono or reduced fee legal services at the location(s) contacted.

18. Petitioner was granted an adjournment to obtain counsel prior to the final dates of testimony at the OAL. Petitioner never secured a commitment for legal assistance.

19. On August 4, 2004 Attorney Matrician of the Legal Aid Society of Morris County confirmed via telephone call to OAL, that he would not be representing Petitioner.

20. On August 4, 2004 Ruth Lowenkronz, Esq. Of the Educational Law Center advised the OAL via telephone that "the law center is not in a position to provide legal representation or to provide for the services of a pro bono attorney" for Petitioner. Attorney Lowenkronz said Petitioner had previously been advised of this same information.

21. On August 10, 2004, the Honorable W. Hunt Dumont, J.S.C. entered a Judgment favoring the Madison Board of Education and Ordering Petitioner to reimburse Respondent for the education provided in the Madison school district after Petitioner was no longer a resident.

22. The proof hearing to determine homelessness and the amount of compensatory and consequential damages, attorneys fees and costs of suit owed by Petitioner was concluded at OAL on August 16, 2004; and the record closed on September 8, 2004.

BACKGROUND AND SUMMARY OF TESTIMOMY

Until July 2001 Petitioner resided in Madison with her twins, one girl and one boy, who are special needs children. Petitioner said she lost her job, lost her apartment

lease, started using a cell phone and a Madison post office mailing address. The children were receiving special education courses in a day placement paid for by Madison Board of Education. But, when Petitioner reported her children to DYFS alleging that her son had sexually abused her daughter, DYFS commenced relocation in another placement. Petitioner did not want both of the children in the same location therefore one placement was obtained in Pennsylvania and another in South Jersey. The Madison Board of Education pays the cost for the residential out-of-district placement. Once the children were placed it became increasingly difficult for the Madison Board of Education to find Petitioner and suspicion grew about her residency.

The following is a summary of the testimony in evidence, which was found by the undersigned to be relevant to the issues in this matter.

FOR RESPONDENT

CHARLES R. MILEWSKI: Certified School Board Business Administrator/School Board Secretary for Madison, has been in the profession for twenty-six years and with Madison since September 2002. He holds a B.A. degree from University of Bridgeport and a M.A. degree from Fairleigh Dickinson University.

The Madison Director of Special Services approached Mr. Milewski, with a concern about Petitioner's residency, when it became increasingly difficult to contact Petitioner. The means of contacting Petitioner was on a cell phone or through a post office address and usually no reply was forthcoming when contact attempts were made. The school district was concerned about paying the special residential education tuition of $85,000.00 per year, for two children who were not the responsibility of the Madison school district. Mr. Milewski explained the Educational Agreements and Contracts entered into by the Madison Board of Education on behalf of Petitioner's children. **(Exhibits R-1, R-2, R-3, R-4, R-5, R-6).** In March 2003, Mr. Milewski was successful in making contact with Petitioner to schedule a meeting at the school. When Petitioner was told that her residency was under suspicion, she said she was living out of her car. She explained that she had lost job and was living various places with friends in

Ringwood and North Bergen. Petitioner came to the meeting very well dressed. Mr. Milewski wrote the license plate number of the Mercedes Benz, which Petitioner drove. He then checked on the license plate and learned that the vehicle was owned by a former company in Madison.

Respondent hired a private Investigator to check on Petitioner's residency. An "Investigation Report" (Report) was submitted which concluded that Petitioner resided in North Bergen. **(Exhibit R-8).** The Investigator took photographs and video-taped the surveillances, which occurred over a one (1) month period at the North Bergen residence of Petitioner. **(Exhibits R-8, R11).** The Report disclosed that Petitioner owns 92 acres of property in upstate New York with a Mr. Joseph Stadler, and as of June 30, 2004 Petitioner still held ownership of the property. **(Exhibits R-12, R-13).**

The Investigator presented the Report and answered inquiries at the August 12, 2003 Closed Session of the Madison Board of Education meeting. Petitioner made an oral presentation during which she admitted to living in North Bergen. She told the Board that the bottom floor consisted of: kitchen table and chairs, leather coach/sofa bed, television, computer, fax machine; and the top floor contents was bedroom furnishings. Petitioner also told the Board that she owns two vehicles (including the Mercedes Benz). Petitioner presented no documents at the Board meeting. Petitioner claimed that she had stayed in a shelter but could not remember the name of the shelter, the location of the shelter or dates she stayed at the shelter. The Board voted unanimously to disenroll Petitioner's two children because Petitioner no longer resided in Madison. **(Exhibit R-7).**

WILLIAM (BILL) KELLY: is a New Jersey licensed Private Investigator hired by the Madison Board of Education on April 1, 2003 to handle a "Residency Verification Case" on Petitioner. Investigator Kelly (Kelly) prepared and submitted a written Report, Photographs and Video Tape of his surveillance. **(Exhibits R-8, R-11).**

For one month the Investigator conducted a surveillance on numerous days and at varying times, but usually an early morning watch (5:45AM, 8AM, 8:30AM) is and was used to determine if persons exit a house or apartment regularly and proceed to work, then return at the end of the work day (6PM, 8PM, 9:45PM). Kelly's Report indicates what time both vehicles were usually at the 6415 Liberty Avenue address and provides pictures of Petitioner and/or Mr. Stadler coming or going at various times and dates. Even though the building provides underground secured parking, the vehicles were always parked on the street. At all time during the surveillance Kelly observed Petitioner entering and driving vehicles, which matched the description of the vehicles registered to her.

Kelly learned that both of Petitioner's vehicles had been registered to Intellectual Advertising, Inc. (an active corporation as of October 27, 1997 with no annual reports filed and Joseph Stadler of Madison named as the registrant); after the business closed, the registrations were changed to Petitioner's name. Kelly inquired of the New Jersey Division of Motor Vehicles, as to the address of the registered owner of the vehicles. The reply from Motor Vehicles indicated Petitioner's address at 6415 Liberty Avenue in North Bergen. **(Exhibits R-9, R-10).**

Kelly investigated Petitioner's allegation (made at the Board meeting) that she had applied for public housing in Madison. On September 8, 2003 he spoke with Pat Cummings, a housing authority representative in charge of resident applications, who told him that Petitioner never inquired or made an application for public housing.

Kelly investigated Petitioner's allegation (made at the Board meeting), that she no longer owned property in New York State. Kelly made an inquiry of the Town of Hammond, New York Tax Collector and learned that as of June 30, 2004 Petitioner had not relinquished ownership of her property in New York. **(Exhibit R-13).**

PETITIONER

Petitioner did not refute the Investigative Report, Video Tape, Photographs or the Testimony of Mr. Kelly, except to question the exact number of times he observed her in North Bergen; and to note that she bought the New York property at a 1994 Tax Sale.

Petitioner did not refute the testimony of Charles R. Milewski (Madison Board of Education Business Administrator) regarding her statements at the office meeting or the School Board meeting, nor did she contradict the explanation of circumstances surrounding the Agreements and Contracts for Educational Services provided for her children. Petitioner said she had no documentation to offer in support of her claim of homelessness.

CREDIBILITY

The credibility of the witnesses is of paramount concern in this case. Petitioner would have the undersigned to believe that after she lost her job and lease that she had nowhere to live. However, the weight of all testimony, including disclosures made by Petitioner indicates that when Petitioner moved from Madison she commenced residency in North Bergen. The information she provided to the school board about living with an older child immediately after loosing her lease was never verified. Many of Petitioner's other stories about no longer owning property in New York, applying for public housing, living with "other" friends and relatives, staying in a shelter, being destitute, without money and homeless – were not credible and were proven to be false after the professional investigation on Petitioner was completed. It appears that Petitioner provided information and documentation in various forms, which was intentionally false and designed to mislead the school officials as to her true residence.

It appears that Petitioner fabricated the truth about her residency, so as to be freed from the parental and educational responsibilities of her children and to have the Madison Board of Education continue paying for residential out-of-district placements.

LEGAL DISCUSSION AND CONCLUSIONS

PROOF OF DOMICILE TO QUALIFY FOR PUBLIC SCHOOL EDUCATION:

Pursuant to *N.J.S.A.* 18A: 38-1, public schools shall be free to persons over five and under 20 years of age who are domiciled within the school district. While there are certain exceptions, this case is not a case of exceptions but instead a case of questioned domicile and/or homelessness. It is the position of Petitioner that she at all times pertinent to this case, was domiciled in the district of Madison because that is the last district of attendance by her children, before she became homeless.

The burden of proving that the Petitioner is domiciled in the school district of Madison falls squarely upon Petitioner. It is Petitioner's burden to show that she was domiciled in the Borough of Madison and that her children were appropriately attending school there. The proof in this case by Petitioner falls very short of meeting the burden. As noted above, her testimony that she was homeless during the relevant time period lacked proof and credibility. Petitioner did not submit documents in support of her claim, which made her testimony appear even more incredible.

HOMELESSNESS:

While *N.J.S.A.*18A: 7B-12 provides that if a parent of a pupil temporarily moves from one school district to another as the result of being homeless, the district in which the parent last resided prior to becoming homeless shall be responsible for the pupil's education. An individual is deemed "homeless" if he/ she "temporarily lacks a fixed, regular and adequate residence." *See J.S. olblo D.S.* v. *Parsippany-Troy Hills Township Board of Education,* OAL Docket No. EDS 1676-01 (2001).

Except for exploring the issue and possibility of homelessness, this case is repetitive of the outcome in the Superior Court. The doctrine of res judicata is applicable to administrative actions and is applied to "prevent wasteful and unnecessary fragmentation of causes of action and duplication of proceedings," and in order to

protect the integrity of the adjudicative process by avoiding contradictory judgments on the same factual issues. *City of Hackensack v. Winner,* 82 N.J. 1,31 (1980). Also, *Fortunato v. Del Corio,* 91 NJ.A.R. 2d(INS) 1, 18 *(l991).* In the instant case, the transmittal documents from the Department of Education Bureau of Controversies and Disputes cited the possibility of homelessness as an issue for exploration and transferred the matter to the OAL for a hearing.

Petitioner does not dispute that she moved from the Borough of Madison in July 2001 and at some point thereafter commenced living in the Township of North Bergen; nor does she dispute that she testified before the Board of Education on August 12, 2003 and disclosed that her permanent living residence was in North Bergen where she also worked. Petitioner's disclosure that she has personal belongings, furnishings, at least one vehicle and lists North Bergen as her permanent address on her driver's licenses and vehicle registrations is an indication that homelessness does not exist. Petitioner's assertion that she has "been homeless and has for three years temporarily lacked a fixed, regular and adequate residence", is not credible and is unbelievable. **I CONCLUDE** that Petitioner has not been domiciled in Madison for three years. **I ALSO CONCLUDE,** that Petitioner was not and is not homeless. **I FURTHER CONCLUDE,** that Petitioner has not met the preponderance of the evidence to show that domicile did in fact exist in the Madison school district.

TUITION REIMBURSEMENT:

As a result of the Conclusions, the next question presented is that of tuition reimbursement. *N.J.S.A.* 18A: 38-1 permits the assessing of a parent, for tuition of a student prorated to the time of the student's ineligible attendance in the schools of the district commenced. Respondent has submitted certified Agreements and approved "New Jersey State Department of Education Mandated Tuition Contracts" for the years 2001-2002, 2002-2003, 2003-2004 for both of Petitioner's children. The Business Administrator and Secretary for the Borough of Madison School District testified in regard to the terms, conditions and funding language of the Agreements and Contracts at the hearing. The three school years of tuition totaled $253,730.29 and were broken down as follows:

STUDENT	SCHOOL YEAR	TUITION
K.B.	2001-2002	$45,625
K.B.	2002-2003	$47.450
K.B.	2003-2004	$49,410
A.B.	2001-2002	$30,384
A.B.	2002-2003	$30,528
A.B.	2003-2004	$33,072

ORDER

It is hereby **ORDERED** that Petitioner's claim be and is hereby **DISMISSED.** It is further **ORDERED** that for the days K.B. and A.B. attended the schools of Respondent, Borough of Madison and/or attended out-of-district specialized educational facilities in southern New Jersey and Pennsylvania, that Petitioner shall pay Respondent tuition in accordance with the provisions of *N.J.S.A.* 18A: 38-1(b)(2), in the sum of $253,730.29, and as set forth in Agreements and Contracts to provide Education Programs for K.B. and A.B. and as appears on Respondent's Statement of Itemized Claims, with costs, and interest in favor of the Petitioner Madison Board 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 (45) 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 (13) 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, 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 23, 2004 (AMENDED)

DATE October 15, 2004-Initial Submission **SANDRA ANN ROBINSON**, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:

DATE OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX
LIST OF WITNESSES

Petitioner:
Andrea Bellomo, *pro se*

For Respondent:

William (Bill) Kelly, Private Investigator

Charles R. Milewski, Madison School Board Administrator and Secretary

EXHIBITS

For Petitioner:

None.

For Respondent:

R-1 K.B. Education Agreement 2001-2002

R-2 K.B. Education Agreement 2002-2003

R-3 K.B. Education Agreement 2003-2004

R-4 A.B. Education Contract 2001-2002

R-5 A.B. Education Contract 2001-2002

R-6 A.B. Education Contract 2001-2002

R-7 August 2003 Madison Board of Education Meeting Minutes

R-8 Investigator Photo's within Surveillance Report on Petitioner June 5, 2003

R-9 Certified Motor Vehicle Abstract July 9, 2003

R-10 Certified Motor Vehicle Abstract August 26, 2003

R-11 Investigator Video

R-12 Town of Hammond, New York Tax Bill August 11, 2003

R-13 Town of Hammond, New York Tax Bill June 30, 2004

515-04

OAL DKT. NO. EDU 9067-02
AGENCY DKT. NO. 268-9/02

DAVID SHTEINGRADT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the President of the Linden Board of Education signed the Settlement Agreement on behalf of the Board. In that neither the file nor the Settlement Agreement contains a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf, and the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within Settlement Agreement.

Moreover, the Commissioner observes that the settlement included with the Initial Decision sets forth terms that appear to have been effectuated prior to approval of the settlement by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. The ALJ and the parties are cautioned against effectuating terms of a settlement agreement in a controverted matter that has been duly transmitted to the OAL prior to its submission to, and approval by, the Commissioner.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/21/04

Date of Mailing: 12/21/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9067-02

AGENCY DKT. NO.: 268-9/02

DAVID SHTEINGRADT,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner
(Oxfeld Cohen, attorneys)

Brian J. Aloia, Esq., for respondent
(Weiner Lesniak, attorneys)

Record Closed: November 17, 2004 Decided: November 19, 2004

BEFORE **MUMTAZ BARI BROWN,** ALJ:

On October 11, 2002 this 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. After several adjournments, the matter was scheduled for

hearing on November 17, 2004. Prior to hearing, the parties agreed to settle the matter. A Stipulation of Settlement indicating the terms of settlement was signed by the parties and a copy is attached hereto.

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 (45) 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.

Nov 19, 2004
DATE

MUMTAZ BARI BROWN, ALJ

Receipt Acknowledged:

11-30-04
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 2 2004
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cdr

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is made and entered into between the Linden Board of Education ("Board") and David Shteingradt ("Shteingradt"). This Agreement is made pursuant to the following terms and conditions.

RECITALS

WHEREAS, on or about July 25, 2001, Shteingradt was hired by the Board as a physical science teacher for the 2001-2002 school year; and

WHEREAS, on or about May 15, 2002, Shteingradt was notified that the Board did not renew his contract for the 2002-2003 school year; and

WHEREAS, Shteingradt's last day of employment coincided with the last day of school in June of 2002; and

WHEREAS, on or about June 6, 2002, the Board advised Shteingradt that he would be suspended through July 15, 2002 without pay; and

WHEREAS, Shteingradt filed a grievance under the collective negotiations agreement's ("Agreement") grievance procedure; and

WHEREAS, on or about August 9, 2002, Shteingradt, by and through the Linden Education Association ("Association"), filed a Demand for Arbitration with the Public Employment Relations Commission ("PERC"), claiming that Shteingradt's suspension without pay violated his rights under the Agreement, and seeking reversal of the disciplinary action and back pay; and

WHEREAS, on or about September 27, 2002, the Association, on behalf of Shteingradt, withdrew its request for arbitration; and

WHEREAS, on or about September 4, 2002, Shteingradt filed a Petition of Appeal with the Commissioner of Education, which was transferred to the Office of Administrative Law, asserting that he was improperly suspended without pay, and seeking *inter alia*, salary for the period of suspension; and

WHEREAS, on or about September 30, 2002, the Board filed an Answer to the Petition of Appeal;

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

1. The "Board," as used herein, shall at all times mean the Linden Board of Education, its subsidiaries, affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, successors, heirs, executors and administrators whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.
2. "Shteingradt," as used herein, shall mean David Shteindradt, his heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.
3. The "Association" as used herein, shall mean the Linden Education Association, its members, subsidiaries, affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys,

successors, executors and administrators whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.

4. Shteingradt shall cause to be filed a withdrawal, with prejudice, of his Petition of Appeal currently pending before the Office of Administrative Law and docketed as EDUOR 09067-02N.

5. In consideration of Shteingradt's covenant set forth in Paragraph 4. the Board agrees to prepare a letter of recommendation on Shteingradt's behalf for future employment opportunities, wherein the Board will attest to his knowledge and experience in the area of physical science.

6. Shteingradt's personnel file with the Board will reflect that he departed with the Board in good standing.

7. Shteingradt expressly agrees and understands that his departure is final and irrevocable no matter what and regardless of any other circumstances. Shteingradt's departure shall be deemed accepted by the Board upon execution of this Agreement. Shteingradt forever waives any and all rights or ability to seek re-employment with the Board in any capacity.

8. Shteingradt and the Association hereby agree that they shall not contest the conditions set forth in Paragraph 1 through 7, inclusive, before any tribunal, court, administrative body or arbitration. The parties further agree and understand that this Agreement is a full and final waiver and release between them covering the above claims before the Office of Administrative Law.

9. This Settlement Agreement and General Release shall not be construed as an admission of any kind to any charge delineated in the within referenced actions.

10. Each party hereby release, acquit and forever discharge the other and from any and all actions or causes of action, suits, debts, claims, complaints, contracts, controversies, agreements, promises, damages, cross-claims, claims for contribution and/or indemnity, claims for costs and/or attorney's fees, judgments and demands whatsoever, in law or equity, which it ever had, now has or may have, as of the date of this Settlement Agreement and General Release arising from or relating to the incidents as set forth in the actions known as David Shteingradt v. Linden Education Association, docketed as EDUOR 09067-02N.

11. This Settlement Agreement and General Release contains the full agreement of Shteingradt and the Board, and may not be modified, altered, changed or terminated except upon the express prior written consent of the parties or their duly authorized agents.

12. The waiver by one party of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other.

13. 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 provision, term or condition of this Settlement Agreement and General Release.

14. This Settlement Agreement and General Release shall be construed and interpreted in accordance with the laws of the State of New Jersey.

15. 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 give full force and effect to the basic terms of this Settlement Agreement.

16. This Settlement Agreement and General Release may be executed in counterparts, with each of which to be deemed to be an original copy, but all of which together shall be deemed one and the same instrument.

17. The parties shall bear all costs and expenses arising from the actions of their own counsel in connection with the Settlement Agreement and General Release. Any additional attorneys fees, which may arise from the actions of the Association's attorneys in connection with the incidents set forth and any incidents related thereto to the action known as EDUOR 09067-02N is to be borne by Shteingradt or the Association. The Board shall bear its own costs.

18. This Settlement Agreement and General Release contains the entire Agreement between Shteingradt and the Board with regard to the matters set forth in it, and shall be binding upon and inure to the benefit of their officials, officers, directors, representatives, employees, agents, servants, administrators, successors and assigns of each, except as set forth herein or as may be agreed to in writing between the parties.

19. In entering into this Settlement Agreement and General Release, Shteingradt has relied upon the legal advice of his union representative and/or attorney, as to the terms of this Settlement Agreement and General Release which have been

completely read and explained and those terms are fully understood and voluntarily accepted.

20. This Settlement Agreement and General Release shall become effective immediately following execution by all the following parties.

IN WITNESS WHEREOF, Shteingradt and the Board have hereunto set their hands.

LINDEN BOARD OF EDUCATION

By: _____
Nicholas Nigro
Board President

DAVID SHTEINGRADT, an individual

By: _____

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516-04

OAL DKT. NO. EDU 8083-04
AGENCY DKT. NO. 325-9/04

BOARD OF EDUCATION OF MILLSTONE TOWNSHIP, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
G.B. and A.B., on behalf of minor child, E.B.,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and General Release, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, to the extent the Commissioner has jurisdiction over these issues, he approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the parties' agreement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/21/04

Date of Mailing: 12/21/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8083-04

AGENCY DKT. NO. 325-9/04

MILLSTONE TOWNSHIP
BOARD OF EDUCATION,

Petitioner,

v.

G.B. and A.B., o/b/o E.B.,

Respondents.

Robert J. Pruchnik, Esq., for petitioner (Kenney, Gross, Kovats, Campbell and Pruchnik, attorneys)

Jayne Wesler, Esq., for respondent (Sussan and Greenwald, attorneys)

Record Closed: November 30, 2004 Decided: November 30, 2004

BEFORE **JOHN R. TASSINI,** ALJ:

STATEMENT OF THE CASE

The Millstone Township Board of Education (BOE) petitioned for an order requiring respondent E.B., a student classified for Special Education and related services, to remain on home instruction and to refrain from attending school until the district determines that E.B. can

return to school without endangering his health. As shown on the attached Stipulation of Settlement Agreement and General Release, the parties have settled the case.

PROCEDURAL HISTORY

On September 15, 2004, the BOE's papers were filed with the Department of Education. *N.J.S.A.* 18A:6-9. The Department transmitted the contested case to the Office of Administrative Law (OAL) where it was filed on September 16, 2004. *N.J.S.A.* 52:14B-2(b). On September 16, 2004, the attorneys and I conferred, the parties represented that they expected to settle the case and a hearing was scheduled for September 29, 2004. Prior to that date, the parties advised that the case had been settled and that they were preparing the Stipulation of Settlement and General Release. On the record closed date, I received the Stipulation of Settlement and General Release with the last of the signatures and a certification showing that the BOE accepted the settlement. I note that the parties have also settled the related case docketed as EDS 6963-04.

FINDINGS OF FACT

1. The petitioner understood the Stipulation of Settlement and General Release and the parties voluntarily entered in to it.

2. The Stipulation of Settlement and General Release fully disposes of all issues in controversy and is consistent with the law.

The case involved substantial issues of fact. The Stipulation of Settlement and General Release avoids the time and expense of full hearing and further litigation. The terms of the Stipulation of Settlement and General Release are reasonable and in the public interest.

CONCLUSIONS OF LAW

This Stipulation of Settlement and General Release meets the requirements of *N.J.A.C.* 1:1-19.1 and should be approved. *See N.J.A.C.* 6A:3-1.3.

ORDER

I **ORDER** that the parties comply with the Stipulation of Settlement and General Release 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 (45) 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 30, 2004

DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

Dec 1, 2004

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 3 2004

DATE

OFFICE OF ADMINISTRATIVE LAW

mph

EDU 8083-04

KENNEY, GROSS, KOVATS, CAMPBELL & PRUCHNIK
130 Maple Avenue, Bldg. 8, P.O. Box 8610
Red Bank, New Jersey 07701-8610
(732) 530-7500
Attorneys for Millstone Township Board of Education

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

MILLSTONE TOWNSHIP BOARD OF EDUCATION, PETITIONER, v. G.B. & A.B. o/b/o E.B., RESPONDENTS.	BEFORE THE COMMISSIONER OF EDUCATION Agency Docket No. 325-9/04 **STIPULATION OF SETTLEMENT AND GENERAL RELEASE**

The Millstone Board of Education, (the "District") with principal offices at 18 Schoolhouse Road, Clarksburg, New Jersey; and George Brunath (G.B.) and Andrea Brunath (A.B.), (the "Respondents" or the "Parents"), on behalf of their minor son, E.B. (the "student" or "E.B."), domiciled at 13 Sugar Loaf Hill, Clarksburg, New Jersey, desiring to settle this contested matter in an amicable and mutually satisfactory way, hereby set forth their full and complete agreement, as follows:

WHEREAS, E.B., is an educationally disabled student as defined in N.J.A.C. 6A:14-1.1 et seq.; and

Attach to ID Settlement

WHEREAS, the Millstone Board of Education is the local educational authority with the responsibility of providing E.B. with a free, appropriate public education; and

WHEREAS, as a result of an IEP meeting held on May 6, 2004, the parties agreed that E.B.'s Individualized Education Program (IEP) should be implemented in a self-contained, first grade classroom at the District's Millstone Elementary School; and

WHEREAS, on or about June 30, 2004, E.B.'s neurologist, Dr. Robert Clancy, wrote the District requesting that E.B. be placed on home instruction; and

WHEREAS, the District's physician, Dr. Howard Cohen, thereafter approved and verified the home instruction request in accordance with N.J.A.C. 6A:14-4.9; and

WHEREAS, throughout the summer of 2004, E.B. did indeed receive medical home instruction from Mr. Joshua DeSantos, a certified teacher of the handicapped; and

WHEREAS, on or about August 12, 2004, Dr. Clancy wrote to the District indicating that E.B. was cleared to return to the Millstone Elementary School; and

WHEREAS, at the commencement of the 2004-05 school year, the Respondents were advised by the District's representatives that E.B. would remain on medical home instruction until such time that Dr. Cohen determined E.B. was medically fit to return to the Millstone Elementary School; and

WHEREAS, on or about September 3, 2004, the Respondents' attorney filed an application for Emergent Relief seeking, among other things, an Order from an Administrative Law Judge requiring that E.B. be permitted, under the "stay put" provisions of the Individuals with Disabilities Education Act (IDEA), to immediately enter to his first grade, self-contained program at the Millstone Elementary School; and

WHEREAS, on or about September 14, 2004, the District filed a Petition of Appeal and Request for Emergent Relief before the Commissioner of Education (Agency Dkt. No.: 325-9/04);

WHEREAS, the District's Petition of Appeal maintains that, in accordance with Title 18A and N.J.A.C. 6A:14-4.9, it is vested with the authority to determine, based upon consultation with the District's physician, when a student is medically fit to return to the general education setting; and

WHEREAS, the District maintains that E.B. should not come off medical home instruction until such time that Dr. Howard Cohen determines that he is medically fit to return to Millstone Elementary School; and

WHEREAS, as a result of settlement discussions on September 16, 2004, the parties have agreed to settle all issues in dispute as set forth in the Petitioners' Petition of Appeal and Request for Emergent Relief (Agency Docket No. 325-9/04);

NOW, THEREFORE, for the considerations specified below, the parties set forth the following mutual covenants and agreement as follows:

1. Effective Monday, September 20, 2004, E.B. shall receive in the family home 2.0 hours per day of medical home instruction to be provided by a certified teacher of the handicapped.

2. E.B.'s medical home instruction in the family home shall continue through and including Monday, September 27, 2004.

3. Effective Tuesday, September 28, 2004, E.B.'s medical home instruction shall be increased to 2.5 hours per day with medical home instruction being provided by a certified teacher of the handicapped to be hired by the Board of Education at its meeting scheduled for

Monday, September 27, 2004. Additionally, E.B. will receive from a District speech therapist the related service of speech therapy as specified in his IEP dated May 6, 2004. The medical home instruction and the speech therapy will be provided at the Millstone Elementary School. The instruction will take place either from 9:05 – 11:35 a.m. or from 1:30 – 4:00 p.m.

4. In order to receive medical home instruction and speech therapy, it will be the Petitioners responsibility to provide E.B. with transportation to and from the Millstone Elementary School.

5. The parties anticipate that E.B. will undergo surgery at the Children's Hospital of Philadelphia in October or November, 2004, with the hope that this surgery will have a positive impact on the severity of E.B.'s ongoing seizure disorder. Accordingly, within sixty (60) days of the commencement of E.B.'s medical home instruction after surgery, the parties agree to convene an IEP meeting in order to satisfy the requirement of an IEP review as set forth at N.J.A.C. 6A:14-4.9, in order to review the results of E.B.'s reevaluation, in order to determine if E.B. is medically fit to return to school at the Millstone Elementary School, and in order to develop an appropriate program for E.B. The issue of an occupational therapy evaluation will be addressed at this IEP meeting..

6. Upon E.B.'s return to school, a functional behavioral assessment will be updated and a behavior intervention plan will be created by the Children's Center of Monmouth County.

7. In consideration for the foregoing, Petitioner hereby withdraws, without prejudice, its Petition of Appeal and Request for Emergent Relief with a Agency Docket No. of 325-9/04.

8. No later than 30 days after the execution of this Stipulation of Settlement, this Stipulation of Settlement shall be filed with the Bureau of Controversies and Disputes.

9. This Stipulation of Settlement 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 Petitioner or the parents. In the event that this Stipulation of Settlement is not fully executed and approved by all parties hereto, this Stipulation of Settlement shall become null and void and shall neither constitute an admission of any party not be referred to by any party in any subsequent legal proceeding for any purpose whatsoever.

10. The Respondents acknowledge that they have been represented by and consulted with legal counsel throughout the negotiations of this Stipulation of Settlement and that they have reviewed the Stipulation of Settlement in detail with their counsel and that they fully understand its requirements and limitations. The parents further expressly state that they are fully satisfied with the representation provided by their legal counsel.

11. The Respondents hereby state that they are signing this Stipulation of Settlement voluntarily of their own free will and not under duress or coercion of any kind.

12. This Stipulation of Settlement shall be construed fairly according to the plain language of its terms and not for or against any party hereto.

13. If, during the term of this Stipulation of Settlement, it is found that a specific clause(s) of the Stipulation of Settlement is/are illegal under Federal or State Law, then the remainder of the Stipulation of Settlement not affected by such a ruling shall remain in full force and effect.

14. All parties are bound by this Stipulation of Settlement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns, are also bound. This Stipulation of Settlement 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.

15. The Respondents understand and agree that the terms and conditions of this settlement shall become null and void in the event that they and/or E.B. are no longer domiciled in the Township of Clarksburg.

16. This Stipulation of Settlement constitutes the full and complete agreement of the parties hereto with respect to its subject matter, 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. a27 October 25 & November

IN WITNESS WHEREOF, the undersigned put their signatures on this 29 day of November, 2004.

FOR THE PETITIONER:

Brian P. Boyle

Board Secretary/School Business Administrator

DATED: 10/24/04

Kathy L. Wurcel

President of Board of Education

DATED: 10/25/04

Robert J. Pruchnik Esq

Robert J. Pruchnik, Esq.
Attorney for the Board

Dated: 11.29.04

FOR THE RESPONDENTS:

GEORGE BRUNATH, Petitioner/Parent

DATED: 11-1-04.

ANDREA BRUNATH, Petitioner/Parent

DATED: 11-1-04

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#520-04L

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

WILLIAM L. LIBRERA
Commissioner

December 23, 2004

Ashton E. Thomas, Esq.
125 Broad Street, Suite 804
Elizabeth, New Jersey 07201

John P. Harrington, Esq.
Apruzzese, McDermott, Mastro & Murphy
Somerset Hills Corporate Center
P. O. Box 112
Liberty Corner, New Jersey 07938

Dear Counsel:

Upon review of the papers filed in connection with petitioner's Motion for Stay, pending appeal to the State Board, of my November 17, 2004 decision in the matter entitled *A. McA., on behalf of minor children, A. McA. and M. McA. v. Board of Education of the Township of Union, Union County*, Agency Dkt. No. 50-2/04, OAL Dkt. No. EDU 3805-04, Commissioner decision No. 466-04, I have determined that there is no basis upon which to grant the requested relief.

Pursuant to *N.J.A.C.* 6A:3-1.15(a), a motion for stay shall be decided upon the criteria set forth for the granting of interim relief as established by *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may only be awarded when the party seeking such relief demonstrates the existence of **each** of four separate conditions: 1) that in the absence of such a stay, the movant will suffer irreparable injury; 2) that there is a clear probability the movant will prevail on the merits of the underlying controversy; 3) that the probability of harm to other persons will not be greater than the harm the movant will suffer in the absence of such a stay; and 4) that the public interest will not be adversely affected by such a stay. *Crowe, supra*. Here, I determine that petitioner has failed to satisfy her burden of demonstrating **any** of these required standards. Most notably, however, she has failed to establish irreparable harm or even a preliminary facial showing that she will ultimately succeed on the merits of this matter.

My November 17, 2004 decision found that petitioner and her children, A. McA. and M. McA., were not domiciliaries of Union Township during the 2003-2004 school year, thereby entitling the children to a free public education in this district, but, rather, they were domiciled with petitioner's sister and her husband in Newark during this time. My decision

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further assessed petitioner tuition, in the amount of $40,254.60, for this period of her children's ineligible school attendance at Union Township's expense. Petitioner's submitted materials here allude to a change in the factual scenario on which this matter was based, specifically, that petitioner's sister and her husband have moved from their home in Newark and now live in Piscataway. I do not find this factual circumstance pertinent to my determination which dealt with the 2003-2004 school year. If, however, as a result of this change, petitioner's children are being denied school attendance in whatever district they now reside, petitioner should file a new Petition of Appeal. To the extent that the instant motion could be considered one for reconsideration of my prior decision, pursuant to *N.J.A.C.* 6A:3-1.15(b), it must, similarly, be denied for failure to satisfy the necessary requisites for consideration.

Accordingly, petitioner's Motion is hereby DENIED.

Sincerely,



William L. Librera, Ed.D.
Commissioner

WLL/DRP/MKD/MH
c: State Boards Appeals
County Superintendent
Via Facsimile and Regular Mail

#521-04

521-04

OAL DKT. NO. EDU 4113-96
AGENCY DKT. NO. 87-3/96

BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that K.M. and her children, K.G., T.G. and K.P., were homeless during the time that they lived in Delran Township following their eviction from their residence in Clifton in that they had no "fixed, regular, and adequate residence." The Commissioner, therefore, agrees that, pursuant to *N.J.A.C.* 6:3-8.4.,[1] the Clifton Board must pay a total of $3,944 in tuition to the Delran Board for the twenty-nine days that K.G., T.G. and K.P. were homeless and attended school in the Delran Township School District.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/23/04

Date of Mailing: 12/23/04

[1] This regulation has since been superseded by *N.J.A.C.* 6A:17-2.9(a).

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 04113-96S
AGENCY DKT. NO. 87-3/96

BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,
Respondent.

John T. Barbour, Esq., for petitioner
Anthony V. D'Elia, Esq., for respondent (Chasan, Leyner, Bariso & Lamparello, attorneys)

Record Closed: October 1, 2004 Decided: November 15, 2004

BEFORE **JEFF S. MASIN,** ALJ:

This matter involves a dispute in which the Delran Board of Education demands that the Clifton Board of Education pay tuition to it to cover the attendance of three children in Delran's school system. The dispute goes back many years. Delran first asserted its claim sometime prior to May 8, 1996, on which date the contested case was transmitted to the Office of Administrative Law ("OAL"). The matter was then assigned to a judge who has since retired. For reasons unknown, it seems that the case "fell between the cracks" for all concerned, the judge and the lawyers, and was never resolved. A recent audit of cases at the OAL revealed that this matter remained unresolved and inquiries to counsel revealed that the matter, which had been the

subject of a motion for summary decision filed by counsel for Delran on October 17, 1996, was still a live controversy despite the passage of time. The case was reassigned to this judge and counsel resubmitted their briefs.

Delran's bases its claim for tuition for the attendance in its schools of three children, "K.G.," "T.G.," and "K.P.," for the period between November 20, 1995, and January 18, 1996, upon a then existing regulation, *N.J.A.C.* 6:3-8.3.[i] This regulation addresses the continuing responsibility placed upon certain districts for the education of children who have left the district and been enrolled in other districts.

In a Certification In Lieu of Affidavit dated October 10, 1996, submitted with the motion for summary decision, Matt Wideman states that prior to November 1996, he owned property located at 166 Center Street, Clifton, New Jersey, and rented the dwelling to K.G. and her three children, the aforementioned students, for at least twenty-five months. He was forced to evict them in November due to a failure to pay rent. Alan Elstein filed a Certification, in which he asserted that he was the Director of Pupil Personnel Services and Curriculum for Delran. He conducted an investigation regarding the three students in question and determined that when K.M. was evicted by Mr. Wideman, she took her three children and stayed at the apartment of J.M., in an apartment complex located in Delran. They remained at this address from approximately November 20, 1995, until January 18, 1996, when K.M. moved to Hackensack. According to the Certification, neither Ms. G. nor the children were listed on the lease for this apartment and he claims that management of the complex had not granted any approval for them to reside there. He states that "the management office informed me that they were not legally residing there," . . . "management also informed me that the legally approved occupancy rating was exceeded by the temporary presence of Ms. G. and her three children in the apartment." According to Elstein, the children were enrolled in the Delran school district during their "temporary stay" at the Delran apartment.

In his response to the motion for summary decision, counsel for the respondent states that the board "cannot dispute any of the factual assertions raised by Delran except that the certification of Alan Elstein . . . does not establish whether the Hunter's Glen apartment living

[i] This regulation has since been superseded by *N.J.A.C.* 6A:17.1 *et seq.*

arrangements actually exceeded legally approved occupancy, and if so, what legal approvals were referred to in that Certification."

The governing regulation at the time that this controversy began was *N.J.A.C.* 6:3-8.3(b)(6). This regulation designated that when a child becomes "homeless" and the child is enrolled in a school district other than the district in which he or she was enrolled prior to becoming homeless, the district of origin is responsible for payment of tuition to the district in which the homeless student is enrolled. The key to this regulation is the question of whether a child is "homeless."

In this matter there is no dispute of fact about the three children having resided for at least twenty-five months in Clifton, about the eviction of the family from the Clifton residence, about its move into an apartment in Delran in which they resided with a man who was the tenant therein, and about their eventual departure to another living arrangement in Hackensack. Nor is there any dispute as to the enrollment and attendance of the children in the Delran school district. While counsel for Clifton is not prepared to accept the assertions in Mr. Elstein's certification regarding the legal infirmities affecting the family's presence in the Delran apartment, no evidential materials have been provided to refute Mr. Elstein's assertions, and therefore no genuine dispute of material fact regarding this issue has been demonstrated. Thus, the sole issue is whether these children were "homeless."

In support of its claim, Delran cites the language of the regulation, which provides "a child or youth shall be considered homeless if he or she is . . .[t]he child of a homeless family which is out of necessity living with relatives or friends[.]" As there is no dispute that these children were living "out of necessity . . . with relatives or [a] friend," Delran claims that they were indeed homeless. But Counsel for Clifton notes that the "complete sentence" in the regulation reads, "(b) . . . A child or youth shall be considered homeless if he or she is: . . . (6) The child of a *homeless family* which is, out of necessity, living with relatives or friends" (emphasis supplied). In Clifton's understanding of the case and the regulation the key is whether the "family" is homeless. It cites the decision in *Board of Education of the Township of Maurice River vs. Board of Education of the City of Wildwood*, 93 *N.J.A.R.* 2d (EDU) 895 ("Maurice River") in support of that interpretation. There, in May 1991, a mother, B.P., left the family

home in Wildwood with her children due to marital discord. She and the children moved in with B.P.'s mother in Maurice River Township, remaining with her mother until November 1991. In August 1991, the mother enrolled A.P. in the Wildwood Elementary School. She did so because she hoped for a reconciliation, but in October 1991 she withdrew the child from Wildwood and enrolled A.P. in Maurice River's school. She filed a registration form with that district, listing the family as "out of necessity living with relatives or friends." Maurice River demanded tuition payments from Wildwood, pursuant to *N.J.A.C.* 6:3-7.3. In November 1991 the mother moved with her children into a duplex in Maurice River. The county welfare board paid a portion of her rent, a subsidy that ended in November 1992. Maurice River determined that A.P. was homeless because of information received from welfare board personnel who said that the mother was homeless and because of the signed registration form listing the mother as "out of necessity living with relatives or friends."

In his decision, Administrative Law Judge Edgar Holmes concluded that merely because one lives "out of necessity" with family or friends does not automatically render one "homeless." "This paragraph covers a typical situation in which a family, already homeless, places one or more of its children with relatives or friends. It is not intended to make all children who reside with relations and friends out of necessity, homeless. Especially when they are living with their mother." *Maurice River, ibid.* at 897. The receipt of temporary rental assistance did not automatically define the family as "homeless," because the purpose of such assistance was, in part, to address cases of "imminent homelessness," as well as cases of "actual homelessness." The Welfare Board properly provided assistance when there was a danger that the family, which had been notified by B.P.'s mother that they could no longer reside with her, would become homeless. It was, however, the case that the family was not actually homeless. The judge added that the child's father "continued to reside in Wildwood to whom the child may have returned."

In his conclusion, the judge determined that A.P. had not lost shelter "so that he lacked 'a fixed, regular and adequate residence.' " Therefore, he dismissed Maurice River's claim for tuition. The Commissioner concurred with the judge's decision. *Id.* at 897.

Clifton argues that the present case is governed by the reasoning of *Maurice River*. Here, the children remained with their mother throughout the period during which they attended school

in Delran. The children were not separated from their mother and they did not lack a "fixed, regular and adequate residence," even though there may have been a legal impediment to the family remaining at the Delran apartment for a long period of time. The regulation simply does not apply to this case.

In a reply to Clifton's position, Delran contends that the language of the regulation is unambiguous and clearly applies to these three children, who were without doubt, "each a 'child of a homeless family.' " Given their involuntary eviction from the Clifton residence, their stay in the apartment in Delran was out of necessity." *Maurice River* is distinguishable. There the mother "voluntarily" removed from the marital home. Further, the family received rental assistance while residing in Maurice River. These two factors distinguish the cases, as in the present matter the mother and her children were "involuntarily evicted" and the mother was not receiving any rental assistance while she and the children resided with a friend "out of necessity."

A review of the regulation existing at the time that this controversy became ripe and the facts of this case demonstrates that Delran is entitled to receive tuition for the attendance of these children in its schools. *N.J.A.C.* 6:3-8.2 defined a "homeless" child as one who "lacks a fixed, regular, and adequate residence." *N.J.A.C.* 6:3-8.3 further defined those children or youths considered to be homeless as those residing in any of several varieties of shelter. These included 1. A supervised publicly or privately operated shelter . . . i. Welfare hotel; ii. Congregate shelters; iii. Transitional housing for families; and iv. Transitional housing for the mentally ill; 2. An institution that provides a temporary residence for individuals intended to be institutionalized; or 3. A public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings. Additionally, the regulation identified as other indicia for considering a child homeless as (b) 1. Living with a parent in a domestic violence shelter; 2. A runaway living in a shelter; 3. A school-aged mother residing in a home for adolescent mothers; 4. Sick or abandoned and residing in a hospital and would otherwise be released if he or she had a permanent residence; 5 Abandoned and therefore has no permanent residence; 6. The child of a homeless family which is out of necessity living with relatives or friends; or 7. The child of a migrant worker who lacks adequate housing. Of all of these categories only one arguably applies to the children in this case. That is "(b) 6, the child of a homeless family which is out of necessity living with relatives or friends." Each of the other categories involves a child living in

a location that in no sense can be viewed as a normal or "regular" place of residence for children. These locations are hotels for welfare recipients, shelters, or other such non-traditional public or private places purposely intended as "way-stations" for those without normal, regular, fixed places of residence, and institutions and facilities for those voluntarily or involuntarily cast off or adrift. But category (b) 6 represents a different sort of situation, one in which a child of a homeless family lives with relatives or friends in a physical setting, a residence, that is, at least seemingly a regular, fixed and normal one. However, here the record indicates that the home to which the family went after its eviction from its Clifton home was one in which it had no legal right to be. Thus, here is a family, clearly staying with family or friend(s) "out of necessity," with no other "fixed, regular and adequate" place for its children to go. It can hardly be argued that residence in a home in which one has no legal right to remain is "regular" or "fixed." And while for purposes of public assistance, emergency shelter assistance might well be unnecessary for this family while it resided in this "temporary" residence since the concern there is largely to assure that the family, and particularly the children, have a roof over their head rather than having to live "on the street," for purposes of this tuition issue the concern is whether the district in which the family stays, in an unauthorized arrangement, should bear the costs for educating the children, rather than that district which was responsible for them before they became adrift, albeit here with their mother.

The decision in *Maurice River* does not describe the exact circumstances that led the mother to remove herself from the marital home. Her removal may well have been "voluntary," as opposed to one forced by domestic violence that could well be classified as "involuntary." The father retained the family home, and as Judge Holmes noted, the children could have possibly returned there (again the report does not indicate any conditions that would have precluded such return, such as a violent father). The decision also does not indicate precisely why the child's grandmother signed a letter advising the welfare authority that the family had to vacate her home. We do not know if the residence of the mother and children created an illegal situation, or there simply was a parting of the ways. At any rate, as reported, the circumstances in *Maurice River* differ enough from those existing in the present case such that the prior decision is not a persuasive indicator of the outcome of this contested case.

Given the response filed by the Clifton Board, there are no disputed material facts here that need to be resolved by testimony and summary decision is appropriate to resolve the case. *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520 (1995). I **CONCLUDE** that the children herein were homeless. I **FIND** that they had no "fixed, regular, and adequate residence," at the time that they lived in Delran Township. Therefore, I **CONCLUDE** that the Clifton Board of Education, as the "district of residence" is required to pay tuition to the Delran Board for the attendance of the three children for the days in question. *N.J.A.C.* 6:3-8.4.

In support of its motion, Delran has submitted demand letters issued to the Clifton Board for payment of tuition for the three students for six days in the month of November, fifteen days in December 1995 and for eight days in the month of January 1996, up through the removal of the family to Hackensack on January 18. These letters, which contain certifications as to their correctness issued by the Board Secretary, are unopposed by any contrary evidence. As the amount of the tuition that would be due to Delran if it prevailed in this case does not appear to be in dispute, I **CONCLUDE** that the Clifton Board must pay a total of $3,944. to the Delran Board.[ii]

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 (45) 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.

[ii] The amounts due are a total of $816 for six days each for three students in November; $2,040 for three students for fifteen days in December and $1,088 for three students for eight days in January.

Within thirteen (13) 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, 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 15, 2004
DATE

JEFF S. MASIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

November 16, 2004
DATE

Mailed to Parties:

NOV 18 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBITS

Exhibit 1	Certification in Lieu of Affidavit by Matt Wideman dated 10/10/96
Exhibit 2	Certification in Lieu of Affidavit by Alan Elstein dated 10/17/96
Exhibit 3	Letter dated 12/6/95 from Joseph L. Picogna to Karen Perkins, Clifton BOE
Exhibit 4	Letter dated 11/30/95 from Joseph L. Picogna to Karen Perkins, Clifton BOE
Exhibit 5	Letter dated 1/10/96 from Joseph L. Picogna to Karen Perkins, Clifton BOE
Exhibit 6	Letter dated 2/15/96 from Joseph L. Picogna to Karen Perkins, Clifton BOE
Exhibit 7	Letter dated 3/11/96 from Joseph L. Picogna to Karen Perkins, Clifton BOE
Exhibit 8	Letter dated 12/14/95 from Maria A. Irmiere to Joseph Picogna
Exhibit 9	Stipulation of Facts, Draft Only, by John T. Barbour in *Delran BOE, Burlington Co. v. Clifton BOE, Passaic Co.*, Agency Docket No. 87-3/96
Exhibit 10	Letter dated 8/30/96 from Anthony V. D'Elia, Esq., to John T. Barbour, Esq.

5 22-04

OAL DKT. NO. EDU 1908-04
AGENCY DKT. NO. 10-1/04

B.L., on behalf of minor child, S.J.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WARREN HILLS REGIONAL HIGH SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching his determination herein.

Upon a careful and independent review, the Commissioner concurs with the Administrative Law Judge that petitioner has failed to meet her required burden of proving, by a preponderance of the credible evidence, that her grandson, S.J.L., was entitled to a free public education in the District's schools during the 2003-2004 school year.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein. The Petition of Appeal is dismissed and petitioner is hereby directed to pay the Board tuition, in the amount of $7,130, for the period of S.J.L.'s ineligible attendance in the District's schools.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/04

Date of Mailing: 12/23/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

523-04

523-04

OAL DKT. NO. EDU 6089-04
AGENCY DKT. NO. 223-6/04

LINDA B. HENDERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF AVON, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/04

Date of Mailing: 12/23/04

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6089-04
AGENCY DKT. NO. 223-6/04

LINDA B. HENDERSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF AVON, MONMOUTH COUNTY,
Respondent.

Linda B. Henderson, petitioner, *pro se*

Kenneth B. Fitzsimmons, Esq., for respondent (Sinn, Fitzsimmons, Cantoli, West and Pardes, attorneys)

Record Closed: December 3, 3004 Decided: December 10, 2004

BEFORE **JOSEPH F. MARTONE**, ALJ:

In this matter, petitioner asserts that respondent board of education, which is a sending district, has made a change in the designated high school receiving districts without approval of the Commissioner of Education in violation of *N.J.S.A.* 18A:38-13. Specifically, respondent changed its policy for assignment of its students to the two receiving high schools from a lottery system to a system based on length of residency. This matter was transmitted to the Office of Administrative Law on July 23, 2004, 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.

A telephone prehearing conference was held on August 6, 2004 to discuss the issues and the possibility of settlement. Following this, the matter was scheduled for hearing to be held on November 16, 2004. In addition, the parties agreed to attend an in-person settlement conference on September 16, 2004.

On September 16, 2004, the parties met with me and engaged in settlement discussions. Those settlement discussions continued thereafter, and on November 1, 2004, the parties advised me that a settlement had been reached. Accordingly, the parties have prepared a Stipulation of Dismissal Without Prejudice and a Settlement Agreement indicating the terms of the settlement, 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 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 (45) 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 10, 2004

DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

12-14-04

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 15 2004

DATE

OFFICE OF ADMINISTRATIVE LAW

mph

Linda B. Henderson, pro se
108 Second Avenue
Avon, NJ 07717

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2004 DEC -3 P 12:31
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

LINDA B. HENDERSON, Petitioner v. AVON-BY-THE-SEA BOARD OF EDUCATION, Respondent	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL Docket No: EDUOT 06089-2004S Agency Reference No: 223-6/04 STIPULATION OF DISMISSAL WITHOUT PREJUDICE

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed without prejudice and without costs against either party.

Kenneth B. Fitzsimmons, Esquire
Attorney for Respondent

Linda B. Henderson
Petitioner, pro-se

Dated: November 15, 2004

SETTLEMENT AGREEMENT

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2004 DEC -3 P 12:31
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Background Recitals

1. Linda B. Henderson ("Henderson") resides at 108 Second Avenue, Avon, New Jersey 07717.

2. Avon-by-the-Sea Board of Education ("Avon BOE") is a board of education formed pursuant to Title 18A of the New Jersey Statutes, and has offices at 505 Lincoln Avenue, Avon, New Jersey 07717.

3. Avon BOE adopted Policy No. 5411 on second reading on May 19, 2004. A true copy of that policy is attached as Exhibit "A".

4. Henderson filed a Petition before the Commissioner of Education on June 17, 2004 contesting the validity of Policy No. 5411.

5. Avon BOE filed an Answer to the Petition on July 6, 2004.

6. This matter has been assigned Agency Reference No. 223-6/04 and OAL Docket No. EDUOT 6089-2004S.

7. Henderson and the Avon BOE have agreed to a settlement of this case. Both parties are desirous of setting forth their agreement in writing.

Agreement

IT IS AGREED by and between Henderson and Avon BOE, on this 15th day of November, 2004, each party intending to be legally bound, as follows:

1. Avon BOE shall cause Policy No. 5411 to be repealed.

2. A new Policy No. 5411 shall be enacted consistent with the agreement of the parties. A true copy of the new policy is attached hereto as Exhibit "B".

3. Avon BOE agrees that the lottery basis of new Policy No. 5411 shall not be amended for a ten year period from the date of this settlement agreement.

IN WITNESS WHEREOF, Henderson and the Avon BOE have signed this Settlement Agreement on the date set forth above.

LINDA B. HENDERSON, pro se

AVON-BY-THE-SEA BOARD OF EDUCATION

FRAN ROONEY, President

EXHIBIT "A"

POLICY

AVON
BOARD OF EDUCATION

5411 HIGH SCHOOL ASSIGNMENT

State law provides that it is the responsibility of the board of education to make assignments of our students entering public high school pursuant to *N.J.S.A.* 18A:38-12.

In order to accomplish this assignment, the following procedures shall apply:

1. The Superintendent of schools shall determine the number of eighth grade pupils to be assigned to each receiving high school by apportioning 37.5% of those pupils to Asbury Park High School and 62.5% to Manasquan High School.

2. Pupils shall have the right to choose to attend either high school based upon seniority, which shall be determined by the number of years a pupil has been enrolled in the Avon Elementary School or any private school, starting with kindergarten, while a resident of Avon. In the case of more than one student entering at the kindergarten level, seniority shall be determined by the date of entrance in kindergarten. Any student enrolled in kindergarten between the commencement of the school year and September 15th shall be deemed enrolled on September 15th that year. A student enrolled in kindergarten after September 15th shall be deemed to have entered kindergarten on the student's actual date of enrollment. If a school does not record the actual date of enrollment in any month, the date of entrance shall be deemed the 30th day of the month. In the event two or more students have equivalent seniority at the kindergarten entry level, seniority shall be determined by a random form of selection made on a lottery basis. The number of drawings in the lottery shall be equal to the number of students having equivalent seniority. Lottery numbers shall begin with number one and end with a number equal to the total number of students in the lottery

pool. Students receiving the lowest numbers in the lottery drawing shall be deemed to have more seniority for high school placement purposes.

At such point when the ratio of assignment is met in one high school, all other eighth grade students and any pupils subsequently entering or reentering the public high school system after completion of the assignment process shall be assigned to the remaining high school.

3. The Superintendent shall notify the parents of students attending a private school that the assignment process will commence. It is anticipated that this information will be available to the Superintendent based upon a list of students receiving non-public textbook and/or transportation aid. Notwithstanding this provision, it is the parents responsibility to notify the Superintendent on or before November 1 of the year preceding the pupil's entry into high school that the parents plan to send their child to public school, and they must submit an affidavit attesting to their years of residency in Avon supported by official documents such as a certificate of occupancy. These documents will be verified through the Avon School District or municipal officials.

4. Once a pupil has been assigned to a receiving high school, the pupil may not transfer to the other receiving high school.

5. If a pupil assigned to a high school chooses to attend private school or another public high school program on a tuition basis and later reenters the public sector, the pupil will be placed in the originally assigned high school.

6. This assignment policy shall pertain to all publicly enrolled high school pupils regardless of whether the receiving high school shall place the pupils outside of the receiving high school's district for special education programs (e.g. vocational educational programs or programs for handicapped pupils).

7. The assignment of Avon pupils will be made to coordinate with the registration periods for the receiving high schools.

N.J.S.A. 18A:38-12
Adopted: May 19, 2004

EXHIBIT "B"

POLICY

AVON
BOARD OF EDUCATION

5411 HIGH SCHOOL ASSIGNMENT

State law provides that it is the responsibility of the board of education to make assignments of our students entering public high school pursuant to *N.J.S.A.* 18A:38-12.

In order to accomplish this assignment, the following procedures shall apply:

1. The Superintendent of Schools shall determine the number of eighth grade pupils to be assigned to each receiving high school by apportioning 37.5% of those pupils to Asbury Park High School and 62.5% to Manasquan High School.

2. Pupils shall have the right to choose to attend either high school based upon a random form of selection made on a lottery basis. The total number of eighth grade students residing in the community, regardless of whether such students attend public or private school, shall constitute the "lottery pool". Lottery numbers shall be publicly drawn and shall begin with number one and end with a number equal to the total number of students in the lottery pool. Students receiving the lowest numbers in the lottery drawing shall have the right to select either one of the receiving high schools. At such point when the ratio of assignment is met in one high school, all other eighth grade students and any pupils subsequently entering or reentering the public high school system after completion of the assignment process shall be assigned to the remaining high school.

3. The Superintendent shall notify the parents of students attending a private school when the assignment process will commence. It is anticipated that this information will be available to the Superintendent based upon a list of students receiving non-public textbook and/or transportation aid.

Notwithstanding this provision, it is the parents responsibility to notify the Superintendent on or before November 1 of the year preceding the pupil's entry into high school that the parents plan to send their child to public school.

4. Once a pupil has been assigned to a receiving high school, the pupil may not transfer to the other receiving high school.

5. If a pupil assigned to a high school chooses to attend private school or another public high school program on a tuition basis and later reenters the public sector, the pupil will be placed in the originally assigned high school.

6. This assignment policy shall pertain to all publicly enrolled high school pupils regardless of whether the receiving high school shall place the pupils outside of the receiving high school's district for special education programs (e.g. vocational educational programs or programs for handicapped pupils).

7. The assignment of Avon pupils will be made to coordinate with the registration periods for the receiving high schools.

N.J.S.A. 18A:38-12
Adopted: November 10, 2004

S 34-04

AGENCY DKT. NO. 301-9/04
OAL DKT. NO. EDU 9419-04

D.H., on behalf of minor child, J.M.H., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, :

RESPONDENT. :

COMMISIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Deputy Commissioner, to whom this matter has been delegated for hearing pursuant to *N.J.S.A.* 18A:4-33, concurs with the Administrative Law Judge that petitioner does not have standing to litigate this action.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter.

IT IS SO ORDERED.*

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 12/29/04

Date of Mailing: 12/29/04

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9419-04
AGENCY DKT. NO. 301-9/04

D.H., o/b/o MINOR CHILD, J.M.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,
Respondent.

D.H., *pro se*

Jennifer Mazawey, Esq., for Respondent (Genova, Burns & Vernoia, attorneys)

Record Closed: October 8, 2004 Decided: November 22, 2004

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner seeks to compel the District to admit his son, J.M.H., into a seventh grade Algebra class without J.M.H. taking the District required screening test. Petitioner proceeded by way of application for emergent relief because classes were to begin on September 9, 2004. The date on which the application for emergent relief was heard

was September 14, 2004. Petitioner sought an order compelling Respondent to enroll J.M.H. in the District's seventh grade Algebra course. At the hearing on the application, Respondent asserted J.M.H. had been enrolled; Petitioner agreed that was the case. Accordingly, the application for emergent relief was rendered moot.

With regard to the remainder of Petitioner's claims, Respondent asserts the enrollment of J.M.H. in the District's Algebra course and attendance of that class has partially satisfied Petitioner's request for relief. Moreover, J.M.H. was admitted to the Algebra pursuant to the written request of Petitioner in compliance with District policy to waive the four criteria for admission into certain tests. Respondent relies on the certification of Terry Trigg Scales in which Ms. Scales certified the Board uses an open enrollment policy for enrollment into classes pursuant to a written request of the parent. Petitioner has provided no rebuttal to this statement; indeed, J.M.H. was admitted to the Algebra class pursuant to the open enrollment policy.

Upon the determination that the application for emergent relief was rendered moot by J.M.H.'s enrollment and attendance in the Algebra class, Respondent made an application for dismissal of the petition based on Petitioner's for lack of standing. A briefing schedule was set and the record closed on October 5, 2004.

Petitioner requested five forms of relief:

1. an injunction preventing the use of test as a requirement and/or prerequisite for enrollment into Algebra;

2. a declaratory judgment, finding the Board's test, policies, practices and procedures violates state law;

3. an injunction preventing the Board from denying J.M.H. access to the Algebra course;

4. a declaratory judgment that the Board's testing policy is discriminatory; and

5. an order allowing J.M.H. to enroll in the District's Algebra course.

It is undisputed that J.M.H. has been enrolled in the District's seventh grade Algebra course. He had, at the time, of hearing been attending classes. His enrollment was pursuant to the written request of D.H. in compliance with the Board's policy. Respondent asserts the undisputed fact that the Board utilizes an open enrollment policy for enrollment into classes renders Petitioner's other request for relief moot as well. In addition, Respondent asserts Petitioner lack standing to challenge the legality of the Board's policies and procedures without articulating a personal injury to himself or J.M.H.

Petitioner asserts that he is the father of a minor child challenging the Board's policy of establishing and having prerequisites as requirements for admittance into classes. He notes that all classes are within a public school setting and regulated by *N.J.S.A.* 18A:36-20.

Petitioner then asserts New Jersey Administrative Procedure Act permits "any interested person" to challenge the applicability of a statute or rule enforced or administered by an agency. *N.J.S.A.* 52:14B-8. Further he asserts he has real and clear interest in the outcome of the hearing and should be granted standing so that the case might be heard on its merits. He also asserts the case concerns issues of public as it seeks to prohibit the use of testing interest to populate certain classes.

Moreover, according to Petitioner, under New Jersey law, any interested person may challenge any rule administered by an agency, *N.J.S.A.* 52:14B-8 and further notes that New Jersey has a tradition of liberal application of criteria regarding standing.

Petitioner further asserts that he sought to have his son enrolled in the Algebra course because the Board has a policy that the U.S. Department of Education, Office of Civil Rights, expressly forbids the Board to use, as a prerequisite for higher math at the

high school. Failure to enroll in seventh grade Algebra would have foreclosed J.M.H. from enrollment in higher math courses in high school.

Petitioner, himself, in his brief dated October 21, 2004, noted that Respondent Board has agreed to no longer use the policy, although he did not specify the policy to which he was referring, and his son has been enrolled in the class for which Petitioner was seeking admission.

Petitioner asserts a matter of public interest but presents no clear statement as to what the public interest he seeks to protect.

Respondent, on the other hand, asserts Petitioner's claim to standing pursuant to the administrative procedure act is simply unsupported by law. To have standing pursuant to the administrative procedure act, asserts Respondent, a party must demonstrate he is an "interested person" which is defined as someone who is a direct party to the administrative action or someone who would affected or aggrieved in fact by the decision in that administrative action. *N.J.S.A.* 52:14B-8. *Camden County v. Board of Trustees of the Public Employees Retirement System*, 170 *N.J.* 439, 446 (2002). Petitioner incorrectly relies on this case because he failed to consider the requirement that an interested person is either a direct party to the action or someone who would be aggrieved by the decision. Instead, he relied solely on the Court's statement ". . . 'only' substantial likelihood of some harm visited upon the Petitioner in the event of an unfavorable decision is needed for the purposes of standing." *Id.* at 446. The Court went on to find the mere assertion of a public interest is not sufficient to seek judicial review of an administrative agency decision. *Id.* at 448.

To be an interested party Petitioner must be directly affected by the challenged policy and suffer some harm in the event of an unfavorable decision. *Davis v. Board of Medical Examiners,* 497 *F. Supp.* 525 (D.N.J. 1980); *Atlantic City Showboat, Inc. v. Department of Community Affairs of State*, 331 *N.J. Super.* 40 (App. Div. 2000); *Mortgage Bankers Association of New Jersey v. New Jersey Real Estate Commission*,

200 *N.J. Super.* 584 (App. Div. 1985); *Ridgewood Education Association v. Ridgewood Board of Education,* 284 *N.J. Super.* 427 (App. Div. 1995).

Because J.M.H. is already enrolled in the Algebra class, neither petitioner nor his son, J.M.H., is someone who will be directly affected by the challenged policy nor will either be harmed by an unfavorable decision.

Petitioner's further claim that the public interest is sufficient to confer standing on him is simply incorrect. The Court may consider public interest when determining whether standing exists; however, public interest on its own is not enough to confer standing on a party. The Court must be able to identify a specific connection between the Petitioner and the public interest he alleges he represents. *Silverman v. Board of Education of the Twp. of Millburn,* 134 *N.J. Super* 253 in which the court determined that plaintiffs who had originally approved the use of tax dollars in a referendum to build a school represented "both their personal interest and the public interest of the community" when they challenged a proposed plan to close an elementary school and lease it to the state for use as a school for the deaf.

In a second case *Ridgewood Education Association v. Ridgewood Board of Education,* 284 *N.J. Super.* 427 (App. Div. 1995), the Court found an association representing employment rights of Ridgewood teachers had standing to bring a declaratory judgment action to challenge the school board policy limiting certain employment policy of the Respondent board of education. In *Ridgewood*, the Appellate Division found although Petitioner, REA, had no members currently working for the Ridgewood Board of Education in the capacity being challenged, REA satisfied the requirement of a substantial likelihood of harm visited upon plaintiff in the event of an unfavorable decision because future members who would be employed as supplemental teachers would be denied tenure under the challenged policy and would therefore be substantially harmed by an unfavorable decision. *Id.* at 779.

Consequently, it is clear that the courts have held that a moving party cannot rely only upon a public interest; he must assert a personal interest as well. In the case before me Petitioner no longer has a personal interest of the outcome of this matter because his son is already enrolled in the Algebra class. He cannot have standing solely based on the public interest of the taxpayers of Montclair, whom Petitioner does not represent. It should be noted the Ridgewood case states that the moving party's interest may be a potential injury that will be avoided by favorable decision. Here, Petitioner cannot demonstrate a potential injury as a result of an unfavorable decision again because J.M.H. is already in the Algebra class. Accordingly, I **CONCLUDE** that Petitioner does not have standing to bring this action; I further **CONCLUDE** that his action should be dismissed with prejudice.

ORDER

I hereby **ORDER** this petition be and hereby is **DISMISSED**, in its entirety, **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 (45) 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 (13) 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, 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 22, 2004
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

November 22, 2004
DATE

Mailed to Parties:

Laura Sanders
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

NOV 23 2004
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

#529-04

529-04

OAL DKT. NO. EDU 8384-02
AGENCY DKT. NO. 309-9/02

JUDY A. MAZZEO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) in his Order of May 27, 2004, adopted by the ALJ as the Initial Decision in this matter. Such Order found that the Board had violated petitioner's tenure rights and, therefore, ordered petitioner reinstated to her former position of principal, together with any and all back pay, benefits and other emoluments. The Commissioner further concurs that the effect of correspondence from petitioner's counsel, dated June 30, 2004, September 8, 2004 and November 9, 2004, is to withdraw petitioner's claim to the position of Supervisor of Basic Skills, together with any and all back pay, benefits and other emoluments relating to that position.[1]

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/23/04

Date of Mailing: 12/23/04

[1] The Commissioner emphasizes that petitioner did not object to the characterization of this correspondence in the Initial Decision as a withdrawal of her claim to the position of Supervisor of Basic Skills.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

ACCEPTING PETITIONER'S WITHDRAWAL OF ADDITIONAL CLAIMS AND ADOPTING AS INITIAL DECISION THE ORDER OF MAY 27, 2004, DETERMINING THAT PETITIONER IS ENTITLED TO REINSTATEMENT AS PRINCIPAL

OAL DKT. NO. EDU 8384-02

AGENCY DKT. NO. 309-9/02

JUDY A. MAZZEO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY,

Respondent.

Robert M. Schwartz, Esq., for petitioner

Joan Kane Josephson, Esq., for respondent (Parker, McCay & Criscuolo, P.A., attorneys)

Record Closed: November 9, 2004 Decided: November 23, 2004

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner is a teaching staff member at respondent's school district, and contends that she was improperly transferred from the position of Principal to the position of Director of Special Projects effective July 8, 2002, and that her salary was reduced in violation of her tenure rights pursuant to *N.J.S.A.* 18A:28-5 and 18A:28-6, and that this action was taken without a recorded roll call majority vote in violation of *N.J.S.A.* 18A:25-1. She seeks a determination that these actions are *ultra vires* and null and void, and reinstatement to the position of Principal with retroactive salary, benefits and emoluments. The matter was transmitted to the Office of Administrative Law (OAL) on December 9, 2002, for hearing as a contested case.

The matter was assigned to me on January 2, 2003, and a prehearing conference was scheduled for March 20, 2003. On March 20, 2003, a prehearing conference was conducted and the matter was scheduled for hearing on October 1 and 2, 2003. I also prepared a draft Prehearing Order which I forwarded to the attorneys on March 24, 2003. Status conferences were held on May 27, 2003, following which the Prehearing Order was entered. On August 18, 2003, the attorneys agreed to finalize a Stipulation of Facts by September 15, 2003, and a Scheduling Order was entered. The time for the submission of the Stipulation of Facts was later extended and the Stipulation of Facts was filed on October 1, 2003, thus obviating the need for a hearing. Accordingly, the hearing scheduled for October 1 and 2, 2003, was adjourned. After the submission of briefs, the record was closed on February 25, 2004. By an Order of Extension, the time limit for filing the Initial Decision was extended until May 27, 2004.

On May 27, 2004, I entered an Order requiring that petitioner be reinstated to her former position as Principal together with any back pay, benefits and other emoluments. I further ordered that the record in this matter be reopened for the scheduling of additional proceedings with respect to petitioner's claim that respondent violated her tenure rights and that she is entitled to reinstatement to the position of Supervisor of Basic Skills, together with any and all back pay, benefits and other emoluments relating to that position.

By subsequent correspondence dated June 30, 2004, September 8, 2004 and November 9, 2004, attorney for petitioner indicated that petitioner has elected not to proceed with her claim to the position of Supervisor of Basic Skills, and in his letter of September 8, 2004 and November 9, 2004, attorney for petitioner requested that the matter be transmitted to the Commissioner.

I **FIND** that, notwithstanding petitioner's appointment to a principal position by respondent effective August 26, 2004, the matter is not moot and petitioner is entitled to a final administrative decision in this matter. In addition, I **FIND** that the effect of the correspondence from attorney for petitioner referred to hereinabove is to withdraw petitioner's claim to the position of Supervisor of Basic Skills, together with any and all back pay, benefits and other emoluments relating to that position.

Accordingly, I **ORDER** that petitioner's foregoing withdrawal of her claim to the position of Supervisor of Basic Skills, together with any and all back pay, benefits and other emoluments relating to that position, is hereby **ACCEPTED**. I further **ORDER** that the Order Determining that Petitioner is Entitled to Reinstatement as Principal entered on May 27, 2004, is hereby **ADOPTED** as the Initial Decision in this matter, and that these proceedings are hereby **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 (45) 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 (13) 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, 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 23, 2004

DATE

Joseph F. Martone, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

11/24/04

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 30 2004

DATE

OFFICE OF ADMINISTRATIVE LAW

mph

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DETERMINING THAT PETITIONER IS ENTITLED TO REINSTATEMENT AS PRINCIPAL AND REOPENING RECORD FOR ADDITIONAL PROCEEDINGS

OAL DKT. NO. EDU 8384-02

AGENCY DKT. NO. 309-9/02

JUDY A. MAZZEO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY,

Respondent.

Robert M. Schwartz, Esq., for petitioner

Joan Kane Josephson, Esq., for respondent (Parker, McCay & Criscuolo, P.A., attorneys)

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner is a teaching staff member at respondent's school district, and contends that she was improperly transferred from the position of Principal to the position of Director of Special Projects effective July 8, 2002, and that her salary was reduced in violation of her tenure rights pursuant to *N.J.S.A.* 18A:28-5 and 18A:28-6, and that this action was taken without a recorded

roll call majority vote in violation of *N.J.S.A.* 18A:25-1. She seeks a determination that these actions are *ultra vires* and null and void, and reinstatement to the position of Principal with retroactive salary, benefits and emoluments. The matter was transmitted to the Office of Administrative Law (OAL) on December 9, 2002, for hearing as a contested case.

The matter was assigned to me on January 2, 2003, and a prehearing conference was scheduled for March 20, 2003. On March 20, 2003, a prehearing conference was conducted and the matter was scheduled for hearing on October 1 and 2, 2003. I also prepared a draft Prehearing Order which I forwarded to the attorneys on March 24, 2003. Status conferences were held on May 27, 2003, following which the Prehearing Order was entered, and on August 18, 2003. On August 18, 2003, the attorneys agreed to finalize a Stipulation of Facts by September 15, 2003, and a Scheduling Order was entered. The time for the submission of the Stipulation of Facts was later extended and the Stipulation of Facts was filed on October 1, 2003, thus obviating the need for a hearing. Accordingly, the hearing scheduled for October 1 and 2, 2003, was adjourned. After the submission of briefs, the record was closed on February 25, 2004. By an Order of Extension, the time limit for filing the Initial Decision was extended until May 27, 2004.

For the reasons set forth hereinafter, I have reopened the record in this matter and I intend to schedule additional proceedings with respect to petitioner's claim that respondent violated her tenure rights and that she is entitled to reinstatement to the position of Supervisor of Basic Skills.

FACTUAL DISCUSSION

Based upon the Stipulation of Facts submitted by the parties to this matter (J-1) it appears that most of the underlying facts are not disputed. Thus, for the purpose of deciding this matter, the facts set forth herein are determined to be the facts in this matter.

Petitioner, Judy A. Mazzeo, first became employed with the respondent, Board of Education of the Township of Barnegat, in or about 1989 as a classroom teacher. Petitioner was promoted to the position of Vice Principal at the commencement of the 1991-1992 school term.

Beginning on or about March 21, 1991, petitioner was re-assigned to perform the duties of the position of Supervisor of Basic Skills. Subsequently, in or about April 1993, petitioner was made an acting Principal and was given the dual assignments of Supervisor of Basic Skills and acting Principal. Beginning with the school year 1994-1995 and continuing thereafter until June 30, 2002, petitioner held the positions of Principal/Supervisor of Basic Skills.

Attached to the Stipulation of Facts are employment contracts given to petitioner. They include:

1. July 24, 1989 employment contract made effective September 1, 1989 through June 30, 1990 at a salary of $33,300.00 for the position of teacher (J-2)
2. April 1, 1990 employment contract made effective September 1, 1990 through June 30, 1991 at a salary of $37,200.00 for the position of teacher (J-3).
3. March 26, 1991 employment contract made effective March 26, 1991 through June 30, 1991 at a salary of $42,780.00 "prorated" for the position of Supervisor of Basic Skills (J-4).
4. May 10, 1991 employment contract made effective July 1, 1991 through June 30, 1992 at a salary of "to be determined" for the position of supervisor (J-5).
5. July 7, 1992 employment contract made effective July 1, 1992 through June 30, 1993 at a salary of $48,569.00 for the position of Supervisor of Basic Skills (J-6).
6. May 3, 1993 employment contract made effective April 27, 1993 to June 30, 1993 at a salary of $52,569.00 for the position of "acting Principal/basic skills supervisor (J-7).
7. May 28, 1993 employment contract made effective July 1, 1993 to June 30, 1994 at a salary "to be determined" for the position of Principal (J-8).
8. May 28, 1993 employment contract made effective July 1, 1993 to June 30, 1994 at a salary "to be determined" for the position of "acting Principal/basic skills supervisor (J-9).
9. June 30, 1993 employment contract made effective April 27, 1993 to June 30, 1993 at a salary of $5,000.00 (pro-rated) for the position of Supervisor of Basic Skills (J-10).
10. June 30, 1993 employment contract made effective April 27,1993 to June 30, 1993 at a salary of $52,569.00 (pro-rated) for the position of Principal (J-11).

11. August 11, 1993 employment contract made effective July 1, 1993 to June 30, 1994 at a salary "to be determined" for the position of Principal (J-12).
12. August 19, 1993 employment contract, signed only by petitioner, made effective September 1, 1993 to June 30, 1994 at a salary "to be determined" for the position of Supervisor of Basic Skills (J-13).
13. May 10, 1994 employment contract made effective July 1, 1994 to June 30, 1995 at a salary "to be determined" for the position of Principal/Supervisor of Basic Skills (J-14).
14. August 31, 1994 employment contract made effective July 1, 1994 to June 30, 1995 at a salary of $66,249.00 for the position of Principal/Supervisor of Basic Skills; said salary inclusive of a $5,000.00 annual payment for the position of Supervisor of Basic Skills (J-15).
15. May 24, 1995 employment contract made effective July 1, 1995 to June 30, 1996 at a salary "to be determined" for the position Principal/Supervisor of Basic Skills (J-16).
16. April 26, 1996 employment contract made effective July 1, 1996 to June 30, 1997 at a salary "to be determined" for the position Principal/Supervisor of Basic Skills (J-17).
17. April 28, 1997 employment contract made effective July 1, 1997 to June 30, 1998 at a salary "subject to terms and conditions agreed upon" for the position Principal/Supervisor of Basic Skills (J-18).
18. March 9, 1998 employment contract, signed only by petitioner, made effective July 1, 1997 to June 30, 1998 at a salary of $73,227.00 for the position Principal/Supervisor of Basic Skills; said salary inclusive of a $5,000.00 stipend for the position of Supervisor of Basic Skills (J-19).
19. April 24, 1998 employment contract made effective July 1, 1998 to June 30, 1999 at a salary of $75,274.00 for the position Principal/Supervisor of Basic Skills; said salary inclusive of a $5,000.00 stipend for the position of Supervisor of Basic Skills (J-20).
20. April 26, 1999 employment contract made effective July 1, 1999 to June 30, 2000 at a salary of $77,382.22 for the position Principal/Supervisor of Basic Skills; said salary inclusive of a $5,000.00 stipend for the position of Supervisor of Basic Skills (J-21).
21. May 26, 2000 employment contract made effective July 1, 2000 to June 30, 2001 at a salary "to be determined" for the position Principal/Supervisor of Basic Skills (J-22).
22. February 28, 2001 employment contract made effective July 1, 2000 to June 30, 2001 at a

salary of $82,096.56 for the position Principal/Supervisor of Basic Skills; said salary inclusive of a $5,000.00 stipend for the position of Supervisor of Basic Skills (contract unsigned) (J-23).

23. April 30, 2001 employment contract made effective July 1, 2001 to June 30, 2002 at a salary of $88,103.32 for the position Principal/Supervisor of Basic Skills; said salary inclusive of a $5,000.00 stipend for the position of Supervisor of Basic Skills (J-24).
24. April 29, 2002 employment contract made effective July 1, 2002 to June 30, 2003 at a salary of $93,505.00 for the position Principal/Supervisor of Basic Skills; said salary inclusive of a $5,000.00 stipend for the position of Supervisor of Basic Skills (J-25).

Also attached to the Stipulation of Facts are the following minutes:

(a)Minutes from April 26, 1993 memorializing the appointment of petitioner as acting Principal for the remainder of the 1992-1993 school term (J-26); and
(b)Minutes dated June 24, 2002 memorializing petitioner's reassignment from the position of Principal to the position of Director of special projects (J-27).

Also attached to the Stipulation of Facts is the Collective Bargaining Agreement between the Barnegat Township Board of Education and the Association of Barnegat Administrators (J-28). The parties stipulated that petitioner's gross bi-weekly salary for the 2001- 2002 school term was $3,670.97. Also attached to the Stipulation of Facts is petitioner's "earning statement" for the pay period ending June 30, 2002 (J-29). Commencing with the 2002-2003 school year petitioner's gross bi-weekly salary was $3,729.38. Also attached is the earning statement for the pay period ending July 15, 2003 (J-30).

The parties stipulated and agreed that the petitioner continued to receive the bi-weekly gross salary of $3,729.38 through June 30, 2003. The petitioner was never requested nor did she provide her consent for the re-assignment voted upon by the respondent on or about June 24, 2002.

Finally, attached to the Stipulation of Facts are the job descriptions for the titles "Principal," (J-31) "Supervisor of Basic Skills" (J-32), and the Director of Special Projects (J-33) position to which petitioner was assigned, effective June 24, 2002.

LEGAL DISCUSSION AND ANALYSIS

1. Issues to be resolved

As stated in the Prehearing Order entered on May 27, 2003, and the Scheduling Order entered on August 18, 2003, the issues to be resolved in this matter are the following:

1. Whether petitioner was improperly transferred from the position of Principal to the position of Director of Special Projects effective July 8, 2002, in violation of her tenure rights pursuant to *N.J.S.A.* 18A:28-5 and -6?
2. Whether petitioner was improperly transferred from the position of Principal to the position of Director of Special Projects effective July 8, 2002, without a recorded roll call majority vote in violation of *N.J.S.A.* 18A:25-1?
3. Whether petitioner's salary was reduced in violation of the school and tenure laws?
4. If respondent has violated petitioner's tenure rights and school laws as aforesaid, to what remedy or remedies is she entitled?

2.Petitioner's legal arguments

Petitioner's legal arguments are fully set forth in petitioner's brief and petitioner's reply brief. The following is intended to be a short summary of these arguments.

Petitioner argues that the position of Director to which petitioner was transferred and the position of Principal are separately tenurable, citing *Kaprow v. Board of Education*, 255 *N.J. Super.* 76, 92 (App. Div. 1992); affirmed 131 *N.J.* 572 (1993), and *Nelson v. Old Bridge Board of Education,* 148 *N.J.* 358 (1997). Petitioner argues that the positions enumerated in *N.J.S.A.* 18A:28-5 are separately tenurable, meaning that tenure accrued within one of the enumerated positions does not transfer to another enumerated position. Petitioner argues that a 1996

amendment to *N.J.S.A.* 18A:28-5 confirms this interpretation. Thus, petitioner contends that she unquestionably had tenure as a Principal and as a Supervisor of Basic Skills at the time of her transfer in July 2002, and that she did not have tenure as a Director because she has never before served in the position of Director.

Petitioner argues that respondent's transfer of petitioner to the position of Director, made without her consent, violated her rights of tenure under the provisions of *N.J.S.A.* 18A:28-6. Petitioner asserts that she cannot be transferred or removed from these positions absent a showing of inefficiency, incapacity or unbecoming conduct or other just cause after being provided with a hearing.

Petitioner contends that respondent's position that it is permitted to transfer petitioner from a Principal title to a Director title because the two positions are covered by the same Principal endorsement, is an argument that has been rejected by the Supreme Court in the *Nelson* case. Finally, petitioner contends that she not only accrued tenure as a Principal, but she also accrued tenure as a Supervisor of Basic Skills, and that when she was removed from the position of Supervisor of Basic Skills, it was a violation of her tenure rights.

3.Respondent's legal arguments

Respondent argues that under the provisions of *N.J.S.A.* 18:A:28-4 and *N.J.A.C.* 6:11-9.3(b), a Principal endorsement is required for positions which include assistant superintendent for curriculum and instruction, Principal, assistant Principal, vice-Principal and Director. Thus, respondent contends that the transfer of petitioner from the position of Principal to the position of Director is within the bounds of her endorsement. Respondent cites a number of cases, including *Williams v. Board of Education of Plainfield*, 176 *N.J. Super.* 254 (App. Div. 1980) in support of its contention that a local board of education can properly transfer an individual from one position to another within the school district within his or her certification where there is no loss of salary or other reduction in tangible employment benefits, and where the teacher is not singled out for the transfer on a prohibited basis. *Carpenito v. Board of Education of the Borough of Rumson,* 322 *N.J. Super.* 522 (App. Div. 1999). Respondent relies on *Carpenito* in arguing that a transfer is not a demotion or dismissal when there is no loss or salary or benefits and the new

position is one that is within the individual's certification. Thus, respondent contends that petitioner is being transferred from one position, Principal/Supervisor of Basic Skills, to another position, Director of Special Projects, which is within the same endorsement for Principals, referring to *N.J.A.C.* 6:11-9.3(b). Moreover, she is suffering from no loss in salary to the tenured position held before the transfer. Thus, respondent contends that it has not violated any of petitioner's rights.

Respondent contends that its transfer of petitioner was in full compliance with *N.J.S.A.* 18A:25-1. Finally, it contends that petitioner's position as Supervisor of Basic Skills was a stipend position, and that it is a position which is notably absent from the list of positions as to which tenure is available pursuant to *N.J.S.A.* 18A:28-5. Respondent contends that the board eliminated this position in its entirety and that the authority of a board of education to reduce teaching staff for good cause, including reasons of economy, is established by *N.J.S.A.* 18A:28-9.

Respondent further argues that the unpublished opinions relied upon by petitioner in his submissions do not constitute binding precedent. Respondent further argues that *N.J.S.A.* 18A:28-6, relied upon by petitioner, has no application in this matter, but deals with only the requirements for obtaining tenure after a transfer or promotion. Respondent contends that *Viemiester v. Board of Education,* 5 *N.J. Super.* 215 (App. Div. 1949) did not involve a transfer, but concerned the abolition of a position and the appointment of the individual to a newly-created position. Finally, respondent asserts that the position of Supervisor of Basic Skills was, in fact, abolished after petitioner's transfer.

4.Analysis

N.J.S.A. 18A:28-5 provides:

> The services of all teaching staff members employed in the positions of teacher, Principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, . . . serving in any school district or under any board of education, . . . 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 manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment in such district or by such board for:

(a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; 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.

For purposes of this chapter, tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. Tenure so accrued shall not extend to any other administrative or supervisory position and nothing herein shall limit or restrict tenure rights which were or may be acquired pursuant to *N.J.S.* 18A:28-6 in a position in which the individual actually served.

N.J.S.A. 18A:26-6 provides that,

Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:

(a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or
(b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
(c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;

provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.

At the time of the filing of the petition herein, the implementing regulations were found at *N.J.A.C.* 6:11-9.3(b)[1] and provided:

> Principal: This endorsement is required for any position that involves service as an administrative officer of a school or other comparable unit within a school or school district. Such positions shall include assistant superintendent for curriculum and instruction, principal, assistant principal, vice principal and director.

Other than specifying the positions for which a principal endorsement is required, this regulation is silent as to the issue present in this matter.

In *Kaprow v. Berkeley Tp. Bd. of Educ.*, 255 *N.J. Super.* 76 (App. Div. 1992), affirmed 131 *N.J.* 572 (1993), the Appellate Division stated that the position of

> "Assistant Superintendent" is a separately tenurable position under *N.J.S.A.* 18A:28-5 and that Kaprow's tenure protection extends to any Assistant Superintendent assignment within the scope of his certificate.
>
> [255 *N.J. Super.* at 92.]

The significance of the above quoted language is that it makes clear the Court's interpretation that each position covered by *N.J.S.A.* 18A:28-5 is a separately tenurable position. Thus, in Kaprow's case, his tenure protection only extended to any Assistant Superintendent assignment within the scope of his certificate.

The decision of the Supreme Court in *Nelson v. Board of Educ. of Tp. of Old Bridge*, 148 *N.J.* 358 (1997) appears to be binding precedent in this matter. In that case, Nelson had achieved tenure in the position of Supervisor of Industrial Arts. The position was abolished by the local board and Nelson was reassigned to a teaching position. When a vacancy occurred in the position of Elementary School Principal, Nelson asserted a tenure claim to that position even

[1] These regulations were repealed by R.2004, d.28, effective January 20, 2004. See, 35 *N.J.R.* 4352(a), 36 *N.J.R.* 469(a). Comparable implementing regulations are now found at *N.J.A.C.* 6A:9-12.3(b).

though he had never served as a principal. His claim was that he achieved tenure as a supervisor and that his tenure was transferable to any position within his administrative certificate. In its decision, the Supreme Court stated (at pp. 366-367) that the Appellate Division should be reversed because it would obviate as a tenure requirement actual service in a position included under a certificate. In reaching this conclusion, the Supreme Court relied on the State Board's assertion that permitting an educator to transfer tenure rights to a separately-tenurable position, such as principal, is unsound public policy. If the Appellate Division opinion were to apply, a tenured school business administrator concerned with purchasing, would be eligible for a principalship after a reduction in force and the tenure achieved under the finance manager endorsement would be transferable to the principal endorsement even if the individual had no prior experience in that position. The Court considered Nelson's duties as a Supervisor of Industrial Arts and contrasted them with the duties of an elementary school Principal, and concluded that the two positions are not significantly similar even though both endorsements fall under the administrative certificate. Based on this reasoning, the Supreme Court concluded that such appointments would promote unsound education policy.

The Supreme Court then pointed out that after the Appellate Division decision, the Legislature amended *N.J.S.A.* 18A:28-5 to make it clear that the positions listed therein are separately tenurable. It reasoned that because of this, deference to the State Board's long-standing interpretation of this provision is even more compelling. Finally, the Court concluded that the State Board's determination was neither unreasonable, unsupported by the record, nor violative of any legislative rule.

Petitioner relies on several administrative decisions to establish that the acquisition of tenure in one position does not give to the employee tenure in another position. In *Brenner v. Board of Education of the Township of Middlesex*, 96 *N.J.A.R.* 2d 81 (1995), Hon. Kathleen Duncan, ALJ, stated that a petitioner's acknowledged tenure as a director did not make her a tenured principal simply because she holds the principal endorsement. The endorsement of principal permits the holder to serve in the positions of assistant superintendent for curriculum and instruction, assistant principal, vice principal. However, to say that the director equals principal is no more supportable than to say the director equals the assistant superintendent for curriculum and instruction, or any of the other designated position titles.

I have reviewed a number of the cases cited by respondent in support of its position. Respondent contends that the circumstances in *Williams v. Board of Education of Plainfield,* 176 *N.J. Super.* 154 (App. Div. 1980), are closely analogous to the present matter. However, in *Williams,* the claim by the transferred-Principal was not that her transfer was an invalid reduction in rank because she had attained tenure as a high school Principal, but because the transfer would cause a reduction in her future salary expectancy. The Court affirmed a determination by the State Board of Education that a local board could properly transfer a tenured high school Principal to the position of elementary school Principal, and that the Principal had no vested right in any future increases in salary. The Court relied on the fact that the transfer did not result in a reduction of the Principal's current level of compensation and that the applicable tenure statute, *N.J.S.A.* 18A:28-5, merely prohibits dismissal or reduction in compensation, except for the reasons stated and in the manner prescribed. Thus, the decision in *Williams* does not support the validity of the transfer of Mazzeo merely because she suffered no reduction in that part of her salary which was attributable to her position as Principal. *Williams* does not deal with the circumstance in which a Principal is transferred to another position, which is not a Principal, position and in which the transferred employee has no tenure rights.

Respondent also relies on *Carpenito v. Board of Education of Borough of Rumson,* 322 *N.J. Super.* 522 (App. Div. 1999). In *Carpenito,* a teacher was transferred from a social studies teaching position to a computer applications teaching position. Both were teaching positions within his certification. The Court held that the transfer was permissible because the transferred-teacher lost no salary or other tangible benefits of employment. I interpret the phrase "loss of tangible benefits of employment" to also include a loss of tenure rights. See, Id., at 533. Therefore, since Carpenito suffered no loss in his tenure rights, he had no seniority rights to the former teaching position.

Respondent also relies on *Greenway v. Board of Education of City of Camden,* 129 *N.J.L.* 46 (Sup. Ct. 1942), *affd,* 129 *N.J.L.* 461 (1943). In that case, a teacher was transferred from high school to junior high school, with no loss of salary and *without impacting tenure rights.* (Emphasis added.) It was ruled that this transfer gave the teacher no cause of action (*citations omitted.*)

In another case relied on by respondent, *Stranzl v. Board of Education of City of Patterson,* 2 *N.J.A.R.* (EDU) 16, 21 (1980), it was held that a local board could transfer an elementary school Principal to a position as Principal of a secondary school in the same district without his consent so long as his tenure in the general position of Principal is protected and his salary is not reduced.

Respondent also refers to *Seyfarth v. Board of Education of Township of Cranford,* 97 *N.J.A.R.*2d (EDU) 160, affirmed by State Board of Education, 97 *N.J.A.R.*2d (EDU) 554 (1996). In that case it was held that the local board did not act improperly in transferring a high school Principal position to a middle school Principal position as long as the salary is not reduced. The Commissioner stated that this was a proper transfer to a position of equivalent rank. *Id.,* 97 *N.J.A.R.*2d at 167.

Finally, in *Ivey Avery et al. v. Board of Education of City of Trenton,* Comm'n decision 573-97 (Nov. 3, 1997) (unreported), tenured teaching staff members held "teacher-specialist" positions which were abolished for reasons of economy and efficiency. The Commissioner found that the board had acted within its managerial prerogative when it transferred the former teacher-specialists into positions as classroom teachers, with the same salary and emoluments. However, it is significant that the transfers were to positions requiring the same endorsement.

Respondent contends that as the court reasoned in *Carpenito v. Board of Education,* 322 *N.J. Super.* at 530, a transfer is not a demotion or dismissal when there is no loss of salary or benefits and the new position is one that is within the individual's certification. In fact, "transfers of teaching staff members are often advisable in the administration of schools for a variety of reasons." *Id.*

I agree with respondent that in this case petitioner Mazzeo does not allege that she was transferred on a prohibited basis. However, I disagree with respondent's interpretation of the foregoing cases on which it relies. In virtually every one of those cases, it was made clear that a transfer who negatively impacts on an employee's tenure rights is prohibited in the absence of tenure charges or employee consent.

Based on the foregoing discussion, I agree with petitioner that the question of tenure distinction between the positions of principal and director has been settled. The positions are separately tenurable and service in one does not give rise to tenure in the other. Service in either position is a prerequisite for tenure acquisition in either position. Thus, while petitioner herein unquestionably had tenure at the time of her transfer as a Principal, and perhaps as a Supervisor, it is clear that she did not have tenure as a Director because she has never served in the position of Director. Each of the positions requires expertise in different areas and are separately tenurable. Tenure is achieved only in a position which has been held by a teaching staff member. Once tenure is achieved, removal of the teaching staff member from the tenured position, by transfer or otherwise, is a violation of the protections to be afforded by tenure. *Veimeister v. Prospect Bd. of Educ.*, 57 *N.J. Super.* 215, 218 (App Div. 1949).

5.Findings and Conclusion

In the present matter, I **FIND** that petitioner was first appointed to the position of Principal effective April 27, 1993 (J-11). I FIND that petitioner's appointment as Principal continued until her transfer effective July 8, 2002. I FIND that petitioner attained tenure as a Principal on April 27, 1996, based on three consecutive calendar years of service pursuant to *N.J.S.A.* 18A:28-5(a). I FIND that, despite the absence of petitioner's consent, she was transferred from the position of Principal to the position of Director of Special Projects, effective July 8, 2002. It is also undisputed that petitioner has not acquired tenure in the position of Director of Special Projects under the provisions of *N.J.S.A.* 18A:28-5 or *N.J.S.A.* 18A:28-6 and the case law since she has never held a director's position, and I so **FIND**. Therefore, I **FIND** that the actions taken by respondent had the effect of removing petitioner from a position or positions in which she had tenure to a position in which she lacked tenure. I **FIND** that in the absence of petitioner's consent to this transfer, and in the absence of tenure charges establishing inefficiency, incapacity, or unbecoming conduct or just cause after a hearing, respondent took actions which are violative of petitioner's tenure rights. Therefore, I **CONCLUDE** that petitioner is entitled to reinstatement to her former position as Principal together with any and all back pay, benefits and other emoluments, if any.

5.Alleged violation of N.J.S.A. 18A:25-1

In the Second Count of her petition, petitioner alleges that the respondent Board of Education did not act by a recorded roll call majority vote of its full membership when it transferred her to the position of Director of Special Projects, and this omission makes the transfer *ultra vires*, and null and void.

In this regard, *N.J.S.A.* 18A:25-1 provides that

> No teaching staff member shall be transferred, except by a recorded roll call majority vote of the full membership of the board of education by which he is employed.

In Title 18A, "teaching staff member" is broadly defined as including members of the professional staff holding a position requiring a certificate issued by the State Board of Examiners.

The minutes of the June 24, 2002 meeting of the Board of Education (J-27) at which petitioner's transfer was approved reflect a recorded roll call majority vote in favor of the transfer. The proposed transfer of Mazzeo, which was part of item 26 on the Board's agenda, received a "yes" vote by seven Board members, and an abstention by one Board member. In her submissions in this matter, petitioner does not dispute the foregoing arguments or factual assertions.

I **FIND** that on June 24, 2002, the respondent Board of Education did act by a recorded roll call majority vote of its full membership when it transferred petitioner to the position of Director of Special Projects, and that this action complied with the requirements of *N.J.S.A.* 18A:25-1. Therefore, I **CONCLUDE** that the transfer is neither ultra vires, nor null and void on this basis.

6.Supervisor of Basic Skills

With respect to the position of Supervisor of Basic Skills, respondent asserts that this

position is absent from the list of positions as to which tenure may be attained. Respondent further asserts that it eliminated this position entirely and that this elimination of the "stipend position" of Supervisor of Basic Skills is permitted by *N.J.S.A.* 18A:28-9. Unfortunately, I failed to realize until now that these assertions raise both factual and legal issues which must be decided in order to determine whether petitioner is entitled to reinstatement to this position together with any back pay, benefits and other emoluments.

I **FIND** that these are factual and legal issues which remain in dispute in this matter. I make this finding because the assertions by respondent concerning the position of Supervisor of Basic Skills is not the subject of any stipulation, nor was any affidavit or certification supplied pursuant to *N.J.A.C.* 1:1-12.4(a) to establish these assertions as a matter of record in conformity with the requirements of *N.J.A.C.* 1:1-15.5(b). Under these circumstances, I **FIND** it to be inappropriate to enter an initial decision since there are disputed issues to be resolved in this matter. Accordingly, I have determined that I will issue the rulings set forth herein in the form of an Order. With respect to the undecided issues concerning the position of Supervisor of Basic Skills, I intend to arrange a telephone conference with counsel to discuss the scheduling of additional proceedings in order to finalize this matter.

ORDER

Based on the **Findings** and **Conclusions** set forth above, I hereby **ORDER** that petitioner shall be reinstated to her former position as Principal together with any back pay, benefits and other emoluments. I further **ORDER** that the record in this matter is hereby **REOPENED**, and I shall schedule additional proceedings with respect to petitioner's claim that respondent violated her tenure rights and is entitled to reinstatement to the position of Supervisor of Basic Skills, together with any and all back pay, benefits and other emoluments relating to that position.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to *N.J.A.C.* 1:1-14.10 or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6.

May 27, 2004
DATE

JOSEPH F. MARTONE, ALJ

mph

APPENDIX

LIST OF WITNESSES:

For petitioner:

None

For respondent:

None

LIST OF EXHIBITS:

Joint Exhibits:

J-1 Stipulation of Facts

J-2 July 24, 1989 employment contract effective September 1, 1989 through June 30, 1990, for the position of teacher

J-3 April 1, 1990, employment contract effective September 1, 1990 through June 30, 1991 for the position of teacher

J-4 March 26, 1991 employment contract effective March 26, 1991 through June 30, 1991 for the position of Supervisor of Basic Skills

J-5 May 10, 1991 employment contract effective July 1, 1991 through June 30, 1992 for the position of supervisor

J-6 July 7, 1992 employment contract effective July 1, 1992 through June 30, 1993 for the position of Supervisor of Basic Skills

J-7 May 3, 1993 employment contract effective April 27, 1993, to June 30, 1993 for the position acting supervisor/basic skills supervisor

J-8 May 28, 1993 employment contract effective July 1, 1993 to June 30, 1994 for the position of Principal

J-9 May 28, 1993 employment contract effective July 1, 1993 to June 30, 1994 for the position of "acting Principal/basic skills supervisor"

J-10 June 30, 1993 employment contract effective April 27, 1993 to June 30, 1993 for the position of Supervisor of Basic Skills

J-11 June 30, 1993 employment contract effective April 27, 1993 to June 30, 1993 for the position of Principal

J-12 August 11, 1993 employment contract effective July 1, 1993 to June 30, 1994 for the position of Principal

J-13 August 19, 1993 employment contract (signed only by petitioner) effective September 1, 193 to June 30, 1994 for the position of Supervisor of Basic Skills

J-14 May 10, 1994 employment contract effective July 1, 1994 to June 30, 1995 for the position of Principal/Supervisor of Basic Skills

J-15 August 31, 1994 employment contract effective July 1, 1994 to June 30, 1995 for the position of Principal/Supervisor of Basic Skills

J-16 May 24, 1995 employment contract effective July 1, 1995 to June 30, 1996 for the position of Principal/Supervisor of Basic Skills

J-17 April 26, 1996 employment contract effective July 1, 1996 to June 30, 1997 for the position of Principal/Supervisor of Basic Skills

J-18 April 28, 1997 employment contract effective July 1, 1997 to June 30, 1998 for the position of Principal/Supervisor of Basic Skills

J-19 March 9, 1998 employment contract (signed only by petitioner) effective July 1, 1997 to June 30, 1998 for the position of Principal/Supervisor of Basic Skills

J-20 April 24, 1998 employment contract effective July 1, 1998 to June 30, 1999 for the position of Principal/Supervisor of Basic Skills

J-21 April 26, 1999 employment contract effective July 1, 1999 to June 30, 2000 for the position of Principal/Supervisor of Basic Skills

J-22 May 26, 2000 employment contract effective July 1, 2000 to June 30, 2001 for the position of Principal/Supervisor of Basic Skills

J-23 February 28, 2001 employment contract effective July 1, 2000 to June 30, 2001 for the position Principal/Supervisor of Basic Skills

J-24 April 30, 2001 employment contract effective July 1, 2001 to June 30, 2002 for the position Principal/Supervisor of Basic Skills

J-25 April 29, 2002 employment contract effective July 1, 2002 to June 30, 2003 for the position Principal/Supervisor of Basic Skills

J-26 Minutes from April 26, 1993 memorializing the appointment of petitioner as acting Principal for the remainder of the 1992-93 school term

J-27 Minutes dated June 24, 2002 memorializing petitioner's reassignment for the position of Director of Special Projects

J-28 Collective Bargaining Agreement between the Barnegat Township Board of Education and the Association of Barnegat Administrators

J-29 Petitioner's "earning statement" for the pay period ending June 30, 2002

J-30 Petitioner's earning statement for the pay period ending July 15, 2003

J-31 Job description for the title "Principal,"

J-32 Job description for the title "Supervisor of Basic Skills"

J-33 Job description for the title "Director of special projects"

For petitioner:

None

For respondent:

None