500-03SEC

IN THE MATTER OF LORI GRUBER, :

MAGNOLIA BOARD OF EDUCATION : COMMISSIONER OF EDUCATION

CAMDEN COUNTY. : DECISION

August 21, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
LORI GRUBER	:	
Magnolia Board of Education	:	**SEC Docket No.: T07-03**
Camden 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:12-33 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, Respondent Lori Gruber was elected to serve a three-year term on the Magnolia Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

\"**WHEREAS,** the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing Respondent to Show Cause why she had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Ms. Gruber responded and advised that she was unable to attend in June due to health reasons and family obligations but that she would attend the October training session; and

WHEREAS, the Commission notified her by letter dated July 15, 2003, that it would discuss this matter at its July 22, 2003 meeting, that she had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered Respondent's reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for Respondent's failure to attend through June; and

WHEREAS, the Commission finds that if Respondent fails to attend by **October 2003,** the Commission finds that it would be appropriate to have her removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Gruber violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend her from the Board until she attends, but remove her from the Board if she fails to attend by the October training session.

Dated: July 22, 2003

Paul C. Gabrinetz
Paul C. G Chairperson

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, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View 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.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers
Lisa James-Beavers, Executive Director

(ljb/psc/m:ethics/trainingresT07-03.doc)

AGENCY DKT. NO. 263-7/03

IN THE MATI'ER OF LORI GRUBER,	:	
MAGNOLIA BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
CAMDEN 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 removal of 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 *N.J.A.C.* 6A:28-l.6; and

Whereas the Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member responded and advised that she had been unable to attend a training session due to health reasons and family obligations but that she would attend the October 2003 training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be suspended from the Board until she attends the October 2003 session and removed if she fails to attend the October 2003 session, and memorialized such

decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* lSA:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to 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 suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event she fails to complete the training session in October 2003, the above-named Board member shall be summarily removed from office as of that date.*

COMMISSIONER OF EDUCATION

Date of Decision: August 21., 2003

Date of Mailing: August 26, 2003

* 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-l.1 ***et seq.*** Pursuant to ***N.J.A.C.*** 6A:4-l.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

501-05

501-03SEC

IN THE MATTER OF KEITH KEELER, BLOOMINGDALE BOARD OF EDUCATION, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

August 21, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
KEITH KEELER	:	
Bloomingdale Board of Education	:	**SEC Docket No.: T24•03**
Passaic 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:12-33 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, Respondent Keith Keeler was appointed to a term on the Bloomingdale Board of Education in June 2001; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, ***School Board Notes;*** and

WHEREAS, the last training session to fulfill the requirement was in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing Respondent to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Respondent advised that he was registered for the September 2003 training session; and

WHEREAS, the Commission notified him by letter dated July 15, 2003, that the Commission would discuss this matter at its July 22, 2003 meeting, that he had the right

/

to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission considered that although Respondent provided no reasons for failing to attend the required training program for more than the one year allowed, he has registered for September 2003 training; and

WHEREAS, the Commission finds that this failure to attend board member training from June 2001 to April 2003 constitutes a violation ofN.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through June; and

WHEREAS, the Commission finds that if Mr. Keeler fails to attend by the end of **September 2003,** the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Keeler violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends, but remove him from the board if he fails to attend by the September training session.

Dated: July 22, 2003

Paul C. Garguilo
Paul C. Gairperson

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, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View 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.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT24-03.doc)

AGENCY DKT. NO. 253-7/03

IN THE MATIER OF KEITH KEELER,BLOOMINGDALEBOARD OF EDUCATION, PASSAIC COUNTY.	: : : :	COMMISSIONER OF EDUCATION 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 removal of 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 *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member advised that he was registered for the September 2003 training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be suspended from the Board until he attends the September 2003 session and removed if he fails to attend the September 2003 session, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, by copy of a letter dated August 12, 2003, from the Board's School Business Administrator/Board Secretary, the Commissioner was advised that the above-named Board member resigned his position as a member of the Bloomingdale Board of Education effective August 11, 2003, rendering the issue of Board member training for this individual moot; now therefore

IT IS ORDERED that this matter is hereby dismissed as moot.*

COMMISSIONER OF EDUCATION

Date of Decision: August 21, 2003

Date of Mailing: August 27, 2003

* 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.

502-03

502-03SEC

IN THE MATIER OF DAVID	:	
TAWIL, DEAL BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MONMOUTH COUNTY.	:	DECISION
	:	

August 21, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
DAVID TAWIL	:	
Deal Board of Education	:	**SEC Docket No.: T21-03**
Monmouth County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seg. 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:12-33 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, Respondent David Tawil was elected to serve a three- term on the Deal Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was in March 2003; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing Respondent to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Tawil responded by letter advising that he was unable to attend weekend sessions for religious reasons, which require observance from sunset Friday through sunset Saturday, and certifies that he was in Hong Kong at the time of the one weekday session offered by NJSBA in October 2002. He further states that he will attend the October 2003 weekday training session; and

WHEREAS, the Commission notified him by letter dated July 15, 2003, that the Commission would discuss this matter at its July 22, 2003 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered Respondent's reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes *aper se* violation ofN.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend; and

WHEREAS, the Commission finds that if Mr. Tawil fails to attend by the end of **October 2003,** the Commission finds it appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Tawil violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends training, but remove him from the Board if he fails to attend by the October training session.

Dated: July 22, 2003

Paul C. Garbarini x
Paul C. Garbarini, Chairperson

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, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View 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.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

psc/ljb/m:ethics/trainingresT21

AGENCY DKT. NO. 260-7/03

IN THE MATIER OF DAVID	:	
TAWIL, DEAL BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MONMOUTH COUNTY.	:	DECISION
_____	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by ***N.J.S.A.*** lSA:12-21 ***et seq.*** to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by ***N.J.S.A.*** lSA:12-33 and ***N.J.A.C.*** 6A:28-l.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to ***N.J.A.C.*** 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member responded and advised that he would attend the October 2003 training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be suspended from the Board until he attends the October 2003 session and removed if he fails to attend the October 2003 session, and memorialized such decision

through a resolution forwarded to the Commissioner of Education, pursuant to ***N.J.S.A.*** 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, counsel, on behalf of the above-named Board member, states that there were seven training sessions conducted between April 2002 and April 2003, all, except one offered in October, were on Saturdays. Counsel reports that the above-named Board member is unable to attend weekend sessions for religious reasons, which require observance from sunset Friday through sunset Saturday, and he was in Hong Kong on a business trip at the time of the one weekday session offered in October. Counsel further reports that respondent plans to attend the October 2003 weekday training session;

Whereas, under these particular circumstances, the Commissioner finds the Commission's recommended suspension of the above-named Board member at this time an unduly harsh sanction but he agrees with the Commission that if the above-named Board member fails to attend the weekday training session in October, 2003, which provides him ample time to arrange his business and personal affairs, he should be removed from the Board; now therefore

IT IS ORDERED that the above-named Board member shall satisfy his training obligation by attending the weekday training session in October 2003, and, in the event he fails

to complete this training session, the above-named Board member shall be summarily removed from office as of that date.*

COMMISSIONER OF EDUCATION

Date of Decision: August 2J 2003

Date of Mailing: August 27, 2003

* 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.

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11504-03SEC

IN THE MATIER OF SIOBHAN	:	
RYAN, BELMAR BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MONMOUTH COUNTY.	:	DECISION
	:	

August 21, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
SIOBHAN RYAN	:	
Belmar Board of Education	:	**SEC Docket No.: T20-03**
Monmouth 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:12-33 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, Respondent Siobhan Ryan was elected to a three-year term on the Belmar Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing Respondent to Show Cause why she had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Respondent failed to provide any response to the Order to Show Cause and further failed to attend a June training session; and

WHEREAS, the Commission notified Respondent, by letter dated July 15, 2003, that the Commission would discuss this matter at its July 22, 2003 meeting, that she had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Respondent did not respond to this letter, nor provide any reason for failing to attend the required training program for more than the one year allowed by law; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a violation ofN.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds removal from the Board to be the appropriate penalty for failure to attend training;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Brunett violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove her from the Board of Education herewith.

Dated: July 22, 2003

Paul C. G, Chairperson

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. lSA:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View 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.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

LJB/PSC/m:ethics/trainingresT20-03

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*If*505-03SEC

IN THE MATTER OF ROBERTS. :

CORRENTI, KEARNY BOARD OF :

EDUCATION, HUDSON :

COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

August 21, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
ROBERTS. CORRENTI	:	
Kearny Board of Education	:	**SEC Docket No.: T15-03**
Hudson 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:12-33 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, Respondent Robert S. Correnti was elected to serve a three-year term on the Kearny Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Mr. Correnti responded and advised that he would attend the October training session and subsequently had the NJSBA confirm that he was registered for the October session by letter dated July 18, 2003; and

WHEREAS, the Commission notified Respondent that the Commission would discuss this matter at its July 22, 2003 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Respondent provided no reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through June; and

WHEREAS, the Commission finds that if Mr. Correnti fails to attend by **October 2003,** the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Correnti violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends, but remove him from the board if he fails to attend by the October training session.

Dated: July 22, 2003

Paul C. Garbarini, Chairperson

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, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View 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.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

AGENCY DKT. NO. 254-7/03

IN THE MATTER OF ROBERTS.	:	
CORRENTI, KEARNY BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, HUDSON	:	DECISION
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 removal of 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 *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member responded and advised that he would attend the October 2003 training session and subsequently had the NJSBA confirm that he was registered for the October session by letter dated July 18, 2003; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be suspended from the Board until he attends the October 2003 session and removed if he fails to attend the October 2003 session, and memorialized such decision

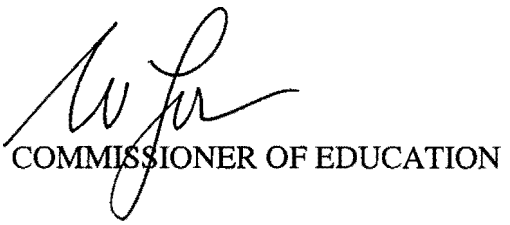
through a resolution forwarded to the Commissioner of Education, pursuant to ***N.J.S.A.*** 18A:12-29;and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to 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 suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event he fails to complete the training session in October 2003, the above-named Board member shall be summarily removed from office as of that date.*



COMMISSIONER OF EDUCATION

Date of Decision: 8/21/03

Date of Mailing: 8/28/03

* 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.

11506-03

T.A., on behalf of minor children, A.A. & W.A.,:

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY, : DECISION

RESPONDENT. :

_____:

August 21, 2003

RECEIVED
L. ... J. JERSEY

L-1. t[illegible]i<[illegible]-[illegible]i[illegible]ce'lecbfrimends and I so move that the board approve Stipu(a1ion of Settlervieflt in the matter of T.A. o/b/o A.A. and W.A. vs1nfp'(AASBit:} [illegible]Rfo'n Board of Education in accordance with the information in the hands of each board member and recorded in the non-public portion of these minutes.

I CERTIFY THAT THE FOREGOING RESOLUTION WAS ADOPTED BY THE TOWNSHIP OF UNION BOARD OF EDUCATION AT ITS REGULAR MEffiNG ON JULY 15, 2003.

JAMES J. DAMATO
BOARD SECRETARY

!} e_

II

OAL DKT. NO. EDU 01013-03
AGENCY DKT. NO. 331-10/02

T.A., on behalf of minor children, A.A. & W.A.,:		
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, 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 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: 8/21/03

Date of Mailing: 8/28/03

11527-03

IN THE MATTER OF THE TENURE	:	
HEARING OF ADAM MUJICA,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION ON REMAND
OF THE CITY OF PATERSON, PASSAIC	:	
COUNTY.	:	

SYNOPSIS

Board certified tenure charges against respondent teacher alleging that he had, on numerous occasions, made sexually inappropriate remarks and gestures to students including commenting on female students' bodies, discussed his personal sex life, discussed the sexual aspects of a television program and addressed female students by the name of the title character, made sexual gestures and squeezed a sexual toy during class. Respondent denied all charges, and argued that the charges and testimony against him were motivated by a plot conceived by the physical education department to have him terminated from his position.

After hearing extensive testimony and argument and assessing the credibility of the witnesses, the A U concluded that the Board's witnesses were credible and that it had proven Charges one through five and eight, that Charge seven had been partially proven, and that Charges six and nine should be dismissed. The A U further determined that the charges that were sustained constituted conduct unbecoming a teaching staff member and, because of the nature of the charges, recommended dismissal of respondent.

The Commissioner adopted the determination of the A U that the Board had sustained most of its charges by a preponderance of the evidence and ordered that respondent be dismissed from his position. The State Board of Education affirmed the Commissioner's Decision.

The Appellate Division affirmed that the District had proven its charges of unbecoming conduct, but remanded the decision for reconsideration of the penalty.

On remand, the Commissioner reiterated that, even without giving weight to respondent's past, undetermined accusations, the unbecoming conduct established herein warranted his dismissal as a tenured teacher.

September 2, 2003

OAL DKT. NO. EDU 10130-00
AGENCY DKT. NO. 417-11/00
COMMISSIONER'S DECISION NO. 294-01
STATE BOARD NO. 36-01

IN THE MATTER OF THE TENURE	:	
HEARING OF ADAM MUJICA,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION ON REMAND
OF THE CITY OF PATERSON, PASSAIC	:	
COUNTY.	:	

For the Petitioner: Gregory Johnson, Esq.

For the Respondent: John H. Norton, Esq.

The Commissioner decided this matter on September 7, 2001, adopting the Administrative Law Judge's (ALJ) conclusion that respondent, a tenured teacher in the State-operated School District of the City of Paterson, was guilty of conduct unbecoming a teaching staff member.[1] The Commissioner ordered that respondent be dismissed from his employment as of the date of that decision. The State Board of Education affirmed the Commissioner's decision on February 6, 2002. On appeal, the Appellate Division affirmed the State Board's decision that the evidence supported the seven charges of unbecoming conduct, but remanded the matter for reconsideration of the penalty. The Court therein stated:

> In disciplinary actions against public employees, under ***West New York v. Bock,*** 38 ***N.J.*** 500, 524 (1962), the employee's past disciplinary record may be considered at the penalty phase only if it resulted in a formally adjudicated action or if the charge was admitted by the employee. ***Accord, In re Wenderwicz,*** 195 ***N.J.***

[1] The Commissioner agreed that the District had proven Charges One, Two, Four, Five and Eight and had partially proven Charges Three and Seven.

Super. 126, 134 (App. Div. 1984). *(State-operated School District of the City of Paterson v. Adam Mujica,* Appellate Division, A-3610-01T5, slip op. at 12-13)

Because the Court determined that the ALJ and the Commissioner "utilized earlier alleged misconduct" against respondent in deciding to dismiss him from his tenured teaching position, *(id.* at 11), and since neither of the past charges had been adjudicated against respondent at the time of his hearing on the tenure charges, the Court remanded this matter for reconsideration of respondent's penalty, "without any weight given to the past, undetermined accusations." *(Id.* at 13)

Upon reconsideration of the appropriate penalty in this matter, and mindful that the Appellate Division clearly affirmed that respondent was guilty of conduct unbecoming a teaching staff member, the Commissioner maintains that respondent's pattern of unprofessional conduct, as demonstrated by the District herein, was sufficient to warrant his dismissal. *See In the Matter of the Tenure Hearing of Roberts,* 94 *N.J.A.R.2d* (EDU) 284; *In the Matter of the Tenure Hearing of Sheridan,* 92 *N.J.A.R.2d* (EDU) 257, *affd* State Board 92 *N.J.A.R* 2d (EDU) 393; *In the Matter of the Tenure Hearing of Van Gilson,* 93 *N.J.A.R.2d* (EDU) 378, 382, 385, *aff'd* State Board 93 *N.J.A.R.2d* (EDU) 630; *In the Matter of the Tenure Hearing of Henry Komorowski, State-operated School District of the City of Jersey City, Hudson County,* decided by the Commissioner July 27, 2000, *aff'd* State Board December 6, 2000, *aff'd* Appellate Division March 4, 2002, A-2486-00T2; and *In the Matter of the Tenure Hearing of Ward Campbell,* 93 *N.J.A.R.2d* (EDU) 196, *aff'd* State Board 93 *N.J.A.R.2d* (EDU) 604, *aff'd* Appellate Division 95 *N.J.A.R.2d* (EDU) 211.

Accordingly, without any weight given to his past, undetermined accusations, the Commissioner concludes that respondent's unbecoming conduct necessitates his dismissal as a tenured teacher.

IT **IS SO** ORDERED.2

COMMISSIONER OF EDUCATION

Date of Decision: 9/2/03

Date of Mailing: 9/3/03

2 This decision may be appealed to the State Board of Education pursuant to *N.J.S.A:* 1SA:6-27 ***et seq.*** and *N.J.A.* C 6A:4-1.1 ***et seq.***

5-2-g-o_5

11528-03

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
RESPONDENTS.	:	

SYNOPSIS

Petitioning parent challenged the Board's placement of her daughter, K.S., in the 6th grade, rather than the 7th grade. The Board contended it took into consideration her age and English proficiency. The Board urged that the petition be dismissed for mootness because K.S. was withdrawn from the District.

The AU concluded that, even though the matter would appear moot, because this issue is one that is capable of frequent repetition, it is not rendered moot. In light of the record and testimony of witnesses, the AU concluded that the Board did not act in an arbitrary or discriminating manner in applying its entrance age policy (#5112) to determine that petitioner's daughter was not eligible for admission to its 7th grade for the 2003-2004 school year. The petition was dismissed.

The Commissioner concurred with the A1J that the matter should not be dismissed as moot. The Commissioner, however, concluded that the Initial Decision misperceived the question at issue herein necessitating remand to the OAL to address and resolve the propriety of the District's actions. Petitioner contended that the District acted in violation of its established regulation for new students, R 5120 (Assignment of Pupils), by its failure to objectively evaluate K.S. through testing in its determination of an appropriate grade placement for her as required by that document. The remand is for expansion of the record as to Board policy #5120 and regulation R 5120 and the interrelationship between the two, along with the reasonableness of the District's deviation from established policies/procedures in making the grade placement determination for K.S.

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.

September 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1840-03
AGENCY REF. NO. 395-12/02

O.S. on behalf of K.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY and ANTHONY P. CAVANNA, SUPERINTENDENT
Respondents

Before **O.S.,** petitioner pro se

Robert Tessaro, Esq., for respondents

Record closed: June 10, 2003 Decided: July 25, 2003

ROBERT J. **GIORDANO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, O.S., the mother of the minor, K.S., appeals the determination of the respondent Board of Education of the Borough of Fort Lee to place K.S. in the sixth

grade at the time of enrollment in the school district. A petition of appeal was filed with the Commissioner of Education on November 22, 2002. Respondent filed an answer to the petition on December 16, 2002. Thereafter, the Department of Education confirmed that the petitioner had withdrawn the original petition and filed a second petition on December 10, 2002. Respondent filed an answer to the second petition on January 10, 2003. Thereafter, the matter was transmitted by the Department of Education to the Office of Administrative Law (OAL) on March 4, 2003 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 in the matter was held on April 16, 2003. Prior to the conclusion of the hearing, counsel for the respondent moved for dismissal of the petitioner's appeal as moot since petitioner had acknowledged that the parents had withdrawn K.S. from the District, first to be home schooled and then enrolling her in a private school, the European Learning Center. The undersigned reserved on the motion pending the receipt of post-hearing briefs. The record remained open for the submission of the post-hearing briefs. The submissions were received by the undersigned by May 30, 2003. The record was held open to June 10, 2003 for the submission of responses by the parties. No responses being submitted by that date, the record was closed on June 10, 2003.

ISSUES

The issues to be resolved are whether the Board has the authority and/or discretion to apply an educational policy utilizing chronological age in determining the grade placement of the minor child, K.S. upon entering and enrolling in its schools and whether the Board has improperly utilized English language proficiency in making such determination.

FACTUAL DISCUSSION

Testimony

Jack Foster

The respondent has employed Jack Foster for thirty-four years, the last five years as principal of the Lewis F. Cole Middle School. He received his undergraduate degree at Montclair State University in 1968 and he holds certificates for teaching, supervisor and principal. He obtained a Master's Degree in Education Administration at William Paterson University in 1981. During his tenure at Fort Lee School District, he has been a teacher and Department Head of various departments. He has also served as principal of a K-12 summer program for remediation and enrichment. The witness was qualified as an expert in the area of educational administration.

Foster described the enrollment patterns in the District. There are 3400 students enrolled in the District. There are 570 students in the Middle School grades 7-8. Fort Lee is a multi-cultural community. The population is approximately forty percent Asian. There is also a fairly high transitional population. The students in the District speak thirty different languages. There are a good number of Russian students and the number is increasing.

The witness explained that he is normally not involved in the placement of the students enrolled in the District. However, he did become aware of this matter in August 2002. He explained that generally parents would register the child at the placement office. There are four elementary schools in the District. The elementary student will be enrolled at the elementary school where the student resides. There is one middle school and one high school.

In this case, the witness was advised there was a problem regarding placement. He met with the parents in August 2002. He advised the parents that he wanted to meet the child. Foster testified that the child was placed in accordance with the District

policy 5120. The placement of the child was age appropriate. The cutoff for Kindergarten is October 31. The District attempts to apply this cutoff throughout. There is a policy to track the students for possible advanced study. The District has accelerated programs to help keep the children challenged.

At the time the parents wanted to have K.S. placed in the Middle School, the sixth grade was the age appropriate placement for her. K.S. was eleven years old at the time. Students in the seventh grade would be twelve or thirteen years old. Foster testified that he spoke to the parents at great length about the placement. He explained to them that his primary concern was age appropriateness. He did acknowledge that K.S. spoke little or no English. Foster testified that to his knowledge, K.S. did well in the last marking period in some areas, specifically art.

The witness was shown a four-page report from Russia regarding K.S. (R-1). These were the records from the prior educational institution in Russia. The records indicated that K.S. was born on February 28, 1991. Foster testified that the country in which the student resides makes the assignment of grade levels. Often, these grade levels do not correspond with the grade levels here. In placing the foreign student, proper consideration is given to age, courses of study, and grades achieved.

Foster described the nature of the programs available in the elementary schools and in the Middle School. Honors programs are started in the seventh grade. Students in the Middle School have seven classes per day and change class every 43 minutes. The classes in the sixth grade are primarily self-contained. The District does have English as a Second Language (ESL) program. The District also has bi-lingual programs, but not in Russian.

After several meetings with the parents, it was determined that the best placement for K.S. would be in the sixth grade for the 2002-2003 school year.

On cross-examination, the witness related the history of the matter. He testified that the concerns regarding placement came to him from the placement office. He

spoke with the mother first by telephone, then at an in-person meeting. The child was not present at that meeting. K.S. was present at a second meeting. The witness recalled her as quiet and shy. He said that they were barely able to greet each other, but he did try to make her feel comfortable. The witness acknowledged that he is not qualified to evaluate her language skills. The District does not have any devise to permit the evaluation of skills. There are many cases of transfer students with different language proficiency levels. Foster opined that language plays a major role in success in school.

Foster acknowledged there are no standardized tests offered in the native languages of foreign students. The ESL department does all standardized testing. Math skills and language arts skills are measured on standardized tests. Another factor to consider is social acceptance. He explained that the seventh grade students in the District for the 2002-2003 school year were born between October 1989 and October 1990. The placement decisions are the reasonable exercise of discretion and are not made in a discriminatory manner.

Vincent Taffaro

Dr. Vincent Taffaro testified next for the respondent. He has been the Assistant Superintendent of the School District for the last thirteen months. Prior to that, he was the principal of School Number 4 for fifteen years. He has also served as assistant principal and classroom teacher in the Fort Lee School District for a total of thirty-one years.

Dr. Taffaro graduated St. Peter's College in 1971. He received a Master's Degree from Jersey City State College in 1977. He received a Doctorate Degree from Fordham University in Educational Administration in 1995. He is certified in teaching, as a supervisor, principal and superintendent of schools. The witness was qualified as an expert in educational administration.

He became aware of a problem in August 2002, related to the placement of K.S. in the school system. He went to the registration office and spoke to the registration officer, Carol Fratee. He also spoke to Mr. Foster. Dr. Taffaro identified the Fort Lee District policy regarding the assignment of pupils (R-2). He testified that age is a factor in the placement decision. He stated that often other countries use different levels, sections, or degrees in the grade system. It is difficult to ascertain from that what would be the appropriate grade level in the school systems here. When he spoke to the parents in August, they were concerned that their child was not being properly placed. They felt she should be in the seventh grade.

Dr. Taffaro felt that based on her age and grade level that the appropriate placement for K.S. was the sixth grade. He advised the parents of this decision both by telephone and in person. He explained to them that they could appeal this decision to the Superintendent of Schools, Dr. Cavanna. Dr. Cavanna met with the parents as well. According to the witness, Dr. Cavanna concurred with the placement decision. Dr. Cavanna sent a letter to the parents outlining the basis for the decision on November 13, 2002 (R-3). Among the factors used in the decision was the chronological age of the student as well as her ability in the English language. He felt that the age of the student is an appropriate factor. He would have been concerned about placing this child in the Middle School. He also felt that the ability of the child to speak English is important in considering the socialization of the child.

The District provides a modified program in the fifth and sixth grades. The students change for several of the classes. This is considered a transitional time for the students. Fort Lee provides an ESL program. The parents will complete a form providing information regarding the length of time in the country and describing the proficiency in the English language. The children are given a language proficiency test. K.S. was given this test on September 12, 2002. Her score indicated that she was at the 42.5 percentile in language proficiency. Parents are free to withdraw their children from the ESL program.

Dr. Taffaro acknowledged that he could not make a judgment as to the grade level of the curriculum in Russia. The decision to place K.S. in the sixth grade were those outlined in the November 13, 2002 letter to the parents.

Peter Emr

The next witness to testify was Peter Emr. He has been the principal at elementary School Number 4 since March 2002. Previously, he had been the assistant principal at Lewis Cole Middle School for two years. He has also been principal in Hackensack for the K through adult education program and assistant principal in the Glen Ridge Middle School. He is an educational consultant in K through adult education in computer-based learning.

The witness received his Bachelor's Degree and Master's Degree from Jersey City State College. He also has approximately fifteen credits in psychology counseling at Seton Hall University.

Mr. Emr learned about the situation involving K.S. in August 2002. He recalled that he was advised that the child was to be placed in School Number 4. The child was registered for the Middle School, but redirected to School Number 4. He recalled meeting with the parents after the start of the school year. When the school year started in September, K.S. was placed in the sixth grade. She was there until November 12, 2002. He testified that K.S. had multiple absences during that time. In October alone, she was absent seven days.

The witness testified that there was a meeting with the parents after they removed K.S. from the school. That meeting was not about the placement but an injury she had apparently suffered in the playground at one time.

He recalled that K.S. participated in the ESL program and the regular education program at School Number 4. He believes that the parents received the report card for the first marking period, which ended October 12, 2002. As he recalled, K.S. did

satisfactorily in all her courses. He testified that toward the end of her stay at the school, K.S. exhibited some behavioral problems. Emr testified that in his opinion, the age appropriate placement in the sixth grade was the best placement for K.S. A seventh grade placement would have been a mistake.

Mr. Emr testified that the parents withdrew the child from the District. He understood that she was going to be home schooled by the parents. A letter dated November 26, 2002, to the Assistant Superintendent of Schools, advised that the parents were withdrawing K.S. from the District and would begin home schooling (R-5).

The witness acknowledged that he became aware that K.S. was obtaining higher scores on assignments from the private tutor at home than she had gotten in school. He stated he did not know how she was scored on those tests. He testified that K.S. had some difficulty in mathematics with computations.

O.S.

O.S. testified on behalf of her daughter. She explained that K.S. did not have enough time to study the sixth grade studies because she was also receiving instruction in seventh grade material from the tutor. K.S. was called "stupid" by her classmates because she was going through the sixth grade again. Petitioner acknowledged that the District maintained a policy regarding entrance age, Policy 5112 (P-6).

The parents insisted that K.S. be tested. They wanted Mr. Foster to meet her. They were upset that at that meeting, Mr. Foster just greeted her and asked questions about things like the sports she liked. They then asked the Superintendent to have K.S. tested.

O.S. explained that K.S. started school in September 1997 in grade 0. She remained in grade Othrough June 1998. In September 2001, K.S. entered her fifth year of school. After the third level of a ten-year program, she was tested and placed in the sixth level of the eleven-year program.

The witness acknowledged that prior to filing the within appeal, she withdrew her daughter from the District. She had her home schooled for one week. She then placed her in the European Learning Center in Fairlawn, New Jersey. Mr. Foster told her that K.S. would not be accepted into the seventh grade in the District.

She also indicated that she did not have a problem with the ESL program in the District. She made her mind up that the placement in the sixth grade was a mistake. When she met with the woman at the registration office, she was told that K.S. would be referred to the seventh grade even though there was an age problem.

FINDINGS OF FACT

Based on the testimonial and documentary evidence presented, and having the opportunity to observe the demeanor of the witnesses and to assess their credibility, I make the following **FINDINGS** of **FACT:**

1. K.S. is a minor born on February 28, 1991.
2. K.S. started school in 1997 in Russia.
3. She attended school in the 1st class in 1999.
4. K.S. attended the 2nd class in 2000.
5. K.S. attended the 3rd class in 2001.
6. In 2002, K.S. attended Junior High School in Russia in the 6th class.
7. K.S. was registered for enrollment in the Fort Lee School District by her parents in August 2002, for the 2002-2003 school year.
8. At the time of enrollment, K.S. was eleven years of age.
9. She was being enrolled for the 2002-2003 school year commencing September 2002.
10. Although the parents requested she be enrolled in the seventh grade, K.S. was referred for enrollment in the sixth grade at elementary school Number 4.
11. The District uses October 31 as the cutoff date for eligibility.

12. For the 2002-2003 school year, students generally eligible for placement in the seventh grade were born between October 1989 and October 1990.
13. K.S. was age appropriate for placement in the sixth grade for the 2002-2003 school year.
14. The English language proficiency test score for K.S. was 42.5 percentile at the beginning of the 2002-2003 school year.
15. Pursuant to District Policy 5112, a child is eligible for entrance into kindergarten that will have attained the age of five years on or before October 31 of the year in which entrance is sought.

LEGAL DISCUSSION

The respondent urges that the petition of appeal must be dismissed for mootness because K.S. was withdrawn from the District, first to be home schooled, and then placed in a private school by the parents. The mootness doctrine is "[t]he principle that when the matter in dispute has already been resolved, there is no actual controversy that would be affected by a judicial decision." Black's Law Dictionary 697 (Abridged 6th Ed.1991). It is well established that questions that have become moot or academic prior to judicial scrutiny generally have been held to be an improper subject for judicial review ... for reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest. *Anderson v. Sills,* 143 *N.J. Super.* 432 (Ch. Div. 1976). Likewise, the Commissioner of Education does not consider moot issues. *J.B. and P.B. v. Bd of Educ of Asbury Park,* OAL DKT. EDU 7940-87 (Oct. 12, 1988) adopted Comm. Ed. (Nov. 23, 1988). See, *Feldman v. Bd. of Educ. of Lindwood,* OAL DKT. EDU 1665-94 (Oct. 14, 1994), adopted Comm. Ed., where the petitioners argued that their child was deprived of the opportunity to participate in a gifted and talented program as required by *N.J.A.C.* 6:8-4.5(4), because the school district did not have an honors program for first graders. After petitioners transferred their child to a private school, the ALJ held:

> . . . the removal of A.F. from the policies and dictates of the Linwood school system destroys the concrete, immediate adversity necessary to sustain a justiciable controversy. Accordingly, I FIND that the removal of A.F. from the Linwood school system renders the matter moot and as a result, petitioner's complaint is herein dismissed.

However, appellate courts occasionally will rule on such matters where they are of substantial importance and are capable of repetition while evading review. *Advance Elec.* Co., *Inc. v. Montgomery Tp. Bd. of Educ.* 351 *N.J Super.* 160 (App. Div. 2002).

The petitioner urges that the assignment of K.S. in the sixth grade denies equal access to education, based on the unlawful consideration of English language proficiency. The New Jersey Constitution (1947), Art. VIII, Sec. IV. par. 1 provides that it is the duty of the State to educate our children and that such education is of supreme importance, *State v. Vaughn,* 44 *N.J.* 142, 145 (1965); *Pingry Corp. v. Hillside Tp.,* 46 *N.J.* 457, 460-461 (1966). It has been held that it is within the authority and discretion of board of education to exclude children within its jurisdiction who sought to transfer into first grade from private kindergarten or day school program who had not attained age of six years on or before October 1 of school year, even though the board made an exception for children not meeting such age requirement who moved into district after attending a public supported kindergarten. *H.A.B., Guardian for S.T.B. v. Manalapan-Englishtown Regional School Dist., Monmouth County,* 92 *N.J.A.R.* 2d (EDU) 640, 1992 WL 405315, (1992). A local board of education may promote or place pupils enrolled into public schools for its district according to the prescription of its own rules. *Boulogne v. Bd. of Ed. of the City of Jamesburg, Middlesex County,* 1964, S.L.D. 107; *Wilcox v. Bd. of Ed. of the Borough of Oceanport, Monmouth County,* 1954-55 S.L.D. 75; *Staats v. Bd. of Ed. of Montgomery Twp., Somerset County,* 1938 S.L.D. 669. *Shenk/er v. Bd. of Ed. of the Bor. of Ho-Ho-Kus, Bergen County,* 1974 S.L.D. 772. The Commissioner of Education in the Shenkler case analyzed the authority of local boards based on cases decided prior to that time. There, the Commissioner noted at pages 777-778 that:

> In Boulogne, supra, the Commissioner was concerned with a policy of local board of education, which required that pupils be six years of age on or before December 31 in order to qualify for entrance to first grade. Such policy was consistent with another Board policy with respect to qualifications for entry to kindergarten.

It has long been held that it is the right and responsibility of the local board of education to establish rules for the promotion of pupils from grade to grade. In 1914, the State Board of Education in reversing the decision of the Commissioner in *Staats v. Board of Education of Montgomery Township,* 1938 S.L.D. 669, 671, said, "The State Board of Education holds that a local board of education has authority to prescribe its own rules for promotion. It is given that express right by statute." In the case of *Wilcox v. Board of Education of Oceanport,* 1954-55 S.L.D. 75, the Commissioner directed the admission of a child on transfer from a private kindergarten, concluding:

> The Board of Education of the Borough of Oceanport, Monmouth County, will determine in its discretion the grade in which the child shall be placed. (See R.S. 18:11-1.) (Now, N.J.S.A.18A:33-1) That a board of education may give consideration to age as a factor in determining promotion policies is set forth in the statutes. R.S. 18: 11-1 requires boards of education provide suitable school facilities and accommodations for the education of the children who reside in the district. Such facilities ... shall include ... courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years.

No child under the age of five years shall be admitted to any public school, except such as may be provided pursuant to law for children of his age. No board of education shall be required to accept by transfer from public or private school any pupil who was not eligible by reason of age for admission on October 1 of that school year, but the board may in its discretion admit any such pupil if he or she meets such entrance requirements as may be established by rules or regulations of the board. *N.J.S.A.* 18A:38-5.

In fulfillment of its duty to provide suitable school facilities, the board has no obligation under the law to employ formal testing procedures to determine a child's fitness to enter a particular grade. The statutes specifically reserve to the local school

district the right to prescribe its own rules for promotion. *N.J.S.A.* 18A:4-24. While the board may use tests for grade placement purposes, it is not required to do so. In the case of Gutch and *Fugger v. Board of Education of Demarest, Bergen County,* decided by the Commissioner March 13, 1963 (1963 S.L.D. 85), affirmed State Board of Education May 1, 1963 (1963 S.L.D. 89), one of the questions was whether a board of education could make psychological testing a prerequisite to early admission to kindergarten. The Commissioner held:

> ... respondent is under no obligation to obtain the results of psychological testing as evidence of readiness for schooling of a child under the age of five years. If, on the other hand, respondent desires such guidance in the exercise of its discretion given it by R.S. 18:15-1, supra, the Commissioner is convinced that there is implied power for respondent to employ such professional assistance or advice as it may reasonably require.

The Legislature, in its wisdom, provided local boards of education with wide discretion to admit or not to admit a child into its schools that was not eligible to be admitted by reason of not having attained the age for admission on or before October 1 of the school year.

CONCLUSIONS

On its face, the instant matter would appear to be rendered moot by virtue of the fact that the petitioners have withdrawn K.S. from the District, thus obviating the adversity necessary to sustain a justiciable controversy. However, by the very evidence adduced on behalf of the respondent, this issue is one that is capable of frequent repetition. The Fort Lee School District is a multi-cultural, transient community with an increasing immigrant population. The provision of an education is of the utmost importance. Thus, I **CONCLUDE** that the issue as presented here is not rendered moot.

As to the issue of whether the respondent may establish enrollment eligibility based on chronological age, the case law leads but to one conclusion. The legislative authority has been conferred upon a local board of education to make and enforce rules

for its own governance under *N.J.S.A.* 18A: 11-1, to include policies adopted by it consistent with *N.J.S.A.* 18A:38-5. The Board herein has done just that. It has determined to use its discretion in determining the appropriate placement of students transferring into the District. There is no evidence extant that the Board here utilized any unlawful consideration in determining the placement of K.S. To the contrary, the evidence leads to the opposite conclusion. K.S. tested at a language proficiency of less than fifty percentile. Notwithstanding this, she was not placed in a grade lower than her age appropriate placement. Only in such case could the petitioner arguably assert that K.S. was misassigned to a class because of her lack of language skills. The respondent Board has, through *N.J.S.A.* 18A:11-1, adopted a rule, not inconsistent with any provision of Title 18A, not to accept children into its kindergarten who have not attained the age of five years on or before October 31 of the school year in which entrance is sought. The Board has extended its rule to apply throughout in determining grade placement for those children within its jurisdiction who seek eligibility for enrollment into the school system at any age. Interestingly, the child's mother acknowledged that K.S. started school in Russia in 1997. As such, she would have been in school for five years prior to enrollment in the Fort Lee District. For the foregoing reasons, I **CONCLUDE** that the Board has not acted in an arbitrary or discriminating manner in applying its entrance age policy to determine that petitioner's daughter was not eligible for admission to its seventh grade for the 2002-2003 school year.

ORDER

Based on the foregoing, I hereby **ORDER** 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.* 52:148-10.

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.

7/25/03
DATE

ROBERT J. GIORDANO, ALJ

Receipt Acknowledged:

7-25-03
DATE

DEPARTMENT OF EDUCATION

E-mail Receipt of Initial Decision Confirmed by the Department of Education on: 7 l::LS \ C3

Mail-e nl[illegible]

'JUL 2 9 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

WITNESSES

For respondents:

Jack Foster
Vincent Taffaro
Peter Emr

For petitioner:

O.S.

EXHIBITS

For respondents:

R-1 Student's Information-Translated from Russian
R-2 Policy 5120 - Assignment of Pupils
R-3 Letter dated November 13, 2002, Dr. Cavanna to O.S.
R-4 Student Profile Sheet
R-5 Letter dated November 26, 2002, O.S. to Vincent Taffaro

For petitioner:

P-1 Spelling test-October 11, 2002
P-2 Math Quiz-October 30, 2002
P-3 Math Quiz-October 27, 2002
P-4 Math quiz-November 1, 2002
P-5 List of Seventh Grade books

P-6 Policy 5112 - Entrance Age

P-7 Policy 5120 -Assignment of Pupils

P-8 Confirmation from Ministry of Education-Translated from Russian

P-9 General Education-Sixth Grade-Translated from Russian

OALDKT. NO. EDU 1840-03
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
RESPONDENTS.	:	

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

Petitioner's exceptions charge that "[i]n his findings of fact, legal discussion and conclusion, [the Administrative Law Judge (ALJ)] completely ignored the whole premise and basis for my petition of appeal." (Petitioner's Exceptions at 1) She claims that throughout this matter, in both her written submissions and at the hearing, she continually stressed that resolution of this matter revolved around one single piece of evidence, a District regulation (P-7) which "requires that all new pupils must be administered the District Approved Standardized Test to ensure proper grade placement." *(Ibid.)* Notwithstanding this clear regulation, which on its face makes no exception for students with limited English proficiency, the District repeatedly denied K.S. an opportunity to take these tests. As such, petitioner contends, the District was in clear violation of its own policies and/or procedures in the placement of her child. Rather than recognizing and addressing this violation, the ALJ erroneously concluded that chronological age,

in and of itself, is a sufficient basis to determine grade placement. In so concluding, she argues, the ALJ's case citations and legal discussion centered around acceptance into kindergarten and first grade, along with the bold assertion that the District has extended the kindergarten/first grade age entrance policy to all grades through high school, an assertion that is without foundation as there is no written policy in the Fort Lee School District so stating. {Petitioner's Exceptions at 2)

Upon his full and independent review and after due consideration of petitioner's exception arguments, the Commissioner finds and concludes that the Initial Decision misperceives the question at issue herein necessitating remand to the OAL to address and resolve the propriety of the District's actions, under the particular circumstances existing in this matter, as explicated below.

Initially, however, the Commissioner concurs with the AI.J that, notwithstanding K.S.'s withdrawal from the District and her subsequent enrollment in a private school, this matter should not be dismissed as moot. Rather, as recognized by the AI.J, "[t]he Fort Lee School District is a multi-cultural, transient community with an increasing immigrant population" {Initial Decision at 13), and, therefore, the issue involved here is of substantial importance and one capable of frequent repetition, qualifying it as an exception to the mootness doctrine. *See Advance, Inc. v. Montgomery Tp.,* 351 *N.J. Super.* 160 {App. Div. 2002).

This said, the Commissioner next observes that, in his Initial Decision, the AI.J categorizes the issues to be resolved in this matter as:

> whether the Board has the authority and/or discretion to apply an educational policy utilizing chronological age in determining the grade placement of the minor child, K.S. upon entering and enrolling in its schools and whether the Board has improperly utilized English language proficiency in making such determination. {Initial Decision at 2)

Based on his review here, the Commissioner finds that the AU's categorization does not adequately identify the issue in controversy. It is by now well-established that a board of education possesses the statutory right to promote or place pupils enrolled in its schools according to the prescription of its own rules. *Shenkler v. Bd. of Ed. of the Borough of Ho-Ho-Kus*, 1974 *S.L.D.* 772, *aff'd* State Board 1975 *S.L.D.* 1157; *Boulogne v. Bd. of Ed. of the City of Jamesburg,* 1964 *S.L.D. 107; Wilcox v. Bd. of Ed. of the Borough of Oceanport,* 1954-55 *S.L.D.* 75. It is, likewise, well-established that when a local school board 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 the 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). The record in this matter indicates that this District has established both a Policy, #5120, and a Regulation, R 5120, with respect to ascertaining the appropriate grade level placement for new or returning students from a private or public school outside of the District *(see* R-2 and P-7), although the interrelationship between these two documents is unclear. The gravamen of the instant petitioner's contention here is that the District acted in violation of its established regulation by its failure to objectively evaluate K.S. through testing in its determination of an appropriate grade placement for her as required by that document. Although recognizing that testing for English language proficiency for students such as K.S. is mandated by *N.J.A.C.* 6A:15-1.1 *et seq.,* the Commissioner finds the examination herein should focus on whether the District's reliance on the results of this test and its "Entrance Age" policy (P-6), dealing with the admission of children to kindergarten and first grade, to determine whether K.S. would more appropriately be placed in 6th or ? th grade, when it appears to have in place a generally applicable

policy or practice for determining grade placement which it ostensibly uses for all other new students, was arbitrary, capricious or unreasonable.

Accordingly, this matter is hereby remanded to the OAL for expansion of the record as to Board policy #5120 and regulation R 5120 and the interrelationship between the two, along with the reasonableness of the District's deviation from established policies/procedures in making the grade placement determination for K.S.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/02/03

Date of Mailing: 9/3/03

* 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.***

529-03

11529-03

T.D'O. and R.D., on behalf of minor children, J.F.D., S.M.D. and S.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents challenged the Board's decision to deny enrollment to their children based on N.J.A.C. 6A:28-2.4(a)(l)(vii), which provides that where the students' dwelling is located within 2 or more local districts, the district of domicile for school attendance purposes shall be that of the municipality to which the resident pays the majority of property tax.

The ALJ found that it was undisputed that petitioners' property was located both in Fort Lee and Englewood and that the majority of the property taxes for the residence were paid to the City of Englewood. Therefore, it would be unfair for respondent to bear the financial burden of providing a free public education to petitioners' children while the City of Englewood received the benefit of the bulk of petitioners' taxes. The ALJ concluded that petitioners' children were not entitled to a free public education in the Borough of Fort Lee. *Citing Zadran,* the ALJ also concluded that, under the facts of this case, it would be inequitable to assess tuition against petitioners for the period of their children's attendance in respondent's schools.

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.

September 2, 2003



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3920-02
AGENCY DKT. NO. 107-4/02

T.D.'O AND R.D. ON BEHALF OF MINOR CHILDREN J.F.D., S.M.D. AND S.C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,
Respondent.

Kenneth J. **Lindenfelser,** Esq., for petitioners

Robert Tessaro, Esq., for respondent

Record Closed: June 26, 2003 Decided: July 31, 2003

BEFORE **LESLIE Z. CELENTANO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners T.D.'O and R.D. challenge the determination made by respondent Fort Lee Board of Education ("Board" or "District") that minor children J.F.D., S.M.D., and S.C. were not domiciled in the District and thus were not entitled to a free public education in the District.

A prior challenge to the Board's residency determination was heard by the Honorable Margaret M. Hayden, administrative law judge (ALJ), *R.O. on Behalf of Minor Children* S.C., S.O.'O *and J.D.'O v. Board of Education of Fort Lee, Bergen County,* EDU 7327-00, Initial Decision (February 21, 2001), *adopted in part, modified in part,* Comm'r of Educ. (April 2, 2001) <http://lawlibrary.rutgers.edu/oal/search.html>. Judge Hayden concluded in that matter that as petitioners were domiciled in Englewood, petitioners' children were not entitled to attend schools in the District. The Commissioner concurred, but ordered a tuition assessment against petitioners for the period of time after which the Board had determined the children were ineligible to attend school in the district. The amount of tuition owed was eventually compromised at the sum of $7,500 for the 2000-2001 school year.

The within matter was transmitted to the Office of Administrative Law (OAL) on May 13, 2002, 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. Counsel for the Board filed a motion for summary decision and petitioners cross-moved for summary decision. A hearing was scheduled for June 13, 2003, at the OAL in Newark and on that date the parties agreed that the matter would be decided on the papers. The Board's reply to petitioners' cross-motion for summary decision was received on June 26, 2003, and on that date the record closed.

FACTUAL DISCUSSION

The essential facts in this matter are not disputed. In approximately March 2000 the District office conducted a review of students enrolled in District schools who were residing in homes on streets straddling the boundary line with the adjacent municipality of Englewood. Petitioners resided at that time in a home located at 460 Westview Place, Englewood, New Jersey, pursuant to the recorded deed. Simultaneous with the review conducted by the District, petitioner T.D.'O submitted a verification of attendance form certifying her address as 460 Westview Place, Englewood, New Jersey. Following the submission of this information by T.D.'O, the District undertook an inquiry regarding the petitioners' property. The deed to the property showed the premises as being

located both in Fort Lee and in Englewood. The inquiry conducted by the Board also determined that the portion of the property located within Fort Lee was assessed for land only, with an annual real estate tax bill of $335.65. The Englewood Tax Assessor's Office assessed the property for land and improvements, resulting in an annual City of Englewood tax bill of $4,412.

As a result of this investigation, petitioners were advised that slightly more than two feet of a corner of the property was located in Fort Lee and the remainder of the property was located in Englewood. The superintendent of the District then determined to terminate the enrollment of petitioners' children. Following that determination petitioners had a hearing before the Board, at which time the decision to terminate enrollment was upheld.

Petitioners appealed that determination and by decision dated April 2, 2001, the Commissioner of Education affirmed in part and modified in part the decision of Judge Hayden, based upon the District's motion for summary decision, that petitioners' children were not entitled to a free public education in the District. The Commissioner modified that portion of Judge Hayden's decision that declined to assess tuition for the period of ineligible attendance, and the amount of tuition due was eventually compromised at the sum of $7,500.

At some point thereafter petitioners were informally advised that based upon the recommendation of the former superintendent, the children could remain in District schools if a portion of the residence were located within the District. Petitioners then represented to the Board that they would construct an addition adding living quarters within the District boundaries. Construction was commenced in August 2001. On November 1, 2001, the District enrollment officer, Thomas Sweeney, reported that his inspection of the premises at 460 Westview Place revealed that neither the inside nor the outside of the new structure was finished, in fact the interior construction was "99% incomplete." A further check by Mr. Sweeney with the Building Department revealed that no inspection had been conducted. Correspondence was sent by the District to petitioners advising that the children had been permitted to remain in District schools based upon a representation that construction of the addition would be diligently

pursued, and inquiring as to the status of the addition. Petitioners thereafter corresponded with the District, indicating that there had been some design changes and delays encountered but that the project was moving forward in a timely fashion.

On November 29, 2001, the superintendent of the District advised petitioners by letter that the New Jersey State Board of Education had adopted a new regulation requiring students to attend school in a district where the majority of the property tax for the dwelling in which they reside is paid. Petitioners were informed that as a result of the change in law the children would no longer be permitted to attend District schools, since even after completion of the addition the amount of taxes paid to the City of Englewood would far exceed the amount of taxes paid to the Borough of Fort Lee.

Petitioners continued with the construction of the addition and the certificate of occupancy was issued on May 14, 2002. Petitioners filed the within appeal seeking to have their children remain in the District without the payment of any tuition for the 2001-2002 or 2002-2003 school years.

MOTION FOR SUMMARY DECISION AND DISCUSSION

Summary decision is available in the administrative process pursuant to *N.J.A.C.* 1:1-12.5. The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery that 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 that 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. Additionally, the facts must be considered in the light most favorable to the opposing party. *Boyer v. Anchor Disposal,* 135 *N.J.* 86 (1994). Moreover, under the most recent guidelines delivered by our New Jersey Supreme Court, summary judgment is encouraged when the proper circumstances present themselves:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby, supra,* 477 *U.S.* at 249, 106 S. *Ct.* at 2511, 91 *L. Ed.* 2d at 212. Credibility determinations will continue to be made by a 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. *Liberty Lobby, supra,* 477 U.S. at 250, 106 S. *Ct.* at 2511, 91 *L. Ed.* 2d at 213. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," *Liberty Lobby, supra,* 477 U.S. at 252, 106 S. *Ct.* at 2512, 91 *L. Ed.* 2d at 214, the trial court should not hesitate to grant summary judgment.
>
> *[Brill v. Guardian Life Ins.* Co. *of America,* 142 *N.J.* 520, 540 {1995).]

This standard is equally applicable in the context of administrative proceedings. Even where a statute calls for a "hearing," where a motion for summary decision is made and supported by documentary evidence and where the objector submits no evidence to demonstrate a genuine issue of material fact, the motion procedure constitutes the hearing and no trial-type hearing is necessary. *Contini v. Newark Bd. of Educ.,* 286 *N.J. Super.* 106, 120-21 (App. Div. 1995), *certif. denied,* 145 *N.J.* 372 (1996). The matter is then considered in light of the applicable law.

In the instant matter, petitioners argue that respondent's motion for summary decision should be denied, but do not specify what material facts are in dispute. Contrary to petitioners' contentions, therefore, the underlying facts are clear and this matter is ripe for summary decision. *N.J.A.C.* 1:1-12.5(b); *Brill, supra,* 142 *N.J.* 520.

LEGAL DISCUSSION AND CONCLUSION

N.J.S.A. 1SA: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 the 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.

Petitioners assert and respondent does not dispute that petitioners have at all times acted in good faith. Petitioners also reference "the agreement made with the Board" which they relied upon in going ahead with plans for the addition.[1] Petitioners also assert the doctrines of laches, estoppel and equity in urging that the District be required to retain the children in the District schools.

N.J.A.C. 6A:28-2.4(a)(1)(vii), which was adopted on November 7, 2001, and became effective on December 17, 2001, provides as follows:

> Where a student's dwelling is located within two or more local school districts, or bears a mailing address that does not reflect the dwelling's physical location within a municipality, **the district of domicile for school attendance purposes shall be that of the municipality to which the resident pays the majority of his or her property tax,** or to which the majority of property tax for the dwelling in question is paid by the owner of a multi-family dwelling.
>
> [Emphasis added.]

Here it is undisputed that petitioners' property is located both in Fort Lee and in Englewood and that the assessment in Englewood of $142,800 exceeds that in Fort Lee of $43,900 by nearly $100,000. Clearly, the majority of the property taxes for the residence are being paid to the City of Englewood.

[1] No written agreement was entered into permitting the students to remain in the District school system.

Following the completion of the addition, the taxes paid to the Borough of Fort Lee for the year 2002 totaled $814.24. Taxes of $4,559.60 were collected by the City of Englewood for the year 2002, more than five times the amount paid to the Borough of Fort Lee.

Respondent cites the matter of *Zadran v. Board of Education of the Township of Belleville,* 97 *N.J.A.R.2d* (EDU) 335, *aff'd in part, rev'd in part,* State Bd. of Educ. (April 1, 1998), wherein the petitioner resided in a condominium located on the border between Belleville and Newark. The petitioner in that matter had a Belleville address and believed that he resided in Belleville, however, in actuality the unit sat directly on the boundary line, with the majority of the unit located in the city of Newark. Petitioner paid real estate taxes to Newark only, but his children were enrolled in Belleville schools. The ALJ concluded, and the Commissioner agreed, that the petitioner's children were domiciled in the city of Newark and not eligible to attend public school in Belleville free of charge, and that therefore tuition reimbursement was owed to Belleville. The ALJ noted that "it would be inequitable to impose the financial burden of educating the Zadran children on the citizens of Belleville while the citizens of Newark enjoy the benefit of tax revenues derived from their living arrangements." The State Board of Education affirmed the conclusion that the Zadran children were domiciled in Newark. I note, however, that the State Board also concluded that despite the "legal and geographical realities" in the case, it would be inequitable under the particular facts of the case to assess tuition against the petitioner for the period of his children's attendance in the Belleville schools, citing *State, Department of Environmental Protection v. Stavola,* 103 *N.J.* 425, 436 n.2 (1986) (any administrative agency in determining how best to effectuate public policy is limited by applying principles of fundamental fairness).

Petitioners in the instant matter urge that the principles of laches, estoppel and equity require that the District accept the children as students in District schools without requiring the payment of tuition. It is unclear, as petitioners make no argument in their papers relative to the concept of !aches, how respondent is guilty of laches in this matter.

The amended regulation[2] was adopted on November 7, 2001, with an effective date of December 17, 2001, and on November 29, 2001, correspondence was sent to petitioners from the Board enclosing a copy of the new regulation. Clearly this is not a situation where the District failed to act quickly enough. Laches is an equitable defense, asserted where neglect or omission to assert a right, over a period of time, causes prejudice to an adverse party. *Enfield v. FWL, Inc.,* 256 *N.J. Super.* 502, 520 (Ch. Div. 1991), *aff'd,* 256 *N.J. Super.* 466 (App. Div.), *certif. denied,* 130 *N.J.* 9 (1992). The delay in enforcing a known right must be unexplained and inexcusable and it must prejudice the party claiming it. *Gladden v. Board of Trustees of the Pub. Employees' Retirement Sys.,* 171 *N.J. Super.* 363, 370-71 (App. Div. 1979); *Allstate Ins. Co. v. Howard Sav. Inst.,* 127 *N.J. Super.* 479,489 (Ch. Div. 1974).

As the State Supreme Court articulated in *Lavin v. Board of Education of the City of Hackensack,* 90 *N.J.* 145, 151 (1982), quoting *Atlantic City v. Civil Service Commission,* 3 *N.J. Super.* 57, 60 (App. Div. 1949):

> "Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. More specifically, it is inexcusable delay in asserting a right . . . . " 30 C.J.S. § 112, pp. 520, 521.

Clearly, petitioners' claim of !aches is without merit.

With regard to the argument advanced by petitioners that the principle of equitable estoppel precludes the removal of the children from the District's schools, petitioners cite to the matter of *Carlsen v. Masters, Mates and Pilots Pension Plan Trust,* 80 *N.J.* 334, 339 (1979), wherein the New Jersey Supreme Court defined equitable estoppel as

> the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed . . . as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse.

[2] *N.J.A.C.* 6A:28-2.4(a)(l)(vii).

The basic requirements for claiming equitable estoppel against anyone - intentional misrepresentation and detrimental reliance thereon - must be proven against the State government. *Citizens for Equity v. New Jersey Dep't of Envtl. Protection,* 252 *N.J. Super.* 62, 79-80 (App. Div. 1990), *affd,* 126 *N.J.* 391 (1991). Since estoppel against the government may be detrimental to the public interest and could interfere with essential governmental functions, however, New Jersey courts require a claimant to prove more than just the basic elements of estoppel. *O'Malley v. Department of Energy,* 109 *N.J.* 309, 316 (1987). In *O'Mal/ey* the Court held that the Department of Energy was not estopped from returning an employee to his permanent position when a promotional examination was not administered between the date of his provisional appointment and date of "demotion." The Court referred to the Civil Service Act of 1986, *N.J.S.A.* 11A:1, in holding that a failure to administer a timely civil service examination does not vest a provisional appointee with the right to retain the provisional appointment until such time as the examination is given. *Id.* at 316. Courts have focused on the requirement of "knowing and intentional misrepresentation" by the party to be estopped. *Id.* at 317. This intent can be seen where the governmental agent "engages in conduct that is calculated to mislead the [petitioner]." *W.V. Pangbome & Co. v. New Jersey Dep't of Transp.,* 116 *N.J.* 543, 553 (1989).

The "intent" requirement is further defined by the Court's ruling that "the party seeking the benefit of estoppal [against the State] has the burden of establishing that an officer of the State, conscious of the State's true interest and aware of the private owner's misapprehension, stood by while the private owner acted in detrimental reliance." *City of Newark v. Natural Resource Council in Dep't of Envtl. Protection,* 82 *N.J.* 530, 545, *cert. denied,* 449 U.S. 983, 101 *S. Ct.* 400, 66 *L. Ed.2d* 245 (1980), citing *O'Neill v. State Highway Dep't,* 50 *N.J.* 307, 318 (1967). Words such as "conscious" and "awareness" connote intentional conduct.

Thus, in addition to the traditional equitable estoppel elements, New Jersey courts also require a showing of intentional misrepresentation or other intentional misconduct, or at least a negligent disregard as to the consequences (detrimental reliance) of the acts by the government in order for a claimant to be able to assert equitable estoppel against the government.

In the within matter there is no allegation of any misrepresentation, intentional or otherwise. The then superintendent's suggestion to petitioners was made based upon the law at the time. The thrust of petitioners' argument is that the District has breached an agreement entered into with petitioners, and upon which petitioners relied. However, no agreement was entered into by the parties. Although I am sympathetic to petitioners' belief at the outset that they resided in Fort Lee, the fact remains that petitioners reside in Englewood and have an Englewood address, as reflected in their deed. As Judge Hayden articulated in the prior proceedings, "the fact that [petitioner] held himself out to others as living in Fort Lee does not change geography." *R.D., supra,* EDU 7327-00, Initial Decision (February 21, 2001) <http://lawlibrary.rutgers.edu/oal/search.html>.

Based upon all of the foregoing, I **FIND** that there are no material facts at issue. I **FIND** that petitioners pay the majority of their property taxes to the City of Englewood and, accordingly, it would be unfair for the Borough of Fort Lee to continue to bear the financial burden of providing a free public education to petitioners' children while the City of Englewood receives the benefit of the bulk of petitioners' property taxes.

The burden of proof rests with petitioners. In proceedings such as this, the parent has the burden of proof by a preponderance of the evidence to establish that the children meet the eligibility requirements. In this matter there is no dispute that J.F.D., S.M.D. and S.C. are not domiciled within the District, and I therefore **CONCLUDE** that petitioners' children are not entitled to a free public education in the Borough of Fort Lee.

The District has asserted a counterclaim for tuition at the per diem rate of $42.69 for the ineligible attendance of each child from the date petitioners were notified of the enactment of *N.J.A.C.* 6A:28-2.4(a)(1)(vii). The rationale applied by the State Board of Education in the *Zadran* case is equally applicable here. The inequity that would result from the assessment of tuition against the petitioners for the period of their children's attendance in District schools is no less compelling than the inequity in *Zadran,* notwithstanding the "legal and geographical realities" in the within matter.

As the Court articulated in *Stavola, supra,* 103 *N.J.* at 436 n.2:

> "When specific parties are particularly affected by a proposed rule, fair play and administrative due process dictate that an agency must conscientiously concern itself with and make reasonable efforts to accommodate the rights and interests of the affected individual and genuinely account for the individualized effect of its proposed action." *Bally Mfg. Corp. v. New Jersey Casino Control Comm'n,* 85 *N.J.* 25, 345 (1981) (Handler, J., concurring).
>
> "[T]here are no simple answers as to what constitutes fundamental fairness" and "[e]ach case must be considered and evaluated on its merits." *In re Kallen,* 92 *N.J.* 14, 27 (1983).

I **CONCLUDE** that under the facts of this case, tuition should not be assessed against petitioners for the period of their children's attendance in District schools.

ORDER

It is hereby **ORDERED** that petitioners' appeal of respondent's determination is **DISMISSED.** It is further **ORDERED** that J.F.D., S.M.D. and S.C. are ineligible for 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.

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.

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LESLIE Z. CELENTANO, ALJ

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

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DATE

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AUG 5 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

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EXHIBIT LIST

For Petitioners:

A	Letter to petitioners from counsel for the Board dated November 5, 2001
B	Letter from petitioners to counsel for the Board dated November 14, 2001
C	Letter to petitioners from Interim Superintendent of Schools Dr. DiGiovanni, dated November 29, 2001
D	Letter to petitioners from Dr. DiGiovanni dated March 25, 2002
E-H	Pictures of petitioners' home
I	Certificate of Occupancy dated May 14, 2002

For Respondent:

A	Change of address form submitted by petitioners
B	Deed dated June 17, 1998, and deed dated July 1, 1993
C	Deed dated June 17, 1998
D	Tax office information from Fort Lee
E	Memorandum from Tom Sweeney to petitioners dated June 7, 2000
F	Letter dated May 10, 2000, from Fort Lee Fire Prevention Bureau revoking petitioners' Certificate of Occupancy
G	Student Verification of Right of Attendance
H	Survey of petitioners' property dated July 8, 1993
I	Survey of petitioners' property dated May 25, 2000
J	Resolution entered into by the Board on June 6, 2000
K	Decision of the Commissioner of Education (in prior proceeding) dated April 2, 2001, and Initial Decision of Judge Hayden dated February 21, 2001
L	Memorandum to Dr. DiGiovanni from Tom Sweeney
M	Letter to petitioners from Interim Superintendent DiGiovanni dated November 29, 2001
N	Letter to petitioners from Interim Superintendent DiGiovanni dated March 25,2002

0 Tax Assessment Information from City of Englewood

P Tax Bill from the City of Englewood

T.D'O. and R.D., on behalf of minor children, J.F.D., S.M.D. and S.C.,	:	
PETITIONERS,	:	
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. The Board's exceptions were timely filed pursuant to ***N.J.A.C.*** 1:1-18.4. No reply was filed by petitioners.

The Board's exceptions, objecting to the Administrative Law Judge's (ALJ) failure to award it tuition in this matter, essentially recast and reiterate a factual recitation and arguments advanced below which the Commissioner determines were fully addressed by the ALJ in her decision and, therefore, will not be revisited herein.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the A U that J.F.D., S.M.D. and S.C. are not domiciled in the Borough of Fort Lee and, thus, are not entitled to a free public education in the District's schools. The Commissioner, similarly, agrees with the A U that, under the particular circumstances existing here, it would be inequitable to assess tuition against petitioners for the period of their children's attendance in Fort Lee schools. *Zadran v. Board of Education of the Township of*

Belleville, 97 *N.J.A.R.* 2d (EDU) 335, *aff'd in part, rev'd in part,* State Board of Education, April 1, 1998.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/2/03

Date of Mailing: 9/4/03

* 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.***

>f-03

11531-03

E.B., on behalf of minor children, R.B. and R.V., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

September 4, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9660-01

AGENCY DKT. NO. 469-11/01

E.B. o/b/o of MINOR CHILDREN,

R.B. AND R.V.,

Appellant,

v.

BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY,

Respondent.

E.B., parent of **R.B. and R.V.,** appearing pursuant to *N.J.A.C.* 1:1-5.4(a)7, for petitioner

Joseph M. Wenzel, Esq., for respondent
(Law Offices of T.M. McCormack, attorney)

Record Closed: September 10, 2002 Decided: July 25, 2003

BEFORE **IRENE JONES,** ALJ:

On December 19, 2002 this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:148-1 to -15 and *N.J.S.A.* 52:14F1 to -13. The matter was scheduled for hearing on several occasions but adjourned because the parties were discussing settlement. On September 10, 2002 a Stipulation of Settlement/Dismissal was filed and was inadvertently misplaced during the OAL's relocation.

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.* 52:148-10.

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DAE /

IRENE JONES,

Receipt Acknowledged:

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DATE

DEPARTMENT OF EDUCATION

Mail eo

ACTING D!RECTOR AND
EFADC::NiSTA/\TIVE **LAW JUDGE**

AUG
DATE

OFFICE OF ADMINISTRATIVE LAW

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LUM, DANZIS, CRASCO, POSITAN & KL!INBERG, LLC
103 Eisenhower Parkway
Roseland, NJ 07068-1049
(973) 403-9000
(973) 403.9021 (FAX)
Attorneys for Respondent

Sfp 12 IZ 12 f/1 'OZ

E.B. o/rJ/o R.B. and R.B.

Pmtioncr,

·VS·

Board of Education. ofth Tov.nsh p of Union, Union County

RC$pondcnt.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

OAL Docket No. EDU-9660-0lN

Civil Action

SETTLEMENT STIPULATION, DISMISSAL AND MUTUAL RELEASE

AGREEMENT and stipulation made this 23rd day of April, between E.B.• on behalf of minor children, R.B. and R.B., Petitioner, and the Board of Education of the Township of Union, Union County, Respondent.

WHEREAS disputes and differences have arisen between the parties with re$pect to the residency of the minor children.

WHEREAS, Petitioner and Respondent desire to finally compromise and settle their differmces by entering into this stipulation;

NOW THEREFORE in consideration of their mutual covenants set forth herein. Petitioner and Respondent hereby agree as follows:

I. Payment. E.B. shall pay the Board of Education of the Township of Union the total cash sum of Two thou.sand two hundred fifty dollars ($2,250.00). This amount is to be paid by Petitioner in the following manner:

$2,250.001hall b. ""• simultangously wilh the signinr ofth/4 ttlpulation.

This amount once paid in full ($2,250.00) represents the settlement of all claims and by and for tuition due and owing for educational service$ providt.d to minor children for School Year 2001-2002. If the full amount is not paid by certined check or attorney trust account check on or before May 3, 2002; the Board *of* Education of the Township of Union reserves the right to enforce this settlement agreement through a coun proceeding for the full amount due plus attorney's fees and costs or in the alternative initiate an action for the full amount of tuition alleged due ti-om the Petitioner.

2. Genertl Release by Petitioner. E.B., on her own behalf and on the behalf of her heirs, penonal representatives, successors and assigns, including but not limited to minor children. hereby releases and forever discharges the Board of Education of the Township of"Union and their employees, agents, officers, directon and attorneys, from any and all actions, causes of action. suits, debts, dues, sums of money, accounts, bills, invoices, covenants, contracts. controversies, agreements, promises, damages, costs, attorneys fees, interest, warranties, representations, claims and demands whatsoever, in law or equity. which Petitioner or anyone claiming by, through or under ever had or now has against the Board of Education of the. Township of Union or its employees, agents, officers, directors or attorneys by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of this instrument. Toe undersigned hereby agree that the effect *of* this general release includes, but is not limited to. the elimination of an.

and all further liability on the part of the Board of Education of the Township of Union, with respect to all matters claimed by E.B. in that certain petition filed with the State of New Jersey Department of Education. Bureau of Controversies and Disputes, Agency Docket No. 469-11/01, captioned "E.B. on behalf of minor children, R.B. and R.B., Petitioner vs. Board of Education of the Township o(Union, Union County, Respondent'\ Petitioner hereby represent and acknowledge that this is a legally binding instrument, that there • e no representations or promises made to them which are not contained in this inatrument, and that the only obligation of Petitioner shall be to pay the Board of Education of the Township of Union the said above-mentioned sum of s2.2s0.oo.

3. General Release by tb.e Board of Education of the Township of Ualon. The Board of Edu.cation o'f the Township of Union, on.their own behalf and on tho behalf of their successors and assigns, hereby releases and forever discharges Petitioner and her heirs, personnel representatives, successors and assi$_{g\,n\,s}$, from any and all actions, causes of action, suits. debts. dues, sums of money. counts.. bills, in.voices, covenants, contracts. controversies. agreements, promises. damage9, costs, attomeys fees., interest;. warranties, representations, claims and demands whatsoever. in law or equity, which the Board of Education of the Township or Union or anyone claiming by, throuah or under ever bad or now has against Petitioner by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of this ins1rumcnt The Wldcrsigncd hereby agree that .the effect of this general release includes. but is not limited to. the elimination of any and all further liability on the part of Petitioner, with respect to all matters claimed by the Board of Education of the Township of Urtiott in that certain counterclaim filed with the State of New Jersey Department of Education. BureaJJ. of Controversies and Disputes,

Agency Docket No. 469-11/01, captioned "E.B. on behalf of minor children, R.B. and R.B., Petitioner vs. Board of Education of the Township of Union, Union Cowty. Respondent", The Board of Education of the Township of Union hereby represents and acknowledges that this is ll legally bindinl instrument. that there are no representations or promises made which are not contained in this instnunent, and that the only obliption *Ot* Petitioner shall be to pay the Board or Education *of* the Township of'Union the said above-mentioned sum of$2,2S0.00.

4. DlsmJssal. The parties hereby agree and stipulate that this case is voluntarily dismissed with prejudice and without costs.

IN WITNESS WHEREOF, the parties hereto have executed this stipulation as of the day and year &st written above.

PETITIONER:
Elvire Bastien

P.ESPONDBNT:
Board of Education of Township of Union

By.-f}1¥-

Title: BQld.Sc;gctary

A'TTEST:

Carl *T.* Herman. Esq.
Anomey for Petitioner

ATI'EST:

Joseph M. Wenzel, Esq.
Attorney for Respondent

OAL DKT. NO. EDU 9660-01
AGENCY DKT. NO. 469-11/01

E.B., on behalf of minor children, R.B. and R.V.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION 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.[1] [2]

Upon review, the Commissioner approves the settlement terms and adopts the Settlement Agreement as the final decision in this matter. In so doing, 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 presented to the Commissioner for his review prior to receiving approval from 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: 9I 4/ 03

Date of Mailing: 9/5/03

[1] It is noted that party representation is listed erroneously in the Initial Decision. Petitioners are represented by Carl J. Herman, Esq., and the Board by Joseph M. Wenzel, Esq. (Lum, Danzis, Drasco & Positan, LLC).

[2] Correspondence indicating Mr. Damato's authorization to approve settlement on behalf of the Board was submitted to the record at the Department's request.

#538-03E

CONTROL BUILDING SERVICES, INC.,	:	
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, PATERSON BOARD OF EDUCATION, EDWIN DUROY, MICHAEL AZZARA AND PRITCHARD INDUSTRIES,	:	COMMISSIONER OF EDUCATION
	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

September 8, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 7429-03
AGENCY DKT. NO. 268-7/03

CONTROL BUILDING SERVICES, INC.,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, PATERSON BOARD OF EDUCATION, EDWIN DUROY, MICHAEL AZZARA AND PRITCHARD INDUSTRIES,

Respondents.

Joseph B. Fiorenzo, Esq., for petitioner
(Sokol, Behot and Fiorenzo, attorneys)

Jack Gillman, Esq., for the State-Operated School District of the City of Paterson, Paterson Board of Education, Edwin Duroy and Michael Azzara

Patrick T. Collins, Esq., for Pritchard Industries
(Franzblau Dratch, attorneys)

BEFORE **RICHARD McGILL,** ALJ:

The dispute in this matter concerns the award of a contract for custodial services by the State-Operated School District of the City of Paterson ("School District") to Pritchard Industries ("Pritchard") pursuant to the Public School Contracts Law, *N.J.S.A.* **18A:18A-1** to -59. The complaining party in this matter is Control Building Service, Inc. ("Control" or "petitioner"), which is the incumbent provider of custodial services to the School District. In a Verified Complaint which was originally filed with the Superior Court of New Jersey and subsequently

transferred to the Commissioner of Education, Control alleges that the process of awarding the contract violated various provisions of the Public School Contracts Law and the Public School Education Act of 1975, as amended, *N.J.S.A.* 18A:7A-3 to -52. In conjunction with the transfer, Control filed a motion to continue a preliminary injunction entered by the New Jersey Superior Court.

Control originally filed the Verified Complaint in the Superior Court of New Jersey on or about June 29, 2003, and an order preliminarily restraining the respondents from executing the contract and Pritchard from performing the services was entered on June 30, 2003. An order maintaining the temporary restraints and transferring the matter to the Commissioner of Education was entered on July 28, 2003.

Control's filing with Commissioner of Education was received on July 31, 2003, and the matter was transmitted to the Office of Administrative Law on August 5, 2003, for determination as a contested case. Oral argument in regard to Control's motion to continue the preliminary restraints entered by the Superior Court of New Jersey was conducted on August 13, 2003.

In terms applicable to this administrative proceeding, Control has in effect applied for emergent relief or a stay pursuant to *N.J.A.C.* 6A:3-1.6(a). As set forth in *N.J.A.C.* 6A:3-1.6(b), the factors to consider in regard to an application for emergent relief are as follows:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

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

The first consideration is whether Control will suffer irreparable harm if the requested relief is not granted. Harm is considered to be irreparable if it cannot be remedied by money damages. Injunctive relief is generally viewed as the only effective means to safeguard the policy

objectives of public bidding statutes. *Disposmatic Corp. v. Mayor & Council of Kearny,* 162 *N.J. Super.* 489, 495-96 (Ch. Div. 1978). Specific to this case, award of the contract to Pritchard will cause Control to lose key managerial personnel assigned to the oversight of the School District's custodial contract. In addition, custodial staff members who become employees of Pritchard may lose their medical benefits for a period of ninety days as described further below. Under the circumstances, petitioner along with others will suffer irreparable harm if the requested relief is not granted.

The second consideration is whether the legal right underlying petitioner's claim is settled. Here, Control's claim is based on well-settled law in regard to bidding on public contracts and a specific statutory provision from the Public School Education Act of 1975, as amended. It follows that the legal right underlying petitioner's claim is well settled.

The third consideration is whether petitioner has a likelihood of prevailing on the merits of the underlying claim. Evaluation of this consideration requires an understanding of the principles underlying statutes governing bidding on public contracts. In *Meadowbrook Carting Co. v. Island Heights Borough,* 138 *N.J.* 307 (1994), our Supreme Court set forth these principles as follows:

> The competitive-bidding process is incorporated in the Local Public Contracts Law. *N.J.S.A.* 40A:11-3 and -4 require that municipalities and counties advertise for bids on public contracts that exceed the statutory threshold amount. The purpose of the Local Public Contracts Law is to "secure for the public the benefits of unfettered competition." *Terminal Constr. Corp. v. Atlantic County Sewerage Auth.,* 67 *NJ.* 403,410,341 *A.2d* 327 (1975); *see also Township of River Vale v. R.J. Longo Constr. Co.,* 127 *NJ.Super.* 207, 215, 316 *A.2d* 737 (Law Div. 1974) (stating that purpose of competitive bidding for local public contracts is not protection of individual interests of bidders, but rather advancement of public interest in securing most economical result by inviting competition in which all bidders are placed on equal basis). The statutes authorizing competitive bidding accomplish that purpose by promoting competition on an equal footing and guarding against "favoritism, improvidence, extravagance and corruption." *Township of Hillside v. Sternin,* 25 *NJ.* 317, 322, 136 A.2d 265 (1957); *see also L. Pucillo & Sons, Inc. v. Mayor of New Milford,* 73 *NJ.* 349, 356, 375 *A.2d* 602 (1977) *(L. Pucillo)* (stating that purpose of act is " •to guard against favoritism, improvidence, extravagance and corruption' ") (quoting *Terminal Constr. Corp., supra,* 67 *NJ.* at 410,341 *A.2d* 327).

Accordingly, the statutory rule in New Jersey is that publicly advertised contracts must be awarded to "the lowest responsible bidder." *N.J.S.A.* 40A: 11-6.1; *see also Hillside, supra,* 25 *N.J.* at 323, 326, 136 *A.2d* 265 (construing predecessor to Local Public Contracts Law). This Court has interpreted that requirement to mean that the contract must be awarded not simply to the lowest bidder, but rather to the lowest bidder that complies with the substantive and procedural requirements in the bid advertisements and specifications. *Hillside, supra,* 25 *N.J.* at 324, 136 *A.2d* 265 ("The significance of the expression 'lowest bidder' is not restricted to the amount of the bid; it means also that the bid conforms with the specifications."); *see also William A. Carey & Co. v. Borough of Fair Lawn,* 37 *N.J. Super.* 159, 165, 117 *A.2d* 140 (App. Div. 1955) ("The lowest bidder, within the contemplation of the statute [the predecessor of *N.J.S.A.* 40A:11-1 to *-49][ ]* is the one whose bid is not only the lowest for the work to be done but also conforms to the requirements of the notice to bidders.").

Strict compliance is required, and a municipality generally is without discretion to accept a defective bid. See *L. Pucillo, supra,* 73 *N.J.* at 356, 375 *A.2d* 602; *426 Bloomfield Ave. Corp. v. City of Newark,* 262 *N.J. Super.* 384, 387, 621 *A.2d* 59 (App. Div. 1993). "The long-standing judicial policy in construing cases governed by the Local Public Contracts Law *** has been to curtail the discretion of local authorities by demanding strict compliance with public bidding guidelines." *L. Pucillo, supra,* 73 *N.J.* at 356, 375 *A.2d* 602. This Court has adopted that approach largely as a prophylactic measure. *Ibid.* As Justice Francis observed in *Hillside, supra,* "In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way." 25 *N.J.* at 326, 136 *A.2d* 265.

As a result, all bids must comply with the terms imposed, and any material departure invalidates a nonconforming bid as well as any contract based upon it. *Id.* at 323, 136 A.2d 265. "It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived." *Terminal Constr. Corp., supra,* 67 *N.J.* at 411, 341 A.2d 327 (citing *Hillside, supra,* 25 *N.J.* at 324, 136 *A.2d* 265). However, minor or inconsequential discrepancies and technical omissions can be the subject of waiver. *Ibid; Hillside, supra,* 25 *N.J.* at 324, 136 *A.2d* 265. That limitation on the doctrine of strict compliance was acknowledged in *Terminal Construction Corp., supra:*

> Essentially this distinction between conditions that may or may not be waived stems from a recognition that there are certain requirements often incorporated in bidding specifications [that] by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding. In sharp contrast, advertised conditions whose waiver is capable of becoming a vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance, or likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding, or which are capable of affecting the

> ability of the contracting unit to make bid comparisons, are the kind of conditions [that] may not under any circumstances be waived. [67 *N.J.* at 412, 341 *A.2d* 327.]
>
> [*Id.* at 313-15.]

Generally, specifications may not be modified after the submission of bids. *Hillside Twp. v. Sternin,* 25 *NJ.* 317, 327 (1957). Further, private understandings which undermine the requirement that all bidders bid on the same specifications are impermissible. *Belousofsky v. Board of Education of City of Linden,* 54 *N.J. Super.* 219, 222-23 (App. Div. 1959). However, imposition of post-bid conditions adverse to the bidder is permissible. *Palamar Const., Inc. v. Tp. of Pennsauken, 196 NJ. Super.* 241,253 (App. Div. 1983).

Several statutes and a regulation are applicable to this case. In accordance with *NJ.SA.* 18A: 18A-4(a), every contract for the performance of services, the cost of which in aggregate exceeds the bid threshold, shall be awarded only by resolution of the board of education to the lowest responsible bidder after public advertising for bids and bidding therefor. A board of education may reject all bids for various reasons including a determination by the board to substantially revise the specifications for goods and services. *NJ.S.A.* 18A:18A-22(d). Change orders to a contract which has been awarded to a bidder are permissible but only under limited circumstances. *NJ.A.C.* 6A:23-7.1{a). Finally, beginning in the fourth year of State operation, the State district superintendent shall bring fiscal matters before the board of education for a vote. *NJ.SA.* 18A:7A-48(b).

The general course of events is reasonably clear from the certifications and exhibits submitted in this matter. Pursuant to contracts awarded after public bidding, Control has provided custodial services to the School District since July 1996. In March 2003, the School District gave public notice of an invitation to bid for its custodial services in accordance with a set of specifications. Two of the specifications are significant in relation to the dispute in this matter. One specification required full employer contribution toward employee health benefits after three months of service. This provision raised a concern that custodial workers would lose their medical benefits for a period of ninety days under a new contractor. Another specification required a one-hour paid meal break for custodians on the shift from 3:00 p.m. to 11:00 p.m. The closing time and date for submission of bids was 11:00 a.m. on April 3, 2003.

At that point in time, Control had a collective bargaining agreement applicable to 214 employees. In accordance with the agreement, health benefits were required for all employees who completed one year of employment. As of July 1, 2003, 196 of those employees would be eligible for health benefits. While the source is not entirely clear from the submissions in regard to the request for emergent relief, there was an expectation or understanding that any new contractor would take on the same custodial workers performing services for the School District as were employees of Control.

Bids were opened on April 3, 2003. Control submitted a bid of $6,841,000. Pritchard's bid of $6,247,000 was lower by $594,000. Two other bids were higher than the amount submitted by Control.

After reviewing the details of Pritchard's bid, the Union raised the concern that medical benefits could not possibly be provided for the estimated amount included in the bid. In addition, it appears that some individuals including members of the Paterson Board of Education ("Board") did not consider the ninety-day interruption in medical benefits to be acceptable. The inference may be drawn that this circumstance raised a concern among certain individuals that the Board would reject all bids and require revisions to the specifications.

In an apparent attempt to deal with this situation, Pritchard wrote a letter dated April 16, 2003, to the School District proposing to provide medical coverage during the first three months at an estimated cost of $123,600. In exchange, Pritchard suggested that the paid meal break for the shift from 3:00 p.m. to 11:00 p.m. be changed to unpaid with an estimated savings of $120,348.83. Pritchard would not charge the difference to the school district. It may be noted that Control estimated the cost of this provision to be in the area of $600,000.

There followed a series of communications between Pritchard's representative and Business Administrator Michael Azzara. The result was an agreement that Pritchard would provide medical coverage to employees as of July 1, 2003, and that the funds to cover the additional expense would be derived from a change order which would provide for an unpaid one-hour meal period for custodians on the shift from 3:00 p.m. to 11:00 p.m. In fact, the

Business Administrator prepared a change order with a date of July 16, 2003, to implement the agreement.

On May 30, 2003, the custodial contract was presented to the Board for consideration. The Board voted to table the matter by a vote of eight to one. In a memorandwn dated June 11, 2003, the School District's attorney expressed the opinion that the change order as proposed by the Business Administrator would be illegal. In addition, the ninety-day hiatus in medical coverage for new employees created a situation where all bidders were not on an equal basis because Control as the incumbent could not benefit therefrom.

The next public meeting of the Board was held on June 11, 2003. At 11:57 p.m., District Superintendent Edwin Duroy handed out a resolution stating that all custodial bids would be rejected and that the contract would be rebid. The comments of the members of the Board reflect consternation that an important matter would be raised at such a late hour and a desire for additional time to consider the resolution. The Board voted to table the resolution without acting on it that evening.

In a letter dated June 13, 2003, to the State Department of Education, the Business Administrator opposed the District Superintendent's recommendation to reject the bids for the custodial services and rebid. The Business Administrator recommended that the contract be awarded to Pritchard. In addition, the Business Administrator stated that the paid lunch break was put in the specifications in error based upon erroneous information that it was required by the current Union contract.

As late as June 19, 2003, District Superintendent Du.roy continued to recommend rejection of all bids and re-bid of the contract. A meeting among School District personnel and bidders was scheduled for June 24, 2003. The meeting was canceled on June 23, 2003.

By letter dated June 24, 2003, the Commissioner of Education directed that the contract be awarded to the responsible low bidder. Thereafter, District Superintendent Duroy awarded the contract to Pritchard. As noted above, the initial temporary restraints were imposed by Order dated June 30, 2003. By letter dated July 22, 2003, the Commissioner of Education rescinded his

prior directive in the letter dated June 24, 2003, citing new facts that had come to light and greater complexity of the issues.

Consideration of these facts in light of the legal principles pertaining to the bidding for public contracts reveals several potentially fatal flaws in the process. First, it is questionable whether all bidders were in equal positions from the start. All bidders other than the incumbent could benefit from the three-month period without medical benefits for new employees. However, Control as the incumbent with existing employees may have been bound by contract to provide health benefits during this period. Second, School District personnel were aware of two problems with the specifications. One problem is that the custodial workers could lose their health benefits for a three-month period. Second, the specifications provided for a costly paid lunch break which was included therein based upon the erroneous belief that it was required by the Union contract. This requirement appears to be quite improvident. These problems would appear to the sufficiently serious to warrant rejection of all bids, revision of the specifications and a re-bid of the contract as recommended by District Superintendent Duroy. Given the concerns expressed by members of the Board, they likely would have followed the recommendation of Dr. Duroy if they had been given a reasonable opportunity to do so. This approach would have placed all bidders on an equal basis in relation to changes in the specifications. Instead, the School District took the approach of negotiating changes in the specifications with only one bidder, namely, Pritchard. This is the sort of favoritism that the laws pertaining to bidding on public contracts are designed to prevent. It follows that Control has a likelihood of success in regard to its allegations of violations of the Public School Contracts Law.

Control also alleges that District Superintendent Duroy violated *N.J.S.A.* 18A:7A-48(b), which requires that fiscal matters be brought before the Board for a vote. This provision requires a good faith effort to provide the Board with a reasonable and meaningful opportunity to vote on fiscal matters. In this case, the Board was not given that type of opportunity and the record does not indicate that a good faith effort was made to do so. It follows that Control has a reasonable probability of success with its contention that the award of the contract to Pritchard by District Superintendent Duroy was *ultra vires* and therefore null and void.

In regard to the equities and interest of the parties, both Control and Pritchard seek the financial benefit of the contract. An additional concern for Control is the potential loss of managerial personnel, if Pritchard provides the custodial service during the pendency of this proceeding. Evidently, the several respondents connected with the School District did not take identical views of the situation. One consideration is that the low bid would produce a savings for the School District relative to the other bids. On the other hand, the Board had concerns with the harshness of the custodial employees losing their medical benefits for a three-month period. Further, the requirement of a paid one-hour lunch break appears improvident such that a revision of the specifications to eliminate this requirement could produce a savings for the School District. Finally and most importantly, parties should not benefit from acts which, as discussed above, are likely violations of various laws. On balance, the equities and interests of the parties indicate that the most appropriate course of action is to maintain the status quo during the pendency of this proceeding.

In view of the above, I **CONCLUDE** that the emergent relief requested by Control should be granted. Accordingly, it is **ORDERED** that the Preliminary Injunction as previously entered by the New Jersey Superior Court, Law Division, Passaic County, on June 30, 2003, and maintained in effect by Order dated July 28, 2003, shall continue in effect during the pendency of this proceeding.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five (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.

A-...'-'\1.003
DATE

RICHARD M. GLEN, ALJ

cl/pb/jb

OAL DKT. NO. EDU 7429-03
AGENCY DKT. NO. 268-7/03

CONTROL BUILDING SERVICES, INC.,	:	
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, PATERSON BOARD OF EDUCATION, EDWIN DUROY, MICHAEL AZZARA AND PRITCHARD INDUSTRIES,	:	COMMISSIONER OF EDUCATION
	:	DECISION ON MOTION
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 (OAL) on August 13, 2003, has been reviewed. Upon such review, the Deputy Commissioner, to whom this matter has been delegated pursuant to ***N.J.S.A.*** 18A:4-33, concurs that petitioner 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. The preliminary injunction previously entered by the New Jersey Superior Court, Law Division, Passaic County, on June 30, 2003, and maintained in effect by Order dated July 28, 2003, shall continue in effect during the pendency of proceedings which shall ':."ntinue at 4

IT IS SO ORDERED.•

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 9/08/03

Date of Mailing: 9/10/03

* 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*.

#540-03

OAL DKT. NO. EDU. 7557-00
AGENCY DKT. NO. 260-7/00

O.M., on behalf of minor child, J.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged the Board's residency determination that minor child, J.M., was ineligible to attend respondent's public schools free of charge in accordance with *N.J.S.A.* 18A:38-1 during the 1998-1999 and 1999-2000 school years. The Board sought tuition reimbursement for the alleged period of ineligible attendance.

In light of the record and the testimony of witnesses, the ALJ concluded that petitioner failed to prove by a preponderance of evidence that J.M. was domiciled in respondent's school district during the years in question. Petition was dismissed. The ALJ concluded that petitioner must be assessed $26,612 as tuition reimbursement to the Board.

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.

September 10, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7557-00
AGENCY DKT. NO. 260-7/00

O.M. ON BEHALF OF MINOR CHILD, J.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,

Respondent.

Michael J. Montanari, Esq., for petitioner
(Fusco & Macaluso, attorneys)

Joseph A. DeFuria, Esq., for respondent
(Gaccione, Pomaco & Beck, attorneys}

Record Closed: March 18, 2003 Decided: July 28, 2003

BEFORE **RICHARD McGILL,** ALJ:

O.M. (hereinafter "petitioner"} filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the Township of

Bloomfield (hereinafter "respondent") in regard to minor child, J.M. Respondent counterclaims for tuition reimbursement for an alleged period of ineligible attendance.

PROCEDURAL HISTORY

Petitioner filed his petition on July 19, 2000, invoking the Commissioner's authority to hear and determine controversies arising under the school laws pursuant to *N.J.S.A.* 18A:6-9. On August 10, 2000, respondent filed an answer and counterclaim. The matter was transmitted to the Office of Administrative Law on August 21, 2000, for determination as a contested case.

The hearing in this matter was held on April 8, September 18, and December 18, 2002, at the Office of Administrative Law in Newark, New Jersey. The record closed on March 18, 2003, upon receipt of petitioner's brief.

ISSUES

The main issue in this proceeding is whether J.M. was eligible to attend respondent's public schools free of charge in accordance with *N.J.S.A.* 18A:38-1 during the 1998-1999 and 1999-2000 school years. More specifically, the question is whether J.M. was domiciled within respondent's school district during these two school years. Since petitioner established to respondent's satisfaction that J.M. was domiciled in the school district as of the beginning of the 2000-2001 school year, there is no question as to disenrollment. The final issue is whether respondent's counterclaim for tuition reimbursement should be granted.

BACKGROUND AND UNDISPUTED FACTS

Prior to May 1998, petitioner lived on D. Avenue in Newark, New Jersey, with his wife, M.M., and three children whose ages as of 1998 were four, eight and fourteen. The youngest of the three children was J.M., who had a serious medical condition such

that he had to take medication multiple times per day and required constant supervision. During the 1997-1998 school year, J.M. was registered in the Newark public schools.

On May 1, 1998, petitioner and **M.M.** purchased property on E. Street in Bloomfield, New Jersey. There were two structures on the property including a front house with three apartments and a single-family dwelling to the rear.

In September 1998, M.M. registered J.M. and J.M.'s older brother, Ju.M., to attend respondent's public schools. The registration form gave E. Street in Bloomfield as their address. Ju.M. entered respondent's Carteret School as a third grade student, and after an evaluation by the child study team, J.M. was placed in a pre-school handicapped class at the Oakview School. After one year at the Carteret School, Ju.M. transferred to a parochial school.

On June 15, 2000, petitioner and his wife purchased a home on Y. Avenue in Bloomfield. It is undisputed that J.M. was domiciled in respondent's school district subsequent to this purchase.

SUMMARY OF EVIDENCE

Petitioner testified on his own behalf, and he called his wife, **M.M.,** as a witness. Respondent's witnesses included District Compliance Officer Jeffrey Allyn and Dr. Nicholas Bruno, who is respondent's Director of Administrative Services.

2. Petitioner's Witnesses

1. M.M.

M.M. testified that she currently lives on Y. Avenue in Bloomfield. Prior to May 1998, M.M. lived with her husband and children in a two-family house on D. Avenue in Newark. From May 1998 into 2000, M.M. resided on E. Street in Bloomfield.

The front house on E. Street has three apartments. M.M.'s parents live on the first floor, and the other two apartments are rented to tenants. A.Q. is M.M.'s mother, and W.A. is M.M.'s father.

Petitioner and M.M. lived in the single-family house on the property on E. Street. This house has a living room, a bedroom, a kitchen and a bathroom on the first floor, two bedrooms on the second floor and a finished basement. Petitioner and M.M. slept in the bedroom on the first floor, and the children slept upstairs.

M.M. has been employed as a police officer for six years. From 1996 to 1998, M.M. was assigned to patrol on rotating eight-hour shifts. It was not unusual for M.M. to hold over for another shift. Since 1998, M.M. has been assigned to central communications where she works as a dispatcher. From January 1999 to the present, M.M. has worked a shift from 6:00 a.m. to 2:00 p.m. with four days on and two days off. M.M. may work an extra shift at times. M.M. was on a shift for 2:00 p.m. to 10:00 p.m. for three months over a summer. Petitioner is also employed as a police officer.

J.M. requires constant care and supervision. As the result of his medical condition and his parents' employment, J.M. often stayed with his grandparents or other relatives including M.M.'s sister and petitioner's sister.

In May 1998, M.M. and petitioner moved their furniture to the single family dwelling on E. Street. They slept at that location, took their meals there and conducted their daily business there. They also received bills and other mail at E. Street. M.M. acknowledged that she and petitioner left some belongings at their previous home on D. Street in Newark and that some mail was sent there.

In addition to the deed for the property on E. Street, M.M. produced copies of bank statements sent to her and petitioner at their address on E. Street. Statements from Valley National Bank were dated November 8, 1999, and March 8, 2000. A statement from PNC Bank was for the period from March 22, 2000, to April 19, 2000. M.M. also produced statements from Public Service Electric and Gas Company for electric and gas service at the front house on E. Street. The statements are dated September 2, 1998, December 2, 1998, February 2, 1999, and June 3, 1999. M.M. acknowledged these bills were for the first floor apartment occupied by her mother in the front house. M.M. also produced a letter from an insurance agency addressed to her and petitioner at E. Street.

On an emergency card for J.M., M.M. listed A.Q., who is M.M.'s mother; L.B., who is petitioner's mother; and M.R., who is M.M.'s sister. M.M. gave E. Street as A.Q.'s address, and she provided the same telephone number for herself and A.Q. M.M. explained that A.Q. did not have her own phone. However, she had a key to the rear house, where she was often present and could use the telephone. M.M.'s parents speak only Spanish. However, someone at the school office would speak Spanish.

J.M. spent most of his time at the home on E. Street. The school bus picked up J.M. at 9:30 a.m. for the pre-school handicapped program and dropped him off at 2:30 p.m. M.M. was often at work during this time span. J.M. was met by M.M.'s mother getting off the bus and was often taken to his paternal grandmother or another relative. J.M. often slept at a relative's home, particularly when M.M. worked night shifts.

M.M. stated that she and petitioner had telephone and cable service at E. Street. However, she did not produce any statements. M.M. acknowledged that she did not change her voter registration until the summer of 2000. However, she stated that she rarely voted in other than presidential elections. M.M. did not recall voting in a primary election in June 1999.

2. O.M.

Petitioner testified that he has been employed as a police officer for twenty-two years. Prior to May 1998, petitioner lived on D. Avenue in Newark with his wife, M.M., and children. That property is a two-family house owned by his mother, L.B., and his stepfather. In May 1998, petitioner and M.M. purchased the property on E. Street in Bloomfield. The property has a front house with three apartments and a single-family house to the rear. Petitioner's mother-in-law and father-in-law lived in the first floor apartment, M.M.'s sister and her family lived in the second floor apartment, and an elderly couple rented the third floor apartment. Petitioner lived in the house toward the rear of the property with his wife and children. The first floor had a living room, a kitchen, a bedroom and a bathroom, the second floor had two bedrooms, and there was a finished basement. Two boys slept in the first floor bedroom. Petitioner and his wife slept in one upstairs bedroom. The other son slept in the other upstairs bedroom.

Petitioner stated that he received mail at both E. Street in Bloomfield and D. Avenue in Newark. Petitioner explained that he does not want people to know where he lives because criminals might seek revenge. Petitioner received mail including mortgage papers and utility bills at E. Street in Bloomfield.

The oldest son went to parochial school in Newark. Ju.M. attend Carteret School in Bloomfield for one year and then transferred to a parochial school in Newark. J.M. was a special education student because of his medical condition and attended respondent's Oakview School.

Petitioner worked a shift from 6:00 a.m. to 2:00 p.m. with four days on and two days off. He was sometimes held over for mandatory overtime. On many occasions, petitioner would be called to work from four to eight hours. Petitioner's wife is also a police officer. M.M. was assigned to a different district, but she usually worked the same shift.

While petitioner and his wife were at work, various relatives particularly petitioner's mother-in-law or his mother took care of the children. At times, petitioner's sister in Little Falls or his mother's sister in Newark took care of the children. When the children were in school, one of these relatives would wait for the school bus. Someone was always with J.M., because he required attention twenty-four hours per day. Petitioner felt fortunate to have relatives to help with the children, because he was called to work at night many times.

Petitioner lived at the property on D. Avenue for five years prior to May 1998. Petitioner had telephone and cable service at D. Avenue, where he lived on the first floor of a two-family house. After petitioner moved to E. Street in May 1998, his niece moved into the apartment a month later. The niece paid the phone bill but kept the same number. Petitioner wanted her to keep the same phone number because he had given it to many people. The niece remained in the first floor apartment for approximately two years. She no longer has petitioner's old telephone number.

Petitioner presented various papers related to his property on E. Street in Bloomfield including records of mortgage interest payments and a property tax assessment. These papers were addressed to petitioner and M.M. at E. Street in Bloomfield.

Petitioner acknowledged that his cars are registered at an address in Little Falls, New Jersey. His wife's car is registered at the same address. Petitioner also acknowledged that his W-2 Form for 2000 shows an address in Newark at which he

lived eighteen to twenty years ago. Petitioner explained that he does not want people to know his address.

While living on E. Street, petitioner started work at 6:00 a.m. The school bus stopped right in front of the house and dropped off J.M. at the same location.

In early 2000, petitioner started looking for a new home and signed a contract to purchase a house in Nutley. Petitioner was packed and ready to move. His mother-in-law was moving to the rear house and the first floor apartment was rented to a new tenant. However, the deal fell through with the result that petitioner had to stay in his mother's home until June 2000.

In June 2000, petitioner and M.M. purchased a single-family house on Y. Avenue in Bloomfield. Petitioner still owns the property on E. Street. The three apartments in the front house are rented to tenants, and petitioner's mother-in-law and father-in-law live in the single-family house. Both J.M. and Ju.M. now attend respondent's public schools.

Petitioner acknowledged that he never registered to vote at E. Street in Bloomfield. Petitioner voted in Newark, until he registered in Bloomfield after he moved to Y. Avenue in 2000.

B. Respondent's Witnesses

1. Jeffrey Allyn

Jeffrey Allyn has been employed by respondent for twenty-two years, and he has been the district compliance officer for fifteen years. His duties include residency verification. During the last two years, Mr. Allyn has conducted residency verifications for approximately 600 residents.

The investigation in regard to J.M. began when Ju.M. asked to call home on September 2, 1998. A secretary noticed that he called a Newark telephone number. On September 3, 1998, Mr. Allyn conducted a surveillance at the address on E. Street in Bloomfield from 7:10 a.m. to 8:30 a.m. Mr. Allyn saw another male child come out of the house but not J.M. or Ju.M. The male child was later identified as M.A., who is a cousin of J.M. and Ju.M.

On September 4, 1998, Mr. Allyn conducted an observation at D. Avenue in Newark beginning at 7:15 a.m. At 8:20 a.m., Ju.M. came out with petitioner and was driven to the home on E. Street where another child was picked up. The vehicle was registered to petitioner at an address in Little Falls, New Jersey.

On September 14, 1998, petitioner's vehicle arrived at E. Street and left without picking anyone up. Ju.M. was present for school and arrived on time that day. On September 16, 1998, Ju.M. and his father left D. Avenue in Newark and went to E. Street where they picked up M.A. On September 22, 1998, petitioner and Ju.M. left D. Avenue in Newark at 8:10 a.m. Mr. Allyn acknowledged that he did not know J.M.'s starting time.

On September 28, 1998, Mr. Allyn performed a door check on the rear house at the property on E. Street. W.A., the maternal grandfather, opened the door. Asked where the children were, W.A. said that they were with someone else for the night. Observing the boys' bedroom, Mr. Allyn did not see any clothes at all and only a few toys. The other bedroom was that of W.A. and his wife. There was no bedroom for petitioner and M.M. In regard to the front house, W.A. stated that the second and third floor apartments were occupied and that the first floor apartment was vacant.

Mr. Allyn returned to D. Avenue in Newark and at 7:59 a.m. saw petitioner leave in uniform and head toward downtown Newark. At 8:20 a.m., a vehicle on which the license plate had M.M.'s first name dropped off J.M. at E. Street and then proceeded to

the Carteret School with Ju.M. This vehicle is registered to petitioner at an address in Little Falls, New Jersey, and was seen at D. Avenue at 7:00 a.m.

Mr. Allyn reported the situation to his supervisor. The determination was to continue the investigation in March 1999.

On March 19, 1999, Mr. Allyn began an observation at D. Avenue in Newark at 7:00 a.m. At 7:38 a.m., Ju.M. and J.M. left the house with petitioner in his truck.

On March 22, 1999, Mr. Allyn began an observation at D. Avenue in Newark at 7:15 a.m. At 7:45 a.m., petitioner and J.M. came out and drove in petitioner's truck to E. Street in Bloomfield.

On April 1, 1999, Mr. Allyn conducted an observation on D. Avenue in Newark from 7: 15 a.m. to 8:25 a.m. and did not see anyone come out. Another district employee, Mr. Barba, observed E. Street in Bloomfield from 8:20 a.m. At 9:42 a.m., J.M. and his mother pulled up in M.M.'s truck, and J.M. later got on the school bus. At 2:03 p.m., the school bus dropped off J.M., and he was driven by M.M. to D. Avenue.

On April 6, 1999, at 9:40 a.m., J.M. came out from the property on E. Street in Bloomfield with his grandfather. At 3:07 p.m., M.M. drove up in uniform and took J.M. to D. Avenue in Newark.

On April 7, 1999, an observation of the property on D. Avenue in Newark began at 6:00 a.m. Petitioner's truck was at this location. The windows were fogged up, indicating that the vehicle had not moved overnight. At 7:35 a.m., petitioner and Ju.M. left the residence. At 9:40 a.m., the school bus arrived at E. Street in Bloomfield and left when J.M. did not come out. At 10:07 a.m., M.M. pulled up with J.M. and then drove J.M. to Oakview School. At 1:42 p.m., the school bus returned J.M. to E. Street. M.M. came out to meet J.M., and they drove to D. Avenue in Newark in M.M.'s truck.

An observation of the property on D. Street began at 7:00 a.m. on April 8, 1999. Petitioner's truck was at that location. At 8:10 a.m., petitioner came out and moved his truck to comply with street cleaning regulations.

On April 21, 1999, an observation was made that none of the family vehicles was at D. Avenue or E. Street, indicating that petitioner and M.M. could be at work. At 8:00 a.m., J.M. was observed being driven in a vehicle registered at an address in Montclair, New Jersey.

At 7:00 a.m. on April 22, 1999, none of the family vehicles was present at D. Avenue or E. Street. After arriving home from school, J.M. remained at E. Street until the observation ended at 4:00 p.m.

An observation on April 23, 1999, continued from 7:00 a.m. to 8:25 a.m. Petitioner's truck was at D. Avenue at that time.

On April 26, 1999, an observation of the property on D. Avenue began at 7:00 a.m. Both petitioner's and M.M.'s vehicles were parked at the property on D. Avenue. At 7:52 a.m., petitioner, Ju.M. and another boy left the house and drove off in the father's truck.

On April 30, 1999, the boys were driven from E. Street to D. Avenue at 3:45 p.m. At 4:00 p.m., petitioner was washing M.M.'s truck, while the children were playing in the yard on a swing set.

On April 30, 1999, Mr. Allyn requested information from the postmaster in Newark concerning persons receiving mail at the property on D. Avenue in Newark. Mr. Allyn was advised that petitioner and M.M. were receiving mail at that address.

To summarize, there were thirteen observations in March and April 1999. At the time, Mr. Allyn could recognize J.M, and the parents knew that they were being

observed. Mr. Allyn never saw petitioner come out of the property on E. Street. However, Mr. Allyn saw petitioner come out of the home on D. Avenue on five occasions. Mr. Allyn was convinced that J.M. was not domiciled at the property on E. Street in Bloomfield.

Further investigation from May to September 1999 revealed that while Ju.M. was attending a parochial school, he used D. Avenue as his home address. Petitioner had cable service and an unlisted telephone number in his name at D. Avenue. Further, a representative of their employer confirmed that both petitioner and M.M. used D. Avenue as their address for employment purposes. These facts confirmed Mr. Allyn's opinion that J.M. never was domiciled in Bloomfield.

In June 2000, respondent requested information concerning petitioner and M.M. from the Essex County Commissioner of Registration and Superintendent of Elections, who responded by letter dated June 27, 2000. According to the letter, the voter files revealed that both petitioner and M.M. live on D. Avenue in Newark. They both voted in the June 1999 primary and listed D. Avenue as their home address. Neither petitioner nor M.M. was registered to vote at E. Street in Bloomfield.

2. Dr. Nicholas Bruno

Dr. Nicholas Bruno is employed by respondent as its Director of Administrative Services. His duties include registration of students and disenrollment.

Dr. Bruno presented the tuition computation for J.M., who is a special education student. For the 1998-1999 school year, the tuition and other costs totaled $12,273. For the 1999-2000 school year, the corresponding costs were $14,339. The total for the two-year period was $26,612.

LAW AND ANALYSIS

a. Law

A person who meets age requirements and is domiciled within a school district may attend its public schools free of charge. *N.J.S.A.* 18A:38-1 (a). A person may have many residences but only one domicile. *Somerville Bd. v. Manville Bd.,* 332 *N.J. Super.* 6, 12 (App. Div. 2000). A child's domicile is normally that of his or her parents. *Ibid.* 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,* 255 *N.J. Super.* 362, 374 (Law Div. 1991), affd, 311 *N.J. Super.* 589 (App. Div. 1998), certif. denied, 157 *N.J.* 541 (1998), *cert.* denied, 526 U.S. 1051, 119 S.Ct. 1357, 143 L *Ed.* 2d 518 (1999). The court further stated as follows:

> "Home is the place where a person dwells and which is the center of his domestic, social and civil life." . . . "[T]he overwhelming proportion of the indicia as to what the decedent regarded as her real, principal and permanent home . . . as well as the central fulcrum of her life must here be found to converge . . . " in that location found to be her domicile. . . . Thus, the concepts of home and domicile mean more than physical residence. They also embody the subject's objective and subjective relationship to that residence.
>
> A person may establish a domicile in one place and then *acquire* a second residence. This does not lead to multiple domiciles, for it "is everywhere conceded that a person can have only one true domicile, which is synonymous with the common understanding of the word 'home.'". . . If a person maintains multiple residences it may become necessary to determine which one is the true domicile. Various approaches to this problem have been used by New Jersey courts.
>
> Establishing a domicile involves an act of volition. "A person has the right to choose his own domicil, and his motive in doing so is immaterial." . . . 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. . . . Additionally, it has been held that a change of domicile "may be made to avoid taxation .

> . . [or some other motive], so long as the necessary ingredients for establishment of the new domicile are present." ... Even a change of domicile predicated on a desire to avoid a forced heirship statute has been upheld when the change was supported by other indicia of a new domicile, ...
>
> It is clear, therefore, 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.
>
> Thus, a person may not arbitrarily designate a given residence as his domicile. It is necessary that the requisite subjective intent be present since domicile is "very much a matter of the mind-of intention." ... "Where there are multiple residences ... domicile is that place which the subject regards as his true and permanent home." ...
>
> "When a man has acquired a domicile in a particular place, that place remains his domicile until he acquires another domicile." . . . In considering whether a change of domicile has occurred, three elements must be considered: 1) whether there had been an actual and physical taking up of an abode in a particular state; 2) whether the subject had an intention to make his home there permanently or least indefinitely; and (3) whether the subject had an intention to abandon his old domicile. The court must evaluate all of the facts of the case to determine the place in which there is the necessary concurrence of physical presence and an intention to make that place one's home. *[Id.,* at 374-76 (citations omitted)].

The acts, statements and conduct of the individual, as viewed in light of all circumstances, determine a person's true intent. *Collins v. Yancey,* 55 *N.J. Super.* 514, 521 (Law Div. 1959). The parent has the burden of proof by a preponderance of the evidence. *N.J. S.A.* 1BA:38-1 (b)2.

b. Factual Discussion

Preliminarily, it may be noted that since J.M. is a child, his domicile is that of his parents, petitioner and M.M. Further, it is undisputed that petitioner and M.M. were domiciled at the property on D. Avenue in Newark prior to May 1998. Thus, the main question in this case is whether petitioner and M.M. changed their domicile from D. Avenue in Newark to E. Street in Bloomfield. The factors to consider are whether there

was an actual and physical taking up of an abode at E. Street, whether petitioner and M.M. had an intention to make their home on E. Street permanently or at least indefinitely and whether petitioner and M.M. had an intention to abandon their old domicile on D. Avenue.

The first question is whether there was an actual and physical taking up of abode at the property on E. Street. Petitioner and M.M. relied on their own testimony and documentary evidence. The latter consisted of a deed, bank statements, electric bills and a letter from an insurance agency. There is no doubt that petitioner and M.M. owned the property on E. Street. It is noteworthy, however, that the electric bills were for the front house at the property on E. Street. It also may be noted that the earliest bank statement was from November 1999. Another consideration is that there was a substantial conflict between M.M.'s testimony and that of petitioner. When asked about the living arrangements in the back house on E. Street, M.M. testified that she and her husband slept in a bedroom on the first floor, while the two boys slept in the bedrooms upstairs, one in each room. In contrast, petitioner testified that two boys slept in the bedroom on the first floor and that petitioner and M. M. slept in one bedroom upstairs with J.M. in the other.

Respondent's witness, Mr. Allyn, testified to multiple observations of D. Avenue in Newark and E. Street in Bloomfield. His testimony was fully credible as to his observations. It is noteworthy that petitioner was observed coming out of the home on D. Avenue in the morning on various occasions. None of the observations had petitioner or M.M. coming out of the property on E. Street in the morning. Perhaps the most telling evidence was the door check on September 28, 1998. On that occasion, the maternal grandfather, W.A., answered the door at the back house on E. Street. According to W.A., one bedroom in the back house was for him and his wife. During his visit, Mr. Allyn found no clothes for boys and only a few toys. The first floor apartment in the front house was vacant.

Petitioner's response is that the observations pertained to only a very small percentage of the days in the school year. Further, none of the observations occurred during the 1999-2000 school year.

The second and third factors are related in that one concerns the intention to make the new home the individual's domicile and the other concerns the abandonment of the old domi ile. One telling consideration is voter registration. In accordance with *N.J.S.A.* 19:4-1, an individual "shall be entitled to vote in the polling place assigned to the election district in which he actually resides, and not elsewhere." The election district of residence is the place where the voter is domiciled. *In re General Election,* 255 *N.J. Super.* 690, 726 (Law Div. 1992). Here, petitioner and **M.M.** never changed their voter registration from D. Avenue in Newark to E. Street in Bloomfield. In fact, petitioner and **M.M.** voted in June 1999 based upon voter registration at D. Avenue in Newark. This circumstance is indicative of an intention not to abandon the domicile at D. Avenue in Newark and change it to E. Street in Bloomfield.

Other circumstances are inconsistent with a change in domicile to E. Street in Bloomfield. First, petitioner and **M.M.** never registered a motor vehicle at E. Street. Second, petitioner and **M.M.** continued to use the address on D. Avenue for purposes of employment. Likewise, the address at D. Avenue was used as Ju.M.'s home address while he attended parochial school. Further, petitioner continued to receive mail and to have electric, telephone and cable service in his name at the property on D. Avenue.

In view of all of the above, petitioner has not demonstrated any of the three elements to establish a change of domicile to E. Street in Bloomfield. Under the circumstances, I **FIND** that petitioner has failed to prove by a preponderance of evidence that J.M. was domiciled in respondent's school district during the 1998-1999 and 1999-2000 school years. Therefore, I **CONCLUDE** that the petition in this matter should be dismissed.

c. Counterclaim

Respondent filed a counterclaim for tuition reimbursement for the periods of ineligible attendance. The applicable statute is *N.J.S.A.* 18A:38-1(b){2), which provides in pertinent part as follows:

> 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 . . . .

Here, the evidence does not support petitioner's claim that J.M. was domiciled in respondent's school district, and petitioner does not challenge the tuition computation as presented by Dr. Bruno. Under the circumstances, I **FIND** that the tuition and costs for J.M. were $12,273 and $14,339 for the 1998-1999 and 1999-2000 school years, respectively, for a total of $26,612. Therefore, I **CONCLUDE** that petitioner must be assessed $26,612 as tuition reimbursement.

Accordingly, it is **ORDERED** that:

1. The petition in this matter is dismissed.

2. Petitioner is assessed $26,612 as tuition reimbursement.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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.

7-1-03
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

7-31-03
DATE

DEPARTMENT OF EDUCATION

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AUG 4 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

WITNESS LIST

For petitioner:

M.M.

O.M.

For respondent:

Jeffrey Allyn

Dr. Nicholas Bruno

EXHIBIT LIST

P-1	Deed dated May 1, 1998	Evidence
P-2	Photocopies of portions of three bank statements	Evidence
P-3	Photocopies of four electric bills	Evidence
P-4	Letter dated May 11, 1999, from Laurie Sojka	Evidence
P-5	Transfer form dated September 3, 1998	Evidence
P-6	Registration checklist dated September 3, 1998, with attached registration forms	Evidence
P-7	Emergency card dated September 15, 1998	Evidence
P-8	Photocopy of 1999 mortgage interest statement (retained)	Evidence
P-9	Photocopy of Form 1098 for 1999 Evidence	
P-10	Photocopy of property tax assessment	Evidence
P-11	Form W-2 for 2000	Evidence
P-12	Letter dated November 4, 1998, from Frank Pomaco, Esq., to Felix Montalvo-Lopez, Esq. (retained)	Identification

R-1	Application for Free and Reduced Price Meals or Free Milk dated September 14, 1998	Evidence
R-2	Tuition computation	Evidence
R-3	Letter dated June 22, 2000, from Coleen French	Evidence
R-4	Memorandum dated September 28, 1998, from Jeff Allyn to Gerry Nazzaretto	Evidence
R-5	Investigation notes dated May 3, 1999	Evidence
R-6	Investigation notes dated May 24, 1999	Evidence
R-7	Request for Boxholder Information dated April 30, 1999	Evidence
R-8	Memorandum dated September 27, 1999, from Jeff Allyn to Gerry Nazzaretto	Evidence
R-9	Letter dated June 27, 2000, from Carmine P. Casciano to J. Frank Vespa-Papaleo, Esq.	Evidence
R-10	Letter dated June 29, 2000, from Frank Pomaco, Esq.	Evidence

OAL DKT. NO. EDU. 7557-00
AGENCY DKT. NO. 260-7/00

O.M., on behalf of minor child, J.M.,	:	
PETfilONER,	:	
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. Petitioner's exceptions were untimely, pursuant to ***N.J.A.C.*** 1:1-18.4, having been filed on August 21, 2003 in response to an Initial Decision mailed on August 4, 2003.[1]

Upon careful and independent review of the record in this matter, and based on the Administrative Law Judge's (AU) credibility assessments, ***N.J.S.A.*** 52:14B-10(c), the Commissioner concurs with the AU that petitioner has failed to sustain his burden of establishing, by a preponderance of the credible evidence, that he was domiciled in Bloomfield during the 1998-99 and 1999-2000 school years, so as to entitle his child, J.M., to a free public education in the District's schools.

Accordingly, the recommended decision of the OAL is adopted for the reasons expressed therein and the within Petition of Appeal is dismissed. Petitioner is hereby directed to

[1] It is noted that at no time during the exception period did petitioner request an extension of time within which to file, pursuant to ***N.J.A.*** C 1:1-18.8.

reimburse the Board for tuition in the amount of $26,612 for the period of J.M.'s ineligible attendance in the District's schools.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: 9/10/03

Date of Mailing: 9/10/03

[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.***

11541-03

IN THE MATTER OF THE TENURE HEARING	:	
OF RICHARD CONSALES, SUSSEX COUNTY	:	COMMISSIONER OF EDUCATION
TECHNICAL SCHOOLS, SUSSEX COUNTY.	:	DECISION

September 10, 2003

State of New Jersey
OFFICE OF ADMINISTRATNE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5934-02

AGENCY DKT. NO.: 206-7/02

IN THE MATTER OF THE TENURE HEARING OF RICHARD CONSALES, SUSSEX COUNTY TECHNICAL SCHOOLS, SUSSEX COUNTY,

---

Margaret A. Miller, Esq., for petitioner
(Weiner Lesniak, LLP, attorneys)

Gary Kraemer, Esq., for respondent
(Daggett, Kraemer & Eliades, attorneys)

Record Closed: July 25, 2003 Decided: July 28, 2003

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

On July 23, 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. The matter was scheduled for a conference on April 22, 2003 and at that time the parties engaged in settlement discussions. The parties reached a settlement on June 24, 2003 and submitted the signed Settlement Agreement indicating the terms of settlement on July 25, 2003. 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.

July 28-V/
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

)-30-03
DATE

DEPARTMENT OF EDUCATION

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OFFICE OF ADMINISTRATIVE LAW

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AGREEMENT M"1J REL E

This Sctlieriient Agrsexnent and Release ("Agreeme ") is made and enterefi into betvveen the Sussex County Vocational and Technical Board of E4:ucation (the "Board") and Richard Consales ("Consales"). This Agreement is made pursuant Fe following terms and conditiom.

RECITALS

WHEREAS, on or about *July* 9, 2002, the Boid certified tenure charges against Consales seeking bis termlnatlon for co unbecomin la public employee, incapacity and other charges; and

WHEREAS. Consales wa$ paid through June 30 12002 and thereafter .placed on an unpaid suspension for 120 days pending the outcome ofth.e ibnure charges; and

WHEREAS. Consales filed an appeal of the tenure-lh.arges before the Commissioner of Education that was subsequently transferred to the Office o d:mini.strative La;.:r; and

WHEREAS, the OAL matter -was scheduled to comw.ence during June of2003; and

WHEREAS, the parties elected to settle all o matters and allegations in dispute in lieu of conducting the hearing, so as to avoid ending further resources and to eliminate the uncertam:ties of litigation; and

WHEREAS, the Board and Consales deem it to be 1 their best interests to set forth in a fui:mal written agreement their respective rights; duties } obligations regarding Consa!es' terntination from the Board; and

WHEREAS, the Board and Consales are now m y desirous of settling the matters and allegations in dispute; and

WHEREAS, all parties have been afforded the oppgrtunity to consider the terms of this Agreement with advice of counsel and/or a representative o, eir choice;

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NOW, THEREFORE, in consideration of the pro ses and the mutual covenants herein contained, and for other good and valuable considerations. 4 parties hereby agree as follows:

I. The Sussex County Vocational and Technical Boar jofEducation (the "Board"), as used herein, shall at all times mean the Sussex County ,yocational and Technical Board of Education, its predecessors, successors and assigns Bf any and all of them, their present and former Board members, officials, officers, r resentatives, servants, employees, agents, attorneys, successors, and administrators w ether in their individual or official capacities, and all other persons, finns, corporatiol,, associations, partnerships or any other entity connected therewith.

2. Consales, as used herein, shall mean Richard Consal s, his heirs, representatives, privies, executors, administrators, assigns, successors-io-inteti st and predecessors-in-interest.

3. The Board agrees tha.t it will not pursue the TenureJfharges filed against Consales and th.at the parties shall cause to be filed a withdrawal W!b.ejudice with the OAL.

4. In consideration of the Board's covenant set forth yl Paragraph 3, Consales agrees to resign from his position as a tenured teacher with fue Board., effective June 30, 2003. Consales further agrees that for the period Septemb1 1, 2002 through June 30, 2003, he shall be deemed to have been oo administrative leavei!

5. Consales expressly agrees and understands that his t on is final and irrevocable no matter what and regardless of whether or not any a cation filed for retirement or other employment is successful. Consales' resignation of his position as a tenured teacher effective June 30, 2003 shall be deemed accepted. b t the Board upon execution of th.is Agreement. Consales forever waives any and all ri1ts or ability to seek re-employment

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with the Board in any capacity. Consales further agrees to never seek reemployment "With the Board at any time in the future in any capacity.

6. In considerations of the promises set forth in Paragnwm 3 through 5, the Board shall pay Consales as follows:

(a) _The sum of $21,000 shall be paid on July 1, 003. The payment shall represent Consales' annual salary for the school year :from j eptember 1: 2002 through June 30, 2003 while on administrative leave. The parties gree that the $21,000 shall be paid through a regular payroll check with all applicaj:.,le taxes and pension contributions applied.

(b) Con.sales shall receive an additional $128,000 to'.e paid on a prorated monthly basis commencing on or about August 1, 2003 and co tinuing for twenty-'four consecutive months thereafter ($5 333.33 per month). All payments made under this subparagraph shall be paid to Consales under a iom 099 without any taxes being withheld.

(c) The Board shall continue Consales' employer-p1d health insurance for a period not to exceed 12 months from July 1, 2003 or untiJ!IlConsales is eligible to receive any level of health benefits through a new employer o by being self-employed.-

(d) This settlement is intended as and for damages fr any and all possible injuries and Consales hereby waives any and all claims for lo t wages, income or future earnings. However, should it be determined that any p a + t s made pursuant to Para h 6 herein constitute gross income within the meaning of the Internal Revenue Code and its applicable amendments, or under any othe:tl federal, state or local statute or ordinance, Consales shall be solely liable for and 1'agrees to pay any amount that may

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be determined to be due and owing as taxes, interest and penalties arising out of such payments. Specifically, Consales understands and agrees that he will be provided with an annual 1099 Miscellaneous form incorporating his payments from the Board. Consales also understands and agrees that any adjustments to his withholding or any estimated tax payments are his responsibility. Further, Consales understands and agrees that the Board will report the payments made to Consales to the Internal Revenue Service, the New Jersey State Division of Taxation and other pertinent agencies, but the Board will not take a position as to whether the payments are taxable. Any and all tax liabilities arising from the payments set forth herein are the sole and exclusive responsibility of Consales and he hereby indemnifies and holds harmless the Board from any and all tax liabilities arising therefrom.

7. In consideration of the promises set forth in this Agreement, the Board agrees to allow Mr. William Leach to prepare a written recommendation for the sole and exclusive use by Consales to apply for a master's degree program. The letter shall not be used for any other purpose whatsoever. The content of the letter shall be as set forth in the attached Exhibit A and placed on Board letterhead and signed by Mr. Leach.

8. The parties further agree and understand that this Agreement is a compromise settlement of all claims asserted and unasserted in connection with Consales' separation of employment. By entering into this agreement, neither party admits that it has violated Title 18 state or federal law or any contractual provisions that might exist.

9. The parties acknowledge and agree that the payments set forth in this Agreement are in full and complete settlement of any and all claims that had been asserted or can be asserted or may be asserted or could be asserted by either party against the other for

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compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental angttlsh, medical expenses, punitive damages, interests, attorneys fees, costs of suit, loss of sick time, loss of vacation time, loss of benefits, consequential damage, reputation damage, breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage which arose out of or could arise out of Consales' employment with the Board.

10. As an inducement for the parties to enter into this Agreement, each party does hereby remise, release and forever discharge all other parties (including the Board's employees and agents) from any and all debts, obligations, suits, actions, causes of action, claims or demands, in law or in equity, which any one party now has or hereafter may assert against the others arising out of Consales' employment by the Board including, but not limited to, all claims, liabilities, costs and attorney's fees under: (1) the tenure charge docketed before the OAL; (2) the Civil Rights Act of 1964, as amended (42 U.S.C. 2000(e) et seq.); (3) the Americans with Disabilities; (4) the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq.; (5) any directive negotiations agreement; (6) Title 18A and its rules and regulations; (7) the Constitution of the United States; (8) the Constitution of New Jersey; (9) wage and hour laws, federal and state; (10) any other federal or state statute or common law; (11) the New Jersey Tort Claims Act N.J.S.A. Title 59; (12) the Fourth and Fourteenth Amendment to the United States Constitution; and/or (13) other causes of action whether enumerated herein specifically or not. Further, Consales hereby waives any and all relief not explicitly provided for in this Agreement.

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11. Consales and the Board expressly understand and agree that the payments set forth in this Agreement include any and all amounts that may be claimed by Consales or on his behalf or by his attorneys, heirs, successors or assigns, against the Board.

12. The parties agree that in consideration of the promises set forth in this Agreement that Consales shall not file, or shall immediately withdraw, with prejudice: (a) any and all appeals before the Commissioner of Education seeking any type of relief whatsoever from the Board; (b) any grievances or arbitrations relative to Consales' employment or termination; and (c) any type of judicial or administrative action of any type or nature in connection with Consales' employment, termination or payments made under this Agreement. This provision expressly pertains to the pending suits filed by Consales against Mr. Jack Utter, Vice Principal, and Joseph Cahunarata, Superintendent

13. Nothing in this Agreement shall prohibit or bar Consales from filing a Workers' Compensation claim against the Board in connection with exposure-type injuries from environmental conditions that might have existed while the Board employed Consales. Consales expressly states that no such claim currently exists, that he is unaware that any such claim potentially exists and does not anticipate filing any such claim at the time of executing this Agreement.

14. In any action commenced against a party to enforce the provisions of this Agreement, the moving party, if it is the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

15. Each party agrees not only to release, acquit and forever discharge the other and its employees/agents from any and all claims which arose from the incidents set forth and in any way related thereto to the tenure charge docketed before the OAL that each party

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could make on its own behalf. but also those which ve been or may be made against the other by any other person or organization on bisfrts ehalf. Consales specifically waives any right to become, and promises not to become, ,member of any class in any case in which any claim is asserted against the Board and its 6mployees/agents and inYolving any eve t that has occurred on or before the date of , Settlement Agt ent and General Release.

16. The Board affirms that, as of the date of executio of this Settlement Agreement and Ge eral Release, they have no knowledge of any pe kting class action against it to which Con.sales could be a potential class member.

17. Comales specifically acknowledges that the paym referred to in Paragraph 6 her_eof constitutes any and all additional consideration o t h f se owed to him for this Settlement Agreement and General Release or arising from collective negotiations agreement, policy or regulation.

18. Unless directed to do so by Court Order or lawfully ssued subpoena with notification to the Board at the time the la'Wfully issued subpoena issued, Consales agrees that he will not give te ony or evidence against the Bo in any proceeding with respect to the incidents giving rise to the tenure charges docket]F before the OAL or with respect to the terms and conditions of this Agreement

19. The parties and their attorney(s) agree and prom.is that they will not disclose, either directly or indirectly, in any manner whatsoever; anyd ormation regarding either: (a) the substance or existence of Consales' tenure charges ifu.d/or his actions giving rise to the tenure charges; or, (b) the existence, terms or contenf of $is Settlement Agreement and General Release, to any person or organization, fcluding, but not limited to, any

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govern.mental agency, members of the press and edia, present and former officers, employees and agents of the Board and other me lbers of the public. This paragraph sh.all-not preclude the parties or their attomey(s) frol# disclosing the existence or tenns of this Settlement Agreement and General Release to governmental authorities that require such information. The parties may only state, without elaboration, as follows: "The situation has been resolved to the mutual satisfactio J of Consales and the Board." In the event that the Board is approached for a reference, :e only information to be provided will be Consales .date of hire, date of resi$_{gna}$tion an salary.

20. This Settlement Agreement and General Release cotibins the full agreement of Consales and the Board and may not be modified, altered, chwiged or terminated except upon the express prior written consent of Consales and the B@ard, which consent must be signed by Consales and the Board or their d ly a thorized Jen.ts.

21. 'fh;e waiver by Consales and/or the Board of a brea h of any provision hereof shall not operate or be construed as a waiver of that breach :Py the other, or as a waiver of any subsequent breach by :the other.

22. I f any term, provision or condition of this SettlemeJ Agreement and General Release is held invalid or unenforceable by a court of competeii.t jurisdiction, such holding shall be without effect upon the validity or enforceabili l of any other provisioD.t term or condition of this Settlement .Agreement and General Release.

23. Consales hereby acknowledges and agrees that he + e r expressly waives and assumes the risk of any and all claims or damages which exi t as of this date for which Consales does not know of or· suspect to exist, whether $ough ignorance, oversight, error,

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negligence, or otherwise. and which, if knoWD., wo d materially effect his decision to entei: into this Settlemeat Agreement and Genera.l Jase.

24. Con.sales represents and warrants t no other perso or entity has or has had any interest in the claims, demands, obligations, or causes of ction referred to in this Settlement Agreement and General Release; that Consales 5 not sold, assigned, transferred, conveyed or otherwise disposed of any of the cl , demands, obligations or causes of action referred to in his verbal complaint(s) and/o in this Settlement Agreement and General Release.

25. This Settlement Agreement and General Release s be construed and interpreted in accordance with the laws oftbe State of New Jersey,;

26. Consales and the Board agree to cooperate fully an execute any and all supplemen ary documents and to take all additional actions which m ly be necessary or appropriate to get full force and effect of the basic terms and interes of this Settlement Agreement and General Release.

27. This Settlement Agreement and General Release s l not be executed in counterparts and shall be enforceable only if executed by Consale;, and the Board.

28. This Settlement Agreement and General Release become effective immediately following execution by Consales and the B ard, but be contingent pon approval by the Office of Administrative Law and Commissio1'r of Education. In the event that approval is not given for this Agreement, Consales all refund all monies provided to hlm hereunder to the Board. In the event that the 1 e r l y i n g tenure charges are litigated as a result of this Agreement being voided in its en ety by the OAL or Commissioner, any amounts paid under this Agreement must be lpplied by the parties against any

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potential Board liability (i.e., subsequent settle r,t, a detennination of back pay damages or the forced continuation of salary durinj the pendancy of the litigation). In the event that litigation is re-instituted and the BoarJ prevails, Consales shall re-pay any amounts paid under this Agreement, except as o t h e 7 e ordered by the Court.

29. Consales and the Board shall bear all c sts and exp e r e s arising from the a tions of their own counsel in connection with the Settlement ieement and General Release. A; further consideration for this Settlement Agreemen;:jan.d General Release, Consales and his attorney agree that the sums set forth in Paragrapij 6 represent all of the monies which the Board has agreed and will ever agree to pay to iConsales and bis attorneys and that any additional attorneys fee which may arise from the actions of Consales' attorneys in connection with the incidents set forth and any in;dents relo!ed thereto to the tenure charge docketed before the OAL are to be home by G nsales.

30. This Settlement Agreeme11t and General Release co ta:i:ns the entire Agreement between Gonsales and the Board with regard to the matters ! et forth in **it,** and shall be binding upon and inure to the benefit of their offic:@$, officers, directors, attorneys, representatives, employees, associates, pa.rtne, agents, servants, executors, administrators, personal representatives, heirs, succ ssors and assigns of each, and all other persons, finns, corporations, associations or :iartnersbips or any other entity or persons connected th rewith, except as set forth h or as may be agreed to in writing between the parti s.

31. In entering into this Settlement Agreement and G peral Release, Consales has relied upon the legal advice of his attorney, who is the a t m e y of bis ovvn choice, as to the **terms of this Settlement** Agreement **and** General **lease which have been** completely

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read and explained by his attorney and those terms are fully understood and voluntarily accepted.

32. This Settlement Agreement and General Release become effective immediately following execution by all the following parties.

IN WITNESS WHEREOF, Consales and the Board have hereunto set their hands.

RICHARD CONSALES

Gary Kraemer, Esq.

Richard Consales

IRACYNCKEJI
·10 No. 225H>23
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Commission Expires 5/22/'JIIJS

SUSSEX COUNTY VOCATIONAL AND TECHNICAL BOARD OF EDUCATION

By:

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STATE OF NEW JERSEY)
) ss.
COUNTY OF 0U5XIf)

I, (rCluj e , TucJv· ' a #iotary Public, d hereby certify that Richard Consales, personally known to me to be the same ierson whose name is subscribed to the foregoing instrument, appeared before me this day person and acknowledges that he signed and delivered the said instrument as his free and vol ta:ry act, for the uses and purposes set forth therein.

Given under m:x hand and official seal thls _Jy . Jiay of _JlnL, 2003.

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ID - 2251023
NOTARY PtJIIUC OF NEW JiRSEY
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EXHIBIT A - TO BE RE-PRINTED ONTO LETTERHEAD AND SIGNED BY LEACH

To. Whom It May Concern:

I recon:unend Richard Consales for your Master's Digree Program. I was his supervisor for the five years that he was an instructor of the Grap]#c Arts Program at Sussex County Technical School located in Sparta TO\,vnship, New Jersey.]?uring the time I supervised him, be received exceptional evaluations and I highly recommend as an excellent candidate for a Master's Degree Program.

Thank you **for** your **consideration** of this letter.

Very truly yours,

_____

William Leach

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OAL DKT. NO. EDU 5934-02
AGENCY DKT. NO. 206-7/02

IN THE MATTER OF THE TENURE HEARING	:	
OF RICHARD CONSALES, SUSSEX COUNTY	:	COMMISSIONER OF EDUCATION
TECHNICAL SCHOOLS, SUSSEX COUNTY.	:	DECISION

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 his careful and independent review of the terms of the settlement, together with the full record in this matter, the Commissioner cannot be satisfied that the proposed settlement meets the standards for review of settlements in tenure matters set forth in *In re Cardonick,* decided by the Commissioner April 7, 1982, *ajf'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846, 850-851, wherein the State Board found that a proposed tenure settlement or withdrawal should be accompanied by supporting documentation as to the nature of the charges, the circumstances justifying the settlement, the consent by the board of education and the teacher to the proposed agreement, the Administrative Law Judge's (AU) findings that the agreement is consistent with the public interest, and that the agreement was entered into by the teacher with a full understanding of his or her rights, including the Commissioner's duty to refer tenure determinations to the State Board of Examiners for possible revocation of certification.

Initially, the Commissioner finds that the within agreement is devoid of the content and analysis fundamental to a board's duty to act in a manner consistent with public policy. *Cardonick* at 848. Here, respondent, a tenured teacher in the Print Communications

Shop, is charged with 14 counts of unbecoming conduct, incompetence, insubordination and other just cause by virtue of his alleged fraudulent submission of time sheets, misappropriation of cash deposits, diversion of school/public monies, disparate treatment of female students, sexual harassment and/or sexism directed toward female students, degrading, violent and aggressive behavior towards students, name-calling, humiliation and ridiculing of students, jeopardizing the safety and welfare of students, awarding of grades not based on merit and failure to administer tests, as well as a host of other alleged offenses. It is well-established that, having once taken up the burden of tenure charges, a board 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 S. Smith, School District of the City of Orange, Essex County,* decided by the State Board of Education November 2, 1983, 1983 *S.L.D.* 489, *aff'd N.J.* Superior Court, Apellate Division, January 30, 1986. In this regard, the District now affirms only that:

> [T]he parties elected to settle all outstanding matters and allegations in dispute in lieu of conducting the hearing, so as to avoid expending further resources and to eliminate the uncertainties of litigation[.] (Settlement Agreement at 1)

Given the serious nature of the charges against respondent, the Commissioner finds the above statement by the Board insufficient to persuade the Commissioner that, in evaluating the within agreement under *Cardonick,* the circumstances in this matter justify the settlement and that the settlement is consistent with the public interest. This is of particular import in the instant matter where there are specific allegations involving inappropriate interactions with students and where the settlement provides for substantial sums of money to be paid to respondent, as well as a continuation of respondent's health benefits for up to a year. The Commissioner also observes that the Board has not provided any explanation as to why the

circumstances in this matter justify the Board's provision of a recommendation for respondent to enter a master's degree program nor how the public interest is served by such recommendation.

Secondly, the Commissioner notes that the proposed agreement does not indicate that respondent was advised of the Commissioner's duty, pursuant to ***N.J.A.C.*** 6:11-3.6, to refer tenure determinations to the State Board of Examiners for possible revocation of his certificate.

Moreover, it is observed that two unidentified individuals signed the proposed settlement on behalf of the Board. In that neither the file nor the Settlement Agreement contains a copy of the Board's resolution approving the proposed settlement, and the agreement is not signed by the Board attorney, who is petitioner's duly authorized representative in litigation, the Settlement Agreement must be rejected by the Commissioner.

Additionally, it appears that the terms of the settlement have already been effectuated through the Board's initial distribution to respondent of $21,000 on July 1, 2003, an additional $128,000 to be paid on a prorated basis commencing on or about August 1, 2003 for 24 consecutive months, and employer-paid health insurance for a period not to exceed 12 months from July 1, 2003 or until respondent is eligible to receive health benefits through a new employer or by being self-employed. Notwithstanding that the proposed settlement provides for respondent's repayment of these distributions should the Commissioner fail to approve the Settlement Agreement, the Commissioner reminds the Board that it has acted at its own peril, since 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.

Finally, the Commissioner is compelled to comment on Term #19 of the herein proposed Settlement Agreement. Although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, it does not in any way alter the fact that

the filing of tenure charges, tenure charge documents and any record of or determination related to same are a matter of public record. *See Williams v. The Board of Educ. of the Atlantic City Public Schools et al.,* 329 *N.J. Super.* 308 (App. Div. 2000). Moreover, pursuant to *N.J.A.C.* 1: 1-14.1 (a), records of all hearings shall be open for public inspection unless, for good cause shown, the A U orders the sealing of the record, or any part thereof. Furthermore, the Commissioner cautions the Board that any action it may take with respect to disclosure of information regarding this tenure matter must fully comport with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:lA-1 *et seq.*

In conclusion, 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 expansion of the record and 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.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/03

Date of Mailing: 9/11/03

• 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.* lSA:6-27 ***et seq.*** and *N.J.A.C.* 6A:4-l.1 ***et seq.***

542-('J

/1542-03

N.W.O'H, on behalf of minor children, M.P.O'H. AND C.M.O'H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

September 15,2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11219-02

AGENCY DKT. NO. 276-9/02

N.W.O'H., o/b/o MINOR CHILDREN,

M.P.O'H. AND C.M.O'H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWN OF DOVER, MORRIS COUNTY,

Respondent.

Robert J. Stickles, Esq., appearing for petitioner
(Klett, Rooney, Lieber & Schorling, attorneys)

Philip E. **Stern,** Esq., appearing for respondent
(Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: July 18, 2003 Decided: July 29, 2003

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

Petitioner N.W.O'H. requested a hearing on behalf of minor children, M.P.O'H. and C.M.O'H., challenging the Board of Education's residency determination in this matter. In accordance with 20 *U.S.C.A.* § 1415 and 34 *C.F.R.* § 300.500 *et seq.,* the

Commissioner of Education requested that an Administrative Law Judge conduct a hearing. This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on December 31, 2002, 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 April 4, 2003 at the OAL, 33 Washington Street, Newark, New Jersey. During a telephone conference held on March 26, 2003, the parties requested that the hearing be adjourned to discuss settlement. After several discussions, they submitted the attached Settlement Agreement and Release, which sets forth the terms of the settlement.

The parties have agreed to a settlement and have prepared a Settlement Agreement and Release, 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.* 52:148-10.

DA' *J–9, ;Jo7:; 3*

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

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DEPARTMENT OF EDUCATION

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w.:EF ACTING DIPECTOR AND ADMSNISTfiATIVE LAW JUDGE

AUG 4 2003

DATE

OFFICE OF ADMINISTRATIVE LAW

jb

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agr e ent") madk. thij] ____ day of _J \I\ o ___, 2003, by and between the Dover Board of Education ("Board"), and Mr. N. W. O'Halloran, ("Mr. O'Halloran") on behalf of minor children, M.P. O'H., and C.M. O'H. ("the Children").

RECITALS

WHEREAS, the Board and Mr. O'Halloran have been involved in a litigation styled, KN.W. O'H. on behalf of minor children. M.P. O'H. and C.M. O'H v. Dover Board of Education, Docket Number EDUOS 11219-02N (hereinafter referred to as "the Litigation"); and

WHEREAS, the Board and Mr. O'Halloran desire to resolve amicably and in good faith all matters and issues arising out of the Litigation;

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, the Board and Mr. O'Halloran agree as follows:

ARTICLE I

Release

1.1 Mr. O'Halloran's Release of the Board - For its obligations pursuant to this Agreement, Mr. O'Halloran hereby releases and discharges the Board, any and all of its former and current trustees, officers, employees, agents, contractors, representatives, predecessors, successors and assigns, as well as its heirs, executors and administrators, from liability on or for the Litigation styled, KN.W. O'H. on behalf of minor children, M.P. O'H. and C.M. O'H v. Dover Board of Education, Docket Number EDUOS l 1219-02N.

1.2 The Board's Release of Mr. O'Halloran -- For his obligations pursuant to this Agreement, the Board hereby releases and discharges Mr. O'Halloran, any and all of his agents, representatives, predecessors, successors and assigns, as well as his children, heirs, executors and administrators, from liability on or for the Litigation styled, KN.W. O'H., on behalf of minor children. M.P. O'H. and C.M. O'H v. Dover Board of Education, Docket Number EDUOS 11219-02N.

ARTICLE II

Terms of Settlement

2.1 Consideration - As consideration for Mr. O'Halloran's Release as set forth herein, the Board will allow the Children to attend Dover Public Schools for the remainder of the 2002-2003 school year. The Board waives any past or present tuition which may be due and owing resulting from the Children's attendance at the Dover Public Schools at any time through and including the 2002-2003 school year. In the event that Mr. O'Halloran moves to Dover such that he establishes residence in Dover, the Children will be entitled to a free public education in the Dover Public Schools. In the event that Mr. O'Halloran remains in his present residence, the Children will be enrolled in the Rockaway Public Schools for the 2003-2004 school year; provided, however, that shonld it develop that the residence is actually within the municipal boundary of Dover, the children will be entitled to a free, public education in the Dover Public Schools. In the event that Mr. O'Halloran moves to another location outside of Dover, and establishes residence in that location, the Children will be enrolled in that location's public schools. Mr. O'Halloran and the Board understand that the aforementioned consideration is all either party will be entitled to under this Agreement.

ARTICLE III

Miscellaneous

3.1. Entire Agreement - This 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 to set forth herein, and as set forth in any other documents executed directly or in connection with this Agreement. No condition or provision of this Agreement may be modified, waived or revised in any way except in writing executed by all parties and referring specifically to this Agreement.

3.3. No Admissions - Nothing contained in this 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.

3.4 Binding Effect - This 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.

3.5 Governing Law and Choice of Forum - This 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.

3.6 Partial Invalidity- In the event any provision of this Agreement is held to be contrary to or invalid under the laws of any country, state, municipality or other jurisdiction, such illegality or invalidity shall not affect in any way any of the other provisions hereof, all of which shall continue in full force and effect.

3.7 Captions - The captions set forth in this 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 Agreement.

3.8 Signature in Counterpart - This 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.

3.9 Authorization - The Board hereby represents and warrants that the undersigned officer of' the Board is fully authorized to execute this Agreement on the B,oard•s hehalf.

3.10 InyeltiaR.tjoos - Toe parties to this Agreement acknowledge and agree that they have entered into this Agreement and have executed it without duress or coercion, aa,d have ckme so \Vith the opportunity to consult coW1Sel. Each party further acknowledges and qrees that no other party has made representations, warranties. promises or qreeinents not set forth herein and no party relies in any way upon any wtlttllllty,-statement ·of fact or opW.nr, l.ifidcmai:uliiig; aiiclosure or n'on-disclosure not set forth herein in entering into t1'Js Agreenient and executin& it. no party h u been indnced in any way, except for the consideration, representations, warranties. atatementa and coven.anti recited herein, to enter into thls Agreement.

3.1 t Conm:w;tion and Enforcement - The terms o f this Agreement are the product o f neaotiations between the parties. and shall be construed without regard to any pre6Umption or other rule requiring construction against the party causing this Agreement to be drafted.

IN wrrNBSS WHBRBOF, the parties have executed this Agreement on the date above written.

DOVER. BOARD OP EDUCATION

adu/ ,President

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Mr. N.W. O'Hallornn

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OAL DKT. NO. EDU 11219-02
AGENCY DKT. NO. 2'76-9/02

N.W.O'H, on behalf of minor children, M.P.O'H. AND C.M.O'H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement 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 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: 9/15/03

Date of Mailing: 9/15/03

543-03

K.W. and W.B., on behalf of minor child, L.B., PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLSTONE, SOMERSET COUNTY, RESPONDENT.	:	DECISION

September 11, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4177-02
AGENCY DKT. NO. 138-5/02

K.W. and W.B., O/B/O L.B.,
Petitioner,
v.
MILLSTONE BOROUGH BOARD OF EDUCATION,
Respondent.

Angela White Dalton, Esq., for petitioner, (Bowe & Fernicola, attorneys)

Bruce W. Padula, Esq., for respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: July 21, 2003 Decided: July 22, 2003

BEFORE **ANTHONY T. BRUNO,** ALJ:

This matter was transmitted to the Office of Administrative Law on June 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 parties have agreed to a settlement and have prepared a Stipulation of Dismissal and 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.

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 22, 2003
DATE

ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed

ACTING DIRECTOR AND
CH/EF ADMINISTRATIVE LAW JUDGE

JUL 29 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

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SCARINCI & HOIJJ!Nl3B<X, LLC
1100 Valley BrcokA'ftttU.e
P.0. Box 790
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Tel: 201•392-8900
Att.ome)·s for Mlllstone Board o fEducation

K.W. .md. W.B ODb:.laali' of'tb.e U.OH.B.,	STATE OF NEW JERSEY OF.FJCP. OP ADMINISTRATIVE LAW
l'etlt:ionc:r.s,	O A l DOCKET Na,: EDU-4177-0.2
'!I!.	Dock.at No.: 138-5/02
MILLSTO'NEBOR.OUOHBOAIU>OP EDUCATION, Respondent.	STIPULATION 0:F OJSMISSAL M"D SE'ITLEMENT AGREEMENT

WBEREAS, on er about May 9, 2002., Petitio.neni filed a Pe:tit:.ion of Appeal with 'illl' C llioner of Sduoauon regar4ins Pctftk>11eis' i:esideccy qt:talifiem:iens for a free public education ifl the ndeat•o dbb:iot; a =

WHEREAS, on Ju.'"e 3> 200 Respolldent 6led it, Answer and widl the Commissioner; and

WHEREAS, 1:hc pmi,:= hs.ve sgr:= to am.icably n:sol this upol'1 the foll0'Wlll.J tcmm mid li!Qnditiom,

NOW THEREFORE, the parties sfipulaw B1.ld agrc= as fclkrws:

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2. Rcspo.o.d.eat stipnla:tea and agrees thm its co m for tuition oosu. shall be dismi8s.ed with dice md without costs or attomeys fees; Md

3. PQtitiorun qrc:o lo 'Withdraw I.,& from me sebooJs by Millstn11.t Borough 8 o u d of' on. and further agree not to s<lGk:m-admU:tanoe thereto.

DATED: 7/18/03

Angela White Dalton, Esq.
Attorney for Petitioners

Frank G. Chilson, Business Administrator
Millstone Borough Board of Education

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OALDKT. NO. EDU 4177-02
AGENCY DKT. NO. 138-5/02

K.W. and W.B., on behalf of minor child, L.B., PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLSTONE, SOMERSET COUNTY, RESPONDENT.	:	DECISION

The record, Stipulation of Dismissal 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, although the Commissioner has no objection to the terms of the settlement, he is compelled to reject it because the record includes no indication that the agreement was approved by the Board of Education as required by ***N.J.A.C.*** 6A:1-13.(d). In this regard, the Commissioner notes that the Department provided ample opportunity for such indication to be brought to the record prior to the Commissioner's decision in this matter, but the Board did not respond to the Department's request.

Accordingly, this matter is remanded to the Office of Administrative Law for such proceedings as are necessary to ensure compliance with ***N.J.A.C.*** 6A:1-13.(d).

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/11/02
Date of Mailing: 9/11/02

544-03

IN THE MATTER OF THE TENURE	:	
HEARING OF FREDDIE WILLIAMS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY.	:	
	:	

SYNOPSIS

Board of Education brought charges of excessive absenteeism and unbecoming conduct against tenured custodian.

ALJ found that the Board failed to prove charge of excessive absenteeism, finding, among other deficiencies, that the Board did not consider the reasons for and nature of respondent's absences and that it offered no proof of any adverse impact as a result of the absences. ALJ found the Board proved unbecoming conduct based on one instance of respondent's unauthorized absence from the worksite (not two, as charged) and several instances of respondent's failure to clock out at the end of his shift.

Commissioner adopted Initial Decision with modification. Commissioner concurred with ALJ's findings and conclusions as to tenure charges, but disagreed that a 30-day suspension was sufficient penalty for the charges proven. The Commissioner instead directed that respondent forfeit the salary already withheld from him pursuant to *N.J.S.A.* 18A:6-14.

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.

September 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4579-02S

AGENCY REF. NO. 191-6/02

IN THE MATTER OF THE TENURE HEARING OF FREDDIE WILLIAMS, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY

Thomas W. Sumners, Jr., Esq., appearing for Petitioner (Sumners George, P.C., attorneys)

Sidney H. Lehmann, Esq., appearing for Respondent (Szaferman, Lakind, Blumstein, Blader, Lehmann & Goldshore, P.C., attorneys)

Record Closed: June 10, 2003[1] Decided: July 29, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 28, 2002, the School District of the City of Trenton, Mercer County, certified tenure charges against Freddie Williams, a tenured custodian, to the Commissioner of the State

[1] It would appear that the record should have been closed on April 28, 2003, upon receipt of appellant's post-hearing brief. However, there was some confusion over the finality of the Stipulation of Facts filed on January 23, 2003. Although filed as a joint exhibit, petitioner submitted a letter that same date objecting to the facts set forth in paragraphs 3 and 5, stating that "if there is a need to discuss the Stipulation further because Respondent does not agree with the changes set forth above, I am available for a telephone call." The undersigned anticipated that either appellant would respond to the letter or the parties would submit a revised Stipulation of Facts deleting those paragraphs. It was not until a telephone conference on June 6, 2003, that the parties indicated that with two exceptions, the Stipulation filed on January 23, 2003, was being admitted into evidence as the final version of that

Department of Education. Charge One alleged that respondent was guilty of unprofessional conduct due to excessive absenteeism, having been absent 46½ times between July 1, 2000 and June 30, 2001, and 47 times between July 1, 2001 and April 10, 2002. Charge Two alleged that respondent was guilty of insubordination for failing to sign out upon leaving the building on ten separate occasions and for an unauthorized absence from the work site. Respondent filed an answer to the tenure charges on July 8, 2002 and the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law on July 18, 2002, as a contested case in accordance with *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Pursuant to *N.J.S.A.* 52:14B-10.1, a prehearing conference should have been held by August 10, 2002, thirty days from the date the Department of Education deemed the file to be complete. For whatever reason, the Administrative Law Judge to whom this matter was initially assigned failed to schedule a prehearing conference until September 26, 2002, at which time he determined that a conflict prevented him from hearing the case. The matter was reassigned to this ALJ on September 30, 2002, and, pursuant to *N.J.A.C.* 1:1-13.1 and –13.2, a telephone prehearing conference was held on October 1, 2002.

At the time of the prehearing conference, the parties indicated that discovery was substantially complete. Therefore, the matter was scheduled for and commenced on October 10, 2002. Due to scheduling conflicts, the additional hearing dates of October 28 and 29, 2002, could not be honored and the matter was rescheduled for December 4, 2002, at which time the hearing was continued. The hearing concluded on January 6, 2003, and the record was closed on June 10, 2003.

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document. The parties agreed that paragraph 5, as amended by petitioner, was acceptable; and it would be "the court's call" to decide the facts in issue in paragraph 3. Consequently, the record was closed on that date.

FACTUAL DISCUSSION

Stipulated Facts

Some of the material facts are not in dispute and have been agreed upon in a Stipulation of Facts submitted on January 23, 2003. *N.J.A.C.* 1:1-15.11. That stipulation is reprinted below, *verbatim*:

1. Exhibits P-11, P-12, P-14 and P-15 introduced by the Petitioner, Trenton Board of Education, have been admitted into evidence as business records of the Trenton Board of Education. As such, they are not admitted to the accuracy (truth) of the matters contained within them, but rather as documents which reflect the record maintained by the Board with respect to Mr. Williams' attendance.
2. Exhibit P-15 sets forth certain notations with respect to the attendance of the Respondent, Freddie Williams, for the July 1, 2001 through June 30, 2002 school year. The parties have agreed and stipulated that the notation of C for October 31, 2001 which under the Board's codes indicates an illness in the immediate family, should be changed to a G indicating an absence due to a subpoena directed to Mr. Williams to appear in Court.
3. December 3 and December 12, 2001, which have the code symbol G entered, should be changed to a code symbol Z indicating an absence beyond the days for which Mr. Williams was entitled to paid time off. Employees are not paid for Z days because they are absences not covered by regulation. [Respondent is not paid for Z days because they are not excused absences covered by regulation.]
4. The absences set forth for February 4, 5, 6, 7, and 8, 2002 are inaccurately recorded as G days. They should be recorded as Z days as they were absences due to Mr. Williams' personal illness, which the Board maintains were in excess of the sick days for which he was entitled to compensation.
5. Rescinded.

6. In Charge 2 of the Statement of Tenure Charges the allegations of unauthorized absence from the work site are limited to only the allegations set forth in paragraph 7 with respect to January 4, 2002, referring to a failure to properly sign out for lunch and paragraph 10 with regard to an allegation the Respondent did not properly sign out when he was observed on the corner by the school speaking to an individual. None of the other dates referenced in Charge 2 related to an allegation of unauthorized absence from the work site.

Hearing Testimony and Evidence

Testimony of Judy M. Steele

Judy M. Steele has been employed by the Board for twenty-five years, the last six as Principal of the Gregory Elementary School. Ms. Steele testified that during the 2000-2001 and 2001-2002 school years, respondent was assigned to the second shift and worked from 2:00 p.m. to 9:30 p.m. Since the light cleaners left each night at 8:00 p.m., he worked alone until 9:30 p.m. At the end of his shift, he was expected to call the Central Dispatch office, set the alarm and lock up.

On September 15, 2000, acting upon information she'd received from his supervisor, Aida Lamboy, Ms. Steele sent respondent a memorandum concerning allegations that he had, on at least two occasions, left work before his 9:30 p.m. departure time and/or failed to sign out. Specifically, on September 8, 2000, he had called out at 9:12 p.m. but failed to sign out upon leaving the building. On Thursday, September 14, 2000, he had called out at 9:05 p.m., but signed out with a 9:30 p.m. departure time.

Although respondent denied these allegations during a scheduled 3:30 p.m. meeting in her office, Ms. Steele continued to receive reports that he was "coming and going at different times without signing in and out." In fact, the alleged misconduct persisted even after the Board switched from a manual reporting system to an electric time punch clock.

Testimony of Aida Hernandez Lamboy

As head custodian at the Gregory School, Aida Lamboy is charged with the responsibility of ensuring that the building is kept clean and in good condition. She supervises two custodians, one of whom works the 6:00 a.m. – 3:00 p.m. shift, and respondent, who works the 12:30 p.m. – 9:30 p.m. shift. She is also in charge of four light cleaners who work from 4:00 p.m. – 8:00 p.m.

Ms. Lamboy testified that she began reporting problems with respondent's attendance early in the 2000-2001 school year. These problems continued throughout the year and culminated with the Board sending respondent a Letter of Warning on June 15, 2001 (Exhibit P-2). The letter, which was the second such letter he had received that year, related to an incident that had taken place on June 12, 2001. On that date, respondent reported for work at 4:00 p.m., one-half hour later than his then-scheduled starting time, and left early, telling Ms. Lamboy that he "owed the district a couple of hours." Respondent's time card indicated that he punched out for the night at 11:00 p.m.

On January 7, 2002, Ms. Lamboy sent a memorandum (Exhibit P-3) to Everett Collins, the Board's Director of Facilities, concerning respondent's conduct the previous Friday, January 4, 2002. According to Ms. Lamboy, although he had not "clocked out" or called Central Dispatch to say he was leaving, respondent was not on the premises at 5:45 p.m. He returned approximately ten minutes later, explaining that he had "let another person out of the building and that's why [I] forgot to clock out." He added that he had then gone to a friend's house to get the date and time of a viewing. When asked why he had not done that during his lunch break, respondent replied that it was the time for his lunch break and he now "could clock in." At that point, Ms. Lamboy reminded him about a memo he had received concerning clocking out when leaving the building. Respondent replied, "I never leave the building for lunch."

Ms. Lamboy also advised Mr. Collins that there had been several occasions the previous month when respondent had neglected to clock out at the end of his shift. On each occasion, respondent's explanation was that he had forgotten. When she told respondent that she would be

reporting this misconduct to Mr. Collins, respondent asked her if she really had to do that. She replied in the affirmative, stating, "Yes, I have to[,] is my job to do so."

On March 4, 2002, Ms. Lamboy sent Mr. Collins a letter (Exhibit P-8) concerning respondent's time card for the week ending March 1, 2002. The only entry for February 27 was a "clock in" at 12:20 p.m. The time card (Exhibit P-9) also included the following handwritten notation: "I talk to Mr. Amata about me punching out." In her letter, Ms. Lamboy questioned respondent's explanation that he'd had trouble with the clock that day because no one else had reported having had any problems punching in or out.

Ms. Lamboy also reported that upon returning from lunch at 1:04 p.m. on February 28, 2002, she observed respondent speaking to a person in a van at the corner of Rutherford and Prospect Avenues. When she clocked in, she noticed that respondent had not clocked out.

Testimony of Everett O. Collins

Everett O. Collins has been the Director of Facilities for the Trenton Board of Education for the past five years. Among many other things, he is responsible for the district's custodians. It is in this capacity that he knows respondent and is familiar with his work history.

Mr. Collins testified that on March 14, 2001, Robert Richardson, the Coordinator of Custodial Services and Grounds, sent respondent a memorandum (Exhibit P-10) regarding "Leave Abuse/Absenteeism." In this memorandum, Mr. Richardson advised respondent that because he had abused his leave privileges, he had been placed on leave restriction. Consequently, vacation and personal leave would not be granted and sick leave would be approved only if respondent submitted a doctor's note the day following the absence. These restrictions were imposed for the remainder of the school year.

Mr. Richardson also advised respondent to accept the memorandum as a warning. In the event respondent did not report for work and failed to submit a doctor's note the following day, disciplinary action, including termination proceedings, would be initiated.

On November 6, 2001, of the following school year, Mr. Collins sent respondent a memorandum (Exhibit P-13) advising him that as of October 31, 2001, he had completely exhausted all of his days. Therefore, "[f]rom this day forward, any time off will be without pay."

One month later, on December 13, 2001, Mr. Collins sent a memorandum (Exhibit P-16) to Anita McLaurin, Payroll Supervisor, concerning respondent's excessive use of leave days. In this memorandum, Mr. Collins reported that respondent, who had exhausted all of his days, had not reported for work on December 3 and December 11, 2001. Consequently, respondent was to be placed on "non-pay status" for those absences.

On January 10, 2002, Mr. Collins sent a memorandum (Exhibit P-18) to Dr. Clarence Guthrie, Assistant Superintendent for Human Resources, concerning respondent's "problem" with signing in and out during the workday. Although his supervisor, Ms. Lamboy, had warned him about this, respondent had failed to correct his misconduct. Therefore, Mr. Collins recommended that respondent be suspended from work for three days without pay "in order to rectify this problem once and for all."

Finally, on March 5, 2002, Mr. Collins sent a memorandum (Exhibit P-20) to Fougere Aupont, Human Resources Manager, recommending that respondent be terminated. In this memorandum, Mr. Collins reported that

> Mr. Freddie Williams's behavior continues to be problematic. He has received numerous verbal warnings as well as memos regarding refusal to punch out when leaving the building, unexcused absences, failure to complete assigned duties etc. Mr. Williams has received both a three (3) day and a five (5) day suspension with the hopes that his behavior would improve to no avail. It is clear that Mr. Williams refuses to comply with the rules set forth by the administration and at this time I am recommending Mr. Williams (*sic*) employment be terminated.

Concerning respondent's alleged abuse of leave privileges, Mr. Collins testified that the collective bargaining agreement (Exhibit J-1) entitles custodians to take eighteen days of sick leave per year; three days of leave for illness in the immediate family; three days of leave for personal business or religious holidays; and, in the case of an employee such as respondent, who

has been employed by the Board for five years, twelve days of vacation time. With the exception of leave taken for personal business or religious holidays, unused days are cumulative.

The Monthly Summary for the 2000-2001 contract or school year (Exhibit P-12) indicated that respondent had accumulated and carried over from the 1999-2000 school year four unused vacation days, thirteen unused sick days, and one personal day. Pursuant to the Collective Bargaining Agreement, he received a new allotment of twelve vacation days for a total of sixteen such days and used eight, leaving a balance of eight days. He also received a new allotment of eighteen sick days for a total of thirty-one such days, used them all and did not have any remaining days to carry over. Finally, he received and used the new allotment of three personal days. Consequently, for the 2001-2002 school year, respondent was entitled to twenty vacation days, eighteen sick days, and three personal days.

Testimony of Freddie Williams

Freddie Williams has been employed by the Board as a custodian for five years. He was initially hired as a substitute custodian in 1997 and became a full-time assistant custodian on January 4, 1999. Originally assigned to the Holland Middle School, he has worked at the Gregory School since July 10, 2000.

As a member of the Trenton Custodians Association, the Collective Bargaining Agreement governs the amount of leave time to which he is entitled. Under this agreement, he is entitled to eighteen days of sick leave per year; three days of leave for illness in the immediate family; three days of leave for personal business or religious holidays; and twelve days of vacation time. With the exception of leave taken for personal business or religious holidays, unused days are cumulative.

Although the Yearly Summary for 2000-2001 (Exhibit P-11) indicates that he was out sick August 14-18, 2000, he was actually on vacation at that time. Consequently, the A's, which denote personal illness, should have been V's. Similarly, he should not have been docked for half a personal business day on August 22, 2000, because he had actually left early for treatment of alcoholism at Princeton House, Medical Center of Princeton, where he attended ninety

Alcoholics Anonymous meetings over ninety days. Therefore, he should have been marked as taking one-half an A day.

Respondent added that he had been in the Center's in-patient program from August 22, 2000, through September 1, 2000, and had provided Mr. Richardson with a note regarding his participation in the program. The Center's Discharge Summary Report (Exhibit R-1) verified that he had been admitted on August 23, 2000, and discharged August 28, 2000.

On February 7, 2001, respondent required treatment for a back injury suffered on January 31 of that year. He was treated at the Fischer Chiropractic Back & Neck Pain Center and cleared to return to work on February 12, 2001. The absences recorded on February 5-9, 2001, were all due to this injury.

Respondent acknowledged receiving Mr. Richardson's March 14, 2001 memorandum placing him on restricted leave. In April and May, he had to use sick leave to have all of his teeth extracted. His initial appointment was on April 2, 2001 and was followed by appointments on April 9, 2001 and May 21, 2001. The Eastern Dental Excuse Slip for April 9, 2001 (Exhibit R-3) indicated that he could return to work on April 11. The Excuse Slip dated May 21, 2001(Exhibit R-3) asked that he be excused from work May 21-23. Respondent stated that Ms. Lamboy, Mr. Collins and the Board were all provided with these notes.

Respondent asserted that during the 2000-2001 school year he did not take any sick time unless he was actually ill. Moreover, he always brought in a doctor's or dentist's note the first day he returned to work. For example, he had been trying to get his dental work done for a long time, going back to his days at the Holland Middle School. In April 2001, the time finally came to get this work done and he brought in the Excuse Slips from Eastern Dental following each appointment.

He was also physically unable to report for work July 9-13, 2001, due to a broken hand. Although the doctor did not want him to return to work until July 23, 2001, and even then only for light duty (Exhibit R-4), he came back after one week. A recurrence of the same injury caused

his orthopedist to recommend he remain out of work from October 1-12, 2001 (Exhibit R-5). Yet, he returned to work on October 4, 2001.

Although charged with Z days – absences not covered by regulations – for the week of February 4-8, 2002, respondent stated that he had been hospitalized with high blood pressure. In fact, he had called the Buildings & Grounds office the morning of February 4 to state that he would be reporting to work late and, upon being hospitalized, dispatched a friend to the office to advise Mr. Collins. He later supplied a doctor's note excusing his absences February 4-11. Nevertheless, Mr. Collins deemed his sending of a friend to the office an infraction of the call out procedure, which requires the employee himself to call out sick. Then, because he did not report for work or call out on February 5, 6, and 7, Mr. Collins recommended he be suspended without pay the week of February 11-15, 2002. He did not take any action to contest the suspension.

Similarly, although he was charged with a C day – illness in the immediate family – on October 12, 2001, respondent stated that the date was actually October 31, 2001, and he had been absent because he had to honor a subpoena. Respondent elaborated on this point in his answer to the tenure charges, explaining that his mother had been a murder victim and he had taken time off to meet with the assistant prosecutor who would be trying the case and then to attend the trial against his stepfather.

Concerning his alleged failure to comply with sign-in/sign out procedures, respondent denied that he failed to sign out upon leaving the building on September 8, 2000. He also stated that although he called out at 9:12 p.m. on September 14, 2000, he did not sign out until 9:30 p.m. because he remained in the building checking windows and doors before setting the alarm and exiting. He added that this procedure normally takes forty minutes.

Respondent also maintained that he had been on the grounds, even if not in the building, the evening of January 4, 2002. After letting the light cleaners out, he drove his car around to the rear of the building on Exton to lock the back gate. Since his cousin's house is on the corner of Exton and Stuyvesant Street, he stopped by to ask her for the time of her brother's funeral. He then returned to the building where he encountered Ms. Lamboy.

Respondent allowed that he had forgotten to sign out on February 27, 2002. As soon as he realized it he spoke to Mr. Amato, who suggested that he make a notation on his time card. He followed Mr. Amato's advice but inadvertently drew the line from the notation to a space for February 26 instead of February 27.

He also admitted taking five minutes to speak to a friend during a "quick smoke" on February 28, 2002. He did not sign out because he was unaware of any rule requiring him to do so during smoking breaks.

Respondent also stated that many of his failures to sign out were due to logistics. As he explained it, the time clock is located in the rear of the building, while the key pad for the alarm is located near the front office. Once he set the alarm, he did not have enough time to go to the rear of the building, sign out and exit.

DISCUSSION OF THE LAW

N.J.S.A. 18A:6-10 provides:

> No person shall be dismissed or reduced in compensation, (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, . . . except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, 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, signed by the person or persons making the same, whom may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

N.J.S.A. 18A:17-3, in turn, provides:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, . . . except for neglect, misbehavior or other offense and only in the manner prescribed by [*N.J.S.A.* 18A:6-10].

Excessive Absenteeism

Excessive absenteeism may constitute sufficient grounds for the removal or suspension of a tenured employee. *Passaic Bd. of Ed. v. Viani*, 92 *N.J.A.R.*2d (EDU) 76. In fact, chronic or excessive absenteeism may warrant removal even when the sick leave is taken for legitimate medical or health reasons. *State-Operated School District of Jersey City v. Pellechio*, 92 *N.J.A.R.*2d (EDU) 269; *In the Matter of the Tenure Hearing of Marsden*, OAL Docket Number EDU 1188-84; *Kelsey v. Board of Education of the City of Trenton, Mercer County*, 1989 *SLD* 1622. Excessive absenteeism may also be found to constitute incapacity, unbecoming conduct, and other just cause for removal. *Ibid.*

The rationale underlying the principle that chronic or excessive absenteeism is conduct that warrants dismissal has, for the most part, been addressed in cases involving full-time teachers. For example, in *Trenton Bd. of Ed. v. Williamson*, OAL Docket No. 7335-85 (April 14, 1986), Administrative Law Judge Bruce Campbell held that "there is no question that repeated and excessive absenteeism of regular teachers poses a threat to the integrity of the educational process." Similarly, in *In the Matter of the Tenure Hearing of Reilly*, 1977 *S.L.D.* 403, the Commissioner found that "[f]requent absences of teachers from regular classroom activity disrupt the continuity of the instructional process."

A custodian is not held to the same attendance requirements as a teacher. *Passaic Bd. of Ed. v. Viani, supra*, 92 *N.J.A.R.*2d 76. Nevertheless, a school custodian holds a position of trust and responsibility requiring high standards of dependability. *In the Matter of the Tenure Hearing of Joseph McDougall*, 1974 *S.L.D.* 170. Regular attendance is essential because repeated absences may make it difficult to keep the building clean and possibly jeopardize the health and safety of the students and staff members of the school. *State-Operated School District of Paterson v. Watson*, 93 *N.J.A.R.*2d (EDU) 362.

The point at which absenteeism is so chronic as to warrant dismissal falls within the prerogative and discretionary authority of the local board of education, subject to review pursuant to the Commissioner's general authority to hear and determine controversies and disputes arising

under the school laws. *Ibid*; *In the Matter of the Tenure Hearing of Sheets*, 1980 *S.L.D.* 1536, *rev'g* 1979 *S.L.D.* 790. Among other things, the Commissioner has conditioned dismissal upon a demonstration by the board that it has attempted to correct the pattern of absenteeism and that such efforts failed to elicit any change. *In the Matter of the Tenure Hearing of Marsden, supra*, OAL Docket Number EDU 1188-84. Consequently, the nature of any warnings given to an employee and any corrective action taken by the board, as well as the reasons for the absences, are relevant to the questions of whether discipline should be imposed. *Passaic Bd. of Ed. v. Viani, supra*, 92 *N.J.A.R.*2d 76. There must also be a showing of the harm the custodial employee's absences have had on the provision of a thorough and efficient education. *Ibid.*

The number of leave days to which a custodial employee of the Trenton Board of Education is entitled derives from the Agreement between the Trenton School Custodians Association and the Trenton Board of Education (Exhibit J-1). Pursuant to this Agreement, respondent was entitled to take eighteen days of sick leave per year; three days of leave for illness in the immediate family; three days of leave for personal business or religious holidays; and, in the case of an employee such as respondent who has been employed by the Board for five years, twelve days of vacation time. With the exception of leave taken for personal business or religious holidays, unused days are cumulative. Personal business or religious days not used may only be added to accumulated sick leave for calculation of retirement benefits. They may not be accumulated for any other purpose.

At the end of the 1999-2000 school year, his first as a full-time custodian, respondent had thirteen unused sick days, four unused vacation days and one unused personal day. Starting July 1, 2000, respondent received a credit of three family illness days, three personal days, eighteen sick days and twelve vacation days for the 2000-2001 school year. Therefore, the Board's records indicated that he had available to him a total of fifty-four paid leave days; eighteen carried over from 1999-2000 and thirty-six credited for the following year.[2]

[2] The plain language of Article IX, Section E, of the Agreement between the Custodians Association and the Board would appear to prohibit employees from accumulating unused personal business days or religious holidays for use in the following year. In what may have been a bookkeeping error, the Board credited respondent with the unused personal day from the 1999-2000 school year, giving him a total of four for 2000-2001. The error must have been caught, because after respondent used three personal days in 2000-2001, the end-of-year monthly summary for the 2001-2002 school year did not credit him with an unused day and showed a zero balance in the personal day column.

During the course of the 2000-2001 school year, respondent used all thirty-one of his allotted sick days. Seven of these days were taken after he had received the March 14, 2001 memorandum from Robert Richardson placing him on leave restriction. Respondent substantially complied with the requirements of this memo and, with but one exception, the sick days taken after March 14, 2001 were all excused.

According to the 2000-2001 Yearly Summary (Exhibit P-11), respondent called out sick on April 2-3 and 9, 2001, as well as May 14-15 and 21-22 of that year. The excuse slips obtained from Eastern Dental (Exhibit R-3) asked that he be excused on April 2, April 9-11 and May 21-23. Therefore, the absence on April 3 was unexcused. Yet, when he could have remained home with excused absences on April 10 and 11, he reported for work. Then, although the dentist excused him from work May 21-23, he inexplicably used a vacation day instead of a sick day on May 23.

Overall, respondent's testimony and documentary evidence disclosed excuses for slightly more than half of the thirty-one sick days taken in 2000-2001 as follows:

- The Medical Center's Discharge Summary (Exhibit R-1) accounted for his absences on August 23, 24 and 25, 2000. Discharged on August 28, respondent did not use another sick day, but took a vacation day instead. He added that although he had been recorded as out sick on August 14-18, 2000, he was actually on vacation those five days. While this assertion cannot be verified on the record before me, given the number of other disputed entries in the Board's Yearly Summaries, it is not inconceivable. Therefore, the eight sick days he took that month may be considered excused.
- The Fischer Chiropractic Back & Neck Pain Center's certificate (Exhibit R-2) excused his absences for February 7, 8 and 9, 2001. According to respondent, all of his absences that week were due to the same back injury. Since it may be that he was hurt on February 5 and could not get in to see the doctor until February 7, his absences the week of February 5-9 may be considered excused.

Therefore, respondent should have had a total of fifty-three and not fifty-four leave days available to him in 2001-2002.

- Eastern Dental Center's Excuse Slips (Exhibit R-3) explained his absences on April 2 and 9, as well as May 21-22, 2001, for a total of four days.

Therefore, although the Board asserts that respondent only submitted documentation for eleven of the thirty-one days, and respondent argues that there was documentation to cover twenty-three of those days, it would appear that the actual number is closer to seventeen, the midpoint between the parties' totals.

The Board has made much of the fact that respondent took seven sick days after he received Mr. Richardson's March 14, 2001 memo placing him on restricted leave. As respondent correctly points out, the memo did not prohibit him from taking any additional sick leave. Rather, it put him on notice that if he was absent again and failed to provide a doctor's certificate, disciplinary action, including termination proceedings, might begin. Yet, when respondent used sick days on April 3 and May 14-15 and did not provide doctor's notes, the Board did not take any corrective or punitive action, such as withholding his increment or imposing a suspension. Instead, it focused on respondent's overall number of sick days, added it to the days he took in 2001-2002, and initiated the present tenure proceedings.

Be that as it may, the fact remains and I **FIND** that respondent did not exceed the number of sick days he was contractually entitled to take during the 2000-2001 school year. In fact, even with the Board's unexplained withholding of one day's pay in July 2000 for an unspecified reason, and one-half day's pay in June 2001 for an unauthorized personal illness, the sick day column in the Monthly Summary (Exhibit P-12) had a zero and not a negative balance. Given the fact that all of his other absences were vacation or personal days respondent was entitled to under the Agreement, respondent's absenteeism in 2000-2001was not technically excessive.

However, that does not necessarily mean that his absenteeism in 2000-2001 could not form the basis for the Board's initiation of tenure charges and ultimate decision to terminate his employment. *Smith v. Board of Education of the City of Trenton*, OAL Docket No. EDU 5255-88; *Bas Zion Kelsey v. Board of Education of the City of Trenton, Mercer County*, 1989 *SLD* 1638. As the Commissioner of Education stated in *Kelsey*:

> Initially, it is stressed that absences, even legitimate ones which do not exceed statutory or contractual entitlements, may be the basis for increment withholding, notwithstanding the fact that a teacher's performance may be good, or even excellent, when he or she is present in the classroom. . . . What a board of education is required to show, however, is that there was consideration of (1) the particular circumstances of the absences and not merely the number of absences . . .; (2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact; and (3) that there be some warning given to the employee that his or her superiors were dissatisfied with the pattern of absences. (Citations omitted)

Although respondent may not have submitted doctors' and dentists' notes covering all of the sick days he used, those he did submit certainly made the Board aware of his medical and dental problems. However, there is no evidence to suggest that the Board actually considered them. If anything, it would appear that the Board was focused exclusively on the number and not the nature of those problems. By way of example, in his March 14, 2001, memorandum to respondent (Exhibit P-10), Mr. Richardson states that the Board extends leave privileges to employees "when there is a legitimate need." In the very next sentence he goes on to state that "abuse of leave privileges is another matter" and proceeds to place him on leave restriction. The unmistakable implication is that most if not all of respondent's leave days were taken for other than legitimate purposes. It is almost as if the doctors' notes were accepted as simply verifying that respondent had been absent on a particular day. There is nothing in the record disclosing consideration of "the particular circumstances of the absences and not merely the number of absences." *Ibid.*

Similarly, the record does not contain any evidence illustrating "the impact that the absences had on the continuity of instruction during the period of time the absences occurred." *Ibid.* Neither Ms. Steele, Ms. Lamboy, nor Mr. Collins testified that respondent's numerous absences had a deleterious impact on the budget, scheduling, or morale, much less resulted in dirty or unsanitary conditions. In fact, the only mention of dirty conditions was in Mr. Collins' June 15, 2001 Letter of Warning (Exhibit P-2), and even there it was in the context of respondent having left the building for a period of time without punching his time card.

On the facts presented, I **CANNOT FIND** that respondent's absences during the 2000-2001 school year were excessive, improper, or deleterious to the overall delivery of educational services. However, those absences remain in play because they may also be viewed in conjunction with his absences in the 2001-2002 school year. As the Hon. Joseph Lavery, ALJ, held in *Smith v. Board of Education of the City of Trenton*, *supra*, OAL Docket No. EDU 5255-88:

> Past conduct over a reasonably relevant period of time may be considered, where it establishes a pattern which has continued into the school year in which the action to withhold the increment is taken. Where conduct not warranting board action to withhold salary increments in a single year continues in subsequent years, and a cumulative effect of the pattern imposes a deleterious impact on the delivery of educational services, the board may withhold future increments because of this continuing pattern.

Id. at p. 7, *citing Borrelli v. Bd. of Education, Borough of Rutherford*, State Board decision, July 3, 1985, at 5-6. Therefore, following an examination of respondent's absences during the 2001-2002 school year, it will be necessary to determine whether the absences in 2000-2001 and 2001-2002, when viewed together, establish a pattern of chronic behavior.

When the new school year began on July 1, 2002, respondent had available for his use eighteen days of sick leave, three days of leave for family illness, three personal days, and twenty days of vacation leave. How respondent may have used those days remains unclear because the Board's records are somewhat inconsistent. For example, the monthly summary (Exhibit P-14) indicates that by the end of October respondent had exhausted his eighteen days of sick leave, three days of leave for family illness and three personal days. However, the daily summary (Exhibit P-15) indicates that he had only taken sixteen days of sick leave, one day of leave for family illness and one personal day. Much more confusing is the fact that the same daily summary, printed out seven months before Exhibit P-15 and attached to the Statement of Tenure Charges, discloses that respondent had in fact exhausted his eighteen days of sick leave, three days of leave for family illness, and three personal days.[3]

[3] In his post-hearing brief, respondent attempts to amplify the inconsistencies in the Board's records by drawing comparisons to the Absence Record for 2001-2002 (Exhibit J-2). In so doing he has presumably forgotten that it was at his insistence that this exhibit was admitted into evidence on the condition that only the letter codes at the bottom

Similarly, Exhibit P-15 charged respondent with unauthorized absences on December 3 and 12, 2001, and February 4-8 and 11-15, 2002, for a total of twelve such absences. Yet, the version of P-15 attached to the Statement of Tenure Charges lists those same days as absences necessitated by his having been subpoenaed to appear in court or by virtue of his being a party in a court action. Respondent was not a party in the case and he introduced into evidence but one subpoena (Exhibit R-6) that covered an absence on October 31, 2001. Article IX, paragraph F, of Collective Bargaining Agreement provides that only absences necessitated by subpoena shall not result in a deduction of salary. Therefore, had those February dates been court related, eleven of these twelve absences still would have been unauthorized and more properly designated as "Z" days.

The Stipulation of Facts clears up half of this inconsistency. Pursuant to paragraph 4, the absences set forth for February 4-8, 2002 were inaccurately recorded as G days. Instead, they should have been recorded as Z days since they were absences due to Mr. Williams' personal illness, which the Board maintains were in excess of the number of sick days to which he was contractually entitled. However, it is the remaining five Z days covering February 11-15, that are much more problematic.

By memorandum dated February 7, 2002, Mr. Collins advised respondent that he was recommending respondent be suspended for a period of five days commencing February 11, 2002. According to Mr. Collins, the recommendation was being made as a result of respondent's violation of the call out procedure on February 4, 2002, and subsequent failure to report for work on February 5, 6 and 7.[4] Respondent did not contest the suspension and therefore did not report for work the week of February 11-15, 2002.

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of the document were to be considered. The actual letter entries on any given date were to be ignored. As it happens, Exhibit J-2 would have supported the version of P-15 attached to the Statement of Tenure Charges.

[4] There is no dispute that respondent also failed to report for work on February 8, 2002. Had Mr. Collins waited one more day, he most assuredly would have added that absence to the list of dates on which respondent had failed to report for work. Therefore, rather than consider it a separate infraction worthy of discipline in its own right, in the interests of fairness I am instead considering the five-day suspension as having been based upon respondent's failure to report for work the week of February 4-8, 2002.

Although the Board suspended and ordered respondent not to report for work, it nevertheless proceeded to charge him with five Z days for that period of time. It is difficult to understand how these five days could have been "absence[s] not covered by regulations" when they were the product of a suspension imposed in accordance with regulations. But even more incomprehensible is the Board's subsequent decision to include these five days of suspension in the Statement of Tenure Charges. *See* Charge One, paragraph 3.[5] The Board cannot on one hand order respondent not to report for work and then, on the other, charge him with unauthorized absences after he followed that order. Therefore, insofar as the charge of excessive absenteeism for the 2001-2002 school year is concerned, I **FIND** that respondent's absences of February 11-15 should not be considered and must be removed from those upon which the Board relies.

It is equally troubling that the Board has included the absences of February 4-8 in the Statement of Tenure Charges. The suspension of February 11-15 was expressly imposed as punishment for these unauthorized absences.[6] To allow the Board to include the same absences among those upon which it is seeking respondent's termination would be to punish him twice for the same offense. I therefore further **FIND** that the absences of February 4-8 also should not be considered and must be removed from those upon which the Board relies.

When the 2001-2002 school year began, respondent had available for his use eighteen days of sick leave, three days of leave for family illness and three personal days. As of October 31, 2001, he had exhausted all twenty-four of those days. Thereafter, he was charged with two absences in December and the aforementioned ten absences in February. After adding in the eleven vacation days he used, the Board charges that respondent was absent from work on forty-seven occasions. However, having found that the February absences ought not be considered, the total must be adjusted down to thirty-seven. Moreover, since the number of vacation days respondent has taken in any given year has never been an issue and should not factor into this

[5] "After exhausting all of his leave days for the 2001-2002 period, Respondent was again absent for two (2) days in December 2001 and ten (10) days in February 2002."

[6] There is little doubt that February 8, 2002, would have been included but for the fact Mr. Collins drafted his memo on Thursday, February 7 instead of waiting to see if respondent reported for work the following day.

equation, the net number of absences should be twenty-six, two over the allotment of twenty-four,[7] and I so **FIND**.

Insofar as the actual sick days are concerned, there is once again nothing in the record disclosing that the Board considered "the particular circumstances of the absences and not merely the number of absences." *Kelsey v. Board of Education of the City of Trenton, Mercer County, supra*, 1989 *SLD* 1638. The Board could not dispute that respondent was physically unable to report for work July 9-13, 2001, due to a broken hand. It had been provided with the July 12, 2001, letter from Mercer-Bucks Orthopaedics and was aware that the doctor did not want him to return to work until July 23, 2001, and even then only for light duty. It must also have been aware that he came back after one week. A recurrence of the same injury caused his orthopedist to recommend that he remain out of work from October 1-12, 2001. Yet, he returned to work on October 4, 2001. The nature of his injuries and the fact that he prematurely returned to work on two occasions seems not to have mattered.

Additionally, as was the case with his absences in 2000-2001, the record is bereft any evidence illustrating the impact that the absences may have had on the school during the period of time the absences occurred. *Ibid.* As stated earlier, neither Ms. Steele, Ms. Lamboy, nor Mr. Collins testified that respondent's absences caused scheduling problems or had a negative impact on morale, much less resulted in dirty or unsanitary conditions. Once again, it would appear that the Board was preoccupied with the number of absences, not the adverse impact, if any, they may have had.

On the facts presented, I **FIND** that respondent's absences during the 2001-2002 school year were, technically, excessive. However, I **CANNOT FIND** that they were necessarily illegitimate or deleterious to the overall delivery of educational services.

[7] Respondent carried a balance of eight vacation days over to the 2001-2002 school year. When added to the twelve additional days he automatically received, he had a total of twenty such leave days. Had he used them for his absences on December 3 and 12, 2001, a charge of excessive absenteeism would have been more difficult to sustain, particularly when there was no evidence establishing that the absences had a deleterious impact on the delivery of educational services.

In *Smith v. Board of Education of the City of Trenton, supra*, OAL Docket No. EDU 5255-88, Judge Lavery held that misconduct continuing from one year to the next, such that it established a pattern, warranted board action even though the misconduct would not necessarily have warranted board action in a single year. However, in order for the action to be sustained, the board first had to establish that "a cumulative effect of the pattern imposes a deleterious impact on the delivery of educational services." Having already found that the record is bereft of any evidence establishing that respondent's absences had any impact, much less a deleterious one, on the delivery of educational services in 2000-2001 and 2001-2002, I **FIND** that the issue of whether or not the continuing conduct over the course of these two years constituted a pattern warranting termination is now moot.

Unbecoming Conduct

The remaining charges against respondent, alleging unauthorized absence from the worksite and failure to follow established procedures for signing out, fall under the general heading of unbecoming conduct. While there is no single definition of the term, unbecoming conduct on the part of public employees may include excessive, violent, or other intemperate behavior that is not in accord with propriety, modesty, good taste or manners, or behavior that is otherwise unsuitable, indecorous, or improper under the circumstances. It may consist of conduct that is disrespectful to one's supervisors, discourteous to one's fellow employees and disruptive of governmental operations. A finding of unbecoming conduct does not require that any specific rule or regulation has been violated, but may be based primarily on a violation of an implicit standard of good behavior. *In re Emmons*, 63 *N.J. Super.* 136, 140 (App. Div. 1960); *Newark v. Massey*, 93 *N.J. Super.* 317, 323 (App. Div. 1967).

In the field of education, our Supreme Court has held that the touchstone of the charge is a teacher's fitness to discharge the duties and functions of the office or position. *Laba v. Newark Board of Education*, 23 *N.J.* 364, 384 (1957), *See also, In re Tenure Hearing of Grossman*, 127 *N.J. Super.*13, 28-29 (App. Div. 1974), *certif. denied*, 65 *N.J.* 292 (1974). A significant number of cases have found certain types of specific behavior to be unbecoming conduct as well. For example, in *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967), the use of physical force by a teacher to maintain discipline was held to constitute unbecoming conduct. Similarly, in *Matter of*

the Tenure Hearing of Cowan, 224 *N.J. Super.* 737, 741 (App. Div. 1988), a teacher with an uncontrollable temper who verbally and physically abused students was found to have engaged in unbecoming conduct.

Unbecoming conduct may be found where there has been a series of incidents indicating a pattern of behavior, or a single sufficiently flagrant incident. *Redcay v. State Board of Education*, 130 *N.J.L.* 369 (Sup. Ct. 1943), *aff'd o.b.* 131 *N.J.L.* 326 (E. & A 1944). In *Redcay*, a school principal was found guilty of the charges of inefficiency, incapacity, insubordination, lack of cooperation, unfitness and conduct generally unbecoming a principal. In so finding, the court stated:

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way.
> [130 *N.J.L.* at 371.]

Unbecoming Conduct – Unauthorized Absence from Worksite

The Board alleges that although he had not "clocked out" or called Central Dispatch to say he was leaving, respondent was not on the school grounds at 5:45 p.m. the evening of January 4, 2002. He returned approximately ten minutes later and, upon being confronted by his supervisor, Aida Lamboy, explained that he had "let another person out of the building and that's why [I] forgot to clock out." He added that he had then gone to a friend's house to get the date and time of a viewing. When asked why he had not done that during his lunch break, respondent replied that it was the time for his lunch break and he now "could clock in." At that point, Ms. Lamboy reminded him about a memo he had received concerning clocking out when leaving the building. Incongruously, respondent replied, "I never leave the building for lunch."

Respondent testified that although he was not in the building, he had been on the grounds that night. At the time in question, he had let the light cleaners out and driven his car around to the rear of the building on Exton to lock the back gate. Since his cousin's house is on the corner of Exton and Stuyvesant Street, he stopped by to ask her for the time of her brother's funeral. He then returned to the building where he encountered Ms. Lamboy.

One factor to consider in determining which party's version of an 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). More importantly, in so far as this matter is concerned, "[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).

Careful comparison of Ms. Lamboy's and respondent's respective versions of the incident discloses that they are actually quite similar and tend to support one another. To the extent they differ, it is in the number, and to a certain extent, the nature of the details provided. Each version tends to fill in the blanks left by the other and the two may be read together as one unified narrative. However, there is an old saying that "the devil is in the details," and a close reading of the details provided by respondent more than suggests that, even without addressing Ms. Lamboy's testimony, his version of the incident is incredible.

Initially, respondent stated that at the time in question, 5:45 p.m., he had let the light cleaners out and driven his car around to the rear of the building on Exton to lock the back gate. However, the principal, Ms. Steele, testified that the light cleaners leave each night at 8:00 p.m. Moreover, Ms. Lamboy stated that when she could not find respondent in the building she had asked "one of the ladies," *i.e.* one of the light cleaners,[8] if she knew where he had gone. Had respondent actually let the light cleaners out, there would not have been anyone left for Ms. Lamboy to question concerning his whereabouts.

One must also question why he drove his car around to the rear of the building on Exton to lock the back gate. Certainly, he could have accessed the gate just as easily by exiting the building and walking through the lot. It is conceivable that it may have been because his car had been parked on the street and he wanted to move it to the lot for the balance of the evening. But it is just as plausible that he had decided to run a quick errand and did not believe he or his car

[8] Ms. Lamboy testified that in addition to two custodians, she supervises four light cleaners who work from 4:00 p.m. to 8:00 p.m.

would be missed. In fact, had Ms. Lamboy not returned to retrieve her paycheck at that particular time, his absence would have gone unnoticed.

Finally, respondent testified that although he was not in the building, he had been on the grounds. However, it is respondent's own words that belie that statement. By his own admission, he stopped by his cousin's house, which is located on the corner of Exton and Stuyvesant Street, to ask her for the time of her brother's funeral. In fact, this statement is consistent with the one he gave to Ms. Lamboy that evening. No matter how proximate to the school it may have been, the cousin's house was not *on* the grounds.

In his closing brief, respondent asserts that the testimony, as well as Exhibit P-3, establishes that this incident took place during his lunch break, a period during which he is entitled to leave the grounds. Therefore, the most he can be charged with is a failure to sign out. However, respondent appears to be stretching the record. Among other things, respondent did not testify that he had visited his cousin's house during his lunch break. Moreover, a careful reading of Exhibit P-3 discloses that it was not respondent, but Ms. Lamboy, who first mentioned lunch when she asked him why he had not gone to his cousin's house during his lunch break. Although he replied, "this is my lunch time," when reminded about the policy of clocking out for lunch he stated, "I never leave the building for lunch," failing to recognize the inherent contradiction in those two statements. Therefore, on the facts presented, I **FIND** that respondent was absent from the worksite without authorization.

The Board also alleges and Ms. Lamboy testified that on February 28, 2002 at 1:04 p.m., she observed respondent speaking to a person in a van at the corner of Rutherford and Prospect Avenues. When she clocked in, she noticed that respondent had not clocked out. For his part, respondent admitted taking five minutes to speak to a friend during a "quick smoke" on February 28, 2002. He did not sign out because he was unaware of any rule requiring him to do so during smoking breaks.

It is notable that the Board does not dispute respondent's statement that he was on a smoking break. Although Ms. Lamboy testified that she was returning from her lunch break at that time, she did not state that respondent was or should have been on his. Nor did the board

offer any testimonial or documentary evidence concerning the length of "smoking" breaks or the procedure that should be followed in taking them. Examination of the time cards in evidence discloses two sign in and two sign out lines for each day worked in any given week. From that, one might reasonably infer that an employee was only required to clock in at the beginning of the shift, clock out for lunch, clock back in at the conclusion of lunch, and clock out at the end of the shift. Consequently, the fact that respondent did not clock out does not, as the Board would suggest, mean that he improperly failed to follow clocking out procedures and I so **FIND**.

More importantly, the evidence presented does not lead to an inescapable conclusion that respondent was absent from the grounds without authorization. Assuming that a custodian is not required to clock out for a smoking break, it is not unreasonable to assume that such a policy anticipates that the break will be brief and the custodian will remain on the grounds and available if needed. Here, there is nothing to suggest that when respondent's friend pulled over at the corner of Rutherford and Prospect Avenues and respondent walked out to greet him it was anything but spontaneous. Common sense also suggests that if respondent and his friend had a need to discuss something important at length and could only get together during his shift, respondent would not have arranged to do so during an extended smoking break in broad daylight right in front of the school.

Significantly, the Board did not offer any evidence that respondent's break was for a period of time longer than it takes to smoke a cigarette. It appears to have taken a rather rigid stance that any departure from the grounds without first signing out, no matter how long the duration, is by definition an unauthorized absence. Taken to an illogical extreme, a custodian who spontaneously left the grounds to assist a pedestrian or remove a safety hazard from the sidewalk would be guilty of an unauthorized absence. Therefore, in the absence of a specific policy concerning smoking breaks, I **FIND** that respondent's absence was of such a short duration and so *de minimis* that it does not constitute an unauthorized absence.

Unbecoming Conduct – Failure to Sign Out

The final charges against respondent relate to his alleged failure to clock out on September 20-21, 2001; November 14 and 16, 2001; December 10-12 and 20-21, 2001; and

February 27, 2002. In support of these charges the Board introduced time cards that disclose the following information:

- The time card for the week ending September 21, 2001, Exhibit P-4, shows that on September 20, respondent clocked in at 2:34 p.m., but failed to clock out at the end of his shift. The same is true for September 21, when respondent clocked in at 2:42 p.m. but failed to clock out.
- The time card for the week ending November 16, 2001, Exhibit P-5, illustrates that on November 14, respondent clocked in at 2:22 p.m., but failed to clock out at the end of his shift. However, the same cannot be said of November 16, when respondent clearly clocked out at 9:52 p.m.
- The time card for the week ending December 14, 2001, Exhibit P-6, illustrates that on December 10, respondent clocked in at 2:26 p.m. and clocked out at 10:09 p.m. However, respondent failed to clock out on December 12 after clocking in at 2:12 p.m. Curiously, the time card also indicates that respondent did not clock in or out on December 11, suggesting that he was absent on that date. An examination of Exhibit P-15 disclosed that respondent was recorded as present on that date but absent on December 12. Since the time card indicates that he was, in fact, present on December 12, his absence on December 11 must have been incorrectly recorded as December 12 in Exhibit P-15.
- The time card for the week ending December 21, 2001, Exhibit P-7, reveals that on December 20, respondent clocked in at 2:03 p.m., but failed to clock out at the end of his shift. The same is true of December 21, when respondent failed to clock out after clocking in at 1:08 p.m.
- The time card for the week ending March 1, 2002, Exhibit P-9, reveals that on February 27, respondent clocked in at 12:20 p.m., but did not clock out at the end of his shift. There is, however, a handwritten note stating, "I talk[ed] to Mr. Amata about me punching out." The arrow from the note is drawn to a space for February 26, but was clearly intended for February 27 because respondent did, in fact, clock out on the 26th.

Consequently, it would appear that respondent failed to clock out at the end of his shift on at least six, and possibly seven, separate occasions.

The primary date in controversy is that of February 27, 2002. In her March 4, 2002 letter to Mr. Collins, Exhibit P-8, Ms. Lamboy directed his attention to the time card for that date and asked him to "read what he wrote for the 27th of Feb. Freddie told me he had problems with the time clock. But how come nobody else had problems with it."

During his testimony, respondent did not mention anything about having had a problem with the clock. Rather, he admitted that he had forgotten to sign out on that date. As soon as he realized it he spoke to Mr. Amato, who suggested that he make a notation on his time card. He followed Mr. Amato's advice but inadvertently drew the line from the notation to a space for February 26 instead of February 27. However, he did not insert the approximate time he ended his shift.

Unfortunately, neither party called Mr. Amato as a witness. Consequently, we do not know when respondent called Mr. Amato and received his advice to annotate the time card. In all probability it was sometime before March 1, 2002, the last work day on the card. By the same token, we do not know whether Ms. Lamboy or Mr. Collins attempted to contact Mr. Amato in order to determine whether respondent actually called him and, if so, what he said.

Respondent has proffered two alternative excuses for his failure to clock out. As he advised Ms. Lamboy and then stated during cross-examination, he had problems with the clock that evening. However, he also testified on direct that he simply forgot. The two are mutually exclusive and the former is implausible due to the fact that no other employees reported any problems that day. Moreover, he clocked in earlier that day and the following day without any difficulty. That being the case, I will take his second explanation – that he simply forgot – as the truth. Consequently, whether or not he actually called Mr. Amata, the fact remains that respondent failed to clock out on February 27, 2002, and I so **FIND**.

Respondent also testified that many of his failures to sign out were simply a matter of logistics. As he explained it, the time clock is located in the rear of the building, while the key pad for the alarm is located near the front office. Once he sets the alarm, he does not have enough time to go to the rear of the building, sign out and exit. Yet, however problematic the building layout may have been, it is indisputable that respondent was able to call out, set the alarm and

clock out, in whatever order, on countless other evenings during the course of his employment. Therefore, respondent's failures to clock out on September 20-21, November 14, and December 12, 20 and 21, 2001 were due to a lack of effort or forgetfulness, and I so **FIND**.

Nevertheless, respondent argues that his failures to clock out cannot form the basis for a tenure proceeding because the Board does not have a specific rule or regulation requiring an employee to punch in or punch out. More specifically, he cannot be charged with a violation of a rule if he does not have knowledge that such a rule exists. In support of this argument respondent cites but one case, *Grossman v. State Health Benefits Commission*, 92 *N.J.A.R.* 2d 35 (1991), in which Administrative Law Judge Daniel B. McKeown held that an individual could not be penalized for failing to comply with a rule when the appointing authority did not provide him with notice of the rule.

Respondent's reliance on *Grossman* is misplaced. In that case a health insurance provider had denied a claim for reimbursement of prescription drug expenses because the claimant had failed to file his claim within ninety days of the end of the calendar year in which the expenses were incurred. The health insurance had been in his late wife's name and the eighty-one-year-old claimant was unaware of the rule because he had not been provided with a manual explaining the procedure for filing a claim, even after he decided to continue the coverage in his own right.

Upon reviewing the manual, ALJ McKeown found that the very rule upon which the provider relied clearly acknowledged that it might not be reasonably possible to file claims within the ninety-day time period but that such claims would still be accepted if proof of loss was furnished as soon as reasonably possible. He further found that since the claimant had suffered from depression following the death of his wife of fifty-one years and the receipts had long been packed in a box in anticipation of a move to Florida, it had not been reasonably possible for him to file the claim any sooner. Consequently, Judge McKeown ordered the provider to reimburse the prescription drug expenses.

Unlike *Grossman*, this case does not involve a lack of knowledge of an existing rule that by its own terms may be relaxed when compliance is not reasonably possible. That there may not have been a written policy is of no moment. The many verbal and written admonitions

respondent received more than adequately placed him on notice that he was required to clock out at the end of his shift. The fact that he did so on all but a handful of occasions establishes that he knew what was expected of him. Moreover, in a matter such as this, a finding of unbecoming conduct does not require that any specific rule or regulation has been violated, but may be based primarily on a violation of an implicit standard of good behavior. *In re Emmons*, *supra*, 63 *N.J. Super.* at 140; *Newark v. Massey*, *supra*, 93 *N.J. Super.* at 323.

Given my findings that respondent is not guilty of excessive absenteeism; but is guilty of unbecoming conduct for an unauthorized absence on one occasion and failing to comply with the clocking out procedure on seven occasions, I **FIND** and **CONCLUDE** that the termination of respondent's tenure rights and his removal as a custodian is not an appropriate remedy. Under the circumstances, the imposition of a period of suspension is the appropriate penalty that should be imposed. The reason for a suspension is to remind respondent of his obligation and responsibility to follow the rules necessary for the overall delivery of educational services. Consequently, on the facts presented, I **FIND** and **CONCLUDE** that the imposition of a thirty-day suspension is the appropriate penalty to be imposed in this matter.

DECISION AND ORDER

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that respondent's tenure rights be and are hereby **RESTORED**. It is further **ORDERED** that based upon these findings of guilty to the tenure charges of unbecoming conduct, respondent be and is hereby **SUSPENDED** for a period of thirty days. And it is further **ORDERED** that respondent be **AWARDED** back pay, related benefits and seniority in an amount that reflects the imposition of a thirty-day suspension.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 29, 2003 — DATE

ISRAEL D. DUBIN, ALJ

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

7/31/2003

DATE

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE,

AUG - 6 2003

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

EXHIBITS

For Petitioner:

P-1 Memorandum dated September 15, 2000

P-2 Memorandum dated June 15, 2000

P-3 Memorandum dated January 7, 2002

P-4 Time Cards for weeks ending September 14, 2001 and September 21, 2001

P-5 Time Card for week ending November 16, 2001

P-6 Time Cards for weeks ending December 14, 2001 and December 28, 2001

P-7 Time Card for week ending December 21, 2001

P-8 Letter dated March 4, 2002

P-9 Time Card for week ending March 1, 2002

P-10 Memorandum dated March 14, 2001

P-11 Yearly Attendance Summary, 2000-2001

P-12 Monthly Attendance Summary, 2000-2001

P-13 Memorandum dated November 6, 2001

P-14 Monthly Attendance Summary, 2001-2002

P-15 Yearly Attendance Summary, 2001-2002

P-16 Memorandum dated December 13, 2001

P-17 [Not moved into evidence]

P-18 Memorandum dated January 10, 2002

P-19 [Not moved into evidence]

For Respondent:

R-1 Medical Center at Princeton Discharge Summary Report

R-2 Doctor's Note from Fischer Chiropractic Back & Neck Pain Center

R-3 Dentist's Notes from Eastern Dental

R-4 Doctor's Note from Mercer-Bucks Orthopaedics, P.C.

R-5 Doctor's Note from [illegible]

R-6 Subpoena for October 31, 2001

R-7 Doctor's Note from Harold J. Brown, M.D.

R-8 Memorandum dated February 7, 2002

Joint Exhibits:

J-1 Agreement between Trenton School Custodians Association and the Trenton Board of Education

J-2 Memorandum dated November 6, 2001 with Absence Record attached (admitted limited to use of code at bottom of Absence Record only)

WITNESSES

For Petitioner:

Judy M. Steele

Aida Hernandez Lamboy

Everett O. Collins

For Respondent:

Freddie Williams

OAL DKT. NO. EDU 4579-02
AGENCY DKT. NO. 191-6/02

IN THE MATTER OF THE TENURE	:	
HEARING OF FREDDIE WILLIAMS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Pursuant to *N.J.A.C.* 1:1-18.4, exceptions to the Initial Decision were filed by the Board of Education (Board), as were reply and cross-exceptions by respondent.[1]

In its exceptions, the Board urges the Commissioner to reject the Initial Decision and find instead that respondent's absences as set forth by the Administrative Law Judge (ALJ) do, in fact, constitute excessive absenteeism, since respondent has exhibited a continuing pattern of absenteeism despite being placed on notice about his attendance. The Board further urges that dismissal from tenured employment is the appropriate penalty for the instances of unbecoming conduct found by the ALJ, or at the very least, a 120-day loss of salary as was imposed in *In the Matter of the Tenure Hearing of Ralph McCullough, School District of the City of Trenton, Mercer County,* decided by the Commissioner on September 6, 2002 and affirmed by the State Board of

[1] See note 2 below.

Education on April 2, 2003. In reply, respondent urges adoption of the Initial Decision with respect to the charge of excessive absenteeism, but contends that the ALJ erred in finding respondent guilty of unbecoming conduct and imposing a 30-day suspension as a result.[2]

Initially, the Commissioner concurs with the ALJ, for the reasons carefully enumerated in the Initial Decision, that under all the circumstances of this matter, the Board has not met its burden of proving its charge of excessive absenteeism. Additionally, finding no basis to disagree with the credibility determinations of the ALJ or with his analysis of respondent's actions, the Commissioner further concurs that respondent is guilty of unbecoming conduct for one instance of unauthorized absence from the worksite (not two, as charged) and several instances of failure to clock out at the end of his work shift.

The Commissioner does not agree, however, that the appropriate penalty for respondent's unbecoming conduct as proven on the present record is a 30-day suspension. While there is no question that the charges proven in this matter do not rise to the level of warranting respondent's dismissal from tenured employment, they *do* warrant a penalty sufficiently severe to discourage the cavalier attitude evident in respondent's testimony with respect to basic employee responsibilities of remaining on premises when on duty and appropriately signing or clocking out at the end of a work shift. The Commissioner finds a 30-day suspension insufficient for this purpose, and he

[2] The Commissioner here notes that respondent's submission, filed within the time period for reply exceptions as extended at respondent's request, is substantially in the nature of primary exceptions, not reply or cross-exceptions as purported. However, to the extent that respondent's submission does not constitute a reply to the Board's exceptions, the arguments raised therein substantially reiterate those of respondent's post-hearing brief, which both the ALJ and the Commissioner have fully considered.

directs instead that respondent forfeit the salary already withheld from him pursuant to *N.J.S.A.* 18A:6-14.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: 9/15/03

Date of Mailing: 9/16/03

[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.*

546-03

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
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged the Board's residency determination that her children were not domiciled in the District.

In light of the record and the testimony of witnesses, the ALJ found that the District established proof that petitioner was a resident and domiciliary of Sea Bright not Atlantic Highlands. The ALJ ordered the children removed from the Atlantic Highlands School District. The ALJ did not make any calculation with respect to unpaid tuition amounts since the Board made no claim for tuition.

The Commissioner adopted the Initial Decision with modification. Based on the record and the credibility assessments of the ALJ, the Commissioner concurred with the ALJ that petitioner failed to establish that she was a domiciliary of Atlantic Highlands so as to entitle her children to a free public education in that District. The Commissioner, however, rejected the ALJ's apparent belief that, absent the filing of a counterclaim for tuition, the Board is not entitled to collect such compensation for the period of the children's ineligible attendance in its schools. The Commissioner determined that tuition was clearly identified as a relief sought in the Board's Answer. Thus, the Commissioner remanded the matter to OAL solely for such further proceedings as may be needed in order to determine the amount of tuition due the Board for the period of ineligible attendance.

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.

September 22, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2566-03

AGENCY DKT. NO. 99-3/03

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: July 1, 2003 Decided: August 7, 2003

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 matter 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 at the conclusion of the hearing, the record closed.

FACTUAL DISCUSSION

The following is intended to summarize the testimony and evidence, which I found to be relevant to the issues in this matter.

It is undisputed that on February 25, 2003, the Board of Education of the Borough of Atlantic Highlands held a hearing at which petitioner was present. Following that hearing, the Board adopted a resolution setting forth its findings and conclusions. In particular, it concluded that M.F., the parent of K.F. and K.F., and M.F.'s children, are not domiciled within the Borough of Atlantic Highlands, and it ordered that they be removed from the school. Petitioner filed a petition of appeal with the Commissioner of Education on April 2, 2003, in which she asserts that the decision of the Board is incorrect.

It is also undisputed that K.F. and K.F. attended the Atlantic Highlands Elementary School operated by respondent Board from January 2003 through the end of the school year in June 2003. By letter dated February 12, 2003, the Board Secretary notified M.F. of the intention of the Board to have a hearing on February 25, 2003, in order to determine whether the parent and children were domiciled within the Borough.

At the hearing before the OAL, the first witness to testify for respondent was Timothy R. Haase. He is an employee of respondent school district and has been the Assistant Principal for two years. Prior to that, he was a Child Study Team Director, and he also served for 12 years as a teacher. He knows both of M.F.'s children. He explained that the Atlantic Highlands Elementary School is a small school with an enrollment of 300 children. As a result, he knows all of the children on a personal basis.

As part of his duties, Mr. Haase investigated assertions that the children were no longer living in Atlantic Highlands, but were living in Sea Bright. Mr. Haase testified that he knows of at least two school district employees and one mother of a student who stated that M.F. was no

longer living in Atlantic Highlands but was living in Sea Bright. However, he did not identify these individuals.

Mr. Haase testified that he decided to make observations of the premises located on East Highland Avenue, Atlantic Highlands, where the children allegedly resided with M.F. He observed this address on February 5, 6, 10 and 25, 2003, by parking his car across from the entrance to the residence from 7:50 a.m. until 8:30 a.m. or 8:35 a.m., and he just watched to see if the children exited the residence to go to school. He explained that school starts at 8:35 a.m. He never saw the children or M.F. leave this residence on any of the four occasions he observed it. However, the children arrived at the school at 8:35 a.m. on the first three mornings, and at 8:25 a.m. on the fourth morning.

Mr. Haase also testified that he conversed with Kimberly Littlefield, a teacher in the school district. He asked her to make an observation of a home in Sea Bright because he knew she drove to work in that vicinity. He also had information that this was where the children were living at that time. On February 10, and 25, 2003, Ms. Littlefield observed the children leaving the Sea Bright home.

Mr. Haase testified that the Board of Education sent all correspondence to both addresses. He identified a certified mail envelope (R-1) which was addressed to M.F. at the Atlantic Highlands address. This letter was stamped as Unclaimed, and written on the face of the envelope by the postal authorities was the notation: "Fwd to __ New Street, Sea Bright, New Jersey 07760."

On cross-examination, Mr. Haase testified that Ms. Littlefield observed the Sea Bright address on February 10 and 25, 2003, and that she would be testifying in this matter. He also admitted that neither the Atlantic Highlands residence not the Sea Bright residence was observed after February 25, 2003.

Kimberly Littlefield testified that she has been employed as a schoolteacher by the Atlantic Highlands Board of Education for 31 years. She knows both K.F. and K.F. She was requested by Mr. Haase to observe the premises located on New Street in Sea Bright, New

Jersey. The request was made of her because she lives in Long Branch and drives by the Sea Bright address.

On February 10, 2003, Ms. Littlefield observed the Sea Bright address from 7:30 a.m. to 8:30 a.m. On February 25, 2003, she observed the Sea Bright residence from 7:30 a.m. until 8:10 to 8:20 a.m. She explained that school starts at Atlantic Highlands Elementary School at 8:25 a.m. On both of these occasions, she saw K.F., K.F., and M.F. leave the house, get into the car, and drive to school. She also saw both of the children later than day in school. She explained that on February 10, 2003, she observed M.F. drive the children to school. On February 25, 2003, she observed W.M. drive the children to school.

The final witness called by respondent school district was Doris T. Muller. Ms. Muller testified that she is a process server and investigator and has been engaged as such for well over 25 years. She was retained by the attorney for respondent the day before the hearing to serve an order. She was instructed to go to __ New Street in Sea Bright, New Jersey to serve the order. If no one was there, she was then to go to the Atlantic Highlands address.

Ms. Muller testified that when she arrived at the 22 New Street address in Sea Bright, K.F. answered the door and said, "I am K____." She also spoke to the other child. They stated to her that their mother worked in Red Bank in a mortgage company. Another woman came to the door who only spoke Spanish. She then asked the first child what grade he was in, and he said, "I'm going into fourth grade and I go to school in Atlantic Highlands." She then left the order with the adult who was present.

M.F. testified in this matter. She stated that she had been living with W.M. at his home on East Highland Avenue, Atlantic Highlands. On or about January 15, 2003, she had to leave these premises and she took an apartment on New Avenue in Sea Bright temporarily and remained there until the beginning of February 2003. She indicated that she now no longer lives in Sea Bright, but has moved back to Atlantic Highlands, and her aunt now lives in the Sea Bright apartment. She provided copies of envelopes mailed to her by the school district to the Atlantic Highlands address (P-1 and P-2), as well as copies of Verizon Wireless Bills sent to her at the Atlantic Highlands address (P-3, P-4 and P-5).

M.F. explained that it was necessary for her to leave W.M.'s home for a short period of time, but that they have since cleared up their problems. She claimed to have moved back to Atlantic Highlands shortly after moving to Sea Bright, and that her aunt has taken over the lease on the Sea Bright apartment.

M.F. admitted that her children answered the door to the Sea Bright apartment when the process server came the day before the hearing. She explained that her aunt was babysitting the children while she was work. She admitted that the children were with the aunt in Sea Bright during the hearing of this matter. However, their whole house is set up in Atlantic Highlands.

M.F. testified that the school district is pursuing this matter as a vendetta because of school vandalism committed by her son.

On cross-examination, M.F. admitted that her name is on the lease for the Sea Bright apartment. She signed the lease on January 15, 2003, and she admitted that it is a one-year lease and the lease term is from January 2003 through January 2004. Her aunt, L.S., who is now babysitting, has taken over the lease on that apartment, and pays rent of $1,100 for a two-bedroom apartment. She also states that the phone in the apartment is in her aunt's name. Her aunt is not employed, and she is using her savings and social security in order to pay the rent.

W.M. testified that he is the owner and occupant of the premises located on East Highland Avenue, Atlantic Highlands. He admitted that there was a stressful situation between M.F. and him, and M.F. was told to leave his house by DYFS. He explained that M.F. had been calling DYFS and complaining about the situation in his house and that the DYFS caseworker called M.F.'s bluff and ordered her to leave. However, at the end of February or the beginning of March 2003, M.F. and her children moved back to Atlantic Highlands, and they now live with W.M. at the East Highland Avenue address in Atlantic Highlands. He indicated that DYFS took action to instruct M.F. to move out of his home on January 9, 2003, but DYFS never officially ordered them out. M.F. and the children moved back right after the school district's last observation at the end of February 2003. W.M. indicated that he is a retired former police officer.

W.M. identified an Atlantic Highlands Police Department investigation report of an incident which occurred on January 9, 2003, involving him and M.F. (P-6). This report contains allegations by M.F. concerning an incident that took place several nights prior to that date. The report indicates that W.M. and M.F. got into an argument and that he was physically and verbally abusive to her. W.M. was advised by DYFS that M.F.'s children could no longer reside at his house and would be moved temporarily to another location until her apartment was ready. M.F. stated several times to the investigating officer that she was going to try and get a temporary restraining order against W.M. after she moved to her new apartment. The officer reported that it is apparent that M.F. will not be returning to live in Atlantic Highlands again. She stated to both DYFS and to the investigating officer that she was moving to Sea Bright.

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), affd, *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, supra,* at 520,521*; see* also *State v. Benny, supra,* at 251.

> 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, aff'd 58 *N.J.* 112 (1971).) Thus, the domicile is what one regards as a true and permanent home. *In re Jaffe, supra,* at 90, 91.

The courts have recognized that a person may have multiple residences, but only one domicile, *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 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 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,* 255 *N.J. Super.* 362, 376 (Law Div. 1991), 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). 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 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, 255 N.J. Super. 362, 375 (1991)]

My decision turns on the element of intent in accordance with *Fort Lee Board of Education v. Kintos, supra,* affd 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.

In the present matter, M.F. and W.M. testified that sometime after February 25, 2003, M.F. no longer resides in Sea Bright with her children, but that she has moved back to W.M.'s residence in Atlantic Highlands. In support of this position, M.F. relies on objective evidence in the form of letters addressed to her by the school district in April and May 2003 (P-1 and P-2). She also relies on Verizon wireless phone bills for February, March and April 2003 (P-3, P-4 and P-5).

The school district discounts the letters sent to the address in Atlantic Highlands and provided testimony that letters were sent to both the Atlantic Highlands and the Sea Bright addresses. In addition, it argues that a bill for a wireless phone does not establish a place of residence, but simply shows where the bill was sent.

The objective evidence relied upon by the school district are the observations made by Assistant Principal Haase on February 5, 6, 10 and 25, 2003, establishing that on those dates, petitioner and her children were not living at the Atlantic Highlands address, but were living in Sea Bright. In addition, they relied upon the objective observations by Ms. Littlefield on February 10 and 25, 2003, when petitioner and her children were seen leaving the Sea Bright residence in order to travel to school.

Respondent also relies upon a certified mail envelope addressed to M.F. and mailed on May 13, 2003, addressed to the Atlantic Highland residence (R-1). The notations on this envelope are that it is unclaimed, and it contains the forwarding address to the premises located in Sea Bright. Finally, respondent relies upon objective evidence in the form of the testimony of a process server who observed the children at the Sea Bright premises on the day prior to the scheduled hearing in this matter.

I also find to be of significance are statements made by petitioner on January 9, 2003, to both the investigating officer and DYFS (P-6) that she could no longer live in Atlantic Highlands, that she was leaving to move into her new apartment in Sea Bright and that she would not be returning to Atlantic Highlands.

I **FIND** that the proofs relied upon by the school district in this matter have established

that petitioner herein is a resident and domiciliary of Sea Bright, New Jersey. I **FIND** that petitioner has not established with her proofs that her intent is to reside in Atlantic Highlands. Therefore, I **CONCLUDE** that the actions of respondent in determining that K.F. and K.F., as well as M.F., are not residents and domiciliaries of Atlantic Highlands is correct, and the order of the Atlantic Highlands Board of Education requiring that the children be removed from the Atlantic Highlands school district should be **AFFIRMED.**

I note that since respondent has made no claim for tuition, that I am making no calculation with respect to unpaid tuition amounts.

DECISION AND ORDER

Based on the foregoing, it is hereby **ORDERED** 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, is hereby **AFFIRMED**, and petitioner's appeal is hereby **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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 7, 2003
DATE

JOSEPH F. MARTONE, ALJ

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

8/7/03
DATE

M. Kathleen Duncan /CS

Mailed to Parties:

AUG 13 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX

LIST OF WITNESSES:

For petitioner:

M.F.

W.M.

For respondent:

Timothy R. Haase

Kimberly Littlefield

Doris T. Muller

LIST OF EXHIBITS:

For petitioner:

P-1 Envelope addressed to petitioner from respondent, postmarked April 9, 2003

P-2 Envelope addressed to petitioner from respondent, postmarked May 15, 2003

P-3 Verizon Wireless Bill, for February 2003

P-4 Verizon Wireless Bill for March 2003

P-5 Verizon Wireless Bill for April 2003

P-6 Police Department of Atlantic Highland's Investigation Report, dated January 9, 2003

For respondent:

R-1 Certified Mail envelope addressed to M.F., unclaimed with forwarding address

OAL DKT. NO. EDU 2566-03
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
RESPONDENT.	:	

The record of this 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. Petitioner requested and was granted an extension of time within which to file primary exceptions and replies to the exceptions filed by the Board.[1] Such submission, filed on petitioner's behalf by James J. McGuire, Jr., Esq., was received in accordance with the extended timeframe.

The Board excepts to the Administrative Law Judge (ALJ) declining to assess tuition in this matter notwithstanding his finding that petitioner and her children were not domiciled in Atlantic Highlands during the period at issue herein. It urges that the ALJ's reasoning in this regard, *i.e.*, "that '....since respondent has made no claim for tuition ...I am making no calculation with respect to unpaid tuition amounts[,]' Initial Decision at Page 9" (Board's Exceptions at 1 and 2), is clearly erroneous. The Board points out that Page 2 of its Answer to the petition in this matter specifically requested "that the Commissioner of Education

[1] Petitioner, who was previously *pro se*, stated that she wished to secure the services of her attorney to make the filing.

*** award respondent tuition pursuant to *N.J.S.A.* 18A:38-1(b)(1)***." (*Id.* at 2) The Board attaches to its exceptions a Certification of its Board Secretary/School Business Administrator detailing the amount of tuition to which it claims to be entitled and urges that the Commissioner modify the decision of the ALJ to award it such amount.

Petitioner's exceptions contest the validity of the ALJ's factual findings and credibility assessments in reaching his conclusion that she and her children were not domiciled in Atlantic Highlands. She contends that, because domicile, by definition, involves not only the place where an individual resides but also the place that he or she has the "intent" of returning to permanently, in any judgment with respect to petitioner's "intent," her testimony should receive the greatest consideration.

Upon careful and independent review of the record in this matter, and based on the credibility assessments of the ALJ, *N.J.S.A.* 52:14B-10(c), the Commissioner finds no basis to disturb the conclusion of the ALJ that petitioner has failed to establish that she is a domiciliary of Atlantic Highlands so as to entitle her minor children, K.F. and K.F. to a free public education in that District. In so finding, the Commissioner stresses that challenges to the factual findings rendered by an ALJ require the objecting party to provide the Commissioner with relevant portions of the transcript of the hearing in order to permit him to assess the merits of those exceptions. *In re Morrison*, 216 *N.J. Super.* 143, 157-158 (App. Div. 1987). Transcripts were not filed in this matter.

The Commissioner, however, rejects the ALJ's apparent belief that, absent the filing of a counterclaim for tuition, the Board is not entitled to collect such compensation for the period of K.F. and K.F.'s ineligible attendance in its schools. *See Z.A., on behalf of minor children, A.K. and J.K. v. Board of Education of the Village of Ridgewood, Bergen County,*

decided by the Commissioner July 23, 2003. *Also see N.J.S.A.* 18A:38-1, *N.J.A.C.* 6A:3-8.1(d), *N.J.A.C.* 6A:28-2.10(b). Rather, tuition is clearly identified as a relief sought in the Board's Answer and the Commissioner finds and concludes that, petitioner having failed to prevail on her appeal, the Board is entitled to collect such tuition in this matter. Inasmuch as the record before the Commissioner is devoid of any information which would form a basis for a calculation in this regard,[2] a remand to the OAL is required for additional fact finding as is necessary to determine the amount of tuition due, pursuant to *N.J.A.C.* 6A:28-2.10.

Accordingly, the Initial Decision of the OAL is adopted, as modified above, for the reasons expressed therein. This matter is hereby remanded to the OAL solely for such further proceedings as may be needed in order to determine the amount of tuition due the Board for the period of the ineligible attendance of petitioner's children in the District's schools.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 9|22|03

Date of Mailing: 9|22|03

[2] It is noted that the Board's Certification, submitted for the first time with its exceptions, is violative of *N.J.A.C.* 1:1-18.4(c) and cannot be considered herein.

[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.*

549-03

IN THE MATTER OF THOMAS KEELEN, :

KEANSBURG BOARD OF EDUCATION, :

MONMOUTH COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

A vendor employee alleged respondent former Board member violated *N.J.S.A.* 18A:12-24(b) and (e) of the School Ethics Act for attempting to use his official position to secure an unwarranted advantage for himself and for the solicitation of a political contribution.

The ALJ determined that complainant's allegations were proven by a preponderance of competent and credible evidence. The ALJ transmitted the case back to the School Ethics Commission to determine whether respondent's conduct constituted a violation of the Act and to make a recommendation relative to sanction.

After considering the nature of the charges, the Commission found respondent blatantly disregarded N.J.S.A. 18A:12-24(b) and (e) of the Act and his conduct warranted removal from the Board. Since respondent is no longer on the Board, the Commission recommended a penalty of censure.

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 censured as a school official found to have violated the School Ethics Act.

September 22, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EEC 8784-01
AGENCY DKT. NO. C06-01

IN THE MATTER OF CHARGES OF
VIOLATION OF THE SCHOOL ETHICS ACT
BY THOMAS KEELEN

Kimberly Lake Franklin, Deputy Attorney General, for complainant School Ethics Commission, Department of Education (Peter C. Harvey, Acting Attorney General of New Jersey, attorney)

David Corrigan, Esq., for respondent Thomas Keelen

Record Closed: March 3, 2003 Decided: March 27, 2003

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

An employee of a vendor with the Borough of Keansburg Board of Education (BOE) alleges that respondent Thomas Keelen, while president of the BOE, solicited a contribution to his election campaign for election to the Borough's governing body (council) with the implication that the contribution would affect the possibility of the vendor's future contracts with the BOE. On this basis, the respondent is charged with violation of the School Ethics Act.

N.J.S.A. 18A:12-21 to -34. A school official who violates the Act is subject to sanctions, including reprimand, censure, suspension or removal. N.J.S.A. 18A:12-29(c); N.J.A.C. 6A:28-1.16. The respondent denies the allegations and submits that the charge should be dismissed.

PROCEDURAL HISTORY

On February 14, 2001, William J. Noe, an employee of Aramark, a BOE vendor, filed a complaint with the School Ethics Commission. N.J.S.A. 18A:12-27; N.J.A.C. 6A:28-1.8. By letter dated February 16, 2001, the Commission's executive director notified the respondent that he had an opportunity to file a written response to the complaint. On April 20, 2001, respondent filed his response. R-1; N.J.S.A. 18A:12-29(b); N.J.A.C. 6A:28-1.10, -11. By letter dated August 20, 2001, the Commission notified the respondent that during its June 26, 2001, meeting it had found probable cause to credit the complainant's allegations and probable cause to believe that he (respondent) had violated the Act. N.J.S.A. 18A:12-29(b); N.J.A.C. 6A:28-1.12, -1.13, -1.14. The Commission transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on December 10, 2001. N.J.S.A. 18A:12-29(b); N.J.S.A. 52:14B-2(b); N.J.A.C. 6A:28-1.14. By letter dated April 25, 2002, the respondent's attorney substituted for respondent's prior attorney and entered his appearance. On April 29, July 24 and September 23, 2002, conferences were held, but the case could not be settled. On January 30, 2003, the case was heard in the OAL, Trenton. On the record closed date, the last of the parties' written closings was received in the OAL.

The incident on which this case is based gave rise to two other cases the Commission transmitted to the OAL: In re Charges of Violation of the School Ethics Act by Judith Ferraro, OAL Dkt. No. EEC 8783-01, and In re Charges of Violation of the School Ethics Act by Hugh Gallagher, OAL Dkt. No. EEC 8785-01. Respondents Ferraro, Gallagher and Keelen were notified that they should appear for an April 29, 2002, in-person conference. However, respondents Ferraro and Gallagher failed to appear and I received no message explaining their absence or providing good cause for their failure to appear. By letter dated April 29, 2002, I notified them that, by May 10, 2002, they should file with me written explanations showing good cause for their failure to appear; that, if they did not do so, I would assume that they did not wish

to defend the charges; and that the Commission could enter final decisions imposing sanctions, etc., against them. Neither of those respondents filed such an explanation, so the OAL's clerk transmitted the cases back to the Commission.

FINDINGS OF FACT

In 1999 and 2000 respondent was president of the BOE; Aramark was a BOE vendor, responsible for maintenance of the BOE's buildings and grounds, and its contract with the BOE was subject to renewal every year; and Mr. Noe was the Aramark employee responsible for the maintenance of the BOE's buildings and grounds.

The BOE election was scheduled to be held in April 2000 and the election for the Borough's governing body (council) was scheduled to be held in May 2000.

Ms. Ferraro and Mr. Gallagher were members of the BOE and candidates for reelection in the April 2000 BOE election. The respondent's BOE term was to end in May 2000, and he was not a candidate for reelection to the BOE; he was a candidate in the May 2000 council election. The respondent's commercial building on the Borough's Main Street housed the headquarters for his, Ms. Ferraro's and Mr. Gallagher's campaigns and all were seeking contributions for their campaigns. N.J.S.A. 18A:12-23, "political organization."

Mr. Noe testified credibly that, on Saturday, April 29, 2000, he checked the BOE's schools' buildings and grounds to confirm that Aramark's personnel were performing properly. Thereafter, he and his young son were walking on Keansburg's Main Street when he observed the respondent, Ms. Ferraro, Mr. Gallagher, and BOE members Dolores Bartram and William Manoes by the respondent's building and they signaled him to enter the building. The respondent testified that he observed Mr. Noe and that (only) he stepped out of his building to signal Mr. Noe in. In any event, Mr. Noe and his son entered the building, where the respondent, Ms. Ferraro, Mr. Gallagher, Ms. Bartram and Mr. Manoes were present. Mr. Noe testified that respondent, in a jesting manner, stated, "We've got you now!"

Mr. Noe also testified as follows: In the campaign headquarters, all of the above-named persons except the respondent sat down. The respondent stated that they had put together a "list" of vendors with dollar amounts they figured the vendors could afford, and said, "We penciled you in for $1,000." The respondent stated that he wanted a contribution and, in a stern tone, stated, "Frankly, I expect it and I don't care how you get it." Knowing that the respondent and his running mates were candidates and wanted contributions to their campaigns, he (Mr. Noe) had already discussed the matter with an Aramark superior and, consistent with that discussion, he replied that Aramark would contribute, but to both parties in the election. However, the respondent replied, "We really don't want you to give to both parties. That would work against us. . . . You know, Billy, let's face it. These things are remembered come contract time." The respondent and he repeated the substance of this exchange and the respondent then stated, "We'll remember this" and "Let's face it, everybody remembers who supported them and who didn't."

On cross-examination, Mr. Noe testified that the date of the above-described conversation in the campaign headquarters was probably, maybe absolutely, April 29, 2000. He also testified as follows: He probably asked the respondent who his running mates were in the council election. The respondent's statements distressed him, especially because they were made in the presence of his son, and, on the Monday after the weekend, he reported what had occurred to Scott Donegan, his Aramark superior. Mr. Donegan advised him to speak to the police, but several of the above-named persons had ties to the Borough police, e.g., Ms. Bartram worked for the Borough police and Ms. Ferraro's son was a Borough police officer who was married to the respondent's daughter. In an attempt to obtain proof of what he took to be a threat to his job, after April 29, 2000, he recorded telephone conversations with Ms. Ferraro and Mr. Gallagher. Eventually, he contacted the Monmouth County Prosecutor's Office, the Attorney General's Office, and the Commission.

The respondent testified as follows: The BOE's (April 2000) election had already occurred by the time of the above-described conversation in the campaign headquarters and, at that time, he had no expectation that, after his BOE term ended (in May 2000), he would serve again on the BOE. When he stated to Mr. Noe that he had "penciled Aramark in for $1,000," he may have mentioned other vendors, but there was no discussion of the BOE and he did not state anything about future contracts with the BOE. After the above-described conversation,

Ms. Ferraro reported to him that Mr. Noe called her and stated that Aramark would contribute to the campaign, but that it would contribute to both sides, and, given those terms, he (the respondent) refused the contribution. Aramark made no contribution, but he had "no hard feelings" about no contribution being made.

During the BOE's May 2, 2000, organizational meeting, the respondent, as president of the BOE, presided until Mr. Gallagher, nominated by Ms. Ferraro, became the BOE president. Mr. Gallagher then presided over the meeting, during which a BOE vice president was elected, professional appointments were made, etc. P-1.

The respondent was unsuccessful in his run for council, and in October 2000 he was appointed to complete the term of a BOE member who resigned.

In December 2000, while Mr. Noe was away on vacation, a snowstorm struck the Borough; Aramark's personnel failed to adequately remove the snow; and parents and others complained. In January 2001, Mr. Noe was called to the BOE's school administration offices for the BOE's Buildings and Grounds Committee's meeting to review snow removal procedures. The respondent, Ms. Ferraro, Mr. Gallagher, and Mr. Manoes (still BOE members), BOE superintendent Barbara Trzeszkowski, and BOE business administrator Barbara Pieszcynski were present and told the respondent that they were unhappy with Aramark's snow removal. Mr. Noe agreed that Aramark had performed poorly and the Committee reprimanded him.

On February 14, 2001 (as noted in the procedural history), Mr. Noe filed his complaint with the Commission.

In June 2001 Mr. Noe ended his employment with Aramark.

In 2001 the BOE again contracted with Aramark.

Mr. Noe, who now resides in Virginia, returned to New Jersey for the hearing.

Balancing all of the competent and credible evidence and considering the demeanor of the witnesses, Mr. Noe's testimony was credible. And to summarize, as Mr. Noe testified, the respondent, while president of the BOE, i.e., a "school official" subject to the Act, stated to Mr. Noe, "We've got you now!"; stated that he expected a $1,000 contribution from Mr. Noe's employer, a BOE vendor whose contract was subject to yearly renewal; and stated, "These things are remembered come contract time." N.J.S.A. 18A:12-23. The respondent solicited the contribution for the purpose of influencing him in the discharge of his duties. Although the respondent's BOE term ended in May 2000, when he made the solicitation he was politically tied to BOE members who would remain on the BOE after that time and, therefore, he appeared to be in a position to influence them in the exercise of their official duties related to contracting. Further, the respondent himself returned to the BOE in October 2000.

CONCLUSIONS OF LAW

In the Act, the Legislature found and declared:

> a. 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.
>
> b. To ensure and preserve public confidence, school board members and local school administrators should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards among them.
>
> [N.J.S.A. 18A:12-22.]

A local school district board of education member (among other persons) is a "school official" under the Act. N.J.S.A. 18A:12-23.

N.J.S.A. 18A:12-24 states, in pertinent part:

> b. No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others;
>
> . . . .
>
> e. No school official, or member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the school official has no knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence the school official in the discharge of his official duties.
>
> [Emphasis added.]

A school official who violates the Act is subject to sanctions, including reprimand, censure, suspension or removal. N.J.S.A. 18A:12-29(c); N.J.A.C. 6A:28-1.16.

Consistent with the findings of fact, the complainant's allegations have been proven by the preponderance (greater weight) of the competent and credible evidence. N.J.S.A. 52:14B-10(c). There is good cause for the Commission to determine whether the respondent's conduct constituted a violation of the Act and make a recommendation relative to sanction. N.J.S.A. 18A:12-29(c); N.J.A.C. 6A:28-1.15.

ORDER

I **ORDER** the clerk of the OAL to transmit this contested case back to the Commission. The Commission may make a finding and recommendation consistent with N.J.S.A. 18A:12-29, -30; N.J.A.C. 6A:28-1.15.

I hereby **FILE** my initial decision with the **SCHOOL ETHICS COMMISSION**. Pursuant to N.J.S.A. 18A:12-29, the School Ethics Commission has jurisdiction to determine whether a violation of the School Ethics Act occurred. If it concludes that the conduct constitutes a violation of the School Ethics Act, it shall recommend an appropriate penalty to the Commissioner of Education. The Commissioner of Education shall issue the final decision in this matter.

The recommendations of this decision as to whether the conduct constitutes a violation of the School Ethics Act may be adopted, modified or rejected by the **SCHOOL ETHICS COMMISSION**. If the School Ethics Commission 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.

If the School Ethics Commission determines that a violation has occurred, it shall issue a written decision recommending to the Commissioner of Education an appropriate penalty and shall forward the record, including this recommended decision and its decision, to the Commissioner of Education. The Commissioner of Education may subsequently render a final decision as to the appropriate penalty. If the Commissioner of Education does not render a final decision within forty-five (45) days of its receipt of this initial decision, and unless such time period is otherwise extended, the recommended decision of the School Ethics Commission 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 **SCHOOL ETHICS COMMISSION, DEPARTMENT OF EDUCATION, P.O. Box 500, Trenton, NJ 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 27, 2003
DATE

JOHN R. TASSINI, ALJ
Receipt Acknowledged:

DATE

SCHOOL ETHICS COMMISSION
Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For Complainant:

P-1 Minutes of the BOE's May 2, 2000, meeting

For Respondent:

R-1 Affidavit of Thomas Keelen

WITNESSES

For Complainant:

William J. Noe

For Respondent:

Thomas Keelen

	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
IN THE MATTER OF THOMAS KEELEN,	:	
	:	**Docket No.: C06-01**
KEANSBURG BOARD OF EDUCATION MONMOUTH COUNTY	:	**DECISION**

The School Ethics Commission, having reviewed the Initial Decision of the Office of Administrative Law, dated March 27, 2003, determined at its June 24, 2003 public meeting to accept the Initial Decision of the Administrative Law Judge.

The Commission has found that the respondent blatantly disregarded the School Ethics Act, N.J.S.A. 18A:12-21 et seq., by soliciting a contribution to his election campaign for the Keansburg Borough Council, implying that the contribution would affect the possibility of the vendor's future contracts with the Board. The Commission concludes that respondent's conduct constitutes an attempt to use his official position to secure an unwarranted advantage for himself in violation of N.J.S.A. 18A:12-24(b) and the solicitation of a political contribution for the purpose of influencing him directly or indirectly in the discharge of his official duties in violation of N.J.S.A. 18A:12-24(e).

Regarding the penalty, the Commission would have recommended that the Commissioner of Education remove respondent from his position on the Keansburg Board of Education (Board). However, since respondent is no longer a member of the Board, the highest penalty that the Commission can impose is a censure. The Commission therefore recommends that the Commissioner of Education impose a penalty of censure in this matter.

This decision, having been adopted by the Commission, 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 thirteen (13) days from the date on which the Commission's decision was mailed to the parties, the respondent 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, Chairman

Resolution Adopting Decision – C06-01

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof; and

Whereas, the Commission found probable cause to credit the allegations that Thomas Keelen violated N.J.S.A. 18A:12-24(b) and (e) of the School Ethics Act; and

Whereas, the matter was brought before Administrative Law Judge John R. Tassini and the allegations were proven by the preponderance of the competent and credible evidence; and

Whereas, the Commission now finds that respondent violated N.J.S.A. 18A:12-24(b) and (e) of the School Ethics Act and believes that the penalty of removal would have been the appropriate sanction, but may not impose removal since Mr. Keelen is no longer a member of the Board; and

Whereas, since the highest penalty that may be imposed in this matter is censure, the Commission finds that censure is the appropriate sanction;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter finding Thomas Keelen in violation of the Act and recommending that the Commissioner of Education impose a penalty of censure.

Paul C. Garbarini, Chairman

I hereby certify that the School
Ethics Commission adopted this decision
at its public meeting on June 24, 2003.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 289-8/03

IN THE MATTER OF THOMAS KEELEN,	:	COMMISSIONER OF EDUCATION
KEANSBURG BOARD OF EDUCATION,	:	DECISION
MONMOUTH COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding that Thomas Keelen, former member of the Keansburg Board of Education, violated *N.J.S.A.* 18A:12-24(b) and (e) of the School Ethics Act, and recommending a penalty of censure have been reviewed. 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. Respondent submitted no comments.

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 concurs with the Commission that the appropriate sanction for respondent's flagrant violations of attempting to use his official position to secure an unwarranted advantage for himself and the solicitation of a

political contribution for the purpose of influencing him directly or indirectly in the discharge of his official duties would have been removal. However, since respondent is no longer a member of the Board, the Commissioner agrees that censure is the appropriate penalty for respondent in this matter. In so ruling, the Commissioner is satisfied from the record before him that, in recommending a penalty for the violations it 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 Thomas Keelen be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 9/22/03

Date of Mailing: 9/23/03

* This decision, as the Commissioner's final determination regarding penalty in this 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.*

558-03

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" Board of Education claimed the Department was required to provide full State funding for its 2003-04 early childhood education program. The Department had provided Early Childhood Program Aid (ECPA) and Preschool Expansion Aid (PSEA) in accordance with prescribed formulas, but the district contended that additional State monies were required to fully fund the difference between the total of these aids and the approved preschool budget.

The ALJ concluded that the Department correctly calculated the district's ECPA and PSEA, but that this did not end the inquiry. The ALJ concluded that Court, Department and legislative pronouncements, taken together, require that the district's preschool plan be funded entirely by the State, subject to legislative appropriations.

The Commissioner concurred that ECPA and PSEA were correctly calculated, but rejected the conclusion that full State funding of preschool program was required regardless of other funds available in the district budget. The Commissioner held that the State's obligation is to ensure that sufficient funds are available to fully support the district's approved early childhood education plan, with additional State aid to be provided where formula aids and local resources are together inadequate for this purpose. 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.

September 25, 2003



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION –
SUMMARY DECISION
OAL DKT. NO. EDU 3423-03
AGENCY DKT. NO. 104-3/03

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

Richard E. Shapiro, Esq., for petitioner

Michael C. Walters, Deputy Attorney General, for respondent
(Peter C. Harvey, Acting Attorney General of New Jersey, attorney)

Record Closed: May 19, 2003 Decided: May 21, 2003

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by an Abbott school district from the adequacy of state aid granted to fund its early childhood plan for the 2003-2004 fiscal year ("FY 2004"). Petitioner Phillipsburg Board of Education ("Board" or "Phillipsburg") contends that it is entitled to full state funding of its approved preschool program. Phillipsburg seeks an additional $835,034 of state aid required for full state funding of its approved preschool program.

Basically, the New Jersey Department of Education ("Department") denies that the state is legally obligated to provide full funding for Phillipsburg's preschool program. Instead, the Department maintains that preschool funding for Abbott districts may be derived from a combination of sources including, where applicable, local tax share. The Department seeks dismissal of the complaint on two grounds: first, that the amount of Preschool Expansion Aid ("PSEA") awarded to Phillipsburg was correctly calculated in accordance with the relevant statutory provisions; and, second, that this appeal is premature because the Department has not yet determined whether Phillipsburg will receive additional state aid that could be used to support its preschool program.

For the reasons that follow, the state is obligated to fully fund the preschool programs in the Abbott school districts and the Commissioner should seek sufficient appropriations from the Legislature to implement Phillipsburg's approved preschool plan for FY 2004.

Procedural History

On February 14, 2003, the Department approved Phillipsburg's preschool program plan for FY 2004 at a total cost of $3,540,720. By notice dated February 26, 2003, the Department advised Phillipsburg that its estimated PSEA for that year had been determined to be $961,775. (Later, on March 17, 2003, the Department revised these figures upwards by $50,000 to total costs of $3,590,720 and PSEA of $1,011,775).

Phillipsburg filed a verified petition of appeal to the Commissioner of Education ("Commissioner") on March 27, 2003, challenging the adequacy of state funding for its FY 2004 preschool program. Subsequently, on April 4, 2003, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

Both parties filed cross-motions for summary decision, together with supporting briefs, on May 13, 2003. They filed reply briefs, including a certification from Phillipsburg's business administrator/board secretary, on May 16, 2003. In addition, on May 19, 2003, the parties filed a joint stipulation of facts and consented to the admission of joint exhibits.

The OAL heard oral argument on May 19, 2003, on which date the record closed.

Findings of Fact

All of the material facts are stipulated. From the pleadings, joint stipulation and representations of counsel at oral argument, **I FIND** the following facts:

Phillipsburg School District is an Abbott District as defined by *N.J.S.A.* 18A:7F-3 and *N.J.A.C.* 6A:24-1.2. Under New Jersey Supreme Court decisions and Department regulations, the Board has certain programmatic, budgeting and supervisory responsibilities for a preschool program for all eligible three and four year olds residing in the district. Initially, the Department had approved a total budget of $3,393,741 for Phillipsburg to implement its FY 2004 Abbott preschool program. As a result of a prior appeal and settlement negotiations, the Department increased the total approved budget to $3,590,720. Whatever the ultimate source of funding, the parties agree that Phillipsburg has demonstrated a need for $3,590,720 to operate its 2003-2004 preschool program.

Utilizing a statutory formula, the Department calculated Phillipsburg's Early Childhood Program Aid ("ECPA") for FY 2004 to be $1,743,911. Phillipsburg accepts the correctness of this calculation. Additionally, Phillipsburg is eligible for Preschool Expansion Aid ("PSEA"), which the Department calculates as the difference between the total budget for the FY 2004 approved plan and the FY 2002 approved plan. In the 2001-2002 FY, the total budget for Philipsburg's approved preschool plan was

$2,578,945. Consequently, the Department performed the following computation to obtain an initial PSEA of $1,011,775 for Phillipsburg in FY 2004.

FY 2004 Approved Plan	$3,590,720
FY 2001 Approved Plan	-2,578,945
Initial PSEA	$1,011,775

Since total costs of $3,590,720 were approved for FY 2004 and promised state aid comes to $2,755,686, Phillipsburg seeks additional state aid of $835,034. It does not matter to Phillipsburg whether such aid is designated as ECPA, PSEA or something else, so long as the state share fully covers Phillipsburg's approved preschool budget.

Presently, the Department has not yet approved Phillipsburg's school budget for FY 2004 or ascertained whether Phillipsburg might receive "Additional Abbott v. Burke State Aid". According to the Deputy Attorney General, the Department expects to complete its review of Phillipsburg's school budget and allocate any additional state money by May 31, 2003.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Department should arrange for full state funding of Phillipsburg's approved preschool program for FY 2004.

During oral argument, the Department framed the issue very narrowly in terms of whether it correctly calculated the amount of Phillipsburg's PSEA for FY 2004. State regulations contemplate that Abbott districts will increase the participation of eligible three and four-year old children in preschool programs over a three-year period. Accordingly, the Department set goals of achieving 70% participation in the 2001-2002 school year, 80% participation in the 2002-2003 school year and 90% participation in the 2003-2004 school year and each school year beyond. *N.J.A.C.* 6A:24-3.3(b)(1). To effectuate such anticipated growth, the Legislature appropriated "Preschool Expansion

Aid" to cover increased costs from year to year. In the Governor's Budget Message for FY 2004, this legislative intent is clearly articulated:

> The amount appropriated hereinabove as Abbott Preschool Expansion Aid is for the purpose of funding *the increase in the approved budgeted costs from 2001-2002 to 2003-2004* for the projected expansion of preschool programs in "Abbott districts." Payments of Abbott Preschool Expansion Aid shall be based on documented expansion of the preschool program. (Emphasis Added). (at D120).
> http://www.nj.gov/treasury/omb/publications/04budget/pdf/34.pdf

Guided by the highlighted language, the Department correctly calculated the amount of Phillipsburg's PSEA as equivalent to "the increase in approved budgeted costs from 2001-2002 to 2003-2004." Nearly identical language, except for the years involved, was contained in the Appropriations Act enacted into law for FY 2003. *L.* 2002, *c.* 38.

That conclusion, however, does not end the inquiry. As noted, Phillipsburg does not care how the aid is categorized, as long as it originates from state funds. Phillipsburg argues that the case law, the Legislature's understanding of the constitutional mandate and the Department's own interpretation of its responsibilities all support the proposition that the state must fully fund preschool programs in Abbott districts.

New Jersey's highest court recognizes "that pre-school for three- and four-year olds will have a significant and substantial positive impact on academic achievement in both early and later school years." *Abbott v. Burke*, 153 *N.J.* 480, 506 (1998) ("*Abbott V*"). Recently, the Supreme Court reiterated that high-quality preschool programs for children in Abbott districts "are a critical component of the whole school reform effort." *Abbott v. Burke*, 163 *N.J.* 95, 120 (2000) (*Abbott VI*). Underlying the Commissioner's plan for early childhood programs "is the clear commitment that if there is a need for additional funds, the needed funds will be provided or secured." *Abbott V*, at 518. Phillipsburg asserts that this commitment to provide funding must be viewed in the context of earlier decisions emphasizing the existence of municipal overburden and the

inadequacies of the local tax base. *See, e.g., Abbott v. Burke*, 119 *N.J.* 287, 355-357 (1990) (*Abbott II*); *Abbott v. Burke*, 100 *N.J.* 269, 292-293 (1985) (*Abbott I*). Nonetheless, in *Abbott V*, the State Supreme Court stopped short of declaring a constitutional mandate for preschool education programs. Rather, the Court interpreted the statutory language as evincing "a clear indication that the Legislature understood and endorsed the strong empirical link between early education and later educational achievement." *Abbott V,* at 507.

Language in the Governor's Budget Message for FY 2004, the very document on which the Department relied, reflects continuing legislative concern that the Abbott districts receive full state funding for their preschool programs. Thus, the Governor's proposed budget envisions that:

> The amount appropriated hereinabove for Additional Abbot v. Burke State Aid will provide additional resources to "Abbott districts" *to meet the State's obligation to fully fund parity and the approved early childhood operational plans.* The remaining funds appropriated will be used for the award of discretionary funding to Abbott districts to maintain the programs, services and positions from the prior year that the commissioner determines are essential to the provision of a thorough and efficient education in those districts. (Emphasis Added). (at D-120).

Two important points are readily apparent from this passage. First, the state acknowledges its responsibility to provide *full funding* for early childhood programs and dedicates "Additional Abbott v. Burke State Aid" for that specific purpose. Second, any "remaining funds" may be used for "discretionary" awards for other items deemed by the Commissioner to be "essential" for a thorough and efficient education. Read together, these provisions strongly imply that state reimbursement for the full cost of childhood programs is nondiscretionary.

Significantly, the Governor's Budget Message for FY 2004 does not impose any preconditions on receipt by Abbott districts of additional state aid for preschool programs. In contrast, the Governor's Budget Message requires that, before establishing any "discretionary" funding, the Commissioner "shall determine whether some or all of the additional funds sought can be achieved by reallocating non-

instructional expenditures, increasing the local property tax levy or achieving economies and efficiencies in the delivery of services and programs." (at D-120).

Public pronouncements of the Department have consistently adopted the same approach. As recently as February 6, 2003, a top official of the Department wrote to the Abbott districts that, "The state will meet its obligation to fully fund parity and preschool programs for Abbott districts." Last year, the Department reassured Abbott districts on March 18, 2002 that sufficient state funds would be available "to fully support the district's approved preschool plan." None of these policy statements gave any suggestion that the Department would look to local funding to defray the cost of preschool programs.

Finally, the Department contends that the issues are not ripe for determination and that action on the appeal should be deferred until a determination has been made on additional state aid. Phillipsburg responds that the issue of full state funding is clearly drawn and that it is entitled to immediate relief. Appeals involving school budgets in Abbott districts are of high priority and receive expedited consideration. Since the facts are undisputed and the parties have had adequate opportunity to brief the legal issues, no good reason exists to delay resolution of this dispute.

Order

It is **ORDERED** that summary decision be granted in favor of Phillipsburg.

And it is further **ORDERED** that the Department fully fund Phillipsburg's preschool program for FY 2004, subject to sufficient legislative appropriation.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 21, 2003
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

May 23 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 27 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX
List of Exhibits

No.	Description
J-1	Copy of memorandum to Abbott Chief School Administrators and Business Administrators from Richard Rosenberg, Assistant Commissioner, dated March 18, 2002
J-2	Copy of memorandum to All Abbott Superintendents and All Abbott Business Administrators from Gordon MacInnes, Assistant Commissioner and Richard Rosenberg, Assistant Commissioner, dated March 18, 2002
J-3	Copy of letter to H. Gordon Pethick, Chief School Administrator, from Ellen Freede, Ph.D. and Gordon MacInnes, Assistant Commissioner, dated January 6, 2003
J-4	Copy of memorandum to Abbott School Districts from Richard Rosenberg, Assistant Commissioner, dated January 15, 2003
J-5	Copy of memorandum to Chief School Administrators and Board Secretaries/School Business Administrators from Richard Rosenberg, Assistant Commissioner, dated February 6, 2003
J-6	Copy of memorandum to Phillipsburg School District from Richard Rosenberg, Assistant Commissioner, dated February 26, 2003

OAL DKT. NO. EDU 3423-03
AGENCY DKT. NO. 104-3/03

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 have been reviewed. Exceptions were filed by the Department of Education (Department), as were replies by the Board of Education (Board), in accordance with the provisions of *N.J.A.C.* 1:1-18.4 and extensions duly requested and granted. Following enactment of the FY '04 Appropriations Act, a supplemental submission was made by the Department, to which the Board, in turn, replied.

In its exceptions, the Department urges the Commissioner to limit his adoption of the Initial Decision to finding that the Department correctly calculated the amount of the Board's Preschool Expansion Aid (PSEA) for the 2003-04 fiscal year, and to reject Administrative Law Judge (ALJ) Springer's addressing of broader issues in a matter pled solely as an appeal of the Department's February 26, 2003 PSEA determination. The Department contends, as it did in its Letter Brief in Reply to the Board's Motion for Summary Decision at 1-2 and 4, that the February 26 determination under appeal was confined to the issue of PSEA and "neither calculates nor advises [the

Board] of the amount of Additional *Abbott v. Burke* State aid that it will receive" so that any assertion by the Board regarding such aid is "entirely inappropriate" in the present proceeding. Instead, the Department argues, the Board's entitlement to Additional *Abbott v. Burke* State aid was the subject of a May 30, 2003 Department determination which the Board appealed on June 5, 2003 in accordance with the expedited schedule established by the Supreme Court on May 21, 2003, so that consideration of additional aid in the current context is misplaced. (Department's Exceptions at 1-3, quotation at 2)

The Department further contends that the ALJ erred in interpreting the Governor's Budget Message for FY '04, on which he relied in concluding that the Board's approved Early Childhood Plan must be fully funded with State aid, that is, with a combination of Early Childhood Program Aid, PSEA and Additional *Abbott v. Burke* Aid. Instead, the Department urges, the pertinent language should be read as "requiring the Department to *ensure that there are sufficient funds in [the Board's] budget* to support the approved Early Childhood Plan," with such funds deriving from both State aids and the local tax share where available. (Department's Exceptions at 4-6, quotation at 5-6, emphasis supplied) The Department argues:

> In *Abbott v. Burke*, 153 *N.J.* 480 (1998), the Supreme Court opined, "the Commissioner may, before seeking new appropriations, first determine whether funds within an existing school budget are sufficient to meet a school's request for a demonstrably needed supplemental program." *Id.* at 518. The Court further opined, "[u]nderlying the Commissioner's proposal for whole-school reform, early childhood programs and supplemental programs, is the clear commitment that *if there is a need for additional funds*, the needed funds will be provided or secured." *Ibid.* (emphasis added).
>
> The above-quoted language demonstrates that the Supreme Court intended for the Commissioner to ensure that the early childhood programs are fully funded, however, the Commissioner could first determine whether funds within an existing school budget are sufficient to meet a school's request for such programs. Because local tax levy is included [in] the budget, the

> Commissioner can consider those funds as well as other revenue supporting the budget when determining the amount of Additional *Abbott v. Burke* State aid, if any, that a district needs.
>
> (Department's Exceptions at 5)

The Department buttresses its position with the language of the FY '04 Appropriations Act, adopted by the Legislature and signed by the Governor as *P.L.* 2003, *c.*122, contrasting that language with the earlier Governor's Budget Message as cited in the Initial Decision at 6.[1] The Department urges:

> Notably, the Governor's Budget Message for FY04 provided: "The amount appropriated hereinabove for Additional *Abbott v. Burke* State Aid will provide additional resources to 'Abbott districts' to meet the State's obligation to fully fund parity and *the approved early childhood operational plans*." (Emphasis added). The FY04 Appropriations Act provides: "The amount appropriated hereinabove for Additional Abbott v. Burke State Aid will provide additional resources to 'Abbott districts' to meet the State's obligation to fully fund parity *and approved 'Abbott' preschool expansion*." *L.* 2003, *c.* 122.
>
> ***
>
> Here, the Legislature revised the language contained in the Governor's Budget Message to clarify that, contrary to Judge Springer's interpretation, the Department is not required to ensure that Phillipsburg's approved Early Childhood Plan is fully funded with State aid such as Additional *Abbott v. Burke* State aid. By purposefully deleting the words "early childhood operational plans" from the Governor's Budget Message and replacing those words in the FY04 Act with "'Abbott' preschool expansion," the FY04 Act unequivocally demonstrates that, while the Department must ensure that Phillipsburg's "approved 'Abbott' expansion" is fully funded with State aid, the Department is not required to ensure that Phillipsburg's approved "early childhood operational plan" is fully funded with State aid. Moreover, this revision is consistent with the method, established in the FY04 Act, by which Preschool Expansion Aid is calculated. "funding the increase in the approved budgeted costs from 2001-2002 to 2003-2004 for the projected expansion of preschool programs in "Abbott districts." *L.* 2003, *c.* 122.
>
> (Department's Supplemental Submission at 2-3)

In reply to the Department's threshold objections, the Board counters that the ALJ did *not* address issues outside the scope of the pleadings, since the Petition of

[1] The Department added this argument in the post-exceptions submission noted at page 10 above.

Appeal not only challenged the amount of PSEA awarded the Board, but also the Department's failure to fully fund the Board's approved preschool program.[2] (Board's Reply Exceptions at 2-4) The Board further objects to the Department's protestation over the scope of the ALJ's ruling, noting that the Department itself raised the issue of full funding by arguing, in its initial brief in support of a motion for summary decision, that " 'as a matter of law,' while the State must ensure that Phillipsburg's preschool program is fully funded, there is not a concomitant obligation that such funding be provided by the State," and that the Department "sought summary decision based on the claim that there was no State obligation to fully fund the DOE-approved preschool program with State funds; the [Department] cannot now be heard to complain that the ALJ ruled adversely to the [Department] on the very 'matter of law' asserted by the [Department]." (*Id.* at 4-5, quoting Department's Letter Brief of May 13, 2003 at 8) Neither, the Board alleges, can the Department claim that the Initial Decision wrongly addresses yet-to-be-determined Additional *Abbott v. Burke* Aid; this claim "disingenuously misconstrues" the Initial Decision, which did *not* find that the Board was owed Additional *Abbott v. Burke* Aid, but rather concluded that the State had an obligation, to be met however the State deemed fit, to provide full State funding for approved preschool programs, subject to legislative appropriations. (*Id.* at 5-6, quotation at 6) The Board urges that deferral of the question of full State funding makes no sense as a matter of public interest, since the question will only recur later if not resolved here, where it has already been fully briefed and considered. (*Id.* at 6-7)

[2] The Board points to its claim for relief, and also to ¶¶ 4, 7, 11, 13, 14, 18 and 20 of the Verified Petition, noting that while PSEA is mentioned, "the gist of these claims is that the State must fully fund the DOE-approved preschool program with State funds." (Board's Reply Exceptions at 3-4, quotation at 3)

In reply to the Department's further exceptions, the Board references its arguments made before, and adopted by, the ALJ, and offers the additional argument that the Supreme Court's decision in *Abbott V, supra,* nowhere intimates that preschool programs should or could be funded in part by local tax share; indeed, the Board avers, the Court's decision was based on the recommendations of the Honorable Michael King, P.J.A.D., sitting as the remand court, and, while the Court disagreed with Judge King regarding full-day preschool, it "did not take issue with his conclusion that preschool would be funded by ECPA, T&E, parity funds and the incremental State funding needed to fully fund the preschool program." (Board's Reply Exceptions at 7-9, quotation at 8-9) Finally, the Board offers the Office of Legislative Services' analysis of the Department's FY '03 budget, explaining the purpose of PSEA as a new line item funding the increase in costs between 2001-02 and 2002-03 for programs which had been, "[u]p until this time***funded through a combination of Early Childhood Program Aid and Additional *Abbott v. Burke* Aid." This excerpt, the Board opines, "reflects the Legislature's clear understanding that prior to the 2001-02 school year, the State had fully funded preschool with State funds and that PSEA was to ensure full state funding for any increase in 2002-03 over 2001-02. Thus, when the FY '04 Appropriations Act provides that PSEA in 2003-04 is to fund the difference between the 2002-03 program and the 2003-04 program, the evident legislative intent is to continue the full State funding in effect prior to the 2001-02 school year -- and extended into the 2002-03 school year by PSEA -- into the 2003-04 school year." (*Id.* at 9-10, quotation at 10)

Moreover, the Board counters, the Department errs in claiming that the language of the Appropriations Act as finally adopted by the Legislature supports its

position, since the Initial Decision does not, as the Department alleges, rely exclusively on the earlier Governor's Budget Message, but rather places that message in the context of continuing expressions of legislative concern, the *Abbott* decisions, and the Department's repeated public pronouncements. (Board's Supplemental Submission at 1-2) Additionally,

> [t]he FY ['04] Appropriations Act still links the Additional *Abbott v. Burke* State Aid to the "State's obligation" to fully fund parity and approved Abbott preschool expansion. Significantly, the language is not limited to the formula for funding approved preschool expansion *aid*, but rather to the funding of preschool expansion. Moreover, the FY Appropriations Act does not define what the Legislature meant by the State's obligation so the Commissioner must "employ extrinsic aids, such as legislative intent or prior precedent, to interpret the language at issue." *In re Passaic County Util. Auth.*, 164 *N.J.* 270, 300 (2000) (citation omitted). (*Id.* at 3)

Thus, the Board concludes, "properly construed under governing legal principles," the FY '04 Appropriations Act not only fails to support the Department's position, but actually "reinforces the correctness" of the Initial Decision. (*Id.* at 4)

Upon his own review and consideration, the Commissioner initially concurs with the ALJ and the Board that the issue to be decided in this matter is not limited strictly to the question of whether the Department correctly calculated the amount of PSEA due the district for 2003-04. Notwithstanding that the Petition of Appeal was, in fact, pled largely in terms of PSEA as claimed by the Department, the Commissioner finds it in the best interest of both the parties in this matter and Abbott districts generally to decide the broader question squarely underlying the Board's specific allegations, that is, the question of whether Court, legislative and Department pronouncements, alone or in combination, require that the entire cost of approved Abbott preschool programs be funded, dollar for dollar, exclusively by the State.

The ALJ answered this question in the affirmative, based on legislative intent as expressed through the Governor's FY '04 Budget Message, read in light of 1) Court language recognizing preschool as a critical component of Abbott reform efforts although not a constitutional mandate and acknowledging the statutory endorsement of the link between preschool and later educational achievement; 2) prior enactments reflecting the Legislature's concern with fully funded early childhood education in Abbott districts; and 3) Department pronouncements expressing clear commitment to full funding of preschool programs.

The Commissioner, however, cannot concur with the ALJ's analysis. With respect to the requirements of the Court, nowhere in the *Abbott* decisions is there a suggestion, let alone a directive, that approved Abbott preschool programs must be funded *exclusively* by the State. On exception, the Board argues implicit endorsement of its position by the Court's silence in response to Judge King's statement that preschool would be funded by ECPA, T&E, parity funds and "the incremental State funding needed to fully fund the preschool program," with no mention of local revenues. (Board's Reply Exceptions at 8-9) Similarly, based on the Board's earlier arguments, the ALJ cites to the Court's concern with municipal overburden and Abbott districts' inadequate tax bases and to its language referencing the State's "clear commitment that if there is a need for additional funds, the needed funds will be provided or secured." (Initial Decision at 5) These statements, however, do not even on their face require State funding regardless of need. Rather, they provide for the State to ensure, with additional aid if necessary, that sufficient funds are available to the district to fully fund its preschool program, that is, to ensure that any gap remaining after receipt of statutory formula aids will be addressed by

the State *to the extent that need exists* because funds otherwise available to the district are insufficient to fully support the approved program. This reading is consonant not only with the Court's actual language and concern with local taxation capabilities, but also with its overall recognition that, while adequate funding is critical to achievement of a thorough and efficient system of public education in Abbott districts, such funding is a shared responsibility between the State and the local district.

Taken within the proper framework, then, the proffered Department pronouncements regarding "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. Rather, they must be understood as reflections of the Department's commitment, and recognition of its obligation, to provide or secure additional State funds to the full degree necessary to support approved programs where local budgetary resources, including formula aids, local levies and monies realized through economies, efficiencies and reallocations, are found inadequate for this purpose. Indeed, this is the only interpretation consistent with sound educational policy, which must recognize *both* the critical importance of ensuring that approved Abbott preschool programs are supported by sufficient funds *and* the necessity to allocate State and local resources as efficiently and effectively as possible in meeting the shared responsibility for education in Abbott districts.

Finally, the Commissioner cannot ignore that the Legislature has now spoken definitively on the question posed by this appeal. Even granting, *arguendo*, that prior Legislatures provided for full State funding of Abbott district early childhood operational plans during the first years of their development, and that the Governor's

Budget Message for FY '04 appeared to continue that pattern, the current Legislature has acted deliberately and decisively to clarify that its intent for the FY '04 budget year is to provide additional funding for *only* those costs directly associated with approved program expansion, not for the entire early childhood operational plan. In that regard, it is noted that there is no question, nor does the Board except to the ALJ's conclusion, that the Department correctly calculated the district's PSEA in accordance with the prescribed legislative formula.

Accordingly, for the reasons set forth above, the Initial Decision of the Office of Administrative Law is rejected except insofar as it concludes that the Department correctly calculated petitioner's ECPA and PSEA for 2003-04. The Petition of Appeal, therefore, is dismissed in its entirety.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 9/25/03

Date of Mailing: 9/26/03

[3] 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.

559-03

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" Board of Education claimed the Department was required to provide full State funding for its 2003-04 early childhood education program. The Department had provided Early Childhood Program Aid (ECPA) and Preschool Expansion Aid (PSEA) in accordance with prescribed formulas, but the district contended that additional State monies were required to fully fund the difference between the total of these aids and the approved preschool budget.

The ALJ concluded that the Department correctly calculated the district's ECPA and PSEA, but that this did not end the inquiry. The ALJ concluded that Court, Department and legislative pronouncements, taken together, require that the district's preschool plan be funded entirely by the State, subject to legislative appropriations.

The Commissioner concurred that ECPA and PSEA were correctly calculated, but rejected the conclusion that full State funding of preschool program was required regardless of other funds available in the district budget. The Commissioner held that the State's obligation is to ensure that sufficient funds are available to fully support the district's approved early childhood education plan, with additional State aid to be provided where formula aids and local resources are together inadequate for this purpose. 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.

September 25, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2202-03

AGENCY DKT. NO. 107-3/03

BOARD OF EDUCATION OF
THE TOWNSHIP OF NEPTUNE,
MONMOUTH COUNTY,

Petitioner,

v.

NEW JERSEY STATE
DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Michael C. Walters, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: June 9, 2003 Decided: July 2, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an appeal by the Neptune Township School District, which is an *Abbott* school district, challenging the adequacy of State aid granted to fund its early childhood plan for the 2004 fiscal year (FY 2004). Neptune filed a verified petition of appeal with the Commissioner of Education (Commissioner) on March 27, 2003, and on April 9, 2003, the matter was transmitted

the matter to the Office of Administrative Law (OAL) for hearing as a contested case. The Department filed an answer to the petition on April 23, 2003.

Petitioner's Board of Education (Board or Neptune) contends that it is entitled to full state funding of its approved preschool program. Neptune seeks an additional $3,768,176 of State aid which it contends is required for full State funding of its approved preschool program.

The New Jersey Department of Education (Department) denies that the State is legally obligated to provide full funding for Neptune's preschool program. Instead, the Department takes the position that preschool funding for *Abbott* districts may be derived from a combination of sources including, where applicable, local tax share. The Department seeks dismissal of the complaint on two grounds: first, that the amount of Preschool Expansion Aid (PSEA) awarded to Neptune was correctly calculated in accordance with the relevant statutory provisions; and, second, that this appeal is premature because the Department has not yet determined whether Neptune will receive additional state aid that could be used to support its preschool program.

The matter was assigned to me on or about May 6, 2003. A telephone conference was scheduled for May 22, 2003 and a hearing was scheduled to commence on June 6, 2003.

On and after May 27, 2003, after consultation with the attorneys, it was learned that the Honorable Ken R. Springer, ALJ had issued an initial decision in a matter entitled *Board of Education of the Town of Phillipsburg v. New Jersey Department of Education*, OAL Dkt. No. EDU 3423-03, Agency Dkt. No. 104-3/03, decided May 21, 2003. In that case, the identical legal issue based on similar facts was addressed by Judge Springer. I indicated to the attorneys that I had reviewed Judge Springer's initial decision and that my impression was that I agreed with his legal conclusion. The attorneys agreed to proceed in this matter by stipulating the essential facts and by relying upon their legal arguments in prior similar cases. I could then reach a conclusion without the necessity for an evidentiary hearing. Based on this agreement, the attorneys supplied me with an agreed upon statement of figures (J-1) and their prior submissions which have been marked in evidence (P-1 through P-4, R-1 through R-5). Upon receiving the written submissions, the record in this matter closed on June 9, 2003.

FACTUAL DISCUSSION

All of the material facts in this matter are either stipulated or undisputed. From the pleadings and the representations of counsel, **I FIND** the following facts:

The Neptune Township School District is an *Abbott* District as defined by *N.J.S.A.* 18A:7F-3 and *N.J.A.C.* 6A:24-1.2. Under New Jersey Supreme Court decisions and Department regulations, the school district has certain programmatic, budgeting and supervisory responsibilities for a preschool program for all eligible three- and four-year-olds residing in the district.

It has been stipulated and agreed by and between the parties that the Department has approved Neptune's Early Childhood Plan for the 2003-2004 school year in the amount of $5,967,430. Also, for the 2003-2004 school year, the Department's initial award to Neptune of PSEA was $114,545 and Neptune's Early Childhood Program Aid (ECPA) was $2,084,709. Accordingly, the approved amount of Neptune's 2003-2004 Early Childhood Plan exceeds the aggregate of Neptune's ECPA and PSEA by $3,768,176.

Utilizing a statutory formula, the Department calculated Neptune's ECPA for FY 2004 to be $2,084,709. There has been no challenge to the correctness of this calculation. Additionally, Neptune is eligible for PSEA, which the Department calculates as the difference between the total budget for the FY 2004 approved plan and the FY 2002 approved plan. In the 2001-2002 FY, the total budget for Neptune's approved preschool plan was $5,852,885. Consequently, the Department performed the following computation to obtain an initial PSEA of $114,545 for Neptune in FY 2004.

FY 2004 Approved Plan	$5,967,430
FY 2001 Approved Plan	-5,852,885
Initial PSEA	$ 114,545

Since total costs of $5,967,430 were approved for FY 2004 and promised state aid comes to $2,199,254 Neptune seeks additional state aid of $3,768,176. It does not matter to Neptune

whether such aid is designated as ECPA, PSEA or something else, so long as the State share fully covers Neptune's approved preschool budget.

LEGAL DISCUSSION

In this matter, it is undisputed that the Department has approved a total budget of $5,967,430 for Neptune to implement its FY 2004 *Abbott* preschool program. Whatever the ultimate source of funding, Neptune has demonstrated a need for $5,967,430 to operate its 2003-2004 preschool program. Based on the foregoing facts and the applicable law, and giving full credit to Judge Springer for his well-reasoned decision in *Board of Education of the Town of Phillipsburg v. New Jersey Department of Education*, OAL Dkt. No. EDU 3423-03, Agency Dkt. No. 104-3/03, (decided May 21, 2003), I have also concluded that the Department is obligated to fully fund the preschool programs in the *Abbott* school districts. Therefore, the Commissioner should seek sufficient appropriations from the Legislature to implement Neptune's approved Early Childhood Program for FY 2004.

As stated by Judge Springer in the *Phillipsburg* case, State regulations contemplate that *Abbott* districts will increase the participation of eligible three- and four-year- old children in preschool programs over a three-year period. Accordingly, the Department set goals of achieving 70% participation in the 2001-2002 school year, 80% participation in the 2002-2003 school year and 90% participation in the 2003-2004 school year and each school year beyond. *N.J.A.*C. 6A:24-3.3(b)(1). To effectuate such anticipated growth, the Legislature appropriated "Preschool Expansion Aid" to cover increased costs from year to year. In the Governor's Budget Message for FY 2004, this legislative intent is clearly articulated:

> The amount appropriated hereinabove as *Abbott* Preschool Expansion Aid is for the purpose of funding *the increase in the approved budgeted costs from 2001-2002 to 2003-2004* for the projected expansion of preschool programs in "*Abbott* districts." Payments of *Abbott* Preschool Expansion Aid shall be based on documented expansion of the preschool program. (Emphasis Added). (at D120).
>
> *http://www.nj.gov/treasury/omb/publications/04budget/pdf/34.pdf*

Guided by the highlighted language, the Department correctly calculated the amount of Neptune's PSEA as equivalent to "the increase in approved budgeted costs from 2001-2002 to 2003-2004." Nearly identical language, except for the years involved, was contained in the Appropriations Act enacted into law for FY 2003. *L.* 2002, *c.* 38.

That conclusion, however, does not end the inquiry. As noted, Neptune does not care how the aid is categorized, as long as it originates from state funds. Neptune argues that the case law, the Legislature's understanding of the constitutional mandate and the Department's own interpretation of its responsibilities all support the proposition that the State must fully fund preschool programs in *Abbott* districts.

New Jersey's highest court recognizes "that pre-school for three- and four-year olds will have a significant and substantial positive impact on academic achievement in both early and later school years." *Abbott v. Burke*, 153 *N.J.* 480, 506 (1998) (*Abbott V*). Recently, the Supreme Court reiterated that high-quality preschool programs for children in *Abbott* districts "are a critical component of the whole school reform effort." *Abbott v. Burke*, 163 *N.J.* 95, 120 (2000) (*Abbott VI*). Underlying the Commissioner's plan for early childhood programs "is the clear commitment that if there is a need for additional funds, the needed funds will be provided or secured." *Abbott V*, at 518. This commitment to provide funding must be viewed in the context of earlier decisions emphasizing the existence of municipal overburden and the inadequacies of the local tax base. *See, e.g., Abbott v. Burke*, 119 *N.J.* 287, 355-357 (1990) (*Abbott II*); *Abbott v. Burke*, 100 *N.J.* 269, 292-293 (1985) (*Abbott I*). In *Abbott V*, the State Supreme Court stopped short of declaring a constitutional mandate for preschool education programs. Rather, the Court interpreted the statutory language as evincing "a clear indication that the Legislature understood and endorsed the strong empirical link between early education and later educational achievement." *Abbott V,* at 507.

Language in the Governor's Budget Message for FY 2004 reflects continuing legislative concern that *Abbott* districts receive full state funding for their preschool programs. Thus, the Governor's proposed budget envisions that:

> The amount appropriated hereinabove for Additional Abbot v. Burke State Aid will provide additional resources to "*Abbott* districts" *to meet the State's obligation to fully fund parity and the approved early childhood operational plans.* The remaining funds appropriated will be used for the award of discretionary funding to *Abbott* districts to maintain the programs, services and positions from the prior year that the commissioner determines are essential to the provision of a thorough and efficient education in those districts. (Emphasis Added). (at D-120).

Two important points are readily apparent from this passage. First, the State acknowledges its responsibility to provide *full funding* for early childhood programs and dedicates "Additional *Abbott v. Burke* State Aid" for that specific purpose. Second, any "remaining funds" may be used for "discretionary" awards for other items deemed by the Commissioner to be "essential" for a thorough and efficient education. Read together, these provisions strongly imply that State reimbursement for the full cost of early childhood programs is nondiscretionary.

Significantly, the Governor's Budget Message for FY 2004 does not impose any preconditions on receipt by *Abbott* districts of additional state aid for preschool programs. In contrast, the Governor's Budget Message requires that, before establishing any "discretionary" funding, the Commissioner "shall determine whether some or all of the additional funds sought can be achieved by reallocating non-instructional expenditures, increasing the local property tax levy or achieving economies and efficiencies in the delivery of services and programs." (at D-120).

Public pronouncements of the Department have consistently adopted the same approach. As recently as February 6, 2003, a top official of the Department wrote to the *Abbott* districts that, "The state will meet its obligation to fully fund parity and preschool programs for *Abbott* districts." Last year, the Department reassured *Abbott* districts on March 18, 2002, that sufficient State funds would be available "to fully support the district's approved preschool plan." None of these policy statements gave any suggestion that the Department would look to local funding to defray the cost of preschool programs.

Finally, the Department contends that the issues are not ripe for determination and that action on the appeal should be deferred until a determination has been made on additional state aid. The school district's response is that the issue of full state funding is clearly drawn and that it is entitled to immediate relief. Appeals involving school budgets in *Abbott* districts are of high priority and receive expedited consideration. Since the facts are undisputed and the parties have had adequate opportunity to brief the legal issues, no good reason exists to delay resolution of this dispute.

DECISION AND ORDER

It is **ORDERED** that summary decision be granted in favor of petitioner Board of Education of the Township of Neptune. It is further **ORDERED** that the Department fully fund the Neptune Township School District early childhood program for FY 2004, subject to sufficient legislative appropriation.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 2, 2003
DATE

JOSEPH F. MARTONE, ALJ

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

July 2 2003 lam
DATE

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JUL 8 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

APPENDIX:

LIST OF EXHIBITS:

Joint exhibits:

J-1 Letter of Michael Walters, Deputy Attorney General, dated June 5, 2003, setting forth the agreed upon figures applicable herein

For petitioner:

P-1 Letter brief dated May 14, 2003, in *Board of Education of the Town of Phillipsburg v. New Jersey Dept. of Education*, OAL Dkt. No. EDU 3423-03

P-2 Letter brief dated May 16, 2003, in *Board of Education of the Town of Phillipsburg v. New Jersey Dept. of Education*, OAL Dkt. No. EDU 3423-03

P-3 Letter brief dated May 22, 2003 in *Board of Education of the Township of Pemberton v. New Jersey Department of Education*, OAL Dkt. No. EDU 2203-03

P-4 Letter brief dated June 1, 2003 in *Board of Education of the Township of Pemberton v. New Jersey Department of Education*, OAL Dkt. No. EDU 2203-03

For respondent:

R-1 Letter brief dated May 13, 2003, in *Board of Education of the Town of Phillipsburg v. New Jersey Dept. of Education*, OAL Dkt. No. EDU 3423-03

R-2 Reply letter brief dated May 16, 2003 in *Board of Education of the Town of Phillipsburg v. New Jersey Dept. of Education*, OAL Dkt. No. EDU 3423-03

R-3 Letter brief and supporting certification dated May 27, 2003 in *Board of Education of the Town of Phillipsburg v. New Jersey Department of Education*, OAL Dkt. No. EDU 3423-03

R-4 Letter brief dated May 26, 2003 in *Board of Education of the Township of Pemberton v. New Jersey Department of Education*, OAL Dkt. No. EDU 2203-03

R-4 Certification of Yut'Se O. Thomas in *Board of Education of the Township of Pemberton v. New Jersey Department of Education*, OAL Dkt. No. EDU 2203-03

OAL DKT. NO. EDU 2202-03
AGENCY DKT. NO. 107-3/03

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH 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. Exceptions were filed by the Department of Education (Department), as were replies by the Board of Education (Board), in accordance with the provisions of *N.J.A.C.* 1:1-18.4.

In its exceptions, the Department urges the Commissioner to limit his adoption of the Initial Decision to finding that the Department correctly calculated the amount of the Board's Preschool Expansion Aid (PSEA) for the 2003-04 fiscal year, and to reject Administrative Law Judge (ALJ) Martone's addressing of broader issues in a matter pled solely as an appeal of the Department's February 26, 2003 PSEA determination. The Department contends that the February 26 determination under appeal was confined to the issue of PSEA and "neither calculates nor advises [the Board] of the amount of Additional *Abbott v. Burke* State aid that it will receive" so that any assertion by the Board regarding such aid is "entirely inappropriate" in the present proceeding. (Department's Exceptions at 1-3, quotation at 2-3)

The Department further contends that the ALJ erred in relying on the Governor's Budget Message for FY '04 in concluding that the Board's approved Early Childhood Plan must be fully funded with State aid, since the FY '04 Appropriations Act, adopted by the Legislature and signed by the Governor as *P.L.* 2003, *c.*122, expressly revised the earlier Governor's Budget Message language as cited in the Initial Decision. The Department urges:

> Notably, the Governor's Budget Message for FY04 provided: "The amount appropriated hereinabove for Additional *Abbott v. Burke* State Aid will provide additional resources to 'Abbott districts' to meet the State's obligation to fully fund parity and *the approved early childhood operational plans*." (Emphasis added). The FY04 Appropriations Act provides: "The amount appropriated hereinabove for Additional Abbott v. Burke State Aid will provide additional resources to 'Abbott districts' to meet the State's obligation to fully fund parity *and approved 'Abbott' preschool expansion*." *L.* 2003, *c.* 122.
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> Here, the Legislature revised the language contained in the Governor's Budget Message to clarify that, contrary to Judge Martone's interpretation, the Department is not required to ensure that Neptune's approved Early Childhood Plan is fully funded with State aid. By purposefully deleting the words "early childhood operational plans" from the Governor's Budget Message and replacing those words in the FY04 Act with "'Abbott' preschool expansion," the FY04 Act unequivocally demonstrates that, while the Department must ensure that Neptune's "approved 'Abbott' expansion" is fully funded with State aid, the Department is not required to ensure that Neptune's approved "early childhood operational plan" is fully funded with State aid. Moreover, this revision is consistent with the method, established in the FY04 Act, by which Preschool Expansion Aid is calculated: "funding the increase in the approved budgeted costs from 2001-2002 to 2003-2004 for the projected expansion of preschool programs in "Abbott districts." *L.* 2003, *c.* 122. (Department's Exceptions at 4-5)

This interpretation, the Department avers, is consistent with the Court's language concerning Additional *Abbott v. Burke* Aid. The Department argues:

> In *Abbott v. Burke*, 153 *N.J.* 480 (1998), the Supreme Court opined, "the Commissioner may, before seeking new appropriations, first determine whether funds within an existing school budget are sufficient to meet a school's request for a demonstrably needed supplemental program." *Id.* at 518. The Court further opined, "[u]nderlying the Commissioner's proposal for whole-school reform, early childhood programs and supplemental programs, is the clear commitment that *if there is a need for additional funds*, the needed funds will be provided or secured." *Ibid.* (emphasis added).
>
> The above-quoted language demonstrates that the Supreme Court intended for the Commissioner to ensure that the early childhood programs are fully funded, however, the Commissioner could first determine whether funds within an existing school budget are sufficient to meet a school's request for such programs. Because local tax levy is included [in] the budget, the Commissioner can consider those funds as well as other revenue supporting the budget when determining the amount of Additional *Abbott v. Burke* State aid, if any, that a district needs. (*Id.* at 5-6)

In reply, the Board counters that the ALJ did *not* address issues outside the scope of the pleadings, since the Petition of Appeal not only challenged the amount of PSEA awarded the Board, but also the Department's failure to fully fund the Board's approved preschool program.[1] (Board's Reply Exceptions at 2-4) The Board further objects to the Department's protestation over the scope of the ALJ's ruling, noting that the Department itself raised the issue of full funding by arguing, in its initial brief in support of a motion for summary decision, that "'as a matter of law,' while the State must ensure that Neptune's preschool program is fully funded, there is not a concomitant obligation that such funding be provided by the State," and that the Department "sought summary decision based on the claim that there was no State obligation to fully fund the DOE-approved preschool program with State funds; the [Department] cannot now be heard to complain that the ALJ ruled adversely to the [Department] on the very 'matter of

[1] The Board points to its claim for relief, and also to ¶¶ 4, 7, 11, 13, 14, 18 and 20 of the Verified Petition, noting that while PSEA is mentioned, "the gravamen of [these] claims is that the State must fully fund the DOE-approved preschool program with State funds." (Board's Reply Exceptions at 3-4, quotation at 3)

law' asserted by the [Department]." (*Id.* at 4-5, quoting Department's *Phillipsburg*[2] Letter Brief of May 13, 2003 at 8) Neither, the Board alleges, can the Department claim that the Initial Decision wrongly addresses yet-to-be-determined Additional *Abbott v. Burke* Aid; this claim "disingenuously misconstrues" the Initial Decision, which did *not* find that the Board was owed Additional *Abbott v. Burke* Aid, but rather concluded that the State had an obligation, to be met however the State deemed fit, to provide full State funding for approved preschool programs, subject to legislative appropriations. (*Id.* at 5-6, quotation at 6) The Board urges that deferral of the question of full State funding makes no sense as a matter of public interest, since the question will only recur later if not resolved here, where it has already been fully briefed and considered. (*Id.* at 6-7)

The Board next proffers that the Supreme Court's decision in *Abbott V, supra,* nowhere intimates that preschool programs should or could be funded in part by local tax share; indeed, the Board avers, the Court's decision was based on the recommendations of the Honorable Michael King, P.J.A.D., sitting as the remand court, and, while the Court disagreed with Judge King regarding full-day preschool, it "did not take issue with his conclusion that preschool would be funded by ECPA, T&E, parity funds and the incremental State funding needed to fully fund the preschool program." (Board's Reply Exceptions at 7-10, quotation at 8) Finally, the Board offers the Office of Legislative Services' analysis of the Department's FY '03 budget, explaining the purpose of PSEA as a new line item funding the increase in costs between 2001-02 and 2002-03 for programs which had been, "[u]p until this time***funded through a

[2] As noted in the Initial Decision at 2, the parties in this matter agreed to incorporate and rely upon submissions and arguments made in the matter of *Board of Education of the Town of Phillipsburg, Warren County, v. New Jersey State Department of Education*, OAL Dkt. No. EDU 3423-03, Agency Dkt. No. 104-3/03. As indicated below, that matter was decided by the Commissioner on September 25, 2003.

combination of Early Childhood Program Aid and Additional *Abbott v. Burke* Aid." This excerpt, the Board opines, "reflects the Legislature's clear understanding that prior to the 2001-02 school year, the State had fully funded preschool with State funds and that PSEA was to ensure full state funding for any increase in 2002-03 over 2001-02. Thus, when the FY 04 Appropriations Act provides that PSEA in 2003-04 is to fund the difference between the 2002-03 program and the 2003-04 program, the evident legislative intent is to continue the full State funding in effect prior to the 2001-02 school year -- and extended into the 2002-03 school year by PSEA -- into the 2003-04 school year." (*Id.* at 9-10, quotation at 9-10)

Finally, the Board contends that the Department errs in claiming that the language of the Appropriations Act as ultimately adopted by the Legislature supports its position. According to the Board, the Initial Decision does not, as the Department alleges, rely exclusively on the earlier Governor's Budget Message, but rather places that message in the context of continuing expressions of legislative concern, the *Abbott* decisions, and the Department's repeated public pronouncements. (*Id.* at 10-11) Additionally,

> [t]he FY ['04] Appropriations Act still links the Additional *Abbott v. Burke* State Aid to the "State's obligation" to fully fund parity and approved Abbott preschool expansion. Significantly, the language is not limited to the formula for funding approved preschool expansion *aid*, but rather to the funding of preschool expansion. Moreover, the FY Appropriations Act does not define what the Legislature meant by the State's obligation so the Commissioner must "employ extrinsic aids, such as legislative intent or prior precedent, to interpret the language at issue." *In re Passaic County Util. Auth.*, 164 *N.J.* 270, 300 (2000) (citation omitted). (*Id.* at 11-12)

Thus, the Board concludes, "properly construed under governing legal principles," the FY '04 Appropriations Act not only fails to support the Department's position, but actually "reinforces the correctness" of the Initial Decision. (*Id.* at 12)

Upon his own review and consideration, as he did in the matter of *Board of Education of the Town of Phillipsburg, Warren County, v. New Jersey State Department of Education*, decided on September 25, 2003, subsequent to issuance of the Initial Decision herein, the Commissioner first concurs with the ALJ and the Board that the instant matter is not limited strictly to the question of whether the Department correctly calculated the amount of PSEA due the district for 2003-04. Notwithstanding that the Petition of Appeal was, in fact, pled largely in terms of PSEA as claimed by the Department, the Commissioner finds it in the best interest of both the parties in this matter and Abbott districts generally to decide the broader question squarely underlying the Board's specific allegations, that is, the question of whether Court, legislative and Department pronouncements, alone or in combination, require that the entire cost of approved Abbott preschool programs be funded, dollar for dollar, exclusively by the State.

The ALJ, concurring with the Initial Decision in *Phillipsburg*, *supra,* answered this question in the affirmative based on legislative intent as expressed through the Governor's FY '04 Budget Message, read in light of 1) Court language recognizing preschool as a critical component of Abbott reform efforts although not a constitutional mandate and acknowledging the statutory endorsement of the link between preschool and later educational achievement; 2) prior enactments reflecting the Legislature's concern

with fully funded early childhood education in Abbott districts; and 3) Department pronouncements expressing clear commitment to full funding of preschool programs.

The Commissioner, however, does not concur with the *Phillipsburg* analysis. With respect to the requirements of the Court, nowhere in the *Abbott* decisions is there a suggestion, let alone a directive, that approved Abbott preschool programs must be funded *exclusively* by the State. On exception, the Board argues implicit endorsement of its position by the Court's silence in response to Judge King's statement that preschool would be funded by ECPA, T&E, parity funds and "the incremental State funding needed to fully fund the preschool program," with no mention of local revenues. (Board's Reply Exceptions at 8-9) Similarly, based on the Board's earlier arguments, the ALJ cites to the Court's concern with municipal overburden and Abbott districts' inadequate tax bases and to its language referencing the State's "clear commitment that if there is a need for additional funds, the needed funds will be provided or secured." (Initial Decision at 5) These statements, however, do not even on their face require State funding regardless of need. Rather, they provide for the State to ensure, with additional aid if necessary, that sufficient funds are available to the district to fully fund its preschool program, that is, to ensure that any gap remaining after receipt of statutory formula aids will be addressed by the State *to the extent that need exists* because funds otherwise available to the district are insufficient to fully support the approved program. This reading is consonant not only with the Court's actual language and concern with local taxation capabilities, but also with its overall recognition that, while adequate funding is critical to achievement of a thorough and efficient system of public education in Abbott districts, such funding is a shared responsibility between the State and the local district.

Taken within the proper framework, then, as in *Phillipsburg,* the proffered Department pronouncements regarding "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. Rather, they must be understood as reflections of the Department's commitment, and recognition of its obligation, to provide or secure additional State funds to the full degree necessary to support approved programs where local budgetary resources, including formula aids, local levies and monies realized through economies, efficiencies and reallocations, are found inadequate for this purpose. Indeed, this is the only interpretation consistent with sound educational policy, which must recognize *both* the critical importance of ensuring that approved Abbott preschool programs are supported by sufficient funds *and* the necessity to allocate State and local resources as efficiently and effectively as possible in meeting the shared responsibility for education in Abbott districts.

Finally, as in *Phillipsburg*, the Commissioner cannot ignore that the Legislature has now spoken definitively on the question posed by this appeal. Even granting, *arguendo*, that prior Legislatures provided for full State funding of Abbott district early childhood operational plans during the first years of their development, and that the Governor's Budget Message for FY '04 appeared to continue that pattern, the current Legislature has acted deliberately and decisively to clarify that its intent for the FY '04 budget year is to provide additional funding for *only* those costs directly associated with approved program expansion, not for the entire early childhood operational plan. In that regard, it is noted that there is no question, nor does the Board

except to the ALJ's conclusion, that the Department correctly calculated the district's PSEA in accordance with the prescribed legislative formula.

Accordingly, for the reasons set forth above, the Initial Decision of the Office of Administrative Law is rejected except insofar as it concludes that the Department correctly calculated petitioner's ECPA and PSEA for 2003-04. The Petition of Appeal, therefore, is dismissed in its entirety.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 9/25/03

Date of Mailing: 9/26/03

[3] 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.

560-03

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" Board of Education claimed the Department was required to provide full State funding for its 2003-04 early childhood education program. The Department had provided Early Childhood Program Aid (ECPA) and Preschool Expansion Aid (PSEA) in accordance with prescribed formulas, but the district contended that additional State monies were required to fully fund the difference between the total of these aids and the approved preschool budget.

The ALJ concluded that the Department correctly calculated the district's ECPA and PSEA, but that this did not end the inquiry. The ALJ concluded that Court, Department and legislative pronouncements, taken together, require that the district's preschool plan be funded entirely by the State, subject to legislative appropriations.

The Commissioner concurred that ECPA and PSEA were correctly calculated, but rejected the conclusion that full State funding of preschool program was required regardless of other funds available in the district budget. The Commissioner held that the State's obligation is to ensure that sufficient funds are available to fully support the district's approved early childhood education plan, with additional State monies to be provided where formula aids and local resources are together inadequate for this purpose. 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.

September 25, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2203-03
AGENCY DKT. NO. 106-3/03

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON,

Petitioner,
v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Kathleen Asher, Deputy Attorney General, for respondent, (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: June 19, 2003 Decided: July 30, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an appeal by the Pemberton Township School District, which is an *Abbott* school district, contesting the adequacy of the State preschool expansion aid granted to fund its early childhood plan for the 2003-2004 fiscal year ("FY 2004"). Pemberton filed a verified petition of appeal with the Commissioner or Education on March 27, 2003, and the matter was transmitted to the Office of Administrative Law on April 9, 2003, for hearing as a contested case. The State Department of Education filed an answer to the petition on April 10, 2003.

Pemberton contends that it is entitled to full state funding of its approved preschool program. Therefore, it seeks an additional $424,569 of State Aid for its approved preschool program.

The New Jersey Department of Education denies that the State is legally obligated to provide full funding for Pemberton's preschool program. Instead, the Department maintains that preschool funding for *Abbott* districts may be derived from a combination of sources including, where applicable, local tax share. The Department seeks dismissal of the complaint on two grounds: first, that the amount of Preschool Expansion Aid (PSEA) awarded to Pemberton was correctly calculated in accordance with the relevant statutory provisions; and, second, that this appeal is premature because the Department has not yet determined whether Pemberton will receive additional state aid that could be used to support its preschool program.

This matter was assigned to me on April 14, 2003. A prehearing conference was scheduled for and held on May 2, 2003 and at that time the parties agreed to conduct the plenary hearing on June 3, 2003. However, on or about May 27, 2003, it was learned that the Honorable Ken R. Springer, ALJ, had issued an initial decision in a matter entitled *Board of Education of the Town of Phillipsburg v. New Jersey Department of Education*, OAL Docket No. EDU 3423-03, Agency Reference No. 104-3/03, on May 21, 2003. In that matter, Judge Springer addressed the identical legal issues and facts substantially similar to those presented here.

After careful consideration of Judge Springer's Initial Decision, I contacted and advised the parties that I had read the decision and preliminarily determined that I agreed with his legal conclusion. Following a brief discussion, the attorneys agreed to proceed in this matter by stipulating the essential facts and relying upon the legal arguments already advanced in their prehearing briefs. This agreement obviated the necessity of an evidentiary hearing and, upon receiving a joint statement of figures (Exhibit J-1), the record closed on June 19, 2003.

FACTUAL DISCUSSION

All of the material facts are either stipulated or undisputed. From the pleadings, joint stipulation and representations of counsel, **I FIND** the following facts:

The Pemberton School District is an *Abbott* District as defined by *N.J.S.A.* 18A:7F-3 and *N.J.A.C.* 6A:24-1.2. Under New Jersey Supreme Court decisions and Department regulations, the District has certain programmatic, budgeting and supervisory responsibilities for a preschool program for all eligible three and four year olds residing in the district. The Department has approved a total budget of $5,452,305 for Pemberton to implement its FY 2004 Abbott preschool program.

Utilizing a statutory formula, the Department calculated Pemberton's ECPA for FY 2004 to be $2,858,058. Pemberton accepts the correctness of this calculation. Additionally, Pemberton is eligible for Preschool Expansion Aid, which the Department calculates as the difference between the total budget for the FY 2004 approved plan and the FY 2002 approved plan. In the 2001-2002 FY, the total budget for Pemberton's approved preschool plan was $3,282,627. Consequently, the Department performed the following computation to obtain an initial PSEA of $2,169,678 for Pemberton in FY 2004:

FY 2004 Approved Plan	$5,452,305
FY 2001 Approved Plan	-3,282,627
Initial PSEA	2,169,678

Since total costs of $5,452,305 were approved for FY 2004 and promised state aid comes to $5,027,736, Pemberton seeks additional state aid of $454,569. It does not matter to Pemberton whether such aid is designated as ECPA, PSEA or something else, so long as the state share fully covers Pemberton's approved preschool budget.

LEGAL DISCUSSION

It is undisputed that the Department has approved a total budget of $5,452,305 for Pemberton to implement its FY 2004 *Abbott* preschool program. Whatever the ultimate source of funding, Pemberton has demonstrated a need for $5,452,305 to operate its 2003-2004 preschool program. Based upon these facts, applicable law, and Judge Springer's well-reasoned decision in *Board of Education of the Town of Phillipsburg v. New Jersey Department of Education, supra*, OAL Docket No. EDU 3423-03, I **CONCLUDE** that the Department is obligated to fully fund the preschool programs in this *Abbott* school district. Therefore, the Commissioner should seek sufficient appropriations from the Legislature to implement Pemberton's approved Early Childhood Program for FY 2004.

As Judge Springer stated, State regulations contemplate that *Abbott* districts will increase the participation of eligible three- and four-year old children in preschool programs over a three-year period. Accordingly, the Department set goals of achieving 70% participation in the 2001-2002 school year, 80% participation in the 2002-2003 school year and 90% participation in the 2003-2004 school year and each school year beyond. *N.J.A.*C. 6A:24-3.3(b)(1). To effectuate such anticipated growth, the Legislature appropriated "Preschool Expansion Aid" to cover increased costs from year to year. In the Governor's Budget Message for FY 2004, this legislative intent is clearly articulated:

> The amount appropriated hereinabove as Abbott Preschool Expansion Aid is for the purpose of funding *the increase in the approved budgeted costs from 2001-2002 to 2003-2004* for the projected expansion of preschool programs in "Abbott districts." Payments of Abbott Preschool Expansion Aid shall be based on documented expansion of the preschool program. (Emphasis Added). (at D120). http://www.nj.gov/treasury/omb/publications/04budget/pdf/34.pdf

Guided by the highlighted language, the Department correctly calculated the amount of Pemberton's PSEA as equivalent to "the increase in approved budgeted costs from 2001-2002 to 2003-2004." Nearly identical language, except for the years involved, was contained in the Appropriations Act enacted into law for FY 2003. *L.* 2002, *c.* 38.

That conclusion, however, does not end the inquiry. As noted, Pemberton does not care how the aid is categorized, as long as it originates from state funds. Pemberton argues that the case law, the Legislature's understanding of the constitutional mandate and the Department's own interpretation of its responsibilities all support the proposition that the state must fully fund preschool programs in *Abbott* districts.

New Jersey's highest court recognizes "that pre-school for three- and four-year olds will have a significant and substantial positive impact on academic achievement in both early and later school years." *Abbott v. Burke*, 153 *N.J.* 480, 506 (1998) (*Abbott V*). Recently, the Supreme Court reiterated that high-quality preschool programs for children in Abbott districts "are a critical component of the whole school reform effort." *Abbott v. Burke*, 163 *N.J.* 95, 120 (2000) (*Abbott VI*). Underlying the Commissioner's plan for early childhood programs "is the clear commitment that if there is a need for additional funds, the needed funds will be provided or secured." *Abbott V*, at 518. This commitment to provide funding must be viewed in the context of earlier decisions emphasizing the existence of municipal overburden and the inadequacies of the local tax base. *See, e.g., Abbott v. Burke*, 119 *N.J.* 287, 355-357 (1990) (*Abbott II*); *Abbott v. Burke*, 100 *N.J.* 269, 292-293 (1985) (*Abbott I*). Nonetheless, in *Abbott V*, the State Supreme Court stopped short of declaring a constitutional mandate for preschool education programs. Rather, the Court interpreted the statutory language as evincing "a clear indication that the Legislature understood and endorsed the strong empirical link between early education and later educational achievement." *Abbott V,* at 507.

Language in the Governor's Budget Message for FY 2004, the very document on which the Department relied, reflects continuing legislative concern that the *Abbott* districts receive full state funding for their preschool programs. Thus, the Governor's proposed budget envisions that:

> The amount appropriated hereinabove for Additional Abbot v. Burke State Aid will provide additional resources to "Abbott districts" *to meet the State's obligation to fully fund parity and the approved early childhood operational plans.* The remaining funds appropriated will be used for the award of discretionary funding to Abbott districts to maintain the programs, services and positions from the prior year that the

> commissioner determines are essential to the provision of a thorough and efficient education in those districts. (Emphasis Added). (at D-120).

Two important points are readily apparent from this passage. First, the state acknowledges its responsibility to provide *full funding* for early childhood programs and dedicates "Additional Abbott v. Burke State Aid" for that specific purpose. Second, any "remaining funds" may be used for "discretionary" awards for other items deemed by the Commissioner to be "essential" for a thorough and efficient education. Read together, these provisions strongly imply that state reimbursement for the full cost of childhood programs is nondiscretionary.

Significantly, the Governor's Budget Message for FY 2004 does not impose any preconditions on receipt by *Abbott* districts of additional state aid for preschool programs. In contrast, the Governor's Budget Message requires that, before establishing any "discretionary" funding, the Commissioner "shall determine whether some or all of the additional funds sought can be achieved by reallocating non-instructional expenditures, increasing the local property tax levy or achieving economies and efficiencies in the delivery of services and programs." (at D-120).

Public pronouncements of the Department have consistently adopted the same approach. As recently as February 6, 2003, a top official of the Department advised the *Abbott* districts that, "The state will meet its obligation to fully fund parity and preschool programs for Abbott districts." Last year, on March 18, 2002, the Department reassured *Abbott* districts that sufficient state funds would be available "to fully support the district's approved preschool plan." None of these policy statements gave any suggestion that the Department would look to local funding to defray the cost of preschool programs.

Finally, the Department contends that the issues are not ripe for determination and that action on the appeal should be deferred until a determination has been made on additional state aid. Pemberton responds that the issue of full state funding is clearly drawn and that it is entitled to immediate relief. Appeals involving school budgets in *Abbott* districts are of high priority and receive expedited consideration. Since the facts are undisputed and the parties have had adequate opportunity to brief the legal issues, no good reason exists to delay resolution of this dispute.

DECISION AND ORDER

It is **ORDERED** that summary decision be granted in favor of Pemberton. It is further **ORDERED** that the Department fully fund Pemberton's preschool program for FY 2004, subject to sufficient legislative appropriation.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 30, 2003
DATE

ISRAEL D. DUBIN, ALJ

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

7/31/2003
DATE

Mailed to Parties:

AUG - 6 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

EXHIBITS

Joint Exhibits:

J-1 Memorandum dated June 16, 2003, setting forth Revised Initial FY 2004 Preschool Expansion Aid

OAL DKT. NO. EDU 2203-03
AGENCY DKT. NO. 106-3/03

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON 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. Exceptions were filed by the Department of Education (Department), as were replies by the Board of Education (Board), in accordance with the provisions of *N.J.A.C.* 1:1-18.4.

In its exceptions, the Department urges the Commissioner to limit his adoption of the Initial Decision to finding that the Department correctly calculated the amount of the Board's Preschool Expansion Aid (PSEA) for the 2003-04 fiscal year, and to reject Administrative Law Judge (ALJ) Dubin's addressing of broader issues in a matter pled solely as an appeal of the Department's February 26, 2003 PSEA determination. The Department contends that the February 26 determination under appeal was confined to the issue of PSEA and "neither calculates nor advises [the Board] of the amount of Additional *Abbott v. Burke* State aid that it will receive" so that any assertion by the Board regarding such aid is "entirely inappropriate" in the present proceeding. (Department's Exceptions at 1-3, quotation at 3)

The Department further contends that the ALJ erred in relying on the Governor's Budget Message for FY '04 in concluding that the Board's approved Early Childhood Plan must be fully funded with State aid, since the FY '04 Appropriations Act, adopted by the Legislature and signed by the Governor as *P.L.* 2003, *c.*122, expressly revised the earlier Governor's Budget Message language as cited in the Initial Decision. The Department urges:

> Notably, the Governor's Budget Message for FY04 provided: "The amount appropriated hereinabove for Additional *Abbott v. Burke* State Aid will provide additional resources to 'Abbott districts' to meet the State's obligation to fully fund parity and *the approved early childhood operational plans*." (Emphasis added). The FY04 Appropriations Act provides: "The amount appropriated hereinabove for Additional Abbott v. Burke State Aid will provide additional resources to 'Abbott districts' to meet the State's obligation to fully fund parity *and approved 'Abbott' preschool expansion*." *L.* 2003, *c.* 122.
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> Here, the Legislature revised the language contained in the Governor's Budget Message to clarify that, contrary to Judge Dubin's interpretation, the Department is not required to ensure that Pemberton's approved Early Childhood Plan is fully funded with State aid. By purposefully deleting the words "early childhood operational plans" from the Governor's Budget Message and replacing those words in the FY04 Act with "'Abbott' preschool expansion," the FY04 Act unequivocally demonstrates that, while the Department must ensure that Pemberton's "approved 'Abbott' expansion" is fully funded with State aid, the Department is not required to ensure that Pemberton's approved "early childhood operational plan" is fully funded with State aid. Moreover, this revision is consistent with the method, established in the FY04 Act, by which Preschool Expansion Aid is calculated: "funding the increase in the approved budgeted costs from 2001-2002 to 2003-2004 for the projected expansion of preschool programs in "Abbott districts." *L.* 2003, *c.* 122. (*Id.* at 4-5)

This interpretation, the Department avers, is consistent with the Court's language concerning Additional *Abbott v. Burke* Aid. The Department argues:

> In *Abbott v. Burke*, 153 *N.J.* 480 (1998), the Supreme Court opined, "the Commissioner may, before seeking new appropriations, first determine whether funds within an existing school budget are sufficient to meet a school's request for a demonstrably needed supplemental program." *Id.* at 518. The Court further opined, "[u]nderlying the Commissioner's proposal for whole-school reform, early childhood programs and supplemental programs, is the clear commitment that *if there is a need for additional funds*, the needed funds will be provided or secured." *Ibid.* (Emphasis added).
>
> The above-quoted language demonstrates that the Supreme Court intended for the Commissioner to ensure that the early childhood programs are fully funded, however, the Commissioner could first determine whether funds within an existing school budget are sufficient to meet a school's request for such programs. Because local tax levy is included [in] the budget, the Commissioner can consider those funds as well as other revenue supporting the budget when determining the amount of Additional *Abbott v. Burke* State aid, if any, that a district needs. (*Id.* at 6)

In reply, the Board counters that the ALJ did *not* address issues outside the scope of the pleadings, since the Petition of Appeal not only challenged the amount of PSEA awarded the Board, but also the Department's failure to fully fund the Board's approved preschool program.[1] (Board's Reply Exceptions at 2-4) The Board further objects to the Department's protestation over the scope of the ALJ's ruling, noting that the Department itself raised the issue of full funding by arguing, in its initial brief in support of a motion for summary decision, that "'as a matter of law,' while the State must ensure that Pemberton's preschool program is fully funded, there is not a concomitant obligation that such funding be provided by the State," and that the Department "sought summary decision based on the claim that there was no State obligation to fully fund the DOE-approved preschool program with State funds; the [Department] cannot now be heard to complain that the ALJ ruled adversely to the [Department] on the very 'matter of

[1] The Board points to its claim for relief, and also to ¶¶ 4, 7, 11, 13, 14, 18 and 20 of the Verified Petition, noting that while PSEA is mentioned, "the gravamen of [these] claims is that the State must fully fund the DOE-approved preschool program with State funds." (Board's Reply Exceptions at 3-4, quotation at 3)

law' asserted by the [Department]." (*Id.* at 4-5, quoting Department's *Phillipsburg*[2] Letter Brief of May 13, 2003 at 8) Neither, the Board alleges, can the Department claim that the Initial Decision wrongly addresses yet-to-be-determined Additional *Abbott v. Burke* Aid; this claim "disingenuously misconstrues" the Initial Decision, which did *not* find that the Board was owed Additional *Abbott v. Burke* Aid, but rather concluded that the State had an obligation, to be met however the State deemed fit, to provide full State funding for approved preschool programs, subject to Legislative appropriations. (*Id.* at 5-6, quotation at 6) The Board urges that deferral of the question of full State funding makes no sense as a matter of public interest, since the question will only recur later if not resolved here, where it has already been fully briefed and considered. (*Id.* at 6-7)

The Board next proffers that the Supreme Court's decision in *Abbott V, supra,* nowhere intimates that preschool programs should or could be funded in part by local tax share; indeed, the Board avers, the Court's decision was based on the recommendations of the Honorable Michael King, P.J.A.D., sitting as the remand court, and, while the Court disagreed with Judge King regarding full-day preschool, it "did not take issue with his conclusion that preschool would be funded by ECPA, T&E, parity funds and the incremental State funding needed to fully fund the preschool program." (Board's Reply Exceptions at 7-10, quotation at 8) Finally, the Board offers the Office of Legislative Services' analysis of the Department's FY '03 budget, explaining the purpose of PSEA as a new line item funding the increase in costs between 2001-02 and 2002-03 for programs which had been, "[u]p until this time***funded through a

[2] As noted in the Initial Decision at 2, the parties in this matter agreed to incorporate and rely upon submissions and arguments made in the matter of *Board of Education of the Town of Phillipsburg, Warren County, v. New Jersey State Department of Education*, OAL Dkt. No. EDU 3423-03, Agency Dkt. No. 104-3/03. As indicated below, that matter was decided by the Commissioner on September 25, 2003.

combination of Early Childhood Program Aid and Additional *Abbott v. Burke* Aid." This excerpt, the Board opines, "reflects the Legislature's clear understanding that prior to the 2001-02 school year, the State had fully funded preschool with State funds and that PSEA was to ensure full state funding for any increase in 2002-03 over 2001-02. Thus, when the FY '04 Appropriations Act provides that PSEA in 2003-04 is to fund the difference between the 2002-03 program and the 2003-04 program, the evident legislative intent is to continue the full State funding in effect prior to the 2001-02 school year -- and extended into the 2002-03 school year by PSEA -- into the 2003-04 school year." (*Id.* at 9-10)

Finally, the Board contends that the Department errs in claiming that the language of the Appropriations Act as ultimately adopted by the Legislature supports its position. According to the Board, the Initial Decision does not, as the Department alleges, rely exclusively on the earlier Governor's Budget Message, but rather places that message in the context of continuing expressions of legislative concern, the *Abbott* decisions, and the Department's repeated public pronouncements. (*Id.* at 10-11) Additionally,

> [t]he FY ['04] Appropriations Act still links the Additional *Abbott v. Burke* State Aid to the "State's obligation" to fully fund parity and approved Abbott preschool expansion. Significantly, the language is not limited to the formula for funding approved preschool expansion *aid*, but rather to the funding of preschool expansion. Moreover, the FY Appropriations Act does not define what the Legislature meant by the State's obligation so the Commissioner must "employ extrinsic aids, such as legislative intent or prior precedent, to interpret the language at issue." *In re Passaic County Util. Auth.*, 164 *N.J.* 270, 300 (2000) (citation omitted). (Id. at 11-12)

Thus, the Board concludes, "properly construed under governing legal principles," the FY '04 Appropriations Act not only fails to support the Department's position, but actually "reinforces the correctness" of the Initial Decision. (*Id.* at 12)

Upon his own review and consideration, as he did in the matter of *Board of Education of the Town of Phillipsburg, Warren County, v. New Jersey State Department of Education*, decided on September 25, 2003, subsequent to issuance of the Initial Decision herein, the Commissioner first concurs with the ALJ and the Board that the instant matter is not limited strictly to the question of whether the Department correctly calculated the amount of PSEA due the district for 2003-04. Notwithstanding that the Petition of Appeal was, in fact, pled largely in terms of PSEA as claimed by the Department, the Commissioner finds it in the best interest of both the parties in this matter and Abbott districts generally to decide the broader question squarely underlying the Board's specific allegations, that is, the question of whether Court, legislative and Department pronouncements, alone or in combination, require that the entire cost of approved Abbott preschool programs be funded, dollar for dollar, exclusively by the State.

The ALJ, concurring with the Initial Decision in *Phillipsburg*, *supra,* answered this question in the affirmative based on legislative intent as expressed through the Governor's FY '04 Budget Message, read in light of 1) Court language recognizing preschool as a critical component of Abbott reform efforts although not a constitutional mandate and acknowledging the statutory endorsement of the link between preschool and later educational achievement; 2) prior enactments reflecting the Legislature's concern

with fully funded early childhood education in Abbott districts; and 3) Department pronouncements expressing clear commitment to full funding of preschool programs.

The Commissioner, however, does not concur with the *Phillipsburg* analysis. With respect to the requirements of the Court, nowhere in the *Abbott* decisions is there a suggestion, let alone a directive, that approved Abbott preschool programs must be funded *exclusively* by the State. On exception, the Board argues implicit endorsement of its position by the Court's silence in response to Judge King's statement that preschool would be funded by ECPA, T&E, parity funds and "the incremental State funding needed to fully fund the preschool program," with no mention of local revenues. (Board's Reply Exceptions at 8-9) Similarly, based on the Board's earlier arguments, the ALJ cites to the Court's concern with municipal overburden and Abbott districts' inadequate tax bases and to its language referencing the State's "clear commitment that if there is a need for additional funds, the needed funds will be provided or secured." (Initial Decision at 5) These statements, however, do not even on their face require State funding regardless of need. Rather, they provide for the State to ensure, with additional aid if necessary, that sufficient funds are available to the district to fully fund its preschool program, that is, to ensure that any gap remaining after receipt of statutory formula aids will be addressed by the State *to the extent that need exists* because funds otherwise available to the district are insufficient to fully support the approved program. This reading is consonant not only with the Court's actual language and concern with local taxation capabilities, but also with its overall recognition that, while adequate funding is critical to achievement of a thorough and efficient system of public education in Abbott districts, such funding is a shared responsibility between the State and the local district.

Taken within the proper framework, then, as in *Phillipsburg,* the proffered Department pronouncements regarding "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. Rather, they must be understood as reflections of the Department's commitment, and recognition of its obligation, to provide or secure additional State funds to the full degree necessary to support approved programs where local budgetary resources, including formula aids, local levies and monies realized through economies, efficiencies and reallocations, are found inadequate for this purpose. Indeed, this is the only interpretation consistent with sound educational policy, which must recognize *both* the critical importance of ensuring that approved Abbott preschool programs are supported by sufficient funds *and* the necessity to allocate State and local resources as efficiently and effectively as possible in meeting the shared responsibility for education in Abbott districts.

Finally, as in *Phillipsburg*, the Commissioner cannot ignore that the Legislature has now spoken definitively on the question posed by this appeal. Even granting, *arguendo*, that prior Legislatures provided for full State funding of Abbott district early childhood operational plans during the first years of their development, and that the Governor's Budget Message for FY '04 appeared to continue that pattern, the current Legislature has acted deliberately and decisively to clarify that its intent for the FY '04 budget year is to provide additional funding for *only* those costs directly associated with approved program expansion, not for the entire early childhood operational plan. In that regard, it is noted that there is no question, nor does the Board

except to the ALJ's conclusion, that the Department correctly calculated the district's PSEA in accordance with the prescribed legislative formula.

Accordingly, for the reasons set forth above, the Initial Decision of the Office of Administrative Law is rejected except insofar as it concludes that the Department correctly calculated petitioner's ECPA and PSEA for 2003-04. The Petition of Appeal, therefore, is dismissed in its entirety.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: 9/25/03

Date of Mailing: 9/26/03

[3] 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.

561-03

BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" Board of Education claimed the Department was required to provide full State funding for its 2003-04 early childhood education program. The Department had provided Early Childhood Program Aid (ECPA) and Preschool Expansion Aid (PSEA) in accordance with prescribed formulas, but the district contended that the State was required to fully fund the difference between the total of these aids and the approved preschool budget.

The ALJ concluded, by reference to Initial Decisions in similar matters involving the Phillipsburg and Pemberton school districts, that the Department correctly calculated the district's formula aids, but that Court, Department and legislative pronouncements, taken together, require that the district's preschool plan be funded entirely by the State, subject to legislative appropriations.

The Commissioner concurred that formula aids were correctly calculated, but rejected the conclusion that full State funding of preschool program was required regardless of other funds available in the district budget. The Commissioner held that the State's obligation is to ensure that sufficient funds are available to fully support the district's approved early childhood education plan, with additional State aid to be provided where formula aids and local resources are together inadequate for this purpose. 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.

September 25, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 379-03

AGENCY DKT. NO. 44-2/03

BOARD OF EDUCATION
THE CITY OF MILLVILLE,
CUMBERLAND COUNTY,
Petitioner,

v.

NEW JERSEY DEPARTMENT
OF EDUCATION,
Respondent.

Arnold Robinson, Esq., appeared for petitioner (Robinson and Andujar, attorneys)

Kathleen Asher, Deputy Attorney General, for respondent, (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: August 28, 2003 Decided: September 5, 2003

BEFORE **EDGAR HOLMES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an appeal by the City of Millville School District, which is an *Abbott* school district, contesting the adequacy of the State preschool expansion aid granted to fund its early

childhood plan for the 2003-2004 fiscal year ("FY 2004"). Millville filed a verified petition of appeal with the Commission of Education on February 3, 2003. The State Department of Education filed an answer to the petition on February 3, 2003, and the matter was transmitted to the Office of Administrative Law on February 6, 2003, for hearing as a contested case.

A partial final decision was rendered by the Commissioner of Education on April 17, 2003. This decision essentially approved a withdrawal of certain issues.

Millville contends that it is entitled to full state funding of its approved preschool program. Therefore, it seeks an additional $1,763,866. of State Aid for its approved preschool program.

The New Jersey Department of Education denies that the State is legally obligated to provide full funding for Millville's preschool program. Instead, the Department maintains that preschool funding for *Abbott* districts may be derived from a combination of sources including, where applicable, local tax share. The Department seeks dismissal of the complaint on two grounds: first, that the amount of Preschool Expansion Aid (PSEA) awarded to Millville was correctly calculated in accordance with the relevant statutory provisions; and, second, that this appeal is premature because the Department has not yet determined whether Millville will receive additional state aid that could be used to support its preschool program.

The Honorable Ken R. Springer, ALJ, has issued an initial decision in a matter entitled *Board of Education of the Town of Phillipsburg v. New Jersey Department of Education,* OAL Docket No. EDU 3423-03, Agency Reference No. 104-3/03, on May 21, 2003. In that matter, Judge Springer addressed the identical legal issues and facts substantially similar to those presented here. Judge Israel Dubin followed Judge Springer's decision in *Pemberton BOE,* EDU 2203-03 on July 30, 2003.

On the return day of this matter, the attorneys agreed to proceed by stipulating the essential facts and relying upon the legal arguments already advanced in their prehearing briefs together with the matters presented to Judges Springer and Dubin. This agreement obviated the necessity of an evidentiary hearing.

STIPULATED FACTS

The parties stipulated that the Millville Board of Education seeks $1,763,866. of State aid calculated pursuant to the joint exhibits J-1, J-2, J-3 and J-4 attached hereto and made a part hereof.

LEGAL DISCUSSION

The parties rely on the legal briefs filed herein, filed in *Phillipsburg* and in *Pemberton* together with the legal discussions set forth in the initial decisions of Judges Springer and Dubin.

DECISION AND ORDER

It is **ORDERED** that summary decision be granted in favor of Millville. It is further **ORDERED** that the Department fully fund Millville's preschool program for FY 2004, subject to sufficient legislative appropriation.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 5, 2003
DATE

Edgar Holmes
EDGAR HOLMES, ALJ

By: Joseph Martone ALJ

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

September 5, 2003
DATE

Mailed to Parties:

SEP 9 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/tmp

APPENDIX

EXHIBITS

Joint Exhibits:

J-1 January 6, 2003 letter Department of Education to Miller – 7 pages

J-2 February 18, 2003 letter Department of Education to Miller – 2 pages

J-3 February 6, 2003 memo Department of Education to Chief School Administrators – 2 pages

J-4 February 26, 2003 – memo Department of Education to Millville – 1 page

OAL DKT. NO. EDU 379-03
AGENCY DKT. NO. 44-2/03

BOARD OF EDUCATION OF THE CITY OF MILLVILLE, 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. Exceptions were filed by the Department of Education (Department), as were replies by the Board of Education (Board), in accordance with the provisions of *N.J.A.C.* 1:1-18.4.

In its exceptions, the Department urges the Commissioner to limit his adoption of the Initial Decision to finding that the Department correctly calculated the amount of the Board's Preschool Expansion Aid (PSEA) for the 2003-04 fiscal year, and to reject Administrative Law Judge (ALJ) Holmes' addressing of broader issues. The Department contends that the determination under appeal neither "calculates nor advises [the Board] of the amount of Additional *Abbott v. Burke* State aid that it will receive" so that any assertion by the Board regarding such aid is "entirely inappropriate" in the present proceeding. (Department's Exceptions at 1-3, quotation at 2)

The Department further contends that the ALJ erred in relying, by reference to the Initial Decisions in the related matters of *Board of Education of the*

Township of Phillipsburg, Warren County, v. New Jersey State Department of Education, Agency Dkt. No. 104-3/03, OAL Dkt. No. 3423-03, and *Board of Education of the Township of Pemberton, Burlington County, v. New Jersey State Department of Education,* Agency Dkt. No. 106-3/03, OAL Dkt. No. EDU 2203-03,[1] on the Governor's Budget Message for FY '04 to conclude that the Board's approved Early Childhood Plan must be fully funded with State aid. The FY '04 Appropriations Act adopted by the Legislature and signed by the Governor as *P.L.* 2003, *c.*122, the Department notes, expressly revised the earlier Governor's Budget Message language. Specifically:

> Notably, the Governor's Budget Message for FY04 provided: "The amount appropriated hereinabove for Additional *Abbott v. Burke* State Aid will provide additional resources to 'Abbott districts' to meet the State's obligation to fully fund parity and *the approved early childhood operational plans.*" (Emphasis added). The FY04 Appropriations Act provides: "The amount appropriated hereinabove for Additional Abbott v. Burke State Aid will provide additional resources to 'Abbott districts' to meet the State's obligation to fully fund parity *and approved 'Abbott' preschool expansion.*" *L.* 2003, *c.* 122.
>
> ***
>
> Here, the Legislature revised the language contained in the Governor's Budget Message to clarify that, contrary to Judge Holmes' interpretation, the Department is not required to ensure that Millville's approved Early Childhood Plan is fully funded with State aid. By purposefully deleting the words "early childhood operational plans" from the Governor's Budget Message and replacing those words in the FY04 Act with "'Abbott' preschool expansion," the FY04 Act unequivocally demonstrates that, while the Department must ensure that Millville's "approved 'Abbott' expansion" is fully funded with State aid, the Department is not required to ensure that Millville's approved "early childhood operational plan" is fully funded with State aid. Moreover, this revision is consistent with the method, established in the FY04 Act, by which Preschool Expansion Aid is calculated: "funding the increase in the approved budgeted costs from 2001-2002 to 2003-2004 for the projected expansion of preschool programs in "Abbott districts." *L.* 2003, *c.* 122. (*Id.* at 4-5)

[1] Both matters have been subsequently decided by the Commissioner as indicated below.

This interpretation, the Department avers, is consistent with the Court's language concerning Additional *Abbott v. Burke* Aid. The Department argues:

> In *Abbott v. Burke*, 153 *N.J.* 480 (1998), the Supreme Court opined, "the Commissioner may, before seeking new appropriations, first determine whether funds within an existing school budget are sufficient to meet a school's request for a demonstrably needed supplemental program." *Id.*at 518. The Court further opined, "[u]nderlying the Commissioner's proposal for whole-school reform, early childhood programs and supplemental programs, is the clear commitment that *if there is a need for additional funds*, the needed funds will be provided or secured." *Ibid.* (emphasis added).
>
> The above-quoted language demonstrates that the Supreme Court intended for the Commissioner to ensure that the early childhood programs are fully funded, however, the Commissioner could first determine whether funds within an existing school budget are sufficient to meet a school's request for such programs. Because local tax levy is included [in] the budget, the Commissioner can consider those funds as well as other revenue supporting the budget when determining the amount of Additional *Abbott v. Burke* State aid, if any, that a district needs. (*Id.* at 6)

In reply, the Board posits that it is not seeking additional *Abbott v. Burke* State aid as claimed by the Department; rather it is requesting that, in compliance with the *Abbott V* mandate, the Department fully fund the approved early childhood education budget by filling, with funds designated specifically for that purpose, the gap of $1,763,866 left after payment of formula aids. (Board's Reply at 1-2)

The Board further argues that the Department's attempt to rely on the Legislature's amendment to the Governor's Budget Message cannot be sustained in view of the Court's mandate in *Abbott V*. The Board states:

> *Abbott V* clearly sets forth a mandate to fully fund Early Childhood programs. This mandate should be viewed in the context of earlier Abbott decisions where the Supreme Court recognized the existence of municipal overburdens and the lack of an adequate tax base facing many school districts. *See Abbott v. Burke*, 100 N.J. 269, 292-293 (1985) (*Abbott I*) citing *Robinson v. Cahill,* 69 N.J. 449, 465 (1976) which recognized a "lack of an adequate tax base for educational purposes as

> indicated by the gross disparities shown in per pupil tax resources." *See also Abbott v. Burke*, 119 N.J. 287, 355-357 (1990) (*Abbott II*).
>
> Upon a finding that the right of children to a thorough and efficient system of education is a fundamental right guaranteed by the Constitution, the Supreme Court, in *Robinson v. Cahill*, 69 N.J. 133 (1975), found that the Court was a "last-resort guarantor of the Constitution's command." *Id.* at 154. This supported their finding that "when there occurs a legislative transgression of a right guaranteed to a citizen, final decision as to the invalidity of such action must rest exclusively with the courts." *Id.* at 146-147.
>
> The Supreme [Court] has mandated, with respect to Early Childhood Programs, that when additional funds are needed they should be provided or secured by the Department. *See Abbott V*, 153 N.J. at 518. Accordingly, the Department's argument that legislative interpretation can circumvent the Supreme Court's Constitutional interpretation is without merit. (*Id.* at 2-3)

In addition to the arguments above, the Board further references the arguments of the petitioning boards in the related matters of *Board of Education of the Township of Phillipsburg, supra,* and *Board of Education of the Township of Pemberton, supra.* Briefly, those arguments contend that the instant matter is not limited strictly to the question of whether the Department correctly calculated the amount of PSEA due the district for 2003-04 and that deferral of the broader underlying issue would not serve the public interest; that the Supreme Court's decision in *Abbott V, supra,* nowhere intimates that preschool programs should or could be funded in part by local tax share; that Department communications pertaining to the 2003-04 school year repeatedly referenced "full funding" of early childhood education programs; and that the Department errs in claiming that the language of the Appropriations Act as adopted by the Legislature supports its position because the Act still links Additional *Abbott v. Burke* State Aid to the State's obligation to fully fund parity and approved Abbott preschool expansion.

Upon his own review and consideration, as in the matter of *Board of Education of the Town of Phillipsburg, supra,* and *Board of Education of the Township of Pemberton, supra*, both decided on September 25, 2003, subsequent to issuance of the Initial Decision herein,[2] the Commissioner first concurs with the ALJ and the Board that the instant matter is not limited strictly to the question of whether the Department correctly calculated the amount of PSEA due the district for 2003-04. Rather, the Commissioner finds it in the best interest of both the parties in this matter and Abbott districts generally to decide the broader question of whether Court, legislative and Department pronouncements, alone or in combination, require that the entire cost of approved Abbott preschool programs be funded, dollar for dollar, exclusively by the State.

The ALJ, through reference to the Initial Decisions in *Phillipsburg*, *supra,* and *Pemberton, supra,* answers this question in the affirmative based on legislative intent as expressed through the Governor's FY '04 Budget Message, read in light of 1) Court language recognizing preschool as a critical component of Abbott reform efforts although not a constitutional mandate and acknowledging the statutory endorsement of the link between preschool and later educational achievement; 2) prior enactments reflecting the Legislature's concern with fully funded early childhood education in Abbott districts; and 3) Department pronouncements expressing clear commitment to full funding of preschool programs.

The Commissioner, however, does not concur with this analysis. With respect to the requirements of the Court, nowhere in the *Abbott* decisions is there a

[2] See also *Board of Education of the Township of Neptune, Monmouth County, v. New Jersey State Department of Education*, similarly decided on September 25, 2003.

suggestion, let alone a directive, that approved Abbott preschool programs must be funded *exclusively* by the State. *Phillipsburg* and *Pemberton*, as well as the Board herein, cite to the Court's concern with municipal overburden and Abbott districts' inadequate tax bases and to its language referencing the State's clear commitment that if there is a need for additional funds, the needed funds will be provided or secured. (*Phillipsburg* Initial Decision at 5, *Pemberton* Initial Decision at 5, Board's Reply at 3) By reference, the Board additionally argues implicit endorsement of its position by the Court's silence in response to Judge King's statement that preschool would be funded by ECPA, T&E, parity funds and "the incremental State funding needed to fully fund the preschool program," with no mention of local revenues. (*Phillipsburg* Reply Exceptions at 8-9) These statements, however, do not even on their face require State funding regardless of need. Rather, they provide for the State to ensure, with additional aid if necessary, that sufficient funds are available to the district to fully fund its preschool program, that is, to ensure that any gap remaining after receipt of statutory formula aids will be addressed by the State *to the extent that need exists* because funds otherwise available to the district are insufficient to fully support the approved program. This reading is consonant not only with the Court's actual language and concern with local taxation capabilities, but also with its overall recognition that, while adequate funding is critical to achievement of a thorough and efficient system of public education in Abbott districts, such funding is a shared responsibility between the State and the local district.

Taken within the proper framework, then, as in *Phillipsburg* and *Pemberton,* the proffered Department pronouncements regarding "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. Rather, they must be understood as reflections of the Department's commitment, and recognition of its obligation, to provide or secure additional State funds to the full degree necessary to support approved programs where local budgetary resources, including formula aids, local levies and monies realized through economies, efficiencies and reallocations, are found inadequate for this purpose. Indeed, this is the only interpretation consistent with sound educational policy, which must recognize *both* the critical importance of ensuring that approved Abbott preschool programs are supported by sufficient funds *and* the necessity to allocate State and local resources as efficiently and effectively as possible in meeting the shared responsibility for education in Abbott districts.

Finally, as in *Phillipsburg* and *Pemberton*, the Commissioner notes that the Legislature has spoken definitively on the central question posed by this appeal. Even granting, *arguendo*, that prior Legislatures provided for full State funding of Abbott district early childhood operational plans during the first years of their development, and that the Governor's Budget Message for FY '04 appeared to continue that pattern, the current Legislature has acted deliberately and decisively to clarify that its intent for the FY '04 budget year is to provide additional funding for *only* those costs directly associated with approved program expansion, not for the entire early childhood operational plan. In that regard, it is noted that there is no question, nor does the Board except to the ALJ's conclusion, that the Department correctly calculated the district's PSEA in accordance with the prescribed legislative formula. Nor does the Commissioner agree, as set forth above, with the Board's contention that the Court has mandated exclusive State funding of early childhood education in Abbott districts; thus, the

Commissioner is not persuaded by the Board's argument that legislative interpretation cannot circumvent the requirements of the Court.

Accordingly, for the reasons set forth above, the Initial Decision of the Office of Administrative Law is rejected except insofar as it concludes that the Department correctly calculated petitioner's ECPA and PSEA for 2003-04. The Petition of Appeal, therefore, is dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 9/25/03

Date of Mailing: 9/26/03

[3] 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.

562-03

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 claimed the Department was required to fund full cost of expansion of the district's preschool program from 2001-02 to 2002-03, and that the Department's methodology for reduction of initial Preschool Expansion Aid award (because enrollment was less than projected) improperly left the district with unfunded costs and forced its use of surplus to finish the 2002-03 school year. Petitioner had additionally sought a determination that the district could not be compelled to expend surplus to a level less than 2%, but attempted to withdraw that request at the close of proceedings.

The ALJ found that the *Abbott* Court mandate did not require full State funding of preschool programs regardless of need, and that the Department's per-pupil method of reducing aid for less-than-projected enrollment was a rational means of adjustment. Denying petitioner's request to withdraw the question because it had at that point been fully heard and briefed, the ALJ also found that Abbott districts can, under appropriate circumstances, be directed to allocate surplus to a level less than 2%.

The Commissioner concurred with the ALJ's conclusions, additionally clarifying that the Department's per-pupil reduction methodology was consistent with legislative intent as expressed in the FY'03 Appropriations Act. 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.

September 25, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3424-03
AGENCY DKT. NO. 105-3/03

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., appearing for Petitioner

Allison C. Eck, Deputy Attorney General, appearing for Respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: June 11, 2003 Decided: June 25, 2003

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner Board of Education of the City of Passaic (Petitioner) is challenging Respondent Department of Education (Respondent) determination of funding for preschool program expansion for the 2002-03 school year. On April 4, 2003, the

Department of Education transmitted the matter 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, with a request that the matter be expedited. Consequently, the hearing was held on June 10 & 11, 2003, at which time the record closed. This decision is rendered on an expedited basis.

FINDINGS OF FACT

1. On or about February 5, 2002, the Respondent approved Petitioner's Early Childhood Budget for the 2002-03 school year.

2. On February 22, 2002, after discussions with Petitioner, the Respondent made adjustments to the approved early childhood plan.

3. Petitioner requested additional funding for costs associated with providing special education services; supplemental adjustments were made.

4. Pursuant to an audit of Petitioner's Early Childhood Program Expansion and Enrollment data, enrollment was determined to be 1038 instead of the projected 1917.

5. As a result of the audited enrollment, the amount of Preschool Expansion Aid (PSEA) was reduced for the 2002-03 school year.

6. The initial PSEA calculation for 02-03 was based on the projected expansion over Petitioner's plan in the 2001-02 school year.

7. In the 2001-02 school year, Petitioner's total Early Childhood Plan totaled $8,476,408. For the 2002-03 school year, it was projected that Petitioner's plan would total $18,064,151.

8. The increased costs due to the expansion of the plan was projected to be $9,587,743.

9. There were, however, 879 fewer students enrolled than Petitioner had originally projected.

10. The amount of preschool expansion aid was reduced from $9,587,743 to $1,304,807.

11. Respondent calculated the amount of the award of preschool expansion aid on a per pupil basis.

12. Further review of Petitioner's approved Early Childhood Plan resulted in a total budget of $12,330,283 on April 25, 2003.

ANALYSIS AND CONCLUSION

Petitioner raises three issues in this appeal:

1. Does Respondent's failure to provide PSEA to fully fund the difference between Petitioner's approved Preschool Program for 2001-02 (the designated base year) and the 2002-03 year violate the mandate of the *Abbott* decisions;

2. Are Respondent's reductions in PSEA arbitrary and capricious; and

3. Did Respondent compel Petitioner to utilize a portion of the undesignated fund balance to fund the preschool program, thus bringing the fund balance to .76 percent?

I turn first to the issue, which succinctly stated, is whether Respondent is required, by virtue of the *Abbott* mandates, to fully fund the year to year expansion of the preschool programs, which, by regulation are required to serve an increased percentage of three to four year olds in successive years, beginning with 70 percent of eligible preschoolers in 2001-02 and increasing that number to 90 percent in 2003-04. *N.J.A.C.* 6A:24-3.3(b)1.

Throughout *Abbott v. Burke*, 153 *N.J.* 480 (1998) (*Abbott V*) the Court emphasizes adequate funding as critical to achieving a thorough and efficient

education. *Abbott V, supra* 517-18. The Court specifically relies on the statutory delegation of power to the Commissioner of Education under *N.J.S.A.* 18A:7F-6b to take such action as he may deem appropriate, including, among others, redirecting expenditures. Read in conjunction with other language from *Abbott V*, it is clear, although the court shifts the emphasis from financing a thorough and efficient education to education itself, the provision of adequate funding is a shared responsibility. For example, the Commissioner is directed to "ensure" programs are adequately funded and to "assist" the schools in meeting the need for transportation and other services. *Abbott V, supra* 507-508.

Moreover, in discussing the need for sufficient funds to be provided for Whole School Reform and for supplemental programs that are constituent parts of the reform, the Court acknowledges that there must also be a clear and effective funding mechanism in place and further acknowledges that the first step in making such a determination is whether funds within an existing school budget are sufficient to meet a school's request, although funds may not be reallocated if that will weaken other program. *Abbott V, supra* 518.

Although the foregoing is couched in terms of the use of funds for supplemental programs, the Court links the Early Childhood Programs by commenting

> Underlying the Commissioner's proposal for whole school reform, *early childhood programs*, and supplemental programs, is the clear commitment that if there is a need for *additional* funds, the needed funds will be provided or secured. *Id.* (Emphasis supplied).

The thread running through the *Abbott V* decision is to require adequate funding of the various components of Whole School Reform, including the early childhood program. The language is repeatedly clear, the Commissioner must "ensure" or the Commissioner must "assist."

Consequently, I **CONCLUDE** that adequate funding, in terms of the *Abbott* "mandate" means that the enquiry may start with analysis of the particular budget in question with a view toward "redirecting expenditures and/or reallocating funds; if there is insufficient funding available, then, the Commissioner must ensure that funds are provided.

Petitioner's assertion that failure to require full State funding of the Respondent's preschool program will result in the funding obligation falling on the District's taxpayers through local share is misguided. Review of the language of *Abbott* as well as the statutory provisions invoked by the Court reveals that the initial inquiry in the analysis of adequate funding should begin with a review of the school budget in question with the goal being to reallocate funds which have already been appropriated; thus, the burden on local taxpayers would not be increased.

Accordingly, I **CONCLUDE**, with respect to the issue Respondent's actions being violative of the *Abbott* mandates, Petitioner has failed to sustain the burden of proof.

I turn now to the issue of whether the methodology used to reduce the PSEA, *i.e.,* the per pupil cost, is arbitrary and capricious. PSEA is an amount of State aid to be utilized by a District to cover the costs of the expansion of its preschool program. The Legislature gave the Commissioner the discretion to adjust preschool expansion aid based upon actual need. (C-2, p. 53, line 2-3). Clearly, the choice was left to the Commissioner and, if the reasoning is sound and rational, it should not be disturbed.

In this case, the testimony reflects the preschool plan is based upon the projected costs required to provide preschool programs and services to the District's eligible universe of three and four year olds. The budget consists of fixed as well as recurring costs. A per pupil amount is arrived at by dividing the total budget by the number of students enrolled in the programs. The per pupil cost is an estimate of how much it costs the District to educate an individual student in its preschool program. Petitioner's program did not enroll as many students as originally projected; thus, the Petitioner's preschool program did not expand as projected.

Contrary to Petitioner's assertions, utilizing the per pupil amount to both increase and decrease the preschool budget over the course of a school year is a fair estimate since it is based on the projected expenses of the entire program. The testimony of Respondent's witnesses was instructive on this point indicating that the "per pupil" methodology is used in many other instances.

On the other hand, actual costs incurred cannot be accurately determined until the end of the school year when final audit is prepared. In order to provide adjustments, both increases and decreases, in the current year, the Respondent and the District must use estimates in an attempt to accurately gauge the costs to be incurred, during the fiscal year. As Respondent's witnesses further testified, the per pupil cost adjustment is a reasonable methodology because it is based upon quantifiable figures – namely, the number of students and the budgeted costs. Further, the per pupil amount is based upon the particular District's school budget. The per pupil amount accounts for all of the budgeted costs, is uniformly applied and provides a methodology that should closely approximate the audited costs incurred in providing a preschool education to the District's eligible three and four year old population.

I **CONCLUDE**, therefore, the per pupil calculation provided a rational, uniform basis for the determination made herein. I further **CONCLUDE** that Petitioner has failed to sustain the burden of proof on this issue.

Although Petitioner attempted to withdraw his request for a determination on the issue of whether Respondent has the authority to compel a District to reduce the undesignated fund balance below two percent to .76 percent to fund the preschool 2002-03 program, since testimony had been taken, trial briefs submitted and the record had closed, in fairness to Respondent, I will consider the question.

Respondent determined that in order to fund its educational programs and services in the 2002-03 school year, that Petitioner could appropriate a portion of its undesignated fund balance, which would bring that balance to below two percent. The

New Jersey Constitution mandates that the "Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State . . . ." *N.J. Const.*, art VIII, § 4, ¶1. Through the *Abbott v. Burke* litigation, the Supreme Court has directed the Commissioner and the Legislature to implement remedial measures in order to "ensure that public school children from the poorest urban communities receive the educational entitlements that the Constitution guarantees them." *Abbott v. Burke,* 153, *N.J.* 480, 489 (1998) (Abbott V).

The Commissioner is the chief officer of the Department of Education and has supervision of all schools of the State. *N.J.S.A.* 18A:4-22, *N.J.S.A.* 18A:4-23. See, *Hinfey v. Matawan Regional Bd. of Educ.*, 77 *N.J.* 514 (1978) (Finding that there is lodged with the Commissioner an encompassing responsibility over public education and broad authority to supervise all public schools). Moreover, the Legislature intended that the Commissioner have broad remedial powers under the Comprehensive Education Improvement and Financing Act (CEIFA), See *e.g., Abbott V*, 153 *N.J.* 480 at 499-502, and provided

> Commissioner may direct such budgetary reallocations and programmatic adjustments, or take such other measures as he deems necessary to ensure implementation of the required thoroughness and efficiency standards. *N.J.S.A.* 18A:7F-6.

Having been granted the power to direct reallocations of budgets as well as take all steps deemed necessary to ensure the provision of a thorough and efficient education, I **FIND** it is within the Commissioner's discretion to direct a District to appropriate surplus fund balances to support its educational programs and services, especially if, as in this case, analysis of the school budget disclosed funds which Respondent suggested could be reallocated and the District chose not to do so. For example, Respondent's witness testified that he suggested several non-instructional, non "*Abbott*" positions could be eliminated for economy purposes; the district chose not to follow the suggestion.

Contrary to Petitioner's allegations, there is no prohibition or statutory bar preventing a school district from appropriating money from its general fund which will result in a general fund surplus balance below two percent. Petitioner erroneously relies upon the language contained in the FY03 Appropriation Act which stated that in establishing the final award amount of *Additional Abbott v. Burke State Aid*, the Commissioner "shall consider all of the District's available resources and any appropriate reallocations, including, but not limited to, a reallocation of the District's undesignated general fund balance in excess of two percent." FY03, *L.* 2002, *c.* 38. A close reading of the section in question discloses that there is no mention of PSEA.

Moreover, because the analysis of adequate funding begins with the inquiry of whether the District has money which could be reallocated, I **FIND** when a school district has available revenue sufficient to fund expenses for the remainder of the school year, regardless of whether it is surplus or other undesignated funds, those monies should be utilized before additional State aid is provided. *Cf., Abbott V, supra,* 153 *N.J.* at 518 (providing that commissioner may, before seeking new appropriations, first determine whether funds within an existing school budget are sufficient to meet a school's request for a demonstrably needed supplemental program). Thus, I **CONCLUDE** the Respondent correctly determined that Petitioner should be required to utilize its available resources to fund the programs and services necessary to provide a constitutionally mandated educational program.

Based on all of the foregoing, I **CONCLUDE** this petition should be dismissed.

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 25, 2003
DATE

Maria LaFiandra
MARIA MANCINI LA FIANDRA, ALJ

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

June 26, 2003
DATE

Mailed to Parties:

JUN 30 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses

Henry Lee

Yut'se Thomas

James Turek

Exhibits

For Petitioner:	For Respondent:	
Pet-1	No Number	Memo, March 18, 2002
Pet-2	No Number	Another directive to district about budget
Pet-3	R16-R17	Letter, October 14, 2002
Pet-4	R23-R24	Letter, February 3, 2002
Pet-5	R2-R9	Letter, February 5, 2002
Pet-6	R19-R21	Letter, February 22, 2002
Pet-7	R29	Memo, February 25,2003
Pet-8	No Number	FY 2002-03 Preschool Expansion Aid Notice
Pet-9	R35-R36	Letter, April 25, 2003
Pet-10	No Number	Adjustments to Preschool Expansion Aid (Prepared by Mr. Lee)
Pet-11	No Number	Budget costs not related to per pupil cost calculations (Prepared by Mr. Lee)
Pet-12	No Number	Letter, June 17, 2002
Pet-13	No Number	Office of Legislative Services Bulletin (Judicial Notice C2)
Pet-14	R33	FY 2002-03 Preschool Expansion Aid Notice ($118,064,151 plan)

C-1 FY03 Capital Construction

C-2 Analysis of NJ FY 2002-03 Budget

* Petitioner's documents were received in evidence; Respondent relied on many of the same documents and the Respondent's numbers are indicated for informational purposes only.

OAL DKT. NO. EDU 3424-03
AGENCY DKT. NO. 105-3/03

BOARD OF EDUCATION OF THE TOWN 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 have been reviewed. In accordance with *N.J.A.C.* 1:1-18.4, timely exceptions were filed by the Board of Education (Board), as were replies by the Department of Education (Department).[1]

In its exceptions, which reference prior briefs as well as arguments made in the concurrent matter of *Board of Education of the Township of Phillipsburg, Warren County, v. New Jersey State Department of Education*, Agency Dkt. No. 104-3/03, OAL Dkt. No. 3423-03,[2] the Board first urges the Commissioner to reject the Administrative Law Judge (ALJ)'s conclusion that approved Abbott preschool programs need not be funded exclusively by the State. The Supreme Court's decision in *Abbott V, supra,* the Board opines, nowhere envisions that preschool programs would or should be partly funded by local tax share; indeed, according to the Board, the Court's decision was based

[1] The Board additionally made a submission in response to the Department's reply. However, because applicable rules make no provision for this submission, the Commissioner does not consider it herein.

[2] Subsequently decided by the Commissioner on September 25, 2003.

on the recommendations of the Honorable Michael King, P.J.A.D., and, while the Court disagreed with Judge King regarding full-day preschool, it did *not* take issue with his conclusion that it was the State's obligation to fully fund preschool in Abbott districts. (Board's Exceptions at 3-4) However, the Board contends, even if the Commissioner were to find that the *Abbott* decisions do not require full State funding, the FY '03 Appropriations Act makes it clear that the Legislature "intended that preschool expansion aid would provide full State funding for the expansion of the approved preschool program in the 2002-03 school year over the 2001-02 approved program," so that the Department's actions, and the Initial Decision supporting them, are directly contrary to a Legislative mandate which the Initial Decision fails even to consider. (*Id.* at 4-5, quotation at 5) Finally, the Board argues, although the ALJ did not address the issue despite its having been briefed, the Department itself "repeatedly recognized" the State's legal obligation to provide full State funding for approved preschool programs in numerous memoranda to *Abbott* districts. (*Id.* at 5-6, quotation at 5)

The Board further objects to the ALJ's acceptance of the Department's utilization of a per-pupil formula for calculating adjustments to Preschool Expansion Aid (PSEA), contending that such acceptance is "contrary to fact, law and budgeting and funding practices relating to the Abbott districts." (*Id.* at 6) The Board first posits that Department-approved preschool budgets are *not* constructed on a per-pupil basis, as stated by the ALJ, but are instead derived by totaling the cost of all Department-approved items, including fixed costs; the per-pupil amount is then obtained by dividing the total budget by the projected number of enrolled students. Thus, the Board concludes, using the per-pupil amount to adjust PSEA necessarily leads to reductions that exceed the

actual savings arising from less-than-anticipated enrollment, thereby violating the legislative mandate (FY '03 Appropriations Act) that any adjustments to PSEA be based on "actual need;" in the Board's case, this methodology led to an undisputed shortage of over a million dollars in the amount actually needed to fund the preschool program for the remainder of the 2002-03 school year, rendering unsustainable the ALJ's characterization of adjusted PSEA as a "close approximation" or "fair estimate." (*Id.* at 6-9) Moreover, according to the Board, budgeting in Abbott districts, and funding by the Department, "is always based on the District's projection and the Department's determination of actual need during the school year," since actual *expenditures* will not be known for certain until after the annual audit, at which time the Department makes the necessary adjustments if State funding exceeds actual need. (*Id.* at 9) The Legislature is well aware of this situation, the Board argues, and for this reason it elected to base PSEA adjustments neither on estimates so as potentially to leave districts with shortfalls, nor on actual audited costs so that funding needs for the 2002-03 school year would not be determined until well after the school year had ended and such needs were moot; instead, it required the Department to "make adjustments based on the actual need projected by the District and then to take back any preschool expansion aid that turns out at the end of the school year not to be actually needed." (*Id.* at 9-12, quotation at 11) Indeed, the Board notes, the Initial Decision fails even to recognize the "obvious consequence of its reasoning," that is, the necessity for an adjustment, either up or down, following determination of actual costs through the annual audit. (*Id.* at 12)

Lastly, the Board excepts to the Initial Decision's "gratuitous adjudication" of the question of Department's authority to compel the District to expend

undesignated fund balance (surplus) so as to reduce it to less than 2%, an issue that was "not presented by [the] appeal and, therefore, was unnecessary for its resolution." During hearing, the Board explains, undisputed testimony established that allocations from surplus reducing it to .76 % were voluntarily undertaken by the Board in response to the Department's reduction in PSEA monies, but that the Department did not compel such allocations. (*Id.* at 12-14, quotation at 12) Thus, the Board avers, it attempted to withdraw the question of Department authority to compel expenditure of surplus below 2%, but the ALJ erroneously considered it nonetheless:

> The issue of when and to what extent the Department may compel reallocations by a District should be decided on a complete record that squarely presents this issue for the proper resolution of an appeal.***The initial decision's conclusion that broad reallocation authority may be exercised in these circumstances resolves an issue in the wrong case at the wrong time. Before such a broad issue is determined in an administrative appeal, there should be a full and complete record showing that the District was compelled to reallocate and the effect on the District of that compelled reallocation. This is not the proper case or record to decide issues that could affect all Abbott districts who are compelled to reallocate undesignated general fund balance below 2% in the future. Therefore, Petitioner respectfully requests that the Commissioner reject the initial decision's gratuitous resolution of an issue not properly before that tribunal. (*Id.* at 13-14)

In reply to the Board's exceptions, the Department first argues that the ALJ's conclusion with respect to State funding for approved preschool programs is contrary to neither the *Abbott* rulings nor any statutory or regulatory requirement. Indeed, the Department contends, *Abbott* does not require provision of additional State aid if a district has other revenue sufficient to be reallocated, but requires instead "an analysis of [the District's] budget with a view toward redirecting or reallocating expenditures and funds," with additional aid to be provided only if needed. (Department's Reply Exceptions at 3) The Department further urges adoption of the

ALJ's conclusion that the Department's method of adjusting the District's PSEA award was reasonably based, since any adjustments prior to determination of actual costs through audit, that is, during the current fiscal year, must necessarily be made on estimates, and the Department's method was based on uniform, quantifiable measures for determining "documented need" as directed by the Legislature. (*Id.* at 3-5) Finally, the Department objects to the Board's stance with respect to the propriety of determining the question of the Department's authority to appropriate undesignated fund balance (surplus) below 2%. The Department notes that this issue was identified at prehearing and addressed in both briefs and testimony, and that the Board did not attempt to withdraw it until after it had been fully litigated; thus, the Board is "disingenuous" in now asserting that the issue was not presented on appeal and a full record not developed. The Department also finds "incredible" the Board's claim that it voluntarily reduced its surplus below 2%, since this "was one of petitioner's main arguments as to why the reduction [in PSEA] should not be made, and the District certainly did not 'volunteer' to utilize its undesignated fund surplus balance for the pre-school program." The Initial Decision should be adopted, the Department contends, because the question of Department-directed reallocation of surplus below 2% will surely recur, and its determination here, following full hearing and briefing, will conserve time and resources, as well as provide guidance for future litigation. (*Id.* at 5-7, quotation at 6)

Upon his own review and consideration, the Commissioner initially concurs with the ALJ that the *Abbott* Court did not categorically require full State funding of preschool programs regardless of need. As set forth in *Board of Education of the Town of Phillipsburg, Warren County, v. New Jersey State Department of Education,*

decided by the Commissioner on September 25, 2003, at 16-17,[3] the *Abbott* decisions nowhere suggest, and certainly do not direct, that approved Abbott preschool programs must be funded *exclusively* by the State. Rather, they require the State to ensure, with additional aid where necessary, that sufficient monies are available to an Abbott district to fully fund its preschool program, that is, to provide or secure additional State funds to the full degree necessary to support approved programs where local budgetary resources are found inadequate for this purpose. Similarly, Department pronouncements regarding "full funding" of Abbott preschool programs must be understood as a reflection of, and commitment to, this shared obligation, recognizing both the critical importance of early childhood education in Abbott districts and the necessity of allocating resources efficiently and effectively in providing it. (*Id.* at 17)

The Commissioner agrees with the Board, however, that the central question in this matter cannot be resolved without express consideration of the FY'03 Appropriations Act, which establishes the requirements of the Legislature for PSEA for the 2002-03 school year. The Board contends that, even if the Commissioner were to find that the Court did not require full funding of preschool expansion, he cannot ignore statutory language demonstrating that the Legislature *did.* Specifically, the Board avers, the Legislature required that any adjustment to PSEA be based on "actual need," so that the Department's adjustment methodology, having resulted in less money than was actually needed to finish out the school year, cannot be sustained.

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[3] See also the concurrently decided matters of *Board of Education of the Township of Neptune, Monmouth County v. New Jersey State Department of Education; Board of Education of the Township of Pemberton, Burlington County v. New Jersey State Department of Education;* and *Board of Education of the City of Millville, Cumberland County v. New Jersey State Department of Education.*

The pertinent portion of the Act provides:

> The amount appropriated hereinabove as Abbott Preschool Expansion Aid is for the purpose of funding the increase in the approved budgeted costs from 2001-2002 to 2002-2003 for the projected expansion of preschool programs in "Abbott districts." Payments of Abbott Preschool Expansion Aid shall be based on documented expansion of the preschool program. Upon the Commissioner of Education's request, "Abbott districts" will be required to provide such supporting documentation as deemed necessary to verify that the actual expansion in the preschool program has occurred in the 2002-2003 fiscal year. Such documentation may include enrollment and attendance data that may be subject to an audit. Appropriate adjustments to a district's Abbott Preschool Expansion Aid amount may be made by the commissioner based on actual need. (Exhibit C-1, pages 52-53)

The above-quoted language, in the Commissioner's view, does not support the Board's contention. In the context of the full passage, it is clear that "actual need" refers not, as the Board argues, to a dollar-for-dollar match between State aid and the district's unaudited program costs, but to the extent to which the district's documented expansion differs from its projected. Quantifying, for current-year aid adjustment purposes, the dollar amount associated with that difference by means of a per-pupil cost, derived for each district by dividing its projected budget by its number of projected pupils, is a reasonable, objective and consistent Statewide methodology for carrying out the Legislature's directive; indeed, in most cases, it likely *would*, as found by the ALJ, result in a fair approximation of actual program expansion costs.[4] That the Board in this instance experienced so large a drop in aid based on the Department's determination of "actual need" was due *entirely* to the extraordinary difference between the district's initial enrollment projection (1917) and its actual documented enrollment (1038); such

[4] The Commissioner here notes that, contrary to the Board's representation on exception, the ALJ does not misunderstand or mischaracterize the manner in which preschool budgets are constructed in Abbott districts. Initial Decision at 5.

anomaly, however, does not render the Department's method of adjustment inherently infirm, improper, or in violation of law.

Similarly, there is no violation of the Act in the Board's being required, whether "voluntarily" or by Department direction, to expend surplus funds in order to complete its preschool program for the 2002-03 school year.[5] As noted by the Department in its brief before the ALJ, school districts, including Abbott districts, have no statutory or regulatory entitlement to retain unreserved, undesignated balances through the end of a school year; indeed, the very purpose of surplus is to provide an ability to meet unforeseen costs arising during the course of the year. (Department's Brief at 11) Within an appropriate context, such as when dealing as here with a dedicated, current-year State aid entitlement not structured as a dollar-for-dollar match, use of reserve funds--even to the point of bringing the remaining surplus balance below 2%--to address a gap between aid received and targeted program costs is entirely appropriate, notwithstanding that such funds may have derived from the general budget supported in part by local taxes. To the extent that current-year application of surplus may leave a district with less money to direct toward the following year's budget, or be construed, as it is by the Board herein, as an abrogation of the State's responsibility for "full" funding, the overall framework for State support of Abbott districts—the larger context within which the current matter must be viewed—acts to ensure that district students will not be deprived of the educational entitlements guaranteed them by the New Jersey Legislature and Constitution.

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[5] The Commissioner concurs with the ALJ and the Department that this issue is appropriately decided herein.

Accordingly, as clarified above, the Initial Decision of the Office of Administrative Law is adopted as the final decision in this matter. The actions of the Department are sustained and the Petition of Appeal dismissed.

IT IS SO ORDERED.[6]



COMMISSIONER OF EDUCATION

Date of Decision: 9/25/03

Date of Mailing: 9/26/03

[6] Pursuant to *P.L.* 2002, c. 38, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

563-03

563-03

GAIL REMPELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST HANOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

September 26, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7571-01

AGENCY DKT. NO. 264-6/01

GAIL REMPELL,

Petitioner,

v.

BOARD OF EDUCATION OF EAST HANOVER TOWNSHIP, MORRIS COUNTY,

Respondent.

Richard A. Friedman, Esq., appearing for Petitioner
(Zazzali, Fagella & Nowak, attorneys)

Joseph R. Morano, Esq., appearing for Respondent
(Viola, Benedetti, Azzolini & Morano, attorneys)

Record Closed: August 6, 2003 Decided: August 8, 2003

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on August 31, 2001, 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 October 29, 2002 at the OAL, 33 Washington Street, Newark, New Jersey, which was adjourned at the request of Petitioner's counsel. The matter was rescheduled for April 22, 2003. 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 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 8, 2003
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

8-14-03
DATE

M. Kathleen Duncan/CG
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 14 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

F-11.2

ZAZZALI, FAGELLA, NOWAK,
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Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

GAIL REMPELL,	:BEFORE THE OFFICE OF :ADMINISTRATIVE LAW
Petitioner,	:
v	:
	:AGENCY DOCKET NO.: 264-6/01
EAST HANOVER TOWNSHIP BOARD OF EDUCATION, MORRIS COUNTY	:OAL DOCKET NO.: EDUOR 07571-01N :
	: **SETTLEMENT AGREEMENT**
Respondent.	:

This Settlement Agreement is made between the petitioner, Gail Rempell, and the respondent, East Hanover Township Board of Education ("Board").

Introduction and Background

WHEREAS, petitioner filed a petition with the Commissioner of Education under Agency Docket No.: 264-6/01, OAL Docket No.: EDUOR 07571-01N, alleging that the reduction of her employment to part-time and assignment of other employees to positions as speech language specialists by the respondent violated her tenure and seniority rights.

WHEREAS, the parties are desirous of resolving this matter promptly and

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

F-11.3

amicably, and

WHEREAS a settlement in this matter will save both parties and the public the cost and uncertainties of litigation, the parties agree that this matter shall be resolved based upon the following terms.

1. Respondent shall pay to petitioner, within 30 days of the date of the Commissioner's approval of this Settlement Agreement, the sum of $9,000.00.

2. The parties agree that no deductions shall be taken for taxes or any other reasons from said payment, and that all taxes and other deductions shall be petitioner's responsibility.

3. Petitioner waives and abandons her claim that the number of speech language specialist positions and their percentages of employment now in effect in the respondent school district, specifically the employment of speech language specialists with one speech language specialist being employed full-time as a speech language specialist, three speech language specialists employed on a half-time basis, and one half-time speech language specialist - half-time co-teacher, all of whom who are either non-tenured or less senior than petitioner (except for the full-time speech language specialist), does not, in the factual circumstances of this matter, violate petitioner's tenure or seniority rights.

4. The parties agree that petitioner preserves, reserves, and retains her tenure and seniority status and rights, so that if a full-time speech language specialist position is created, re-established, or becomes vacant, petitioner may assert tenure and seniority claims to such position.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN

F-11.4

5. Although petitioner agrees to waive or relinquish her challenge to the number of speech language specialist positions and their percentages of employment as referred to in paragraph 3 above, in the event that such configuration is changed, such that a full-time speech language specialist position is created, re-established, or becomes vacant, petitioner reserves the right to assert tenure and seniority claims to any such speech language specialist positions.

6. In consideration of the above terms, petitioner agrees to withdraw the petition of appeal with prejudice.

7. The parties agree that this agreement is contingent upon the approval of the Commissioner of Education, and that if such approval is denied, neither the agreement nor any of its terms shall be admissible in any legal or administrative proceedings of any nature, and that in such event, the matter shall be returned to the Office of Administrative Law for further proceedings.

By: Gail Rempell Dated: 5/22/03
Gail Rempell, Petitioner

East Hanover Township Board
of Education

By: _____ Dated: _____
, Board President

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
ATTORNEYS AT LAW

07-09-03 04:08 RCVD

EAST HANOVER TOWNSHIP SCHOOLS
20 School Avenue
East Hanover, New Jersey 07936
(973)-887-2112
(973)-887-2773 fax#

John L. Tudor
School Business Administrator/
Board Secretary

Larry Santos
Superintendent

July 7, 2003

Viola, Benedetti, Azzolini, & Morano LLC
Attorneys at Law
134 Columbia Turnpike
Florham Park, NJ 07932

ATTN: Mr. Joseph Morano, Esq.- Partner

Re: Rempell Settlement

Dear Mr. Morano:

Enclosed please find the certified minutes for the above referenced settlement that was approved during the June 19, 2003 board meeting.

Please feel free to contact me should you require any other information.

Very truly yours,

John L. Tudor
School Business Administrator/
Board Secretary

JLT:dcl
encl(s)

EXTRACT FROM THE MINUTES OF
A MEETING OF THE BOARD OF
EDUCATION OF THE TOWNSHIP
OF EAST HANOVER, MORRIS
COUNTY, N.J. AS RECORDED IN

THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of East Hanover in the County of Morris, New Jersey, convened in Public Meeting on June 19, 2003 at 7:30 p.m., in the conference room of the board offices, 20 School Avenue, East Hanover, New Jersey.

The following members of the Board of Education were present:

Catherine Pfund-Olsen, President
Patricia Anderson
Edward Garcia
Lisa Krueger
Frank Verducci
Frank Hoffman
Frank Sullivan

The following motion was moved by Mr. Garcia and seconded by Mr.Hoffman and adopted by the Board of Education by the following roll call vote:

Approve the negotiated settlement agreement with Gail Rempell
in the amount of $9,000.00 which is attached.

STATE OF NEW JERSEY)
EAST HANOVER TWP.) ss
COUNTY OF MORRIS)

I, John L. Tudor, Secretary of the Board of Education, of the East Hanover Township School District, in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on June 19, 2003, has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Hanover Township, Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said contract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 7th day of July, 2003.

Board Secretary/Business Administrator

JLT:dcl

2 e

OAL DKT. NO. EDU 7571-01
AGENCY DKT. NO. 264-6/01

GAIL REMPELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST HANOVER, MORRIS 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|26|03

Date of Mailing: 9|26|03

564-03

564-03

THOMAS FEDOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning tenured principal claimed the Board reduced his employment from a 12-month to a 10-month position and similarly reduced his salary while retaining a less senior individual in a 12-month position, thereby violating his tenure and seniority rights.

The ALJ determined that a RIF, a reduction in petitioner's tangible employment benefits, occurred and, thus, petitioner's seniority rights were triggered. (*Carpenito*) Both petitioner and Michael Nazzarro were tenured employees but because petitioner's seniority as a high school principal exceeded that of Nazzarro, petitioner was entitled to bump Nazzarro for the position. The ALJ granted petitioner's motion for summary decision.

The Commissioner adopted the Initial Decision as his own and directed the Board to compensate petitioner as indicated in the Initial 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.

September 26, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
OAL DKT. NO. EDU 7669-01
AGENCY DKT. NO. 287-7/01

THOMAS FEDOR,
Petitioner,
v.
ELMWOOD PARK BOARD OF EDUCATION,
Respondent.

Gregory T. Syrek, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Matthew P. Demaria, Esq., for respondent

Record Closed: August 6, 2003 Decided: , 2003

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

Procedural History

On or about July 12, 2001, petitioner filed an appeal with the Commissioner of Education, alleging that respondent's action to reduce his employment from a 12-month position to a 10-month position while retaining a less senior individual in a 12-month position violated his tenure and seniority rights. On August 23, 2001, respondent filed its answer requesting dismissal of the petition. On September 10, 2001, the Department of Education, Bureau of Controversies and Disputes transmitted this matter

to the Office of Administrative Law as a contested case 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 case was assigned to the undersigned judge on October 24, 2001, and a telephone prehearing conference held on December 19, 2001. The hearing scheduled for July 17, 2002 was adjourned at the request of counsel to August 14, 2002 and then to January 23, 2003. The scheduled hearing was adjourned at the request of counsel who indicated that a joint stipulation of facts and cross motions for summary decision would be filed. The parties have filed a joint stipulation of facts and cross-motions for summary decision. I have considered the briefs filed in the matter and have today heard oral argument, and am prepared to make a determination in this matter.

Stipulated Facts

The parties have filed a joint stipulation of facts, which is attached and constitutes the undisputed facts in this matter. They may be summarized as follows:

This case arises out of a dispute between respondent Elmwood Board of Education and petitioner an Elementary School Principal, Thomas Fedor. Petitioner holds the following certificates and endorsements issued by the State Board of Examiners:

1. Instructional Certificate with endorsement as Secondary School Teacher of Social Studies issued on July 19, 1966.
2. Educational Services Certificate with endorsement for Student Personnel Services issued January 1973.
3. Administrative Certificate with endorsements in:

    a. Principal/Supervisor issued September 1978.
    b. School Administrator issued October 1982.

Petitioner has been employed by respondent since 1966 and has held the following positions:

1966-1975	Teacher of Social Studies, Grades 7 to 12
1975-1978	Guidance Counselor, Grades 7 to 12
1978-1980	Elementary School Principal
1980-1986	Assistant to the Superintendent of Schools
1986-1988	Assistant to the Superintendent of Schools and Acting High School Principal
1988-1990	Assistant to the Superintendent of Schools
1990-1991	High School Principal (12 months)
1991-1992	High School Principal (12 months)
1992-1993	High School Principal (12 months)
1993-1994	High School Principal (12 months)
1994-1995	Elementary School Principal (12 months)
1995-1996	Elementary School Principal (12 months)
1996-1997	Elementary School Principal (12 months)
1997-1998	Elementary School Principal (12 months)
1998-1999	Elementary School Principal (12 months)
1999-2000	Elementary School Principal (12 months)
2000-2001	Elementary School Principal (12 months)
2001-2002	Elementary School Principal (10 months)

On April 24, 2001, respondent acted to appoint petitioner as an Elementary School Principal on a ten (10) month basis.[1] By decreasing petitioner's employment from twelve (12) months to ten (10) months, respondent reduced petitioner's employment and salary. Petitioner's salary for the 2001-2002 school year was $90,924.00 ($90,299.00 plus $625.00 longevity). If respondent had continued to employ petitioner on a twelve (12) month basis for the 2001-2002 school year, his salary would have been $109,108.00 ($108,483.00 plus $625.00 for longevity). Petitioner's salary for the 2000-2001 school year was $105,573.00.

As a result of the reduction in petitioner's employment, from twelve (12) months to ten (10) months, petitioner's sick time was reduced from fourteen (14) days to twelve (12) days. As a result of the reduction in petitioner's employment, from twelve (12) months to ten (10) months, petitioner's vacation time was reduced from twenty (20) days to six (6) days.

[1] At the time of the reduction, petitioner was employed by respondent as the Elementary School Principal for seven (7) consecutive years (from 1994-2001 and as a High School Principal for four (4) consecutive years (1990-1994).

At the time respondent decreased the Elementary School Principal position from twelve (12) months to ten (10) months, Michael Nazzaro (Nazzaro) held the position of High School Principal. Respondent has employed Nazzaro since 1968, in the following positions:

1968-1991	Teacher of Mathematics, High School
1991-1996	Teacher of Mathematics, High School and Facilitator
1996-1997	Assistant Principal
7/9/97-2/3/98	Acting High School Principal
2/4/98-Present	High School Principal (12 months)

Nazzaro was properly certified for the employment positions appointed to by respondent.

Petitioner alleges that the reduction in petitioner's employment, from twelve (12) to ten (10) months violates his rights under the Education Tenure Act, *N.J.S.A.* 18A:28 –1 to –18. Petitioner asserts that since the High School Principal position, held by Nazzaro, was not reduced from twelve (12) to ten (10) months, and petitioner obtained tenure as a principal in 1993, he is entitled to Nazzaro's position based on his seniority and bumping rights.

Discussion

1. Tenure Law

Tenure is a status in a particular position created by statute rather than an agreement of the parties. *Zimmerman v. Bd. of Educ. of Newark*, 38 *N.J.* 65, 72 (1962). Tenure serves to provide a measure of security to teachers and other school employees who faithfully serve for the requisite period. *Barnes v. Bd. of Educ. of Jersey City,* 85 *N.J. Super.* 42, 45 (App. Div. 1964). The Education Tenure Act, *N.J.S.A.* 18A:28-1 to –18, authorizes the tenure of educational personnel.

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 attain tenure, an educator must hold the appropriate certificate for his or her position. *N.J.S.A.* 18A:26-5. 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, -6.2. An educator may possess multiple endorsements under a single certificate, qualifying him or her to fill any position covered by the respective endorsements. *N.J.A.C.* 6:11-6.2 (a)(2), (a)(8).

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:

> 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.]

Once an individual has obtained tenure within a particular area, she or he cannot lose tenure protections as long as she or he continues within the area of tenure absent inefficiency, incapacity, conduct unbecoming a teaching staff member, or other just cause. *N.J.S.A.* 18A:28-5. In the event that a tenured educator is transferred or

promoted to a separately tenurable position, *N.J.S.A.* 18A:28-6 provides for the acquisition of tenure in the new position.[2]

Tenure does not apply in the same way for administrative and supervisory personnel as it does for teachers. *Nelson v. Bd. of Educ. of Township of Old Bridge*, 148 *N.J.* 358, 367 (1997). It has been uniformly recognized by both the State Board of Education and the Commissioner that the positions enumerated under *N.J.S.A.* 18A:28-5,[3] are separately tenurable, meaning that tenure accrued within one of the enumerated positions does not transfer to another enumerated position. *Id.* at 365 (*citing, Kaprow v. Bd. of Educ.*, 255 *N.J. Super.* 76, 92 (App. Div. 1992) (agreeing that "Assistant Superintendent" is a separately tenurable position)). The position of "Principal" is a separately tenurable position. *N.J.S.A.* 18A:28-5. Thus, an educator can only obtain tenure as a principal by holding the requisite certification and working as a principal for the requisite period of time. However, for purposes of acquiring tenure there is no distinction between the position of High School Principal and Elementary School Principal. *N.J.S.A.* 18A:28-5. The lack of distinction between the two categories

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[2] *N.J.S.A.* 18A:28-6 provides: 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; ... 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.

[3] The positions enumerated under *N.J.S.A.* 18A:28-5 are: "teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and excepting those who are not the holders of any other nurse performing school nursing services, school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners."

implies that once an educator acquires tenure in a Principal position, the educator is entitled to tenure in any Principal position.

Educators who are under tenure, "shall not be dismissed or *reduced in compensation* except for inefficiency, incapacity, conduct unbecoming ... or other just cause," *N.J.S.A.* 18A:28-5 (emphasis added), and then only in the manner prescribed by *N.J.S.A.* 18A: 6-10, which provides that a dismissal or a reduction in compensation, must be preceded by:

> a hearing ... 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, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Thus, once an educator has attained tenure, he or she is entitled to notice and a hearing prior to receiving a reduction in salary or being dismissed.

2. A RIF is a reduction in any tangible benefit

Although there are many protections afforded to individuals with tenure, tenure does not prohibit a school district from engaging in a RIF. *N.J.S.A.* 18A:28-9.[4] In the event of a RIF, dismissals must be made on the basis of seniority[5] according to standards adopted by the State. *N.J.S.A.* 18A:28-10. Thus, if it is determined that a RIF occurred, the seniority of the individuals affected by the RIF must be considered.

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[4] The "reduction-in-force" concept is embodied in *N.J.S.A.* 18A:28-9, which provides:

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 position 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 . . .
[*N.J.S.A.* 18A:28-9].

[5] Seniority is a by-product of tenure and comes into play only if tenure rights are reduced by way of dismissal or reduction in tangible employment benefits.

Seniority is a right afforded to employees who have acquired tenure. Seniority entitles tenured employees to either continue in an existing job opening based upon their longevity of employment or to be placed upon an eligible list for reemployment when a new position becomes available. *N.J.A.C.* 6:3-5.1(i). In essence, seniority provides employees with bumping rights. Bumping rights are governed by *N.J.A.C.* 6:3-5.1 which provides, in relevant part:

> (b) Seniority ... shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided.
>
> ...
>
> (h) Whenever a person shall move from or revert to a category, *all periods of employment shall be credited toward his or her seniority in any or all categories in which he or she previously held employment.*
>
> ...
>
> (l) The following shall be deemed to be specific categories, not necessarily numbered in the order of precedence:
>
> ....
>
> 4. High school principal;
>
> ...
>
> 9. Elementary principal
>
> [*N.J.A.C.* 6:3-5.1 (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, 106-7 (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). Seniority can only be obtained by the accrual of actual experience in a

specific job category.[6] *Bednar v. Westwood Bd. of Educ.*, 221 *N.J. Super.* 239, 241 *n.* 1 (App. Div. 1987). Thus, the concept of seniority is narrower than the concept of tenure.

A reduction in force is not limited to the complete elimination of positions. A reduction in hours of employment is considered to be a reduction in force. *Klinger v. Bd. of Educ. Cranbury*, 190 *N.J. Super.* 354, 357 (App. Div. 1982) (*citing Popovich v. Bd. of Educ.*, 1975 *S.L.D.* 737, 745); *see also*, *Bednar, supra,* 221 *N.J. Super.* at 240 (finding a reduction of an art teacher's full-time position to a part-time position constitutes a RIF); *Avery v. Bd. of Educ. Trenton State Board of Education,* EDU 8316-93, *State Bd. of Educ.* #95-97 (July 2001)<http://www.state.nj.us/njded/legal/sboe/2001/jul/sb95-97.pdf> (holding that petitioners suffered a RIF when the board "abolished their 12-month unrecognized positions and reassigned them to 10-month positions with recognized titles"). Thus, when a school board deems it necessary to reduce tangible employment benefits and/or eliminate a position, the seniority regulations shall be applied.

3. Analysis

Based on the stipulated facts and the evidence provided, there is no genuine issue of material fact. Petitioner, a tenured principal, experienced a reduction in salary, vacation days, and sick days as a result of respondent's decision to reduce the Elementary School Principal position from twelve (12) months to ten (10) months. Case law has consistently held that a reduction in hours is a RIF which triggers the application of the seniority regulations. Therefore, respondent had an obligation to consider petitioner's seniority status prior to reducing his hours.

[6]For example, an individual may obtain tenure in any "principal" position, but his seniority is based upon his actual experience with a specific age group. Thus, petitioner has tenure based on the eleven (11) years serving as principal, but only four (4) years of seniority for a High School Principal position and seven (7) years of seniority for the Elementary School Principal position.

For purposes of determining seniority, petitioner served in two different principal categories. Petitioner served four (4) years in the category of High School Principal, and seven (7) years in the category of Elementary School Principal. Petitioner's tenure and service in both principal categories entitled him to assert bumping rights for a principal position in either category.[7]

The undisputed facts indicate that Nazzaro had also obtained tenure as a Principal. However, for purposes of determining seniority, Nazzaro served as principal in the High School category for three (3) years, four (4) months and twenty-five (25) days. Petitioner served in the High School category for four (4) years. Consequently, at the time of the RIF, petitioner's seniority in the High School Principal category exceeded Nazzaro's. Since petitioner was tenured as a Principal and had more seniority in the High School Principal category then Nazzaro, petitioner was entitled to bump Nazzaro for the High School Principal position.

Conclusion

Respondent engaged in a RIF when it reduced the Elementary School Principal position from a twelve (12) month position to a ten (10) month position. Because respondent engaged in a RIF, it had an obligation to consider the seniority rights of those affected by the RIF. Based on the stipulated facts and evidence submitted by the parties, it is clear that respondent failed to fulfill its obligation under the tenure act. Petitioner, based upon his seniority, was entitled to bump Nazzaro for the High School Principal position.[8]

---

[7] Even if seniority were determined based on the broader category of "principal", petitioner, with his eleven (11) years in a principal position, would still have more seniority than Nazzaro and, as such, petitioner would be entitled to bump Nazzaro for the High School Principal position.

[8] Moreover, the collective bargaining agreement negotiated several years ago, has no relevance to the subject matter of the instant dispute, which involves petitioner's seniority rights as a result of a reduction in force.

Order

Based on the above, it is hereby **ORDERED** that petitioner's motion for summary decision is granted. For school year 2001-2002, petitioner is entitled to the difference between the salary he actually earned in the ten-month position and the amount he would have earned as a 12-month high school principal. Petitioner will also be entitled to a back-pay differential for the 2002-2003 school year and thereafter until he is placed or paid for a twelve-month principal position. He is also entitled to restoration of lost sick days and vacation days as well as any other benefits or emoluments of employment loss as a result of respondent's action. I am not, however, awarding prejudgment interest as requested, since I do not find based upon the information available to me that respondent's action was in "bad faith."

This recommended oral decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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 oral 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 oral 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.

END OF TRANSCRIPT

I, Anna M. Leggett, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Elinor R. Reiner's oral decision rendered in the above matter on August 13, 2003.

August 13, 2003
DATE

Anna M. Leggett
ANNA M. LEGGETT, SECRETARY

August 13, 2003
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

8-15-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 18 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 7669-01
AGENCY DKT. NO. 287-7/01

THOMAS FEDOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN 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 once petitioner was subject to a reduction in his tangible employment benefits, as a tenured principal, his seniority rights were triggered. *See Carpenito v. Board of Education of the Borough of Rumson*, 322 *N.J. Super.* 522, 531, (App. Div. 1999). For the reasons set forth by the Administrative Law Judge (ALJ), the Commissioner further agrees that petitioner has established he was entitled to the 12-month High School Principal position held by Michael Nazzaro.

Accordingly, the Commissioner adopts the ALJ's recommendation to grant summary decision to petitioner and directs the Board to compensate petitioner as indicated on page 11 of the Initial Decision.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9|26|03
Date of Mailing: 9|26|03

* 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.*

565-03

JAMES ALT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning teacher alleged the Board failed to acknowledge his tenure and seniority rights upon his reemployment following a reduction in force.

The ALJ concluded that petitioner forfeited his prior tenure and seniority rights when he refused to accept the full-time position offered to him by the Board in 1992. (The Board had sent him a certified notice, the receipt of which was signed by his daughter.) The ALJ concluded he was rehired by the Board as a new teacher in 2001 and was not entitled to his prior seniority, vacation or sick time. Moreover, the ALJ concluded that there were no equitable circumstances present that could operate to require the Board to grant any form of relief to petitioner as a result of the appeal. Petition was dismissed.

The Commissioner concurred with the ALJ's findings and conclusions, clarifying only that, under these particular circumstances, where petitioner failed to respond to a duly served recall notice in 1992, the Board reasonably determined that petitioner had abandoned his tenure and seniority rights.

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.

September 29, 2003

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9624-02

AGENCY DKT. NO. 303-9/02

JAMES ALT,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,

Respondent.

Alfred F. Maurice, Esq., for petitioner, (Springstead & Maurice, attorneys)

Joanne L. Butler, Esq., for respondent, (Schenck, Price, Smith & King, attorneys)

Record Closed: August 7, 2003 Decided: August 15, 2003

BEFORE **EDITH KLINGER**, ALJ:

On September 25, 2002, petitioner, James Alt, filed a Verified Petition before the Commissioner of Education to compel the respondent, Board of Education of the Borough of Bergenfield (Board), to grant him appropriate tenure and seniority rights,

pursuant to *N.J.S.A.* 18A:28-12, after he was allegedly recalled following a layoff from his prior teaching position.

On October 28, 2002, the Board filed its answer to the petition and on November 22, 2002, 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.

The hearing was held on June 24, 2003 and the record closed on August 7, 2003 after receipt of the last submission from the parties.

Alt was employed by the Board as an Industrial Arts teacher on or about September 1, 1969. He remained in that position until he was subject to a reduction in force on or about June 30, 1988.

On June 26, 1991, the Board offered Alt a five-sixths position as a teacher of Industrial Arts. He admits that he received the offer and declined to accept the position.

On May 13, 1992, the Board sent Alt a notice offering him a full-time position in Technology Education, the equivalent of his former Industrial Arts position. The notice was sent to his home by certified mail and the receipt for the letter was signed by Alt's daughter who was seventeen years old at the time. He confirmed that his daughter lived with him and that it was his daughter's signature on the receipt. He does not assert that his daughter was under any disability.

Alt never responded to the offer. He now claims that his daughter never gave him the letter and that this was an improper way for the Board to notify him of the vacant position. He argues that the letter should have been sent by certified mail with the receipt for his signature only.

Service in administrative actions may be made by certified mail, return receipt requested, by regular mail, or in any manner designed to provide actual notice to a

party. *Shannon v. Academy Bus Lines*, 346 *N.J. Super.* 191, 196, (App. Div. 2001); *N.J.A.C.* 1:1-7.1(a). In actions brought in the Superior Court of New Jersey, one may obtain *in personam* jurisdiction over an individual by leaving a copy of a summons and complaint at that individual's usual place of abode with a competent member of the household, aged fourteen or above, residing there. R. 4:4(a)(1) of the Rules Governing the Courts of the State of New Jersey. There is no requirement for service to an 'addressee only' in either forum. I **CONCLUDE** that a Board need provide no greater service of a notice containing a job offer than required to initiate an action against an individual. Therefore, I **CONCLUDE** that Alt must be deemed to have received the offer.

Between approximately 1988 and 2000, Alt was successfully engaged in the restaurant business in New York. In 2000, he decided to return to teaching, applied for a position in the Paramus school system and was hired. In fact, Richard Cirelli, Assistant Superintendent for Personnel of the Bergenfield Board, wrote Alt a letter of reference in support of his application to teach in Paramus. Cirelli testified that, prior to this time, Bergenfield had not been contacted by Alt since he refused the five-sixths position in 1991.

Based upon Alt's success in the restaurant business and his failure to inquire about a teaching position for at least eight years, it may be inferred that he was not particularly interested in being recalled to a full time teaching position in Bergenfield during this period. I **CONCLUDE** that Alt's failure to respond to the Board's offer coupled with his failure make further inquiry for approximately eight years is the equivalent of his refusing the full time position offered.

During the course of Alt's application to Paramus, he had occasion to contact members of the teaching staff in Bergenfield and learned that there was a position open in his field at the Roy W. Brown school there. He was urged by a friend teaching at the Roy W. Brown school to speak to the principal. The principal in turn urged Alt to apply for the vacancy.

The opening at Roy W. Brown was a posted position. Cirelli testified that, if there is a position available which is subject to a recall list, the position is not posted. Alt denies that he ever saw the posting but I **FIND** this to be irrelevant to the present appeal.

I **FIND** that the Bergenfield Board never contacted Alt about filling the position; he approached them. In his letter of application, dated February 28, 2000, he wrote

> I am contacting you to express my interest in an Industrial Arts teaching position at the Roy W. Brown Middle School. I am currently self-employed as an owner/manager of a restaurant. However, I am extremely interested in changing my career path back towards education.
>
> I am an experienced teacher, who taught nineteen years at the Roy W. Brown Middle School from 1969-1988.
>
> ...
>
> I am confident that my strong educational background and skills obtained through my work experience of nineteen years will enable me to be an asset to your teaching staff. Thank you for your time and consideration, and I am looking forward to hearing from you.

The letter is similar to the one Alt wrote to apply for the position in Paramus. It must be noted that Alt mentioned nothing about being recalled or asserted any prior tenure or seniority rights in this letter. He simply applied for a vacant teaching position in his field.

As a result, I **FIND** that Alt was not recalled by the Board to his former teaching position in Bergenfield. This leaves the issue of whether he should have been recalled, that is, whether he was still on the preferred list in 2000 after refusing the Board's offer in 1992.

All of the existing case law says he was not. A teacher who is subject to a reduction in force and refuses an assignment within the scope of his or her certificate abandons the right to tenured employment. *Ralph v. Highland Park Board of*

Education, 91 *S.L.D.* 2476 (McKeown, 1991); *aff'd* 91 *S.L.D.* 2484; *Collins v. New Milford Board of Education,* 86 *S.L.D.* 2231 (Dower-LaBastille 1986); *aff'd*, 86 S.L.D. 2240); *Clark v. Margate Board of Education*, 74 *S.L.D.* 678, *aff'd*, 75 *S.L.D.*1082, *aff'd*, *N.J. Super.*, App. Div., 76 *S.L.D.*1134. Since Alt refused the tenured position offered in 1992, I **CONCLUDE** that the Board had no reason to retain him on the preferred employment list and his tenure and seniority rights were abandoned at that time.

The only remaining issues are Alt's assertions that he is entitled to relief for equitable reasons. The first is that he gave up his position in Paramus to his detriment based upon representations made by Board employees. The second is that the Board is estopped by the representations of its employees from denying him the restoration of his tenure and seniority he seeks.

Alt claims that Bergenfield lured him away from his teaching position in Paramus with promises that he would be given back his former tenure status and seniority and receive a higher salary. Cirelli testified that Alt was not offered enough of a financial inducement for him to leave Paramus, in fact, it would have been unethical for Bergenfield to lure Alt away from Paramus. Alt offered no evidence of a significant difference in salary between Paramus and Bergenfield, and, therefore, based upon the testimony of Cirelli, I **FIND** nothing to support Alt's claim that he was lured away by the promise of more money.

Alt claims he was told that he would be a tenured teacher and retain his prior seniority when he returned to Bergenfield. Cirelli admitted that he thought that Alt was returning to the faculty with his prior tenure and seniority status and might have expressed this opinion to Alt. Dr. John Galish has been superintendent of schools in Bergenfield since 1992. He recommended that the Board hire Alt in 2001. Galish said that he initially thought Cirelli's representations to Alt might bind the Board but later learned that they could not.

Alt was actually treated as a tenured teacher when he began teaching again at Roy W. Brown. He was observed and evaluated on forms designated for tenured

teachers. A notice posted in the teacher's room during the 2001-2002 school year stated that Alt had nineteen years of seniority. This notice is from an unknown source and did not originate with the Board.

Respondent maintains that the errors of its employees do not create an estoppel for the Board. The case law is clear that representations of an individual Board member or administrator are insufficient to bind the Board to a particular course of action. *Robert Busler v. East Orange BOE*, EDU 3916-00, *Comm'r*, (August 30, 2001), *affirmed. St. Bd.*, (February 6, 2002) http://lawlibrary.rutgers.edu/oal/search.html; *Dorrington v. North Bergen BOE*, 1982 *S.L.D.* 247 (Campbell 1982), *aff'd*, 1982 *S.L.D.* 256. This can only be accomplished by official Board action.

In his testimony, Alt could not remember whether anyone told him before he was hired in about November 2001 that his employment would have to be approved by the Board or that the Board had to approve the restoration of his prior tenure and seniority rights. He was never told that the Board had given its approval. He just assumed his teaching contract was for tenured employment. However, according to the Commissioner's decision in *Busler*, *supra*, absent formal action or ratification by the Board, Alt could not reasonably rely upon representations by Board employees. I, therefore, I **CONCLUDE** that these representations are insufficient to confer Alt's prior tenure and seniority and do not create an estoppel against the Board.

By letter dated June 27, 2002, Galish informed Alt that he intended to clear up any misunderstanding that might have arisen concerning the terms and conditions of his employment. He clarified the Board's position on the issue as follows:

> You continued to remain on the preferred eligibility list for a full time teacher position within the scope of your certification. Thus, by letter dated May 13, 1992, you were offered a full time position as a Technology Education teacher, the newly changed title for the Industrial Arts teacher position you formerly held, You declined this offer of employment as well.
>
> Please be advised that your refusal of a full time position within the scope of your certification constitutes an abandonment and results in the forfeiture of tenure and seniority rights accrued as a full time teacher.

> Thus, although you have become employed with the Bergenfield Board of Education recently, the tenure and seniority rights that accrued with your previous employment were forfeited and do not apply to your current employment with the Board.
>
> Please also be advised that any purported personal promises that may have been made to you by anyone are ineffective to bind the Board. By law, the Board only acts by formal action and no formal action to restore your forfeited tenure and seniority has been undertaken by the Board.
>
> This letter resulted in the present appeal.

Alt will become a newly tenured teacher in Bergenfield within about one year. Consequently, his only detriment, if any, is that he would have acquired tenure one year earlier if he had remained in Paramus. This is somewhat offset by his assertion that he earned a higher salary in Bergenfield. He seeks restoration of his seniority and his prior accrued sick and vacation time.

In summary, I **CONCLUDE** that Alt forfeited his prior tenure and seniority when he refused to accept the full time position offered to him by the Board in 1992. I **CONCLUDE** that he was rehired by the Board as a new teacher in 2001 and is not entitled to his prior seniority, vacation or sick time. I **CONCLUDE** that there are no equitable circumstances present that can operate to require the Board to grant any form of relief to petitioner as a result of this appeal.

Accordingly, it is **ORDERED** that the appeal of James Alt is hereby **DISMISSED WITH PREJUDICE** because there is no relief to which he is entitled.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 15, 2003
DATE

EDITH KLINGER, ALJ

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

AUG 18 2003
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 18 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Witnesses:

For Petitioner:

James Alt

For Respondent:

Richard Cirelli

John Galish

Exhibits:

J-1 Letter, dated June 27, 2002, Galish to Alt

P-1 Notice, seniority list

P-2 Evaluation of Tenure Teacher Performance, April 12, 2002

P-3 Evaluation of Tenure Teacher Performance, April 23, 2003

R-1 Letter, dated May 13, 1992, offer of full time position

R-2 Copy of Return Receipt for certified mail

R-3 Letter, dated June 26, 1991, offering five-sixths position

R-4 Letters of Application and enclosures, February 28, 2000

R-5 Letters of Application and enclosures, May 18, 2000

OAL DKT. NO. EDU 9624-02
AGENCY DKT. NO. 303-9/02

JAMES ALT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, 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 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 essentially concurs with the ALJ's findings and conclusions, clarifying only that, under these particular circumstances, where petitioner failed to respond to a duly served recall notice in 1992, the Board reasonably determined that he had abandoned his tenure and seniority rights.[2] Additionally, the Commissioner concurs, for the reasons set forth by the ALJ, that petitioner has failed to demonstrate he is entitled to equitable relief.

[1] Both the exceptions and the reply thereto essentially reiterate arguments which were presented in papers previously considered by the Administrative Law Judge (ALJ). To the extent petitioner's submission included evidence that was not presented at the hearing or was not before the ALJ, such evidence is not considered by the Commissioner. *N.J.A.C.* 1:1-18.4(c).

[2] In this connection, the Board understandably questions,"[i]f Petitioner believed he was never recalled, and therefore entitled to a position, why did he submit applications to the Board in 2000 and 2001? As clearly indicated in Exhibits R-4 (2000) and R-5 (2001- when he was hired), Petitioner applied for positions with the District.

Accordingly, the Initial Decision is adopted with clarification as set forth herein and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 9/29/03

Date of Mailing: 9/29/03

Nothing is referenced in either application *** to indicate that Petitioner seeks to be employed in the position to which he would have recall rights.***" (Board's Letter memorandum in Reply to Petitioner's Post-hearing Brief, August 7, 2003 at 1-2)

[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.*

566-03

566-03

CARL SUNDERLIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

September 29, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 1666-97

AGENCY DKT. NO. 1-1/97

CARL SUNDERLIN,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,

Respondents.

Gail Oxfeld Kanef, Esq., for Petitioner
(Oxfeld & Cohen, attorneys)

Alan J. Schnirman, Esq., for Respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed and Decided: August 12, 2003

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on February 6, 1997 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 case was assigned to the undersigned on March 3, 2003.

A hearing was scheduled for May 16, 2003 at the OAL, 33 Washington Street, Newark, New Jersey. Prior to the hearing, settlement discussions were held and a settlement was reached. The parties having agreed and stipulated, as indicated by

their signatures on the attached Stipulation of Dismissal with Prejudice, that this matter should be dismissed.

I have reviewed the record and dismissal and I **FIND**:

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

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

I **CONCLUDE** that this dismissal meets the requirements of *N.J.A.C.* 1:1-19.1 and that the dismissal should be approved. I approve the dismissal and, therefore, it is hereby **ORDERED** that this matter be and hereby 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.

August 12, 2003
DATE

Maria M. LaFiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

8-15-03
DATE

M. Kathleen Dunn/CH
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 18 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001
Attorneys for Respondent

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

AUG 12 11 27 AM '03

CARL SUNDERLIN, Petitioner, vs. BOARD OF EDUCATION OF THE CITY OF LINDEN, Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDU-166-97 AGENCY DOCKET NO. 1-1/97 **STIPULATION OF DISMISSAL WITH PREJUDICE**

It is hereby stipulated and agreed by the undersigned that this matter is hereby dismissed with prejudice and without costs.

OXFELD COHEN

Attorney for Petitioner

By: _____
Gail Oxfeld-Kanef

DATED: 8/6/03

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Attorney for Respondent

By: _____
Alan J. Schnirman

DATED: 8/7/03

OAL DKT. NO. EDU 1666-97
AGENCY DKT. NO. 1-1/97

CARL SUNDERLIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of dismissal transmitted to the Commissioner by the Office of Administrative Law have been reviewed. It is noted that this matter was characterized as a Settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in her Initial Decision. The Commissioner, however, determines that because no settlement terms were brought to the record, this matter is more appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2. The Commissioner approves the withdrawal and, consequently, this matter is no longer deemed to be a contested matter before him and is, accordingly, dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9|29|03

Date of Mailing: 9|29|03

~~576-03~~
567-03

567-03

B.R., on behalf of minor child, M.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning aunt challenged the Board's residency determination that M.P., who came from Poland to live with her, was not entitled to a free public education under the "affidavit student" provision of N.J.S.A. 18A:38-1(b).

The ALJ concluded that M.P. was entitled to a free public education in the District since she came to live with petitioner due to legitimate family or economic hardship and not solely in order to attend school in the District. Moreover, petitioner provided all of M.P.'s financial support and declared M.P. as a dependent on her income tax return. The ALJ ordered that M.P. be admitted to the District without cost and that the Board's counterclaim for tuition be denied.

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.

October 2, 2003



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1011-03
AGENCY DKT. NO. 283-9/02

B.R. o/b/o minor child M.P.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON,
Respondent.

David R. Fromkin, Esq., for petitioner

Anthony V. D'Elia, Esq., for respondent
(Chasan, Leyner, Bariso & Lamparello, attorneys)

Record Closed: August 14, 2003 Decided: August 15, 2003

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal on behalf of a high school student seeking enrollment in the Clifton public school district. Petitioner came from Poland to live with her aunt and uncle because her father is ill and unable to earn a livelihood. She resides in Clifton and attended Clifton High School for the 2002-2003 academic year. The dispute involves whether petitioner is entitled to a free public education under the "affidavit student" provision of *N.J.S.A.* 18A:38-1(b).

Basically, the issue is whether petitioner satisfies the two-part statutory test for admission as an affidavit student: first, the "hardship test," *i.e.*, whether the child's parent is incapable of supporting or providing care for the child "due to a family or economic hardship;" and, second, the "gratis test," *i.e.*, whether she is "supported by such other person gratis as if [s]he were the other person's own child."

Procedural History

On or about September 2, 2002, B.R. applied to the Clifton Board of Education ("Board") for admission of her niece M.P. to the local public high school. In support of that application, she submitted an affidavit from the child's father in Poland verifying that he is seriously ill and provides no financial support for his child. Although the affidavit appeared to satisfy the statutory requirements, Clifton denied admittance for lack of adequate documentation.

Thereafter, on September 12, 2002, the aunt filed a verified petition with the Commissioner of Education ("Commissioner"), contending that petitioner is eligible to attend school in the district. The Board filed its answer and counterclaim on November 12, 2002. Pursuant to *N.J.S.A.* 18A:38-1(b), M.P. was admitted to school, provided that the aunt and uncle would be liable for tuition if the Board ultimately prevailed in this litigation. Subsequently, on January 6, 2003, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on August 14, 2003. Witnesses and exhibits are listed in the appendix.

Findings of Fact

All of the material facts are undisputed. I **FIND**:

M.P., age 17, lived with both parents and her brother in a one-bedroom apartment in Poland. Last summer, her father became seriously ill and was hospitalized for several weeks. According to the father's affidavit, he remained "unconscious and in critical care" for two weeks. Hospital records, translated from

Polish, corroborate that the father was treated for "bilateral pneumonia, acute respiratory failure, chronic anemia [and] arterial high blood pressure." After discharge from the hospital, the father required further medical treatment and had "to be assisted and looked after by another person." On doctor's orders, he is "discouraged from traveling" and is "unable to drive a car."

Prior to his hospitalization, the father had supported his family by operating a convenience store and traveling around Poland to various flea markets. Unable to work or to travel, the father now survives on a meager disability pension from the Polish government. Because of extreme financial difficulties, the father sent his daughter to live with B.R. and her husband in the United States.

B.R., petitioner's aunt, is also her godmother. She and her husband have lived in the City of Clifton for eight years. presently, they own a house in Clifton and pay real estate taxes that support the local school system. While M.P. has been staying with them, the aunt and uncle have paid all of her living expenses. Their joint income tax return for 2002 reflects that the aunt and uncle claimed M.P. as their dependent. They do not receive any financial support from M.P.'s parents in Poland. Indeed, they send money to M.P.'s parents in Poland "to help them out."

M.P. came to the United States because of financial problems at home and not in order to get an education at Clifton High School. Her aunt testified that M.P. can continue living at her home "beyond the school year free of charge." When M.P. graduates from high school her aunt "wants her to go to college."

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that M.P. satisfies the statutory criteria and is entitled to a free public education in the Clifton 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. A sworn statement from the resident must establish that he or she is domiciled within the district, that he or she will assume all personal obligations for the child and that he or she intends to support the child gratuitously for a longer time than merely through the school term. In addition, a sworn statement from the child's parent or guardian must show that he or she is incapable 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 "solely for the purpose of receiving a free public education in the district."

If the school board determines that the evidence does not support the validity of the claim, it may deny admission to the child and the resident may appeal to the Commissioner for a hearing. At such hearing, the resident "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." *Id.* Such proceedings are subject to the requirements of due process, and a district may not automatically deny an application on the basis of inadequate documentation without consideration of the full circumstances developed at the evidentiary hearing. *J.A. v. Board of Educ. for South Orange and Maplewood*, 318 *N.J. Super.* 512 (App. Div. 1999).

Recently, the Appellate Division construed the pertinent statute as "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 guarding to obtain the benefit of a free education in that district" *P.B.K. o/b/o E.Y. v. Board of Educ. of Tenafly*, 343 *N.J. Super.* 419, 428 (App. Div. 2001). Specifically, the Court held that the prohibition does not apply where a student will be left "without a school even though a resident domiciliary." *P.B.K.*, at 428.

Unrefuted evidence shows that M.P. came to live with her uncle and aunt in Clifton due to legitimate family or economic hardship and not solely in order to attend

the Clifton School District. Her relatives in Clifton are long-time residents who own their own home. Moreover, the record establishes that the aunt and uncle provide all of M.P.'s financial support and have declared her as a dependent on their income tax return. Consequently, she is clearly eligible for free attendance in the Clifton Public Schools.

Order

It is **ORDERED** that M.B. be admitted to the Clifton School District without cost.

And further **ORDERED** that the Board's counterclaim for tuition 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.

Aug. 15, 2003
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

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

AUG 18 2003
DATE

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 18 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX
List of Witnesses

1. B.R., aunt of M.P.

List of Exhibits

No.	Description
P-1	Copy of affidavit of non-resident parents on form prepared by the Clifton Public Schools, dated December 2002
P-2	Copy of English translation of document prepared by Dr. Barbara Urbas-Myrczek, dated September 6, 2002
P-3	Copy of English translation of document prepared by Dr. Kazimiera Nowara, dated May 21, 2003
P-4	Copy of 2002 federal income tax return of the uncle and aunt
P-5	Copy of credit card receipt, dated June 10, 2003
P-6	Copy of 2002 Polish tax return of the father

OAL DKT. NO. EDU 1011-03
AGENCY DKT. NO. 283-9/02

B.R., on behalf of minor child, M.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 demonstrated that: 1) she is domiciled within the Clifton School District; 2) she is supporting M.P. *gratis*; 3) M.P.'s parents are incapable of supporting M.P. and caring for her in their own country due to economic and family hardship; and 4) M.P. is not residing with petitioner solely for the purpose of receiving a free public education in the District. M.P. is, therefore, entitled to attend school in the Board's district, free of charge, pursuant to *N.J.S.A.* 18A:38-1 *et seq.*

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10|2|03

Date of Mailing: 10|3|03

* 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.*

568-03

BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY AND BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

In December 2001, the Ocean County Superintendent of Schools notified respondent Point Pleasant Beach Board (Point Pleasant) that it was the district of residence for A.M. and her children, S.M. and M.C., for 1999-2000. Point Pleasant filed an appeal of that determination 84 days later. The Assistant Commissioner of Education for Finance reversed the determination in March 2002 and found petitioner Springfield Board was the responsible Board. Petitioner challenged the determination by the Assistant Commissioner that it was the district of residence for A.M. and her children and contended that Point Pleasant's appeal of the Ocean County Superintendent's decision was untimely.

The ALJ found that, as a matter of law, the appeal by Point Pleasant to the Assistant Commissioner was not made in a timely fashion as it was filed well beyond the 30-day requirement and no compelling circumstances existed to relax the rules for filing appeals. The ALJ granted summary decision in favor of petitioner.

The Commissioner adopted the Initial Decision with modification. The Commissioner concurred that Point Pleasant's appeal was time-barred and, applying general principles of equity, the Commissioner found that respondents advanced no compelling reason to excuse Point Pleasant from the 30-day filing requirement. The Commissioner granted summary decision in favor of petitioner and set aside the March 2002 determination.

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.

October 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 5987-02

AGENCY DKT. NO. 184-6/02

BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE BOROUGH OF POUINT PLEASANT BEACH, OCEAN COUNTY AND BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY
Respondent.

Thomas O. Johnston, Esq., Esq., for petitioner, Springfield Township Board of Education (Porzio, Bromberg & Newman, attorneys)

Kathleen Asher, DAG., for respondent, New Jersey State Department of Education (Peter C. Harvey, Attorney General of New Jersey, attorney)

Kevin B. Riordan, Esq., for respondent, Point Pleasant Beach Board of Education (Berry, Sahradnik, Kotzas, Riordan & Benson, attorneys)

Arla Cahill, Esq, for Summit Board of Education (Schenck, Price, Smith & King, attorneys)

Record Closed: August 14, 2003 Decided: August 21, 2003

BEFORE **STEPHEN G. WEISS,** ALJ

Procedural History

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case on July 26, 2002 and involves a claim by the petitioner, Board of Education of the Township of Springfield (hereinafter "Springfield Board"), that it is not responsible for the education costs for two children during the 1999-2000 school year since they were not domiciled within the district. The remaining respondents are the New Jersey Department of Education and the Board of Education of Point Pleasant Beach. On July 7, 2003 the Springfield Board and the Summit Board entered into a stipulation of dismissal with respect to any claims between them pertaining to the case.

The essential underlying facts are as follows:

On February 2, 2000, the Point Pleasant Board of Education (hereinafter "Point Pleasant Board") renewed an earlier request to the Ocean County Superintendent of Schools that she investigate into and determine the appropriate district of residence for one A.M. and her two minor children who had moved from Springfield to Point Pleasant Beach in 1999 to reside with A.M.'s boyfriend. The children were enrolled in the Point Pleasant Beach School district for the 1999-2000 school year. In November 1999, A.M. and her children moved into a motel in Point Pleasant Beach, A.M. declared herself to be homeless and she requested public assistance. See *N.J.A.C.* 6:5-1.4(d). Ultimately, in a letter dated December 5, 2001, the Ocean County Superintendent of Schools notified the Point Pleasant Beach Board that as a result of her investigation she determined that Point Pleasant Beach was the district of residence for 1999-2000. That letter was date stamped as received by the Board on December 11, 2001.

On March 5, 2002, 84 days after the determination by the Ocean County Superintendent of Schools was made known to the Point Pleasant Beach Board, it filed an appeal of that determination. On March 20, 2002, the Assistant Commissioner of Education for Finance issued a determination reversing the Ocean County

Superintendent of Schools and determining that Springfield, not Point Pleasant Beach, was to be considered the district of residence for the family during the period in question. In his determination the Assistant Commissioner noted that A.M. and her children had lived in Springfield with A.M.'s parents until June 1999 when they vacated because of the issuance of a restraining order filed by A.M.'s parents. Noting that in his view the issue turned on whether the family was "homeless," the Assistant Commissioner found that their relocation to Point Pleasant Beach was not intended to be permanent and the family had to be considered as "homeless" while they stayed there. Thus, citing *N.J.S.A.* 18:7B-12(c), the Assistant Commissioner determined that since the district of residence for children whose parent or guardian temporarily moves from one school district to another as a result of being homeless shall be the district in which the parent or guardian last resided prior to becoming homeless, Springfield was liable for the cost of their education. He concluded that Point Pleasant Beach could not be the district of residence since the family did not have a fixed, regular residence there. Thus, the school district responsible for the costs therefore had to be Springfield, the last district of permanent residence. Springfield then timely filed a petition of appeal challenging the determination and the matter was transmitted to the Office of Administrative Law as a contested case. Thereafter, a motion for summary decision was filed by the Springfield Board on the basis that Point Pleasant Beach Board's appeal on March 5, 2002 was out of time under the applicable law.[1]

Discussion

Pursuant to *N.J.A.C.* 1:1-12.5(b), any party may move for summary decision upon any of the substantive issues in a case, and the administrative law judge may make a ruling in favor of the movant when the papers filed, together with any supporting affidavits, demonstrate that no genuine issue as to any material fact exists and the moving party is entitled to a summary decision as a matter of law. The OAL rule is essentially the same as the summary judgment rule contained in the New Jersey Rules of Court (see *R.* 4:46-29(c)). *See also, Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520

[1] The "merits" of the controversy are not addressed by the motion.

(1995). Since the appeal by Point Pleasant Beach from the determination of the Ocean County Superintendent came 84 days after the Superintendent's decision was received by it, Springfield maintains that the undisputed facts clearly demonstrate under the regulations in effect at the time the decision was made (an appeal to the Assistant Commissioner had to be made in 30 days), the appeal was untimely and should be dismissed.

The pertinent regulations in effect at the time of the March 5, 2002 decision were *N.J.A.C.* 6:5-1.4(d) and *N.J.A.C.* 6:20-5.3(d) (e) and (f). The first provided that where there was a dispute regarding a determination of the appropriate district of residence, the districts involved were immediately to notify the county Superintendent of Schools who would resolve the dispute. If, as here, the Superintendent could not resolve the dispute, an appeal could be made to the Assistant Commissioner, Division of Finance. Subsection (d) of *N.J.A.C.* 6:20-5 specifically addressed the time frame for the appeal process and stated that where a district contested a determination of residence written notification had to be submitted to the Assistant Commissioner within 30 days of the receipt of the final notice as to the determination of the district of residence. In this case it took 84 days.

Although both regulations have been repealed, (the current version of *N.J.A.C.* 6:5-1.4(d) is *N.J.A.C.* 6A:17-2.8, effective February 19, 2002 and the current version of *N.J.A.C.* 6:20-5.3 is *N.J.A.C.* 6A:23-5.1(d) effective July 1, 2001), the regulations are virtually identical to the prior regulations. Thus, under the regulations in effect at the time the controversy arose, and now, a district contesting a determination of residence and seeking to appeal the same to the Assistant Commissioner must file the appeal within thirty days. *See Lower Camden County Regional School District No. 1 v. Department of Education, Bureau of School Finance*, EDU 8578-98 and EDU 8579-98, Initial Decision June 28, 1999, adopted by the Commissioner, August 13, 1999, aff'd State Board of Education, July 5, 2000. Under both the prior and the current rules governing district of residence disputes over "homeless" children, the County Superintendent's decision has to be appealed within the thirty-day time frame. No

matter which version of which regulation is applied, in my view no change was made or intended to be made with respect to the thirty-day time limit and, unless reasons exist to relax the limitation, the appeal in this matter must be deemed to have been launched substantially out of time.

In its reply brief the Point Pleasant Board points out there are no cases interpreting the provisions applicable to appeals from the County Superintendent's decision which resulted in dismissal on the basis of untimeliness and, citing the recent decision in *Unangst v. Board of Education of the Township of Fredon*, OAL Dkt. No. EDU 9828-98, 2003 WL 1795761 (March 13, 2003) argues that the same criteria for relaxing the 90-day time period with respect to appeals to the Commissioner of Education in school law controversies, generally, should be followed here as well.

In that decision the Commissioner repeated his oft cited references to decisions dealing with the subject (*e.g., Reily v. Board of Education of Hunterdon Central Regional High School District*, 173 *N.J. Super.* 109 (App. Div. 1980); *Weir v. Board of Ed. Of Northern Valley Regional High School District*, 1984 *S.L.D.* (decided by the Commissioner July 20, 1984); aff'd, Superior Court of New Jersey, Appellate Division, Dkt. No. A-3520 84T6 (April 9, 1986, unreported*); Polaha v. Buena Regional School District,* 212 *N.J. Super.* 628 (App. Div. 1986). Thus, according to Point Pleasant Beach, the rule, if it applies, should be relaxed since its effective ability to review the reasons for the County Superintendent's decision and to lodge a timely appeal was shortened by the following factors: (a) the district was on a Christmas-New Year's break between December 24, 2001 and January 2, 2002; and (b) the matter was not transmitted to Board counsel's office until mid-January 2002 when he had been diagnosed with a condition which ultimately necessitated he remain out of work on doctor's orders for six weeks. Thus, these two factors, combined with what the Point Pleasant Beach Board characterizes as the "extraordinary delay" that transpired when the matter was pending before the Ocean County Superintendent, provides sufficient justification for relaxation. Moreover, according to counsel, the usual reasons for enforcing strict time limits are not present here: preservation of the record and stability

of the educational process. Since Springfield was well aware of the potential claim, Point Pleasant Beach Board argues that petitioner suffered no prejudice by the relatively short delay.

I agree that the relaxation rule as to appeals to the Commissioner is the starting point for the inquiry in this case, too. Thus, *N.J.A.C.* 6A:3-1.16 specifically provides that where time limits are not contained in a statute, or in or underlying OAL rule, they may be relaxed or dispensed with by the Commissioner where, " . . . strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." What constitutes "strict adherence" is a fact sensitive issue as witnessed by the many cases decided by the Commissioner concerning the same. However, as the Springfield Board accurately points out, cases relaxing or waiving the 90-day rule with regard to controversies and disputes generally are rare and the rule is sparingly invoked. *See, e.g., DeMaio v. New Providence Bd. of Ed.*, 96 *N.J.A.R.* 2d (EDU) 449; *Gordon v. Passaic Bd. of Ed.* 1985 *S.L.D.* 1929, *aff'd* New Jersey Superior Court, Appellate Division, Dkt. No. A-3294-84T7 (May 27, 1986) (unreported), *certif. den.* 105 *N.J.* 534 (1986); Dreher v. Jersey City Bd. of Ed., EDU 2777-87 (decided by the Commissioner February 2, 1988), aff'd State Board of Education (July 8, 1988); *Unangst v. Township of Fredon, supra*.

Having reviewed the cited cases, as well as others touching on the time limit question, I am convinced that in this case, as a matter of law, the appeal by Point Pleasant Beach Board to the Assistant Commissioner was not made in timely fashion and no compelling circumstances exist dictating that I recommend that the time limit be relaxed. There are no constitutional issues involved. There are no overriding issues of public importance either. While the question of determining homelessness under the regulations is certainly of scholarly interest, each such case is peculiarly fact sensitive and how the Commissioner might rule on the merits of this case may or may not have any bearing on subsequent such disputes involving different parties and different circumstances.

Nor is there any indication, as there were in a few cases, that the person against whom the rule is sought to be applied has somehow deliberately been misled or has been prevented from knowing and understanding his or her rights. Indeed, a lack of sophistication with regard to the time limit is no excuse. *See, e.g., Weir, supra*. While I appreciate there was a 10-day vacation break in late December, the 30-day limit is not a school day concept, it is a calendar day rule. Furthermore, while it is regrettable that Board counsel had a medical issue, it is unclear exactly when that occurred and the firm is a relatively large one. It would be poor precedent for me to conclude that since one particular attorney might have been out unavailable to put together an appeal in a timely fashion, this relieves the client of the burden of the rule to the detriment of the person in whose favor the rule is sought to be enforced.

Finally, while this may be a "money" case involving tuition for two students, the amount involved is not so monumental as to require the Point Pleasant Beach Board be relieved of the obligation on the basis of "hardship" despite its failure timely to file its appeal. While perhaps no "bright line" standard can be established to determine what is or is not substantial, the facts of this case do not compel relaxation based upon financial or other considerations. *Cf. Hoffman v. Hillsborough Board of Education,* 96 *N.J.A.R.* 2d (EDU) 943. If missing a 30-day deadline by 54 days is excusable, why have a time limit at all?

Accordingly, for the reasons set forth, summary decision in favor of the petitioner because of the untimely filing by the Point Pleasant Beach Board of its appeal to the Assistant Commissioner should be 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.

August 21, 2003
DATE

STEPHEN G. WEISS, ALJ

Faxed to the Department of Education on:

August 22, 2003
DATE

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 25 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 5987-02
AGENCY DKT. NO. 184-6/02

BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY AND BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	

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

In its exceptions, respondent New Jersey State Department of Education renews its contention, previously argued before the Administrative Law Judge (ALJ), that this matter should proceed to hearing since the Commissioner is permitted to relax the rules for the filing of appeals pursuant to *N.J.A.C.* 6A:3-1.16. In this connection, the Department asserts that injustice will result if the Commissioner strictly adheres to the "30 day requirement." (Department's Exceptions at 5) The Department also argues that this matter presents "unique and compelling circumstances" warranting such relaxation. (*Ibid.*)

Similarly, respondent Board of Education of the Borough of Point Pleasant Beach, (hereinafter, "Point Pleasant") admits that it filed a late appeal of the Ocean County Superintendent's decision to the Assistant Commissioner of Finance, but maintains that this late filing should be excused by the Commissioner. (Point Pleasant's Exceptions at 1) Point Pleasant cites as a basis for the excusal the reasons considered by the ALJ in his Initial Decision, adding that the County Superintendent's delay in initially deciding this matter contributed to its late appeal. "First," Point Pleasant explains, "they had to find the records, almost two years old, which supported the appeal to the Ocean County Superintendent. Then a decision on whether or not to appeal had to be made." (*Id.* at 2) Furthermore, Point Pleasant argues that the County Superintendent's delay "certainly lulled Point Pleasant Beach, without the availability of advice of counsel, into believing this was not an urgent matter." (*Id.* at 3)

In reply, petitioner, Board of Education of the Township of Springfield, counters that neither respondent has introduced facts in the record to challenge its motion for summary decision. Petitioner contends that even if Point Pleasant's claim regarding its attorney's illness is true, it fails to explain why it did not file a challenge before the middle of January 2002. Neither, petitioner continues, does a one-week break at Christmas justify a March 2002 untimely filing. Additionally, petitioner argues that the relaxation rule advanced by the respondent Department is not applicable to this matter, since that regulation, *N.J.A.C.* 6A:3-1.16, concerns only those rules under Chapter 3, Controversies and Disputes. Finally, petitioner attests that this matter does not present "unusual and compelling" circumstances, as argued by the Department, but is strictly a monetary dispute. (Petitioner's Reply at 4, 5) Petitioner concludes, therefore, that it is entitled to summary decision.

Upon careful and independent review of the record in this matter, the Commissioner finds, like the ALJ, that there can be no dispute that Point Pleasant's appeal pursuant to *N.J.A.C.* 6:20-5.3(d), now codified at *N.J.A.C.* 6A:23-5.2(d), was untimely.[1] Furthermore, applying general principles of equity, the Commissioner finds, for the reasons expressed by the ALJ, that respondents have advanced no compelling reason to excuse Point Pleasant from the 30-day filing requirement.[2]

Accordingly, the Initial Decision of the ALJ is adopted, with modification as set forth herein. Summary decision in favor of petitioner is hereby granted; Point Pleasant's March 2002 appeal to the Assistant Commissioner is time-barred and the decision resulting therefrom, consequently, is set aside.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: 10/2/03

Date of Mailing: 10/3/03

[1] In the first paragraph of its letter dated March 1, 2002, Point Pleasant indicates that its appeal "corresponds to the requirements of *N.J.A.C.* 6:20-5.2(d)(1-3)." (*sic*) (Petitioner's Motion for Summary Decision at Exhibit Q)

[2] In this connection, the Commissioner recognizes that the relaxation rule found at *N.J.A.C.* 6A:3-1.16 is restricted to the rules set forth in Chapter 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.*

569-03

DR. MICHAEL A. COLUCCI,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF TUCKERTON, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning superintendent/business administrator claimed the Board terminated his employment without following statutorily required tenure removal procedures.

The ALJ found that petitioner filed his petition 160 days after he received the final notice of "the subject of the requested contested case hearing." The ALJ dismissed the petition as untimely, finding it barred by the 90-day rule, *N.J.A.C.* 6A:3-1.3.

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.

October 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION PURSUANT TO
***N.J.A.C.* 6A:3-1.3**
OAL DKT. NO. EDU 4208-03
AGENCY DKT. NO. 88-3/03

DR. MICHAEL A. COLUCCI,

Petitioner,

v.

BOARD OF EDUCATION TUCKERTON ELEMENTARY SCHOOL, OCEAN COUNTY,

Respondent.

Richard A. Carlucci, Esq., for petitioner (Griffith and Carlucci, attorneys)

Michael K. Willison, Esq., for respondent (Dickie, McCamey & Chilcote, attorneys)

Record Closed: August 15, 2003 Decided: August 19, 2003

BEFORE **EDGAR R. HOLMES**, ALJ:

STATEMENT OF CASE AND PROCEDURAL HISTORY

The Respondent BOE terminated petitioner from his position as Superintendent and Business Manager at the Tuckerton Elementary School and petitioner appeals to the Commissioner of Education pursuant to *N.J.S.A.* 18A 6-9 *et seq.*

The matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to *N.J.S.A.* 52:14 B-1 to 15 and *N.J.S.A* 52:14F-1to13.

SUMMARY OF THE RELEVANT FACTS

Petitioner signed two contracts with the BOE for the two positions of Superintendent and Business Manager on August 26, 2002. Both contracts were to be effective October 1, 2002 through June 30, 2005, unless terminated earlier. The contracts were terminated earlier. On September 24, 2002, respondent's solicitor notified petitioner of the BOE's decision to terminate his contracts and on September 30, 2002, the BOE rescinded the contracts. On October 1, 2002, the decision was mailed to petitioner who received it on October 2, 2002.

Petitioner filed his petition on March 11, 2003, alleging that the BOE failed to identify the underlying cause of its decision to terminate petitioner in writing or to provide petitioner with an opportunity to be heard, among other things, all contrary to *N.J.S.A.* 18A:6-10, 6-11 and 6-7.1.

However, petitioner does not allege that the respondent BOE failed to provide him with adequate and sufficient notice that the Board took adverse action against him on September 30, 2002. That notice was provided to him both before and after the adverse action, on September 24, 2002, and on October 2, 2002. He admits it in his pleadings.

SUMMARY OF THE RELEVANT LAW

The New Jersey Administrative Code at *N.J.A.C.* 6A:3-1.3(d) provides in pertinent part:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the 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.

In petitioner's brief, this rule is thoroughly discussed.

> New Jersey courts which have interpreted the 90-day filing requirement have applied it strictly. See Kaprow v. Board of Ed. of Berkeley Township, 131 N.J. 572, 622 A.2d 237 (1993). See also Nissan v. Board of Ed. of The Twp. of Long Beach Island, 272 N.J.Super. 373, 640 A.2d 293 (1994); Wilson v. Toms River regional S.D., 96 N.J.A.R.2d (EDU) 872 (1996); Hoffman v. Twp. of Hillsborough, 96 N.J.A.R.2d (EDU) 817 (1996); McCrea v. Upper Saddle River Bd. Of Education, 96 N.J.A.R.2d (EDU) 801 (1996).

In Kaprow, supra, Petitioner was terminated as a tenured assistant superintendent as a result of a reduction in force ("RIF") on June 30, 1981. The Local Board failed to notify Kaprow of his post-RIF rights to certain positions in the district which later became available, despite having a legal duty to provide such notification. Kaprow ultimately learned that the Local Board had failed to notify him of the availability of subsequent positions when he received a letter from the Board Secretary on February 28, 1998. Five months after obtaining this information, Kaprow filed a Petition of Appeal with the Commissioner of Education.

Affirming the dismissal of Kaprow's Petition, Supreme Court of New Jersey concluded that he was on notice of the Board's failure to notify him of post-RIF positions upon receipt of the February 28, 1998 letter from the Board Secretary. The Court noted that N.J.A.C. 6:24-1.2 (c) [now 6A:3-1.3 (d)] does not specify what constitutes adequate notice. However, the Court concluded that notice is sufficient when it informs the individual of "some fact that he or she has a right to know and that the communicating party has a right to communicate." 131 N.J. at 587. It held that the letter from the Board Secretary clearly advised Petitioner of the facts which gave rise to his Petition. Accordingly, the 90-day time period for filing began to run from that date. His petition, filed five months later, was therefore untimely.

It is noteworthy that the Kaprow Court barred the Petition as untimely, even though the Local Board had neglected its statutory duty to notify Kaprow of the availability of post-RIF positions. While the Court disapproved of the Board's conduct, it did not view such conduct as a basis for a departure from strict enforcement of the 90-day statute of limitations.

This point was re-enforced by the Superior Court in Nissan v. Bd. Of Ed. of The Twp. of Long Beach Island, supra. In Nissan, the Court cited Kaprow for the principle that the limitations period "gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days." 272 N.J.Super. at 380 [citing Kaprow, 131 N.J. at 582]. The Nissan Court then went on the hold that "it is not necessary for the purposes of this discussion to decide whether the Local Board acted correctly" in connection with the conduct alleged in Petitioner's Petition. Id. Rather, the Court stated that "what is important is that the Local Board had the right to know within 90 days whether its action was going to be challenged." Id.

In this matter, petitioner filed his petition 160 days after he received the final notice of "the subject of the requested contested case hearing." The alleged failure of the BOE to provide the petitioner with the due process provided by law is not relevant. A contested case hearing

before The Commissioner or his designee is the forum in which such alleged failures are to be cured. Access to this forum is time barred after 90 days.

ORDER

I **DISMISS** the petition filed herein as untimely and **FIND** that it is barred by the 90-day rule, *N.J.A.C.* 6A:3-1.3.

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.

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.

8/19/03
DATE

EDGAR R. HOLMES, ALJ

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

8/20/03
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 26 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

For Petitioner:

None

For Respondent:

None

OAL DKT. NO. EDU 4208-03
AGENCY DKT. NO. 88-3/03

DR. MICHAEL A. COLUCCI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TUCKERTON, OCEAN 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 submitted in accordance with *N.J.A.C.* 1:1-18.4.

In his exceptions, petitioner renews his argument, initially raised in his Brief in Opposition to Motion to Dismiss Appeal, that, pursuant to *Lavin v. Board of Education of the City of Hackensack*, 90 *N.J.* 145 (1982), he has a statutory entitlement to the procedural safeguards enacted by the Legislature in *N.J.S.A.* 18A:6-7[1], *N.J.S.*A. 18A:6-10 and *N.J.S.A.* 18A:6-11 and, therefore, the 90-day limitations period is inapplicable to his claims herein.

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). In so concluding, the Commissioner finds without merit petitioner's argument that the 90-day

[1] Petitioner's reference to this provision may have been a typographical error, since, in his earlier brief, referenced above, he refers to "*N.J.S.A.* 18A:6-7.1" when arguing that he was denied the safeguards to which he was entitled by statute. In any event, neither *N.J.S.A.* 18A:6-7, which requires persons employed in teaching capacities to take an oath to support the Constitution of the United States, nor *N.J.S.A.* 18A:6-7.1, which establishes the requirements for criminal history record checks for candidates of school employment, appears germane to petitioner's claims.

time limitation is inapplicable because his claim is a "statutory entitlement," unrelated to his employment or performance, within the intendment of the Court's determination in *Lavin, supra.* In *Lavin,* the Supreme Court created a *limited* exception to the timely filing requirements when it ruled that crediting military service is a statutory entitlement that is a reward for military service, not for performance as a teacher, and, thus, is not subject to the applicable limitations period. However, this limited exception for statutory entitlements has been strictly applied. *See, e.g., North Plainfield Educ. Ass'n v. Bd. of Educ.*, 96 *N.J.* 587 (1984); *Kaprow v. Board of Education of Berkeley*, 131 *N.J.* 572 (1993); *Nissman v. Board of Education of the Township of Long Beach Island*, 272 *N.J. Super.* 373 (App. Div. 1994), *certif. denied*, 137 *N.J.* 315 (1994). As the Supreme Court in *Kaprow* reasoned:

> Because the decision necessary to confer tenure under *N.J.S.A.* 18A:28-5 is based on an evaluation of teacher performance, behavior, and efficiency, *** the only way Kaprow could acquire tenure rights, and therefore RIF rights, was through employment in the school district. Kaprow's RIF rights are then distinguishable from the petitioner's right to military service credit in *Lavin*; Kaprow is not entitled to his RIF rights independent from the administration of a school system or from his standing as a tenured assistant superintendent.*** *Kaprow, supra,* at 586.

Similarly, even assuming, *arguendo*, the procedural safeguards established in statute would apply to petitioner herein, an issue which would be addressed were this matter to be reviewed on its merits, such statutory rights and protections are acquired only through employment in the school district and cannot, therefore, be viewed as independent from his employment or from the administration of a school system. Where such a "functional relationship" exists, *Kaprow, supra,* at 586, the "statutory entitlement" exception in *Lavin* does not apply.[2] Furthermore, the

[2] See also, *Balwierczak et al. v. Board of Education of the Township of Berkeley Heights, Union County,* decided by the Commissioner December 8, 1999 (No. 407-99), *aff'd* State Board of Education May 3, 2000, where former employees of the Union County Regional High School District alleged that the Board of Education of Berkeley Heights, the district to which they transferred upon dissolution of the regional district, denied them their rights to the

Commissioner finds nothing in this record which warrants relaxation of the filing requirement, pursuant to *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.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/02/03

Date of Mailing: 10/03/03

salary guide placement to which they were entitled pursuant to *N.J.S.A.* 18A:13-64, the Commissioner found that the pertinent statute was designed to operate, upon the dissolution of a regional district, as a "save harmless" provision, and absent rights and benefits accrued through prior employment, *N.J.S.A.* 18A:13-64 does not operate to independently create a benefit; *Nadasky et al. v. Board of Education of the Township of Clark, Union County,* decided by the Commissioner July 9, 2001 (No. 211-01), where retired employees of the Board asserted a statutory right to be paid for unused accumulated sick leave at the contractual rate established by their collective bargaining agreement, the Commissioner rejected their claim that the 90-day rule was inapplicable pursuant to *Lavin, supra*; *Board of Education of the Township of Hamilton, Mercer County* v. *M.M. on behalf of minor child, C.B.*, decided by the Commissioner November 19, 2001 (No. 452-01L), where the petitioning Board of Education argued that reimbursement of tuition is a statutory entitlement not subject to the 90-day rule, the Commissioner determined that, to the extent a local board seeks an order directing payment of tuition pursuant to *N.J.S.A.* 18A:38-1 *et seq.*, such a proceeding is subject to compliance with *N.J.A.C.* 6A:3-1.1 *et seq.* and does not fall within the limited exception enunciated in *Lavin, supra*, for statutory entitlement.

[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.*

5 76-03

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 Order of the Supreme Court.

The ALJ found: 1) the "ancillary" issue of moneys due the District as a consequence of its latest figures indicating that its undesignated general fund balance was below two percent was a "distribution" issue more properly resolved subsequent to receipt of the District's Comprehensive Annual Financial Review (CAFR); 2) the District had demonstrated a reasonable basis to justify its request for a 30 percent natural gas increase; 3) the rule duly promulgated to implement the Court's Order for "maintenance" controlled in this proceeding, and the Office of Administrative Law lacked jurisdiction to determine its validity; 4) the Department had employed a uniform, rational approach in calculating the District's Early Childhood Plan figure and such figure, therefore, was properly established at $650,011; and 5) the District's encumbrances which remained unpaid as of June 30, 2003 were properly excluded from its maintenance budget.

The Commissioner concurred with the ALJ's findings and conclusions with respect to deferring of the undesignated general fund payment question until review of the CAFR, calculation of the Early Childhood Plan figure, and jurisdiction and application of the "maintenance" rule. The Commissioner rejected the granting of a 30 percent increase for natural gas finding that the Department's offered 15 percent increase was not unreasonable or improper, and, while sustaining the propriety of the Department's calculation with respect to the District's encumbrances, he clarified the methodology to be utilized in arriving at this figure.

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.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4158-03

AGENCY DKT. NO. 188-6/03

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., appearing for petitioner

Cindy Campbell, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 23, 2003 Decided: September 24, 2003

BEFORE **JOHN R. FUTEY**, ALJ:

STATEMENT OF THE CASE

In this matter petitioner, the Board of Education of the City of Gloucester, Camden County (hereinafter "Gloucester") appeals a notice by respondent, the New Jersey State Department of Education (hereinafter "DOE") regarding its supplemental funding request for the 2003-2004 budgeted year, pursuant to *N.J.A.C.* 6A:24-1.1 *et. seq.*

PROCEDURAL HISTORY

On March 24, 2003, the DOE moved before the Supreme Court for an Order modifying the decision in *Abbott v. Burke*, 153 *N.J.* 480 (1998) (Abbott IV). See also *Abbott v. Burke*, 172 *N.J.* 294 (2002) (IX). The DOE requested that the discretionary additional *Abbott v. Burke* State Aid (Supplemental Aid) that it would be required to provide in *Abbott* Districts in 2003-2004 be limited to an amount sufficient to support those programs, positions and services in the districts approved budgets for 2002-2003. On April 8, 2003 the Education Law Center (hereinafter "ELC") cross-moved for an order setting an expedited schedule for the DOE's decisions on districts-budgets and requiring the DOE to conduct a formal evaluation of the implementation of the Whole School Reform (hereinafter "WSR"), etc. On April 29, 2003, the Supreme Court Ordered the DOE and the ELC to participate in mediation before the Honorable Phillip S. Carchman, J.A.D., to attempt to resolve issues raised by their motions.

Mediation resolved all issues except the 2003-2004 budget process, so the DOE's motion for an Order extending by an additional year the one-year relaxation of remedies granted in *Abbott IX* remained outstanding. However, the parties agreed to an expedited schedule for budget approvals and appeals, beginning with DOE's reviews and approval and approvals of districts' budgets by May 30, 2003. Districts' appeals from the DOE's reviews were to be transmitted to the Office of Administrative Law (hereafter "OAL") where administrative law judges (hereinafter "ALJs") were to issue initial decisions (hereinafter "ID's") within twenty-five days of the appeal. The DOE's Commissioner was to issue final decisions within twenty-five days of the IDs. On May 20, 2003, the Supreme Court issued an Order incorporating the parties' mediation agreement and providing that the schedule would remain in effect until further order of the Court.

On May 30, 2003, the DOE issued decisions on the *Abbott* districts' budgets. In accordance with the issuance of those letters, in this matter, the DOE's Assistant Commissioner, Division of Abbott Implementation (Gordon MacInnes) notified Gloucester that the DOE had completed its initial review of the District's 2003/2004 expenditure budget dated April 9, 2003, with a budget code 4900. On June 5, 2003, the District's verified petition of appeal was filed

with the DOE. *N.J.S.A.* 18A:6-9. Thereafter, the DOE transmitted this matter as a contested case to the OAL, where it was filed on June 9, 2003, pursuant to the provisions of *N.J.S.A.* 52:14B-1 through –15 and *N.J.S.A.* 52:14F-1 through –13. On June 20, 2003 the DOE's answer was filed in the OAL.

On June 24, 2003, Supreme Court issued an Order approving the mediated agreement and scheduling argument on DOE's motion for an Order extending the relaxation of remedies granted in *Abbott IX.* On July 1, 2003, the DOE moved for an Order amending the schedule for processing the appeals to allow the Court to rule on the standard in the appeals to the OAL for hearings and issuance of initial decisions. On July 10, 2003, the Supreme Court heard Oral Argument on the budget process. The Supreme Court granted the DOE's motion and relaxed *Abbott v. Burke* 153, *N.J.* 480 (1998) (*Abbott V*) remedies as applied to the 2003-2004 budget process.

The Supreme Court also set a schedule for new DOE decisions on supplemental funding and the administrative appeal and hearing process and ordered the DOE to promulgate emergency regulations governing the process. The DOE, relying on the Fiscal Year 2004 Appropriations Act and the Supreme Court's July 23, 2003, Order, promulgated emergency regulations amending *N.J.A.C.* 6A:10, including *N.J.A.C.* 6A:10-1.2, 3.1, -4.2 and –4.7. The regulations are effective August 22, 2003 and expire June 30, 2004.

I was assigned to this matter on June 16, 2003. As a result, I conducted a telephone conference with Gloucester's attorney Richard Shapiro, Esq. and the Deputy Attorney General assigned at the time, James Harris, on June 26, 2003, at which time procedural issues were discussed and a timeline regarding initial hearing was set to be heard for the days of July 11 and July 17, 2003. Based upon the extension of time which was granted by the Supreme Court hereinabove, that schedule was adjourned in order to allow further clarification from the Supreme Court before a further hearing in this matter. That telephone conference took place on July 9, 2003, based upon the foregoing procedural readjustments made by the Supreme Court. Thereafter, upon being advised that the matter was once again ripe for hearing before the OAL, I conducted a telephone conference with counsel on September 2, 2003, at which time the parties agreed to a hearing schedule for the date of September 18, 2003. A letter confirming same was

sent by fax on September 9, 2003, which also set the matter down to be heard peremptorily before me commencing at 9:00 am on the agreed upon date. However, on September 17, 2003, at approximately 3:30 pm, I was for the first time advised that my matter which was peremptorily set for the next day, was to be adjourned at the purported order and direction of some unidentified OAL authority due to the unavailability of Mr. Shapiro, who was then still appearing before the Honorable Edith Klinger, ALJ, at the Newark OAL. Accordingly, I was summarily directed and told that Mr. Shapiro would not be available at the agreed upon and peremptorily set time and date. I nonetheless conducted a telephone conference with both counsel at 4:00 pm on September 17, 2003, at which time both counsel agreed that they would be available at 1:30 pm on September 18, 2003 at the OAL, Trenton. Judge Klinger acceded accordingly. The matter proceeded to hearing on that day. However, since various issues could not be resolved between the parties at that time and due to the scheduling demands of Mr. Shapiro, the matter was continued and heard with the full consent of all the parties on Sunday, September 21, 2003, between 8:45 am and 12:20 pm as well as on September 23, 2003 between 7:30 am and 9:00 am, which ended in virtual darkness (but for the emergency light in the hearing room) as OAL and its surrounding environment experienced an extended power outage due to a vicious storm. The end of the matter was taped on a portable tape battery-operated recorder. Upon completion of all the testimony and upon receipt of all the documentation at that time, the hearing record closed.

STIPULATIONS AND REMAINING ISSUES

At the commencement of the hearing, the parties indicated that they had had an opportunity to confer between the first and scheduled hearing dates and had arrived at a stipulation regarding all funding requirements requested by the District as contained in R-1 and R-7, and as more fully set forth in the written summation of DAG Campbell filed on the last day of hearing herein, except for issues involving utility rate increases (most directly only the gas rate), the Early Childhood Plan for budget year 03-04 (hereinafter "EC Plan 03-04") and the figures utilitized for the Early Childhood Plan for budget year 02-03 (hereinafter "ECP 02-03"), as well as whether or not billing encumbrances should have been calculated in the budget for 03-04, or whether there should have been included in the previous budget for 02-03. These became the framed issues for hearing. It is noted that an ancillary "issue" also arose regarding the excess fund account whose balance was $1,538,947, with the additional Abbott vs. Burke aid to be

$475,703 and the timing of its reimbursement and disbursement to the District. Although I was subsequently advised by the deputy attorney general who substituted in for Mr. Harris and who tried this matter before me, Cindy Campbell, and her supervisor, Assistant Attorney General Michelle Miller, upon my order and direction to report its status to me at 3:30 pm on September 22, 2003, that the issue regarding the date of disbursement of that excess fund back to Gloucester had not yet been clarified, I was nonetheless told by them that it is still not an issue for resolution by this tribunal but rather a simple matter of disbursement. In the event the Comprehensive Annual Financial Review (hereinafter "CAFR") demonstrates that there is an entitlement, current "point in-time" estimates by the DOE suggest that the undesignated general fund may, however, have a surplus in excess of 2 percent. However, the DOE acknowledged that should Gloucester's surplus be determined to be under or below the 2 percent under CAFR, Gloucester will then get the receivable. Thus, this issue will be resolved at that time, although the DOE's representative at hearing, Andrew Bishop, conceded that, according to his own personal and unofficial understanding, this may be the first year that the DOE reduced the undesignated general fund prior to receipt of the CAFR.

TESTIMONY OF THE WITNESSES

In this matter four people testified and their relevant testimonies are summarized as follows:

Dr. Mary Stansky

Dr. Mary Stansky is Gloucester's Superintendent of Schools where she is in her fifth year. As a result of the current budget appeal, the amount that Gloucester thought they would get was the amount of $547,000 in order to hire additional people pursuant to a settlement which had been negotiated with DOE in February 2003. They had an agreement to hire those people, which included two Spanish teachers to meet the "Full Content" standard, one more facilitator for tutoring, six additional tutors, and one additional security person (in one of the four schools where they had no security personal at all.) Gloucester has four schools in its District, including an alternative high school for grades 7 through 12, a junior through senior high school for grades 7 through 12, an intermediate school for grades 4, through 6 and a pre-K through 3 school. They

understood that the maintenance budget would be sufficient in order to meet the ongoing needs of the District and provide the above-cited services. However, given the denial of those funds by DOE they would be unable to provide for those positions in the 03-04 budgeted year, even though they were previously provided during the 02-03 budgeted year. She reviewed a list of the positions and programs that would be lost without that supplemental aid, the after-school and summer programs, and as well as the professional development costs, all of which had been contained in the prior year's budget (P-1). The school supply costs will also be cut. As a result of the adjustment required by DOE in February 2003, which resulted in a reduction of the two Spanish teachers, in the amount of $106,500, the total amount of the loss was recorded as being $6,024,498 (less the $106,500 indicated hereinabove). They are nonetheless required to provide those services for the "Whole School Reform." Those figures were prepared in February 2003 as a maintenance figure at the time and did not include the non-discretionary items, most of which had been resolved as set forth hereinabove in the stipulation entered into between the parties at the due process hearing. She did not believe that the State has relieved them of their obligations for education for this year, however.

Robert Stewart

Robert Stewart is an independent auditor employed by Gloucester. He is the co-owner of an auditing firm in Marlton, New Jersey. He has been a Certified Public Accountant since 1974. On an annual basis his CPA firm conducts audits on an independent basis regarding approximately forty districts throughout the State of New Jersey. This is his first year with Gloucester.

In addition to being a licensed CPA, he is also licensed as a public school accountant which he also received in 1974, and is also a registered municipal accountant (since 1976.) He testified regarding the encumbrances which the district feels should be attached and given credit for in the 03-04 budget year. An encumbrance is a order issued to a vendor but which results in it not being paid by June 30, which is the end of the standard fiscal year. If is not signed off or paid in that year's end by June 30 it serves as a reservation of fund balance as an open encumbrance. It is the district's position that the amounts which constitute encumbrances were denoted and recorded as such by DOE for the 03-04 year in the total amount of $797,686, and

actually should have been charged against the preceding year of 02-03, even though they were not accounts payable.

In that regard, he reviewed the Gloucester Board of Education's Secretary's Reports (P-2 and P-4) regarding the amounts of outstanding expenditures in place as of June 30, 2003. That review comprised Fund Ten, which includes Fund 11 (the general fund), Fund 12 (which comprises the capital fund), and Fund 13 (which constitutes the special school account) (P-3). Those outstanding expenditures should be treated as part of the 02-03 expenditures of the district since, even though they will be spent after June 30, they must be attributed back to the prior budget year of 2002-03. However, it was the district's position that the DOE did not see them as a proper entry. It was his conclusion that all the outstanding expenditures should be made part of the expenditures for the 02-03 year and then added to the DOE's actual expenditure for calculation of the 03-04 budget. Otherwise, there will be a shortfall in that amount of $797,686 in the 03-04 budget.

In the process, he conceded that, from an accounting standpoint, many of those expenditures did remain outstanding as open encumbrances because paperwork had not been completed and the vendors payments had not been completed prior to the end of the fiscal year of June 30, 2003. He also acknowledged that he did not know how much had been even spent to date from the total of the $797,686, representing both of the above cited funds 10 and 15 (this being the Blended Resources Fund.) Finally, he noted that they employ general accepted accounting principles (more commonly referred to as "GAAP"s) in order to arrive at applying credit for outstanding expenditures, even though DOE does not view them as being actual expenditures from the 02-03 year,. The district wants those open expenditures counted for that year, thereby increasing its total allotment for 03-04.

James Devereaux

James Devereaux is the Business Administrator and Board Secretary of Gloucester, which role he has held for three months. He had prior experience as the Township Manager and for two of the three years, Chief Financial Officer, of Washington Township, Gloucester County between 1987 and 1990, the Chief Financial Officer and Administrator for Gloucester City

between 1990 and 1992, and the Township Administrator of Manalapan Township for 9 years, prior to assuming his current role with Gloucester, City.

He testified regarding the issues of utility rate increase as well as the Early Childhood Plan aid in this matter.

Regarding the utility rate increase, the DOE authorized the amount of $91,591.95 for the 03-04 year, while the district seeks the amount of $116,694 for the same period. He based his calculation upon actual bills for natural gas and electricity on behalf of the district which he culled from the 02-03 school year. Thereafter, he separated out the billings for the gas increase verses the electricity increase. He applied a 15 per cent increase only for the electrical component based upon a Board of Public Utilities order of August 2003 which authorized the Public Service Electric and Gas Company to charge that rated increase. It is noted that the DOE did not challenge that figure at the due process hearing. Rather, as stated hereafter, regarding the testimony of DOE's Andrew Bishop, although the DOE originally allocated a zero increase for that purpose, it acceded to the district's request for the 15 percent adjustment only for the electricity for the 03-04 budget year. This constitutes a further stipulation in this matter. And I so **FIND**.

The only utility rate challenge therefore remained regarding the natural gas increase, which the district projected as being 30 percent. Devereaux arrived at that percentage increase based upon his research regarding the market conditions and fluctuations in the natural gas market. In that regard, he referred and offered into evidence two articles from which he had gleaned the range of increases as occurring between 20 and 70 percent projected for the ensuing year, based upon American Industry Standards and an article from the Energy Information Administration. His conclusion was that the increase would probably fall somewhere between those two areas, and, as a result, he merely picked the figure of 30 per cent as being on the low end of that range to support that increase. On cross-examination, he acknowledged that the one article upon which he relied referred to there being projected levels 60 to 70 percent higher than last year as related to a comparison with last summer's rates only. He noted, however, that it would be totally impossible to project over-all figures for the entire year but felt that 30 percent

was a reasonable estimate given what he had otherwise determined from those articles as well as his discussions with unnamed personnel at Public Service Electric and Gas.

As to the issue involving the Early Childhood Plan aid (hereinafter "ECP") a review of the district's budget (R-1) reveals that the DOE treated the EC Plan for 02-03 as a negative in the amount of $3,490,379. The DOE's number is based upon a January 02 letter which stated that the approved plan was that figure. However, Gloucester's approved DOE budget for 02-03 was actually $3,203,949, as of October 2, 2002. (See P-9 and P-10) Yet, on February 25, 2003, Gloucester was told by DOE that they would receive a lesser amount after having deducted the amount of $740,531 from that previously approved figure. This would leave a balance of an actual budget of $2,463,418 for Early Childhood Plan purposes as being the actual budget for the 02-03 year. Thus, they contend that DOE used the wrong figure by employing the amount of $3,490,379 since the actual budget of $2,463,418 was the actual budget for the ECP for the 02-03 period. As a result, it is their contention that the district actually lost nearly $1,000,000 when one combines the nearly $200,000 which they had been reduced by DOE in the budget adjustment on February 25, 2002 ($3,490,379 verses the actual budget of $3,203,949) and the reduction they received of $740,531, which they got as a result of the letter of February 25, 2003. The district should have actually received their increased amount of $376,950 to the bottom line budget. Instead, the DOE's use of the $3,490,379 constituted a negative to the district in the amount of $650,000. He conceded that the district did not do a similar calculation for 03-04.

Andrew Bishop

Andrew Bishop testified on behalf of the DOE as a budget manager, which role he has assumed for several districts, including Gloucester, since December 2001. He is an accountant by trade, has been a Certified Public Accountant since 1994, and has spent over 18 years engaged in audit practice.

He reviewed the maintenance calculation work sheet prepared by DOE (R-1) and (R-7) and indicated that, overall, the DOE attempted to strike a systematic approach to establishing the maintenance budget for 03-04 regarding approved ECP's. In the Gloucester City matter, after they adjusted the 02-03 budget they did a comparison of the budget verses actual calculation for

the programs in place and made a computation of projected spending of Gloucester in that regard (R-2). In that regard, the ECP budget for 02-03 for Gloucester was $3,490,379 (R-4) as an approved budget plan and, as a result, they came to the conclusion that there was not an expansion of a budget but rather a reduction of $650,011 when they compared the EC plan for 02-03 ($3,490,379) verses the EC plan for 03-04 in the amount of $2,840,368, thereby leaving the reduction to $650,011.

Regarding the utilities allowance, Bishop indicated that the DOE originally had calculated the projected increases for electricity and gases being zero. However, as a result of the due process hearing herein, the DOE conceded and agreed that Gloucester should receive a 15 percent increase regarding the electricity based upon the verification that the BPU had granted a rate increase to Public Service Electric and Gas. At the same time however, the DOE was not convinced that any similar bona fide increase for natural gas was adequately demonstrated by the district. However, in the spirit of attempting to maintain uniformity in that regard, it nonetheless conceded and agreed that a 15 percent increase for natural gas expenditures would also be appropriate for the 03-04 budget year, that being based upon his review of a fellow budget director's e-mail which referenced a recommendation for same by the New Jersey Association of School for Business Officials (hereinabove "NJASBO"). He also noted however, that should the actual expenditures exceed that amount, emergency appropriation requests can be made by the district and will be given appropriate review by the DOE upon submission of same.

Regarding any credits for encumbrances, he noted that the DOE worked up the CPA report and gave credit for the actual spending, since actual spending is the best information available, as opposed to encumbrances, which appear as a carryover beyond the authorized fiscal year. As a result, only accounts payable before June 30, and even paid very shortly after June 30 will be given recognition by the DOE on a consistent bases. The DOE's conclusion was that bills not paid by that time would be listed and included in the ensuing budget for 03-04.

LEGAL ANALYSIS

In this matter, Gloucester and the DOE have, as a result of the due process hearing, made significant efforts toward resolving the outstanding issues relative to the maintenance budget

presented for the 03-04 year. Both sides should be commended in that regard since considerable energy was spent during the pendency of the due process hearing in order to re-address all those issues. The stipulations set forth on the record regarding the vast majority of the figures and as referenced hereinabove at the beginning of this decision, reflect those positive and strenuous efforts. Accordingly, only three issues remained at the commencement of the due process hearing and for which findings and conclusions are made at this time it being my understanding that the excess Fund account issue is a distribution issue more properly assessed at the CAFR. After having considered the evidence presented, regarding the utility rate increase, I **FIND** that, since the parties have jointly agreed to an adjustment regarding the electricity rate increase to 15 percent, that issue is also stipulated and moot as an issue before me at this time. That agreement was apparently predicated upon an assessment that the BPU order regarding the PSE&G increase demonstrated the projected increase for electricity over the next year. At the same time, however, I **FIND** that the district has demonstrated a reasonable or plausible basis to suggest a 30 percent increase regarding the natural gas increase, due to the volatility and uncertainty of that market over time. After considering the documentation presented in support of Gloucester's claim regarding a 30 percent increase, I **FIND** it to be somewhat reasonably determined based upon the projections set forth in the articles which were submitted in support of their calculation in that regard. Although there is absolutely no way to demonstrate the viability of the natural gas increases over the next year the district's attempted assessment at least gives a tangible basis upon which to assert the projected increase of 30 percent. And I so **FIND**. As a result, absent any other realistic or corroborated showing to the contrary and/or any other authority who could substantiate anything short of a 30 percent increase, I reject DOE's acquiescence for a 15 percent increase by a preponderance of the credible evidence. I **FIND** that the DOE accepted and conceded a 15 per cent increase, consistent with the electricity rate increase, in order to maintain as must uniformity as possible. However, as was gleaned from the hearing, Gloucester had at least some corroborating proofs while DOE did not. The purported reliance upon the NJASBO e-mail was highly deficient in that regard. And, in any event, to the extent that any amount over DOE's conceded 15 percent gas increase exceeds that amount in reality, those increase must be viewed as unforeseen circumstances and/or unanticipated expenditures, for which cash payment should be forthwith issued by DOE and Gloucester can make a request for emergency appropriations at any time that the projected estimated figures do exceed the authorized budgeted

amount. Thus, they will not be prejudiced in that regard because they do have relief at hand to address those gas increases above 15 percent.

Regarding the Early Childhood Plan figure, I **FIND** that the DOE properly attempted to employ a systematic approach to maintaining a uniform analysis for all of the affected districts and utilized that concept in its assessment of and comparison of the 02-03 and 03-04 budget for Gloucester. In the process, I **FIND** that the use of an approved plan-to-plan review (emphasis added) was reasonable under the circumstances and, accordingly, I will not disturb DOE's determination to fix a review at a uniform period in time, being the date of the actual approved budget, whether or not any subsequent adjustment resulted in recalculations thereafter. Therefore, I **FIND** that the utilization of the ECP budget for 02-03 in the amount of $3,490,379 was properly compared with the ensuing budget for 03-04, of $2,840,368, resulting in a reduction in aid between the two periods of $650, 011. And I so **FIND**.

Although, on first blush, it appeared incongruous to observe that the DOE considered the 02-03 budget figures for the district of $3,490,379 as the baseline which later became emasculated and/or reduced for whatever reason(s) the district has presented nothing which convinces me that any other accounting calculation practice is more do-able. This failing was similarly reflected in the presentation about the encumbrance issue. The proofs were highly deficient and devoid of any detail or clarity to give credence to the District's positions in those regards. The DOE has at a minimum created a systematic approach to be applied across the board among all the boards by comparing "approved" budgets to "approved" budgets. As a result, the DOE's allocation of ECP data correctly reflects the proper comparison data.

At the same time, I also **FIND** that Gloucester's Devereaux incorrectly included the approved preschool expansion aid, which had been based upon a projected enrollment of 336 pupils. At the end of the school year, however, only 238 pupils had been actually enrolled. As a result there was no real expansion at all, and the DOE properly adjusted the expansion aid for 02-03 to be zero (even though technically it was really a negative $1,018,027 for that period.)

Thus, Gloucester erred when it included the approved ECP expansion aid because the final approved ECP expansion aid was zero. As a consequence, I **FIND** that, by comparing only

the final approved ECPs for the two budget periods, the DOE properly calculated Gloucester's ECP aid for 03-04 as being $650,011.00.

Finally, as set forth at the commencement of the due process hearing in this matter, I **FIND** that the DOE properly determined the actual spent expenditures are to be used for calculations purposes instead of the encumbrances, the latter of which have not resulted in a full, credited payment, even according to all appropriate accounting standards, and that, accordingly, the DOE followed proper, sound procedures in calculating and giving credit for only those expenditures which became actual by the end of the fiscal year. Even the district's independent auditor could not confirm the status of any on-going actual payments subsequent to that time, which further illustrates the vagueness with which such calculations would have to be made. The only realistic approach is that which was employed by the DOE under the circumstances. And I so **FIND**.

As a result, notwithstanding any purported "generally accepted accounting principles," (GAAP) as articulated by Gloucester's independent auditor Stewart (but which were not established or corroborated and even though not challenged on its face by the DOE at the due process hearing at all), I am nonetheless satisfied and **FIND** that the DOE has clearly established that any billings for services of any sort will only be allocated and credited in the budget year when the funds are spent and not when reserved as an indebtedness or encumbrance to the district, consistent with the maintenance standard ordered for districts under Abbott. An encumbrance is an accounting tool which permits a district to reserve funds for purchase orders that may have been issued but for which the goods or services have not yet been received. Thus, I **FIND** that any encumbrances which remained open and/or unpaid after June 30, 2003, are chargeable to the budget for 03-04, and not in the proceeding year of 02-03. By contrast, the DOE did give Gloucester credit for true accounts payable in 02-03.

This is based upon the definition of maintenance budget found at *N.J.A.C.* 6A:10-1.2, which specifically provides that a district's maintenance budget shall (emphasis added) include "a budget funded at a level such that the district can implement 2002-2003 approved and provided (emphasis added) programs, services and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures.

Further, if even Gloucester's Stewart could not determine even at this time how many or how much of Gloucester's open encumbrances were accounts payable in 02-03, then how could the DOE be expected to make either an informed decision or apply any credit for those goods or services which have yet to be received at this time.

Of course, Gloucester will be able to have any adjustments made thereto when its Comprehensive Annual Financial Report (otherwise referred to as "CAFR") is made by the DOE approximately two months from now, in November 2003. At that time, Gloucester will hopefully be able to convert its open encumbrances into accounts payable.

I also **FIND** that the Supreme Court set a schedule for new DOE decisions on supplemental funding and the administrative appeal and hearing process and ordered the DOE to promulgate emergency regulations governing the process. The DOE, relying on the Fiscal Year 2004 Appropriations Act and the Supreme Court's July 23, 2003, Order, promulgated emergency regulations amending *N.J.A.C.* 6A:10, including *N.J.A.C.* 6A:10-1.2, 3.1, -4.2, and –4.7. The regulations are effective August 22, 2003, and expire June 30, 2004. Among these emergency regulations, *N.J.A.C.* 6A:10-1.2. move states completely:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke*. Maintenance also does not include non-recurring 2002-2003 expenditures.

The district bears the burden of proving that DOE's calculation of its maintenance budget failed to follow the maintenance budget review required under *N.J.A.C.* 6A:10-1.2. In this matter, I **FIND** that, given the level of proofs and testimony offered by both sides, the DOE

developed Gloucester's 03-04 maintenance budget after it reviewed Gloucester's approved budget for 02-03, made adjustments for actual (emphasis added) expenditures, allowed increases in non-discretionary costs, and dedicated costs for any non-recurring items as mandated in the maintenance budget formula definition. As a result, I **FIND** that the DOE did properly determine Gloucester's 03-04 maintenances budget in accordance with established Supreme Court criteria and appropriate DOE regulations, the only exception to that finding being my determination regarding the utilization of the projected 30 percent natural gas rate increase requested by Gloucester.

Finally after having considered the arguments advanced herein and pursuant to my announced determination at the due process hearing, I **FIND** that the DOE regulations define "maintenance budget" consistent with the Supreme Court mandate and order relative to implementation of those regulations. I further adopt the relevant findings and conclusions in that regard which were contained in the Order Relative to Maintenance Budget of Honorable John R. Tassini, ALAJ, in the matter of *Board of Education of Asbury Park vs. New Jersey Department of Education*, OAL Docket No. EDU 4095-03, Agency No. 199-6/03 dated September 4, 2003, and the Order Relative to Maintenance Budget rendered by Honorable Joseph F. Martone, ALJ, in the matter of the *Board of Education, of Neptune vs. New Jersey Board of Education,* OAL Docket No. EDU 4096-03; Agency No. 202-6103, dated September 10, 2003. And I so **FIND**.

CONCLUSIONS AND ORDER

Based upon all of the foregoing, I **CONCLUDE** that the DOE has demonstrated the reasonableness of its budget for the Gloucester district for the 03-04 school year by a preponderance of the credible evidence. It is **ORDERED** that the proposed budget, as fixed by the DOE for that period, except as to the natural gas rate increase, is **AFFIRMED**. The denial of the 30 percent natural gas rate is **REVERSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

September 24, 2003

DATE

JOHN R. FUTEY, ALJ

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

September 24, 2003

DATE

E-mailed Initial Decision to the parties on:

September 24, 2003

DATE

JRF/mamf

WITNESSES

For petitioner

Dr. Mary Stansky

Robert Stewart

James Devereaux

For respondent

Andrew Bishop

EXHIBITS

For petitioner

P-1 Summary of budget items by Dr. Mary Stansky

P-2 Fund 10 Account

P-3 Abbreviated detailed budget accounts status for Fund 10

P-4 Fund 15 board secretary's report for June 30, 2003

P-5 Abbreviated detailed budget account status for Fund 15

P-6 2003 audit financial summary

P-7 Comparison chart

P-8 Utility calculations rate

P-9 Early Childhood Plan aid calculations for 02-03

P-10 Additional Early Childhood Plan calculations for 02-03

P-11 Letter from Gordon MacInnes to Dr. Mary Stansky, dated January 6, 2003

For respondent

R-1 Maintenance Budget calculation worksheet

R-2 Schedule A from KPMG audit

R-3 School District Budget Statement for the 2002-2003 school year

R-4 Budget approval letter for 2002-2003 Early Childhood Plan

R-5 Budget approval letter for 2003-2004 Early Childhood Plan

R-5.1 Salary Increase Spreadsheet for 2003-2004

R-6 Special Education Tuition Calculation for Gloucester City

R-7 Supplemental Abbott v. Burke Aid calculation worksheet

R-8 School District Budget statement for the 2003-2004 school year

R-9 IDEA increase in aid spreadsheet

R-10 Extraordinary aid spreadsheet

Joint exhibit

J-1 Letter from Gordon MacInnes to Dr. Mary Stansky, dated August 27, 2003

OAL DKT. NO. EDU 4158-03
AGENCY DKT. NO. 188-6/03

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of Gloucester and those of the Department, along with both parties' reply exceptions were duly submitted in accordance with the schedule established in response to the Court's Order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner determines to adopt in part, reject in part and modify in part the Initial Decision of the OAL as detailed below.

Initially, it is noted that petitioner's exceptions strenuously urge that the Commissioner should reject the Administrative Law Judge's (ALJ) resolution of the undesignated general fund issue in this matter, *i.e.*, that "[this issue] is still not an issue for resolution by this tribunal but rather a simple matter of disbursement," a question which would ultimately be resolved at the time of the Comprehensive Annual Financial Report (CAFR)

review.[1] (Initial Decision at 5) (Petitioner's Exceptions at 10-11) Petitioner reports that, subsequent to the receipt of the Department's August 27, 2003 budget decision letter, its auditor conducted a preliminary audit of the undesignated general fund balance which demonstrated that the District's fund balance was now below the required two percent level, contrary to the Department's budget letter calculation and, therefore, "the District should immediately be awarded the Abbott v. Burke State Aid receivable that was improperly and prematurely deducted in the [Department's] August 27, 2003, letter. (Petitioner's Exceptions at 12) The District argues that the Department has a legal obligation to accept its supplemental documentation and to cure any deficiencies in the District's budget that were based on the Department's consideration of outdated and inaccurate information. It, thus, proffers that the required adjustments should be immediately made based on its newly provided supplemental updated information and should not await the CAFR. The District further charges that the Department improperly reduced the undesignated general fund balance, which it had determined was in excess of two percent, prior to the receipt of the CAFR, in violation of the FY 04 Appropriations Act.

In reply, the Department advances "that the ALJ properly found that the issue of when and how Gloucester City would receive its disbursement from the Department if its undesignated general fund balance was below two percent was not a legal issue before him in this matter. However, the issue of the calculation of Gloucester City's excess fund balance was a legal matter properly reviewable by the ALJ in this case." (Department's Reply Exceptions at 2-3) The Department further advances that the Supreme Court's Order directed it to provide the districts with their preliminary maintenance figures for the 2003-04 school year by

[1] Petitioner charges that such determination of the ALJ was the result of an improper *ex parte* conversation with counsel for respondent in this matter and, therefore, the Commissioner is obligated to grant the relief it seeks. Petitioner is advised that "allegations" of impropriety by an ALJ are not properly before the Commissioner of Education nor do such "allegations" provide a basis for the granting of petitioner's requested relief in this forum. Rather, these are appropriately cognizable before the OAL. *See N.J.A.C.* 1:1-14.5; Code of Judicial Conduct for Administrative Law Judges, Canon 3A(6); and *N.J.A.C.* 1:31-3.1(a)4.

August 27, 2003. In fulfillment of that directive, the Department utilized the most recent calculations, provided by the District, to make the requisite projections in its August 27, 2003 budget letter. Although recognizing "the Supreme Court's encouragement to accept supplemental documentation [from districts], the Supreme Court's holding should not be construed such that the Department should accept piece-meal and potentially inaccurate data on an on-going basis, particularly where the district's CAFR will be submitted in several weeks and there will be finality in the data." (Department's Reply Exceptions at 5)

Upon consideration of the arguments advanced by the parties on this issue, the Commissioner, while conceding that the District's *entitlement* to payment may have been properly addressed by the ALJ in these proceedings, concurs that *timing* of such payment was not amenable to resolution by the ALJ. It must be observed, however, that the District's proffered arguments herein are somewhat disingenuous. While charging that the Department improperly made reductions to its undesignated general fund balance based on preliminary projections in advance of its receipt of the CAFR, it, nonetheless, demands payment based on its "supplementary" projections, also prior to completion of the CAFR process. Under the circumstances existing here, the Commissioner determines that resolution of this issue is appropriately deferred subsequent to the completion of the CAFR process. If the District's supplementary information at that time demonstrates that its undesignated general fund balance is below two percent, adjustment will be made to its aid award pursuant to the Appropriations Act (New Jersey Fiscal FY 04 Appropriations Act, *P.L.* 2003, *c.* 122).

Turning to the remaining issues in dispute herein, the Commissioner, first, concurs with the ALJ that the OAL does not have jurisdiction to determine, directly or indirectly, the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R.2:2-3(a); *see, also, Pascucci v.*

Vagott, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to determine "a choice of law" as argued by the District, the Commissioner agrees with the ALJ that the Department's definition of "maintenance budget," as detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003. Consequently, the Department's application of such regulatory definition in its review and approval of the District's 2003-04 budget is wholly appropriate.

In his consideration of the ALJ's grant of a 30 percent natural gas rate increase to the District, the Commissioner cannot agree with the ALJ that the District has met its burden of establishing the necessity of an increase of this magnitude. At this juncture, the Commissioner finds that a review of the respective parties' burdens of proof in this matter is particularly instructive. In this regard, the Commissioner recognizes that the Supreme Court's Order provides that the Department "shall bear the [initial] burden of moving forward to establish the basis for any proposed reductions to the [Abbott] district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations."****Abbott v. Burke*, M-976 September Term 2002, at 7. However, as indicated in the Department's preliminary maintenance decision letter dated August 27, 2003 (Exhibit J-1), the District's maintenance budget was not reduced based on ineffectiveness or inefficiency. Therefore, pursuant to *N.J.A.C.* 6A:24-9.6(c), the District bears the burden of proving that the Department's calculations were unreasonable or otherwise improper. Here, the Initial Decision reflects that James Devereaux, Business Administrator and Board Secretary of Gloucester, testified that he arrived at the projected 30 percent increase in natural gas cost

> based upon his research regarding the market conditions and fluctuations in the natural gas market. In that regard, he referred

> and offered into evidence two articles from which he had gleaned the range of increases as occurring between 20 and 70 percent projected for the ensuing year, based upon American Industry Standards and an article from the Energy Information Administration. His conclusion was that the increase would probably fall somewhere between those two areas, and, as a result, *he merely picked the figure of 30 per cent as being on the low end of that range to support that increase.* (emphasis supplied) (Initial Decision at 8)

Although reporting that the Department "accepted and conceded a 15 per cent increase, consistent with the electricity rate increase, in order to maintain as [much] uniformity as possible" *id.* at 11, and recognizing testimony advanced by the Department's witness that such a figure was based on the recommendation of the New Jersey Association of School Business Officials (NJASBO), the ALJ, nonetheless, granted the increase finding "Gloucester had at least some corroborating proofs while DOE did not." The Commissioner disagrees. Mindful of the District's burden on this issue, the Commissioner finds the proofs advanced by the District to be deficient and devoid of any *competent* evidence that would offer credence to its position with respect to a 30 percent natural gas cost increase. As such, the Commissioner finds that the Department's offered 15 percent increase cannot be found unreasonable or improper. Therefore, the ALJ's finding in this regard is rejected. The District is also reminded that, should its actual natural gas cost exceed the allotted 15 percent, *N.J.A.C.* 6A:10-3.1(g) provides a mechanism for it to apply for additional supplemental funding.

The Commissioner, similarly, concludes that the District has not met its burden of establishing that the Department's use of an *approved* plan-to-plan review to determine the District's Early Childhood Plan figure was unreasonable or otherwise improper. In the Commissioner's view, the process used by the Department, based on the only available "like" components for comparison, *i.e.*, approved 2002-03 and 2003-04 Early Childhood Plans, in order to determine the change in district need from one year to the next, fully allows for reasonable,

fair and consistent preliminary determinations under circumstances where precise calculations must necessarily await the results of the CAFR. As well articulated by the ALJ in her Initial Decision in *Board of Education of the City of Plainfield, Union County, v. New Jersey State Department of Education*, OAL Dkt. No. EDU 5502-03, Agency Dkt. No. 206-6/03, decided September 26, 2003:

> I have considered the arguments of counsel and must agree with the position espoused by the DOE.***Although I agree with the District that the consistent use of the DOE's methodology does not in itself make it correct, I do not agree that simply because it does not work to the District's advantage makes it incorrect. The methodology utilized by the DOE has been applied to all "Abbott Districts" uniformly and has served to increase maintenance budgets in over half of the Districts. The District has not established that the use of this methodology is *per se* improper, illegal, inconsistent with the New Jersey Supreme Court's Order of July 23, 2003 or violative of any of its constitutional rights. The DOE is obligated only to utilize an approach that is reasonable and uniformly applied. Here they have done so. If the methodology is to be changed in each area in which an Abbott District is not advantaged, there will be no uniformity or equity to the provision of Abbott funds. Thus, I reject the District's argument and CONCLUDE that the DOE's methodology is reasonable and will not be second-guessed. (*Id.* at 8)

As such, the Commissioner agrees with the ALJ that the District's Early Childhood Plan adjustment for the 2003-04 school year was properly calculated at $650,011. In so holding, the Commissioner is also mindful that, to the extent that the results of the Department's reasonable approach may be imperfect, even after adjustment following audit, *N.J.A.C.* 6A:10-3.1(g) provides a mechanism for the District to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

As to whether the Department appropriately excluded certain of the District's encumbrances in the development of its maintenance budget, the Commissioner finds that the ALJ's analysis erred in concluding that only expenditures fully *paid* by June 30, 2003 were properly attributable to the 2002-03 budget and all expenditures which remained unpaid after

June 30, 2003 were chargeable to the District's 2003-04 budget, and were not to be included in the calculation of its "maintenance budget." Rather, he finds, the focus of the inquiry in this area is properly the timing of the *receipt* of goods and services, not payment. The ALJ's analysis appears to reflect a fundamental misunderstanding of the differentiation between the terms "encumbrances" and "accounts payable." Respondent's exceptions explain:

> An encumbrance is an accounting tool that permits Gloucester City to reserve funding for purchase orders that were issued during the 2002-2003 school year, but the goods or services were *not* received by (sic) as of June 30, 2003. An encumbrance is not an expenditure in the 2002-2003 school year, but rather merely a reservation of fund balance, which may be expended in the 2003-2004 school year if the goods and services are received. By contrast, an account payable is an expenditure which is incurred in the 2002-2003 school year for goods and services actually received or provided prior to June 30, 2003.
>
> With regards (sic) to those purchase orders for goods and services that have not been received or provided before June 30, 2003, they would be rolled over as encumbrances into 2003-2004 school year. As such these purchase orders are properly excluded from the 2003-2004 maintenance calculation, which properly includes only approved goods and services actually provided in the (sic) 2002-2003. They are not to be included in the 2003-2004 maintenance budget for Gloucester City since they have not been received or provided in that year. (emphasis supplied) (Respondent's Exceptions at 5-6)

Therefore, the Commissioner clarifies that, to the extent that the "encumbrances" as discussed in the Initial Decision represent charges for goods and services *provided* by June 30, 2003, *i.e.*, they have become accounts payable, these are properly chargeable to the District's 2002-03 budget and appropriately included in its "maintenance budget" for 2003-04. Those "encumbrances" representing goods and services not received by that date are properly excluded from the 2003-04 maintenance budget calculation. Petitioner's exceptions assert that the auditor for the District audited certain sections of the District's records, subsequent to June 30, 2003 and immediately prior to the hearing, and, citing Exhibits P-3 and P-6, contends

that he found that the Department had failed to allocate certain open encumbrances to 2002-03 expenditures. (Petitioner's Exceptions at 18-19) The Commissioner, while recognizing that it is entirely possible that adjustments in this area are necessary, in light of the District's burden in this regard and based on the proofs brought to the record, is unable to definitively determine which of the District's encumbrances have become accounts payable by virtue of the receipt of the encumbered goods or services on or before June 30, 2003 so as to be considered 2002-03 expenditures. The Commissioner, therefore, concludes that the District's encumbrances were properly excluded as a budget expense for 2002-03 by the Department, and he directs that any required adjustments be made, based on updated information, in the course of the CAFR review scheduled to begin in November 2003.

Accordingly, the Initial Decision of the OAL is adopted in part, rejected in part and modified in part as set forth above. The instant Petition of Appeal is hereby dismissed.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[2] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the CAFR until November 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[3] 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.

577-03

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" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court.

The ALJ determined that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2. The ALJ also concluded that: 1) the Department incorrectly included encumbrances, reserves for inventory and capital reserves in calculating the excess fund balance; 2) the Department erred in including $1,863,652 of unspent salary and benefits funds in calculating the excess fund balance; 3) the sum of $74,349 for transportation should be added to the District's budget as a nondiscretionary item; 4) the District's request for $1,000,000 for No Child Left Behind should be denied as beyond the maintenance standard; and 5) the District's request for $110,543 for its Second Chance Program should be granted.

The Commissioner concurred with the ALJ's findings and conclusions with respect to the disputed issues except in three instances wherein the Commissioner rejected the ALJ's findings and concluded that: 1) the Department correctly included encumbrances, reserves for inventory and capital reserves in calculating the excess fund balance; 2) the Department correctly included $1,863,652 in unspent salary and benefit funds in calculating the excess fund balance; and 3) the District's request for $110,543 in additional funds for its Second Chance Program did not comport with the maintenance budget standard set forth at *N.J.A.C.* 6A:10-1.2 and, therefore, the District's request for additional funds for this program was denied.

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 4156-03

AGENCY DKT. NO. 190-6/03

BOARD OF EDUCATION OF THE CITY OF VINELAND, GLOUCESTER COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Robert A. De Santo, Esq., for petitioner (Gruccio, Pepper, De Santo & Ruth, attorneys)

Jennifer Killaugh-Herrera, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 22, 2003 Decided: September 25, 2003

BEFORE **JOHN SCHUSTER III**, ALJ:

PROCEDURAL HISTORY

Petitioner appeals the May 30, 2003 determination of the department relating to its 2003-2004 budget and additional *Abbott v. Burke* State Aid application for the same year. On March

17, 2003, Vineland submitted to the respondent a proposed budget for the 2003-2004 school year. On May 30, 2003, the department issued a decision modifying the proposed budget based on the New Jersey Supreme Court order of July 23, 2003, directing that 2003-2004 budgets should be funded at a level which will enable the district to continue implementing its 2002-2003 approved programs, services and positions (the "maintenance" standard). Onto June 6, 2003, petitioner filed with the Department a Verified Petition of Appeal alleging the respondent was improperly calculating its proposed budget and not applying the practice as set forth in *Abbott v. Burke* decisions and orders. The matter was then transmitted to the Office of Administrative Law (OAL) on June 9, 2003, as a contested case pursuant to *N.J.A.C.* 52:14B-2(b). The respondent filed an Answer to the Verified Petition on June 12, 2003 denying any non-compliance in the budget process. The matter was heard on September 18 and 19, 2003, at the OAL in Mercerville, New Jersey. The record remained opened pending the exchange of supporting documentation so that a stipulation regarding special education costs could be made. The stipulation was confirmed on September 22, 2003, and record closed.

STATEMENT OF THE CASE

The Board of Education of the City of Vineland (hereinafter petitioner or Vineland) disputes the calculation by the New Jersey State Department of Education (hereinafter respondent or Department) of its 2003-2004 operating budget. That dispute is significant because the petitioner relies upon supplemental aid provided by the respondent granted pursuant to the line of cases commonly referred to as the *Abbott v. Burke* decisions. These decisions require the Department to provide certain districts with supplemental financial aid in order for those districts to provide a thorough and efficient education for its students. Pursuant to the recent Supreme Court decision of July 23, 2003, the respondent is to provide to the petitioner supplemental aid in an amount as was provided in the 2002-2003 budget and as adjusted to provide for modifications in expenses which are non-discretionary expenses on the part of the petitioner. This is commonly referred to as the "maintenance" standard and pursuant to emergency regulations adopted by the Department, they are defined as the funding for those programs which were previously approved by the Department and provided by the petitioner in the 2002-2003 school year. The petitioner has argued that the respondent, in calculating Vineland's 2003-2004 budget, violated some basic accounting principles and did not include in

its budget calculation various items that should have been included pursuant to the Supreme Court directive. On the other hand, the Department has taken the position that this whole exercise is of minimal consequence because the budget that has been presented by the Department to Vineland is only an interim budget and final numbers will not be determined until the early part of November, 2003, when final calculations are completed. The various issues to be determined in this hearing are enumerated as follows: (1) Did the August 27, 2003 determination letter issued by the Department to Vineland accurately calculate the maintenance standard amount on the approved 2002-2003 budget as mandated by the July 23, 2003 order of the New Jersey Supreme Court? (2) Did the August 27, 2003 determination letter issued by the Department to Vineland correctly calculate the sum of $8,817,650, as the amount of additional excess fund balance that would be available for the 2003-2004 spending? (3) Did the August 27, 2003 determination letter issued by the Department to Vineland properly identify with specificity the Department's approval and disapproval of proposed expenditures in Vineland's 2003-2004 submitted budget?

The petitioner argues that the Department did not appropriately calculate the maintenance standard amount as set forth in the approved 2002-2003 budget and therefore incorrectly calculated the sum of $8,817,650, as the excess fund balance that will be available for the petitioner in the 2003-2004 school year. Vineland further argues that because the Department did not specify which expenditures were approved and which were disapproved, the proposed figures in the respondent's suggested budget did not provide funding for non-discretionary items and/or underprovided for those items. The Department's position is that estimated figures are satisfactory at this stage in the budget process. It argues that even though certain includable expenditures were omitted from the calculation those exclusions are of no consequence because they, along with the review process before this tribunal, is a meaningless exercise until final calculations are made on or about the first week of November. The primary area of dispute is the deductions in the 2002-2003 budget for under-spending in funds 11 and 15, the exclusion of some non-discretionary expenditures and the calculation of the excess fund balance in the proposed 2003-2004 budget. Therefore, the following is an item-by-item review of the evidence presented by the petitioner for modification of the proposed budget.

Excess Fund Balance

The Department has determined that the excess fund balance in the estimated 2003-2004 Vineland budget is $8,817,650. The excess fund balance is an amount which the Department says should be carried over into the 2003-2004 budget as unspent funds or monies on hand that were not spend in the previous year. The petitioner argues that this is an overestimate and the Department's calculations in arriving at this figure does not take into account basic accounting principles for reserves and payables which must be considered. In particular, Vineland points to the audit of its books and records by certified public accountants hired by the New Jersey State Department of Treasury. This audit was performed by Menzoni-Preziosi and Company, P.A., and has been entered into evidence as R-13. Vineland specifically points to Schedule G (page DOE 001236) of that report which recognizes encumbrances and reserves in support of its position (P-4). That schedule lists an adjustment to the surplus balance of $3,714,380 made up of encumbrances (accounts payable) in the amount of $3,041,818, reserves for inventory in the amount of $518,986 and a capital reserve account in the amount of $153,576. Petitioner argues through its Assistant Superintendent for Business and Board Secretary, Kevin J. Franchetta, that the encumbrances and reserves are required to be deducted from the Department's proposed excess fund balance because they are comprised of real debt and monies which must be held in reserve. The Department takes the position that the number it has designated as the excess fund balance is merely an estimate and should not be of any concern, as it is anticipated that a new figure will be determined when the final budget is struck in the beginning of November, 2003. Joseph Kirchon, the Budget Manager for the Department who handled the Vineland request for supplemental aid, testified that the excess fund balance of 8.8 million dollars was an overestimate, but it was his understanding by way of a Department directive that in calculating the excess fund balance he was not to look at setoffs, even though that is customary in accounting practice. I **FIND** that in determining the excess fund balance, it is acceptable accounting practice as evidenced by the Menzoni-Preziosi audit report that encumbrances and reserves should be included in the calculation of that amount. I therefore **CONCLUDE** that the excess fund balance as determined by the respondent in the amount of $8,817,650 should be reduced by the existing encumbrances and reserves in the amount of $3,714,380 so that the appropriate excess fund balance should be $5,103,270.

Fund 11 and 15 Adjustments

The Department takes the position that $7,491,019 of the fund 11 and fund 15 accounts remain unspent in the 2002-2003 budget. It says that because it was unspent, it should be a deduction from that budget in calculating the base 2002-2003 state program budget (P-2). Vineland's position is that not all of those moneys should be deducted because some of those funds were for salaries and benefits for positions that were "approved and provided," but paid for from other sources. Quinten J. Phillips, Jr. the Executive Director of Personnel for the Vineland Board of Education testified that he was familiar with this issue and testified to the following facts. In the 2002-2003 school year there were an inordinate amount of leaves of absence without pay, retirements and resignations in its staff. Those positions were filled primarily with substitute teachers or temporary hires which gave the district a one-time cost savings in salaries and benefits. That cost savings amounted to $2,126,478, but would not be duplicated again in the 2003-2004 school year. In addition, there were four other positions that were previously approved and the associated services were provided through outside contractors, substitute teachers or by some other method. Those positions were for a supervisor, speech therapist, music teacher and bilingual math teacher. The total cost in salary and benefits for those positions is $237,204. He further testified the cost to petitioner in the 2002-2003 year to provide those services was approximately $500,000. Vineland is saying that the leaves, retirements, resignations and unfilled full-time positions were all approved and the services of those positions were provided in the 2002-2003 school year and, therefore, should not be taken away in the 2003-2004 school budget as they satisfy the "maintenance" standard. Consequently, Vineland is seeking to have the fund 11 and 15 deduction reduced by the cost of providing these services in the 2003-2004 school year. That cost would be $2,126,478 plus $237,204 in savings less the $500,000 in costs paid to provide those services. That amount is $1,863,652. *See* P-14.

The respondent argues that leaves, resignations, etc. occur every year and the cost savings are rightfully deducted from the fund 11 and 15 accounts. However, the Department presented no evidence to dispute the testimony of Mr. Phillips that this was an unusual event resulting in part from a higher than normal number of pregnancies. This is in spite of the fact that respondent had audits of petitioner's budgets for the past few years and could have shown that these amounts were not extraordinary if, in fact, they were not.

I **FIND** that the positions affected by the leaves of absence, retirements and resignations as well as the four unfilled full-time positions were approved in the 2002-2003 budget and the services associated with those positions were provided by the petitioner in various ways. Therefore, those positions meet the maintenance standard and must be deducted from the surplus in the fund 11 and 15 accounts, as they are not likely to be recurrent at least to the extent they were in the prior year. I **CONCLUDE** that the fund 11 and 15 accounts of $7,491,019 shall be reduced by $1,863,652 so that the proper deduction is $5,627,367. This then changes the base 2002-2003 state program budget to $134,256,430.

Non-Discretionary Additions

Vineland is seeking $2,555,473 in what it characterizes as mandated or non-discretionary expenses that were not considered by respondent. Those expenses are for transportation, the Second-Chance Program special education and the No Child Left Behind Program.

The Department has conceded that special education costs for out-of-district tuition, residential placements and Bayada nurses were omitted from the proposed 2003-2004 budget and should have been included. It has been stipulated that the sum of $1,370,581 be included in the proposed budget as a non-discretionary addition.

With respect to transportation issues, the petitioner is requesting $74,349 in additional funding which is comprised of $66,000 in salary and $8,349 in benefits for six bus drivers. Vineland's Coordinator of Transportation, Joseph D. Callavini, testified that his duties include the coordination of transporting 11,500 students within the district area of 64 square miles to their specific destinations in a timely manner. He stated that during the early part of the 2002-2003 school year, he found it necessary to develop six new routes and add 6 new drivers which he got from the substitute driver pool. Two drivers were needed because students were not arriving to their school early enough for them to participate in the petitioner's School Breakfast Program. Mandated by *N.J.S.A.* 18A:33-10 (P-7). One driver was needed because of an increase enrollment at one of the elementary schools and one driver was needed because of an increase in enrollment at the County Votec facility. He stated that without the additional buses the petitioner would have violated existing regulations by exceeding passenger capacity and that

would create obvious safety concerns. Two more drivers were needed to transport additional special education students. He further testified that the substitute drivers were paid from the substitute driver fund resulting in a negative balance in that fund at the end of last year. Both Mr. Callavini and Mr. Phillips testified because these six positions were needed on a full-time basis, they had to be filled with full-time employees and part-time drivers could not be continued to be drawn from the substitute list. To do otherwise would violate both the union contract between the petitioner and the drivers' union as well as the New Jersey Department of Personnel civil service rules.

The respondent takes the position that regardless of the reason why full-time drivers are needed this year, those positions did not exist last year and, therefore, are not permitted under the "maintenance" standard.

I **FIND** that petitioner is required to provide transportation for its students and it must do so in accordance with adopted regulations, existing union contracts and pursuant to State civil service rules and regulations. I further **FIND** that the need for six additional drivers has been demonstrated by a preponderance of evidence and the cost for same is reasonable. Therefore, I **CONCLUDE** that the addition of six bus drivers is an allowable non-discretionary item in accordance with the decision of the New Jersey Supreme Court and the sum of $74,349 should be added to the non-discretionary items list.

No Child Left Behind Textbooks, Supplies and Materials

Vineland believes it should receive an extra $1,000,000 in funding to implement its No Child Left Behind (NCLB) Program. Mrs. Marie M. Adair, the Assistant Superintendent of Curriculum and Instruction testified that the NCLB is a federally-mandated and partially federally-funded program which requires that certain basic standards in language arts and math be met by the year 2014. In addition, that program mandates that until the full standard is met, the districts must show annual improvement in test scores in those areas. Mrs. Adair testified that Vineland is not meeting all of its interim requirements, as improvements are not being continually made in test scores to satisfy the mandates of this program. She testified that in order to rectify that situation, petitioner instituted a number of pilot programs to determine the most

effective teaching aids so that continual improvement can be demonstrated in accordance with the program's mandates. She stated that she has developed an improvement plan for the petitioner district which she believes will meet the requirements of this program. That improvement plan will consist of new materials, additional staffing and a coordinated curriculum so that as the students progress in grade, they can build on the foundation that has been previously established for them. This is necessary, she says, to show adequate yearly progress which is a requirement of the NCLB Program. The pilot programs that were tested indicate positive results on the part of the participants. Mrs. Adair testified that in order to meet the annual improvements requirements of the NCLB Program it will be necessary for Vineland to implement the Harcourt Trophies in Waterford Language Arts Program and for mathematical improvements institute the Everyday Mathematics Program in grades K through 6 and the Corps Plus Math Program in grades, 9, 10 and 11, as a supplement for those students who need extra help. The total cost for instituting these three teaching systems would be $1,000,000.

The Department takes the position that instituting these teaching programs is clearly a change in the curriculum and one that was not previously "approved and provided" by the petitioner. Therefore, the Department argues, that these expenses are beyond the "maintenance" standard set by the Supreme Court. In addition, the Department states that in this year of severe budget crunching, the petitioner will have to make due with what was has been in existence and although improvements are desirable at this time there is not available funding to provide for them.

I **FIND** that the Department's position is correct, in that the implementation of new teaching devices reach beyond the "maintenance" standard of those devices that were previously approved and provided by the District. I therefore **DENY** Vineland's request for any funding to modify its No Child Left Behind Program.

Second Chance Program

Vineland is requesting $110,543 in additional funding for its Second Chance Program. Dr. Keith Figgs, the Assistant Superintendent for Administration, testified on behalf of Vineland that the petitioner's Second Chance Program is part of the mandated Required Programs for Secondary Schools which he says the Department requires be in place. Dr. Figgs testified that *N.J.A.C.* 6A:24-1.4(j) states: "The Board shall implement its department-approved plan providing for the establishment of an alternative middle school and high school, or other comparable program, to meet the needs of students who are disaffected or disruptive or who have not been successful in traditional learning environments." Dr. Figgs stated that Vineland has an alternative program called its Second Chance Program for those students who don't deal well in the standard high school setting. The program was established some years ago and was approved by the State Department of Education. It called for a seven-hour standard education day at the same time as the normal high school program ran, but at a separate facility. The program was instituted but because the separate facility was not approved by the Department, the petitioner unilaterally modified it to become an after-school program running from 2 p.m. to 7 p.m. This creates obvious difficulties, in that it is very difficult to find instructors to work those hours and it eliminated participants of the program from partaking in extracurricular activities and it allowed the students who are most in need to be unsupervised for the better part of the day. Because of new construction, students in one of the district's buildings were able to be moved to a section of another building and their vacation allowed the Second Chance Program to be run in that vacated facility. The program could then become a seven-hour-a-day program like the regular high school and run during the day simultaneously with the regular high school programs as was previously approved by the Department. Dr. Figgs testified Vineland's after-school program that was in existence in the 2002-2003 school year does not comply with the program that was approved by the Department. Using the new facility, however, will bring the program into compliance by making it a full-day matriculated program. Currently, students who attend the program full-time can only earn 30 credits a year and the modified program will allow students to earn 35 credits a year. This will allow them to graduate with the required 140 credits in 4 years. Dr. Figgs testified that to bring the program from where it currently is to what was previously approved would require an art teacher whose salaries and benefits will total $52,267, a full-time secretary whose salary and benefits will total $28,674 and a custodian whose salary and benefits

will total $29,602. The total for these positions would be $110,543. Dr. Figgs further testified that modifying the Second Chance Program from an after-school program to a full-day program is most important for the students who need it the most. It will allow the disaffected students to assimilate into the student population, participate in extracurricular activities, remove them from being unsupervised until 2 p.m. and provide them with a matriculated program so that they can either enter the regular high school program or graduate in a timely manner or do both.

The Department takes the position that although these are worthy goals, the regulations do not provide that the program has to be in a separate facility or exist for any given number of hours. Nor does it say that it cannot be an after-school program. The Department takes the position that any increase in funding for this program is violative of the "maintenance" standard, in that it is an expansion of the existing program and not the same as the one that was previously provided.

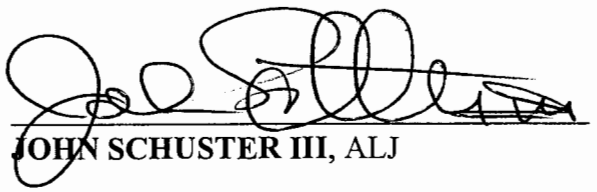
I **FIND** that there is a substantial difference in value to the students affected and society in general between an alternative program that provides the bare minimum to its participants and one which is likely to make a substantial impact on the educational progress of those students. I further **FIND** that the aforesaid regulation implies that the implementation of a department-approved plan means an effective department-approved plan. In this case, the Department approved a full-day program and Vineland would have same but for the fact that the facility it proposed was not satisfactory to the Department. As an interim measure, Vineland then modified its program to an after-school program which has obvious disadvantages. Now Vineland is requesting that its Second Chance Program previously approved and provided be modified to a minor extent so that it become an effective department-approved plan to satisfy the needs of the disaffected and disruptive students within its district. I **CONCLUDE** that this minor adjustment in implementing the previously Department-approved plan does not violate the Supreme Court "maintenance" standard since providing an effective plan is mandated by regulation and there is no mandate that the "maintenance" standard required total inflexibility when implementing its provisions.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to 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.

September 25, 2003
DATE



JOHN SCHUSTER III, ALJ

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

9-25-03
DATE

E-mailed Initial Decision to the parties on:

9-25-03
DATE

jh

WITNESSES

For the petitioner:

Kevin J. Franchetta

Joseph P. Kirchon

Marie M. Adair

Joseph D. Callavini

Quinten J. Phillips, Jr.

Dr. Keith Figgs

Edward J. Rochetti

Dr. Clarence C. Hoover, III

For the respondent:

Joseph P. Kirchon

EXHIBITS

For the petitioner:

P-1 State of New Jersey, Determination Letter, August 27, 2003

P-2 DOE calculation of Supplemental Aid

P-3 Petitioner's calculations of Supplemental Aid

P-4 Auditors Schedule G 2003 Projected Surplus

P-5 Synopsis of petitioner's calculations for excess fund balance

P-6 No Child Left Behind packet

P-7 Statute 18A:33-9 and 18A:33-10

P-8 Summary of need for six new bus drivers

P-9 Summary of non-discretionary additions

P-10 Petitioner's adjusted 2003-2004 Supplemental Funding calculations

P-11 Resignations for 2002-2003 year

P-12 Retirements 2002-2003 year

P-13 Leave of Absence without Pay 2002-2003 year

P-14 Petitioner's summary of unexpended funds

P-15 *N.J.A.C.* 6A:24-1.4

P-16 Department (Mr. Kirchon) Worksheet for CPI

For the respondent:

R-1 Revised 2003-2004 Budget for Vineland Board of Education, March 17, 2003

R-4 2002-2003 Approved Budget for Vineland Board of Education, July 31, 2002

R-13 Audit Report of Menzoni-Preziosi and Company, CPA, August 18, 2003

Joint exhibit:

J-1 Supporting documents 7B of District Budget

OAL DKT. NO. EDU 4156-03
AGENCY DKT. NO. 190-6/03

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 local "Abbott" District's appeal of the Department of Education's (Department) decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Both the Vineland School District's (District) exceptions and the Department's exceptions were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.[1]

Upon careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge (ALJ), that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also,*

[1]In its exceptions, the Department points out that the procedural history set forth in the Initial Decision does not include an essential component to this matter in that there is no reference to the August 27, 2003 determination letter in which the Department issued the District's preliminary maintenance discretionary Additional *Abbott v. Burke* State Aid for the 2003-04 school year. (Department's Exceptions at 2-3) In its exceptions, the District also includes a copy of a letter to the ALJ in which it points out that the District is located in Cumberland County, rather than Gloucester County, and that the Initial Decision makes no mention of the District's appeal of the August 27, 2003 determination letter. (Letter of September 30, 2003 to ALJ Schuster submitted with the District's Exceptions)

Pascucci v. Vagott, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). However, to the extent that he may appropriately do so in an administrative proceeding, the Commissioner opines that the regulation at issue is fully consistent with the language and intent of the Court. Thus, like the ALJ, the Commissioner finds the regulatory definition controlling herein, with no conflict between it and the underlying Court order. Accordingly, the Department's application of such regulatory definition in its review and approval of the District's 2003-04 budget is appropriate.

Moreover, upon a thorough review of the record and the parties' exceptions, the Commissioner concurs with the ALJ's determination denying the District's request for funding to modify its No Child Left Behind Program (NCLB) in that the District's proposed NCLB improvement plan, which involves the addition of new materials and additional staffing, is beyond the "maintenance" standard set forth in *N.J.A.C.* 6A:10-1.2. The Commissioner also concurs that the addition of six bus drivers at a cost of $74,349 is an allowable, nondiscretionary item in that the District is required to provide for the transportation of its students in accordance with regulations, union contracts and State civil service regulations. Additionally, the Commissioner points out that the parties stipulated at hearing that the sum of $1,370,581 is to be included in the District's proposed budget as a nondiscretionary addition for "out-of district tuition, residential placements and Bayada nurses." (Initial Decision at 6 and Letter on Behalf of the Department of September 22, 2003) With respect to these issues, therefore, the Commissioner accepts and adopts the ALJ's factual findings and determines that his analysis and legal conclusions are consistent with the Supreme Court's Order of July 23, 2003, as well as the Department's regulatory amendments adopted on August 22, 2003.

However, the Commissioner does not concur with the ALJ's finding that the Department erred in calculating the District's projected general fund balance by including encumbered funds in the amount of $3,041,818. The Commissioner believes that the ALJ's

analysis reflects a fundamental misunderstanding of the differentiation between the terms "encumbrances" and "accounts payable." In the context of close out procedures for the 2002-03 budget year, an encumbrance is an accounting tool that permits a school district to set aside funds for purchase orders that were issued during the 2002-03 school year for goods or services that were *not* received as of June 30, 2003. Unpaid purchase orders reserved as encumbrances on the June 30 general fund balance sheet, therefore, reflect liabilities to be honored in the next fiscal year for goods and services not received by June 30. For goods and services received and/or provided by June 30, 2003, the encumbrances become accounts payable on the general fund balance sheet. Thus, encumbrances should not be deducted from a district's fund balance as of June 30, 2003, because the underlying goods and services *were not actually received* in the 2002-03 school year. *See N.J.A.C.* 6A:10-1.2, defining a maintenance budget as "a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions***."

The Commissioner points out that, in the matter entitled *Board of Education of the City of Burlington v. New Jersey State Department of Education*, Commissioner Decision No. 581-03, decided October 20, 2003, Keith Costello, Budget Manager/Examiner for the Department of Education, Office of Abbott Implementation, testified that, by memo dated September 16, 2003 to all school districts, Assistant Commissioner Richard Rosenberg addressed the procedures to be followed for open purchase orders and encumbrances on the school district's books as of June 30. The September 16, 2003 memo states, in pertinent part:

> Open purchase orders at June 30, 200X should be classified into the following two categories for review and reclassification:
>
> 1. Category one represents purchase orders for which the goods have been received or the services have been rendered at June 30th that have not been paid. These purchase orders must be expensed in the current audit period, the related encumbrances reversed, and a liability (accounts payable) established. If the invoice has not been received the amount

must be estimated. In accordance with GAAP, an expenditure is recorded when goods are received or services are rendered.

2. Category two represents purchase orders which will be honored in the subsequent year. These purchase orders will be rolled over into the next fiscal year and will be shown in the June 30th general fund balance sheet as a reserve for encumbrances. Per NCGA Statement 1, paragraph 91 "encumbrances outstanding at year-end represent the estimated amount of the expenditures ultimately to result *if unperformed contracts in process at year-end are completed. Encumbrances outstanding at year-end do not constitute expenditures or liabilities."* (emphasis in text) (Exhibit R-1, in evidence) (*Board of Education of the City of Burlington v. New Jersey State Department of Education*, slip opinion at 17)

Accordingly, category one purchase orders and the related encumbrances are to be considered 2002-03 fiscal year expenditures in applying *N.J.A.C.* 6A:10-1.2, but category two purchase orders are considered expenditures in the 2003-04 fiscal year and, thus, are not to be included in development of a "maintenance budget" for the 2003-04 school year pursuant to *N.J.A.C.* 6A:10-1.2.

Assuming the District properly complied with the procedures set forth in the above-mentioned Assistant Commissioner Richard Rosenberg's letter of September 16, 2003, encumbrances for goods and services received by June 30, 2003 were to be reversed and a liability (accounts payable) established. The District's encumbrances outstanding at year-end, therefore, represent the estimated amount of the expenditures ultimately to result if unperformed contracts in process at year-end are completed, and, thus, encumbrances outstanding at year-end do not constitute expenditures or liabilities. In its exceptions, the Department avers that:

> Petitioner's Assistant Superintendent for Business and Board Secretary, Kevin J. Franchetta, testified that the projected encumbrance amount is an estimate and that the true amount will not be determined until the [Comprehensive Annual Financial Report] CAFR is issued. In fact, Mr. Franchetta testified that it is

likely that the projected encumbrance amount will be reduced once the CAFR is issued.[2] (Department's Exceptions at 4)

Although there is no dispute that expenditures for goods and/or services received by June 30, 2003 should be deducted from the District's fund balance, based on Mr. Franchetta's statement that the encumbrance amount is an estimate and the proofs brought to *this* record,[3] the Commissioner is unable to determine which, if any, of the District's encumbrances have become accounts payable by virtue of the receipt of the encumbered goods or services on or before June 30, 2003 so as to be considered 2002-03 expenditures. The Commissioner, therefore, concludes that it was entirely appropriate and consistent with general accounting practices, the procedures provided to school districts in Assistant Commissioner Richard Rosenberg's letter of September 16, 2003 for the processing of year-end purchase orders, and *N.J.A.C.* 6A:23-2.2 and *N.J.A.C.* 6A:10-1.2 to include the encumbered funds in the fund balance calculation. Any adjustments to be made will be based on updated information with respect to the June 30, 2003 encumbrances and accounts payable for the 2002-03 school budget year in the course of the review of the CAFR scheduled to begin in November 2003.

The Commissioner also finds that the District, which has the burden of proof in this matter, failed to demonstrate on the record that inventory reserves in the amount of $518,986 and $153,576 in the capital reserve account[4] represent actual District obligations. The Commissioner, therefore, concludes that the Department appropriately included these reserve funds in the fund balance calculation. As with the encumbrances, any adjustments to be made will be based on updated information in the course of reviewing the CAFR in November 2003.

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[2] The Commissioner notes that the District did not file a reply to these exceptions and, thus, apparently does not dispute the Department's representation of Mr. Franchetta's testimony.

[3] The Commissioner acknowledges that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the CAFR until November 2003.

[4] Although districts are required to establish a capital reserve account, there is no fund balance requirement. *See N.J.A.C.* 6A:26-9.1.

As a result of the Commissioner's conclusions with respect to the appropriateness of the Department's inclusion of encumbrances and reserves in its fund balance calculation, the Department's determination that the District's excess fund balance is $8,817,650 remains unaltered, subject to adjustment following the CAFR.

The Commissioner also does not agree with the ALJ's conclusion that, since District positions affected by leaves of absences, retirements and resignations, as well as four unfilled positions, were approved positions and the services were provided in the 2002-03 budget year, although through the use of substitutes and temporary hires, those positions meet the maintenance standard so that the District's fund 11 and 15 accounts should be reduced by $1,863,652, which increases the District's base 2002-03 program budget from 132,392,778 to $134,256,430. (Initial Decision at 5-6) The Commissioner finds that the ALJ's conclusion is inconsistent with the Court's directive and the maintenance standard which required the Department to consider only *actual* expenditures stemming from goods and services provided in 2002-03 so as to establish a maintenance budget for 2003-04.

Notwithstanding the District's assertion at hearing that, in the 2002-03 school year there were an inordinate number of leaves of absences without pay, retirements, resignations and a higher than normal number of pregnancies which resulted in one-time costs savings in salaries and benefits, the Commissioner points out that teachers take leaves of absences for pregnancies or other reasons every year and that resignations and retirements[5] are also a common occurrence every year. Moreover, although the District provided a lengthy list of individuals who took leaves of absence, retired or resigned during the 2002-03 school year, the District did not bring information to the record to substantiate its claim that the numbers in these various categories and the cost savings resulting therefrom substantially differed from previous

[5] The Commissioner notes that, with the advent of the "baby boomers" reaching retirement age, the number of retirements may actually increase in the 2003-04 budget year.

years, nor did it explain how it reached the conclusion that the number of pregnancies experienced by the District during 2002-03 could not be expected to continue into the 2003-04 school year. The ALJ states that his conclusions are based, in part, on the fact that "the Department presented no evidence to dispute the testimony of Mr. Phillips that this was an unusual event resulting in part from a higher than normal number of pregnancies." (Initial Decision at 5) However, pursuant to *N.J.A.C.* 6A:24-9.6(c), the District bears the burden of proving that the Department's calculations were unreasonable or otherwise improper and the Commissioner finds that the District failed to meet its burden.

In this regard, the Commissioner emphasizes that the Department's charge in this matter was to determine the level of 2003-04 funding that would enable the district to continue in a "maintenance" mode, that is, to implement in 2003-04 the programs, services and positions provided in 2002-03. While it is true that dollar amounts paid out prior to June 30, 2003 will not necessarily reflect the actual costs of the positions provided that year, nor can they perfectly predict the actual cost of providing them in the next, it is *equally* true that originally budgeted amounts and other similar projections are no less imprecise. Thus, in the Commissioner's view, a methodology which preliminarily establishes the 2003-04 cost of providing funding for positions by determining, as nearly as possible without benefit of audit, the actual approved cost of providing them in 2002-2003 and then allowing for reasonable, nondiscretionary adjustments, is a uniform, fair and rational method for estimating future expenditures, such as the costs associated with salaries and benefits, which cannot otherwise be determined with any degree of precision. To the extent that results may be imperfect, even after adjustment following audit, *N.J.A.C.* 6A: 10-3.1(g) provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant. Thus, the Commissioner wholly endorses the Department's fundamental methodology and determines that the Department

acted appropriately in deducting $1,863,652 from the 2002-03 base budget so as to establish the District's 2003-04 maintenance budget.

Finally, turning to the District's request for $110,543 in additional funding for its Second Chance Program, the Commissioner concludes that any increase for this program to expand its hours of operation, notwithstanding the merits of doing so, does not comport with the maintenance budget standard set forth in *N.J.A.C.* 6A:10-1.2. In so determining, the Commissioner points out his disagreement with the ALJ's conclusion that "the implementation of a department-approved plan means an *effective* department-approved plan" (emphasis in text) (Initial Decision at 10), noting that the District, which has the burden in this matter, did not present any evidence that the existing Second Chance Program, which was approved by the Department as a standard education day of seven hours but has been in existence for some time as a five-hour program, has been ineffective. The District, instead, claims that the students in the program would be better served by an expanded program. The Commissioner, therefore, concludes that the Department was correct in rejecting the $110,543 request in additional funding for the Second Chance Program.

Accordingly, the Commissioner adopts in part and rejects in part the ALJ's findings and conclusions in the Initial Decision as set forth herein.[6]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[6] 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.

578-03

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court.

The ALJ found that the Department appropriately applied the duly promulgated rule implementing the Court's order for "maintenance," and that, accordingly, programs, services and positions must have been actually provided or filled in 2002-03 in order to be aided for 2003-04. On this basis, the ALJ rejected District claims for inclusion of approved and budgeted, but unfilled, 2002-03 positions, and textbook purchases approved as part of the District's long-range curriculum plan but eliminated from the 2002-03 budget. The ALJ also found, however, that, under the Court-ordered exception for "non-discretionary expenses," the Department erred in excluding certain expenses associated with salary increases and contractual bonuses.

The Commissioner concurred with the ALJ's general conclusions, as well as his findings with respect to the unfilled staff positions and textbooks. However, the Commissioner rejected the Board's claims for salary increases over 5% and monies to cover employee/retiree bonuses for which no evidence of contractual or other obligation was brought to the record.

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.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 05495-03

Agency Dkt. No. 192-6/03

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON,

Petitioners,

v.

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,

Respondent

Ronald C. Hunt, Esq., for petitioner
(Hunt, Hamlin & Ridley, attorneys)

Francine Kaplan, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 10, 2003 Decided: September 24, 2003

BEFORE **BARRY N. FRANK**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Irvington Board of Education is one of the twenty-eight (28) "special needs" school districts. It serves children in financially disadvantaged communities and has been designated as Abbott districts. Accordingly, pursuant

to an Order of the New Jersey Supreme Court and pursuant to *Abbott v. Burke* 153 *N.J.* 480 (1998) (*Abbott* V), the State Department of Education ("DOE) has been ordered to increase funding to these districts so that the ability to achieve and adhere to the core curriculum contents standards.

On March 24, 2003, the Commissioner of Education moved before the New Jersey Supreme Court for relief from some of the mandates of *Abbott v. Burke*, 153 *N.J.* 480 (1998) (*Abbott* V). Essentially, the relief sought for the fiscal 2003-2004 school year which was processed was a request that a maintenance standard be adhered to for the coming year. Essentially, this maintenance standard means that state aid eliminate in the fiscal 2003-2004 school year support for the programs, positions, services and other items that were not in the district's approval budget for fiscal year 2002-2003.

The motion was responded to by the Education Law Center which also cross-moved requesting an expedited schedule with regard to the review and approval of the *Abbott* school district budgets and the appeals that arose from said budgetary process. Various parties were ordered into mediation before the Hon. Philips Carchman, J.A.D. All issues were resolved during this mediation with the exception of the issues revolving around the fiscal year 2003-2004 budgetary process.

On May 30, 2003, the Department of Education rendered decisions in all of the *Abbott* budgets using the maintenance standard and requested these decisions be approved by the court. Twenty-three districts including the petitioner, Irvington School District, filed appeals from those decisions and ultimately the appeals were transmitted to the Office of Administrative Law ("OAL").

An issue essential to all of the appeals was that of the proper standard for approving the 2003-2004 fiscal year budget.

The New Jersey Supreme Court on June 24, 2003, rendered an Order adopting the terms of the mediation agreement and scheduled oral argument for July 10, 2003 on the remaining issues as to whether or not the maintenance issue would be applied to the fiscal year 2003-2004 budget. On July 23, 2003, the Supreme Court rendered a final Order served upon the Commissioner, granting the application for the *Abbott* file remedies as applied to the 2003-2004 fiscal year budgetary process. In that Order, the New Jersey Supreme Court stated:

> The DOE shall have the authority to treat the 2003-2004 school fiscal year as maintenance year for purposes of calculating additional *Abbott v. Burke* state aide for the *Abbott* districts. During 2003-2004, K through 12 programs provided for in the 2002-2003 school year will be continued, subject to continuance and conditions set forth in this Order.
>
> (July 23 Order at p. 4)

The New Jersey Supreme Court Order went on to state:

> A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in nondiscretionary expenditures. Examples of nondiscretionary expenditures are increases in contracted in salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or any programs, positions, or services, except in respect of paragraph 2c of the court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision
>
> (July 23 Order at p. 5)

The New Jersey Supreme Court also ordered that:

> For purposes of calculating additional *Abbott v. Burke* state aid and in furtherance of its pre-existing duty to relent administrative

> controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the district's noninstructional programs.
>
> (July 23 Order at pp. 5-6)

In response to the New Jersey Supreme Court's Order, the Commissioner created regulations pursuant to an Order of August 22, 2003 and created *N.J.A.C.* 6A:10-1.2 which states and defines the maintenance budget for the 2003-2004 school year as follows:

> For the 2003-2004 school year, a budget funded at levels such as the district can implement 2002-2003 approved and provided programs, services and positions and includes documented increases and nondiscretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of nondiscretionary expenditures or increases in contracted salaries, health benefits and special education tuition. Maintenance does not include the restoration of programs, positions or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's Order of June 24, 2003 in *Abbott v Burke*. Maintenance also does not include nonrecurring 2002-2003 expenditures. (*N.J.A.C.* 6A:10-1.2)

Ultimately on August 27, 2003, the DOE forwarded a letter to the Irvington school district reducing its 2003-2004 budget from $137,639,687.00 to $118,292,283.36. The district appealed this determination and said appeal was before the trial court which reduced it to central issues, namely whether or not all instructional and noninstructional staff positions which had been budgeted and fully approved in the 2002-2003 school budget but not filled during that school year but should be rebudgeted into the 2003-2004 school year under the definition of a maintenance standard.

The secondary issue is that of whether or not the district's long range curriculum for 2003-2004 which essentially consists of funding for textbooks constitute part of the maintenance budget even though no textbooks were purchased during the 2002-2003 school year under this program.

Hearings on the above stated issues were conducted as a result of the appeal of the school district pursuant to *N.J.S.A.* 18A:7f-3 and in accordance with *N.J.A.C.* 6A:10-1.1 *et seq.* on August 29, 2003 and September 3, 2003. Subsequent to these two hearing dates, the record was held open for post-hearing submissions and was ultimately closed with the receipt of these post-hearing submissions on September 10, 2003.

TESTIMONY

Respondent presented its case first putting on its witness, Mr. Michael Arizechi who is the budget manager for the DOE and is charged with reviewing among other district budgets those of the petitioner.

Mr. Arizechi went through the various numbers utilized in arriving at the $118,292,283.36 and presented various Exhibits explaining his calculations. Mr. Arizechi testified that he used certain set percentages to standardly reduce certain requests made by petitioner and that these percentages were applied to monies actually spent by petitioner's school board as opposed to monies that were actually budgeted and approved in the 2002-2003 school year. Mr. Arizechi further testified and cross-examination confirmed that if monies had been budgeted and not expended for 2002-2003 school year, as far as Mr. Arizechi was concerned, the position was taken that monies not spent constituted a surplus. Any monies not expended in the previous budgetary year including monies that had been budgeted and approved applicable to the positions that were not filled or only partially filled, then any funds not spent and allocated to these positions were seen as surplus and as far as Mr. Arizechi was concerned would not be deemed to be included in the maintenance budget for the following school year. Essentially, this witness testified that such numbers were reduced on unexpended funds deemed surplus and this would also include the five year textbook program which has been ongoing since 1999 but apparently showed no expenditures made in 2002-2003 and therefore he would not honor the request

for full funding of same for the 2003-2004 budget as he deemed this not to be a maintenance item.

At the completion of respondent's case, petitioner pled his case and the first witness to testify was Victor R. Demming who was employed by the Irvington Board of Education as an assistant supervisor for business and was also the Board's secretary. This witness apparently handles all fiscal issues for the Board of Education and develops its budgets and so forth.

Mr. Demming testified as to the difficulties the school district was having due to the reduced budget provided for by the DOE. More specifically, Mr. Demming testified that administrative and teaching positions that had been fully funded and approved in the 2002-2003 school year were not provided for in the 2003-2004 school year. Mr. Demming testified that apparently the reason this was not done by the DOE was that certain positions could not be filled during the 2002-2003 school year because the appropriate individuals could not be found. Mr. Demming further testified certain individuals quit in the middle of the year mandating temporary replacements and that in those situations where a position had not been filled, certain temporary individuals were hired; part-time individuals were hired to take up the slack. In any event, Mr. Demming introduced into evidence Exhibits P-1A – E which list in detail the various professional and nonprofessional positions for the 2002-2003 school year and indicated those that had been filled during that year, the salary paid and any differential in said salary.

Mr. Demming testified that the need for the various positions that had been fully approved in 2002-2003 school year had not changed and indeed were more acute for the upcoming 2003-2004 school year. Mr. Demming testified that he felt that under the maintenance standard, since these positions had been fully funded for the 2002-2003 school year, they should once again be fully funded in the 2003-2004 school year. Therefore, he was requesting all funds that had been deducted as a result of monies not spent for these positions in the

approved new budget be fully restored. Mr. Demming further testified that the reduction of the budget had directly impacted the school district's ability to hire for the coming school year and fill its vacancies as the money is not there.

Mr. Demming also testified with regard to the textbooks that needed to be purchased by the district. Mr. Demming testified that the district has a five year program or plan to put into effect to revise the curriculum and purchase textbooks. This plan began in 1999 and was to be completed by 2004. He indicated that the acquisition of textbooks was designed to meet the "curriculum" standards and that the Irvington school district is level II state monitoring district and in order to get out of this position, certain improvements had been made including upgrading the curriculum and of course included in that upgrading would be the purchase of new textbooks needed to replace outdated textbooks or needed to be used in appropriate upgrading of school programs for the benefit of the students. Mr. Demming testified that under this five year program purchases were not made in 2002-2003 because the budget approved during that year precluded such purchases but they have been budgeted by the school district before being reduced by the DOE and excluded. Mr. Demming asserted that in his opinion such purchases given the five year program that was in effect were covered by the maintenance budget and should be restored in the 2003-2004 school year.

I **FIND** the testimony of both witnesses involved to be fully credible and believable. The issue is not the credibility of the testimony of the witnesses but rather the monetary amounts requested by the school district and denied by the Department of Education. Appropriate funding according to the maintenance standards is defined by the New Jersey Supreme Court in which regulations promulgated by the DOE are set forth.

DISCUSSION

Petitioner is arguing essentially two issues. The Irvington school district submits that only instructional and noninstructional staff positions which were budgeted and approved in the 2002-2003 school budget, hence, fully funded should once again be fully funded under the maintenance standard for the 2003-2004 school year even if those positions were unfilled or were vacant or were somehow abandoned by individuals leaving the school district during the 2002-2003 school year. Petitioner quotes the language of the New Jersey Supreme Court in the Order dated July 23, 2003 relating to the *Abbott* cases which states in paragraph 2 as follows:

> The Statewide aggregate amount of additional *Abbott v. Burke* state aid shall be presumptively calculated as the total amount of additional *Abbott v. Burke* state aid approved for *Abbott* district for fiscal year 2002-2003, subject to adjustments as required for maintenance budget. The maintenance budget shall mean that the district will be funded at the level such that the district can implement current approved programs, services and positions and therefore includes documented increases in nondiscretionary expenditures or increases in contracted salaries, health benefits and special education tuition . . .(emphasis added)
>
> *See Abbott* Order of July 23, 2003, pp. 4-5. Also *See* pp. 4-5 of Briefs submitted by petitioner

Petitioner argues that the language set forth in the New Jersey Supreme Court's case is clear. Petitioner argues that the phrase "current approved programs" means all programs that were fully funded during the 2002-2003 school year. If that interpretation is accepted, then even though positions were not filled, those positions were provided for and fully budgeted and agreed upon, the same amount of money should be fully restored and reimplemented under a maintenance standard during the 2003-2004 school year.

This issue was addressed by the Hon. Joseph F. Martone in *Neptune Twp. BOE v. State of New Jersey*, Dep't. of Educ., OAL Dkt. No. EDU 4096-03 (decided September 11, 2003). In this case, Judge Martone wrestled with the issue of whether or not the New Jersey Supreme Court wrote a definition of maintenance standard which conflicted with the rules promulgated by the DOE under the New Jersey Supreme Court's Order, namely, *N.J.A.C.* 6A:10-1.2 *et. seq.* Judge Martone had to deal with how one interpreted the DOE regulations in the New Jersey Supreme Court's Order with regard to how the term "current" approved programs are defined. If petitioner's interpretation is accepted, then obviously any program, services, or positions that were fully funded and approved in 2002-2003 school year would be deemed maintenance programs and would have to be fully funded and approved for the 2003-2004 school year even though those positions were not filled. Judge Martone, however, in analyzing the New Jersey Supreme Court's language and the language set forth in the DOE regulation concluded that "use of the adjective 'current' rather than the adverb 'currently' implies that the program, services, and positions must be in existence in order to be funded." In other words, if as was the case in the 2002-2003 school budget, the positions were not filled or remained vacant in the 2003-2004 school year, these positions would effectively be no longer in existence as they are not being implemented. This being the case, then the DOE is quite correct in reducing the Irvington district's school budget by the unspent amount and then adding on their just percentage to arrive at the maintenance budget which is standard for the 2003-2004 school year.

Judge Martone in his decision at p. 9 also goes on to state:

> The language ultimately adopted by the Supreme Court to define "maintenance budget" is also reflected in the language contained in the DOE's proposal which is attached to the report of the *Abbott* mediation (April 29, 2003). The language proposed by the DOE is as follows: maintenance means that a district will be funded at a level that will enable it to **continue implementing the current approved program, services and positions and therefore includes actual documenting increases and nondiscretionary expenditures**. (emphasis added)

Judge Martone in reviewing the above cited language concludes that under the maintenance standard any programs that had been approved along with any services and positions that had been approved had to be currently in existence for their funding to be continued under the maintenance standard. I fully concur with Judge Martone and believe that based on that definition, petitioner's argument cannot stand. If positions were not filled during the 2002-2003 school year, any funds not expended do become surplus and were appropriately subtracted from the 2003-2004 school budget with a percentage then added on to make up for the increased funding that might be required. There are certainly mechanisms available to the school district for emergency funding should they deem it necessary with regard to staffing needs.

The school district also is seeking to recover monies that were deducted from its budget arguably for "negotiated contract and salary increases for several of the district's bargaining units as well as payments through retirees, contracts and bonuses for transportation employees." Specifically, funds which were earmarked for the district's paraprofessional and secretary's bargaining units representing salary increases for 2002-2003 were reduced by the Department's "adjustments" of budget. As per the court's order of July 23, 2003, maintenance budget included . . . "examples of nondiscretionary expenditures or increases in contract and salaries." (*See* p. 6 of petitioner's Brief).

The issues regarding contractual increases for ongoing employees as well as contracted bonuses to retirees and a contract bonus for transportation employees is a totally different issue. In this instance, the petitioner is seeking to recover monies needed for salary increases for paraprofessional and secretaries who are currently employed as well as contracted bonuses for members of the district's transportation unit. It is also the amount of monies that are contractually due retirees. These monies involve vacation, sick time and personal days. Petitioner submits that all of these payments are mandatory and protected by the

maintenance budget standard and analysis. The sum of monies involved here is a total of $300,000.00 with regard to salary increases for the paraprofessionals and secretaries and $295,118.00 in outstanding payments for the retirees.

I totally concur with petitioner's analysis and find it 100% in line with the Supreme Court's July 23, 2003 Order. Under that Order and the maintenance standard defined by said Order, and under the DOE's emergency regulations, the total of $595,118.00 involved was improperly subtracted from the budget. Salary increases and outstanding essentially contracted payments due retirees is mandatory and not discretionary. The result is the figures and mandatory payments are applicable to petitioner's said existing budget for the 2002-2003 school year as well as outstanding obligations that were in existence in 2002-2003 school year. Consequently, these items under the maintenance standard analysis as payable in the new budget, namely, the 2003-2004 school year budget and should not have been deducted from that budget. Therefore, I **FIND** and **CONCLUDE** that the $300,000.00 representing salary increases for the paraprofessionals and secretaries concurrently employed by the school district must be returned to 2003-2004 school year budget under the maintenance standard analysis. I further **CONCLUDE** that the $295,118.00 in outstanding payments due to retirees is contractual in nature, existed during the 2002-2003 school year budget and must be fully restored to the 2003-2004 school year budget under the maintenance standard.

Petitioner argues that it has been managing money in the long range 5 year curriculum program which commenced in 1999 and stayed until 2004. Petitioner argues that the program itself should be viewed as a "current" program in 2002-2003 for purposes of the maintenance budget analysis. In accordance with Exhibit P-3, petitioner is seeking $637,000.00 for the textbooks that were purchased and included in the requested 2003-2004 school year budget.

Petitioner's witness testified that these textbooks are critical items and are needed for the school district to meet the state's core curriculum content standard. Petitioner also argues that in a disadvantaged community, the need for improved textbooks and replaced updated textbooks is fundamental to the operation of any school district, especially those school districts in the disadvantaged communities that are meant to be served and benefited by the *Abbott* decisions.

The issue is then whether or not these textbooks fall within the maintenance standard. Unfortunately, I must **CONCLUDE** that they do not. Petitioner admits in the testimony before me that the request for these items were eliminated from the 2002-2003 agreed upon school budget and was not provided for in that budget. Under any definition of maintenance standard, the fact that the textbooks were excluded from the 2002-2003 school year budget means that they cannot be included in the maintenance standard definition during the 2003-2004 school year. Clearly, there are other mechanisms that the school district can pursue and other applications that the school district can make should the need for these books be deemed critical for the operation of the school district itself. Therefore, I must **CONCLUDE** that funding for the textbooks do not fall within the maintenance standards as defined by the July 23, 2003 Order of the New Jersey Supreme Court and education regulations for $637,000.00 sought for textbooks in the 2003-2004 school year and the Department of Education properly removed them from the 2003-2004 proposed budget as not adhering to the maintenance standard. That is not to say that there might not be any other emergency programs or applications that can be made to recover this funding but this court has no authority to do so under maintenance standard and rules and definitions handed down to it by the New Jersey Supreme Court and the DOE regulations.

Based upon my review of the foregoing, I in summary **CONCLUDE** that the DOE's figures provided as the budgetary amounts for the Irvington school

district are appropriate in all respects with the exception of the $300,000.00 which was deducted for salary increases for the paraprofessionals and secretaries which should be restored with the DOE district's budget together with the $295,118.00 in outstanding payments to retirees which also should be restored to the district's budget as both amounts are contractual and under the maintenance standard should be included in the 2003-2004 school year budget and were improperly subtracted from same.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the maintenance standard set forth in the July 23, 2003 Order of the New Jersey Supreme Court and as defined by the Department of Education regulations set forth in *N.J.A.C.* 6A:10-1.2 *et seq.*, to be properly followed mandates that the $300,000.00 pertaining to salary increases for paraprofessionals and secretaries as well as contracted bonuses for the districts be restored to the 2003-2004 budget and that in addition, it is further **ORDERED** that the $295,118.00 in outstanding payments contractually due retirees which was removed by the DOE and reduced pertaining to vacation and sick time which is also contractual in nature should be fully restored and placed back into the 2003-2004 school year budget as maintenance items included under the maintenance standard.

It is further **ORDERED** that the budget handed down and returned to the Irvington Board of Education school district should remain intact subject to the above described modifications.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to 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.

September 24, 2003
DATE

BARRY M. FRANK, ALJ

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

9/24/03
DATE

E-mailed Initial Decision to the parties on:
(and faxed to Ronald Hunt, Esq.)

9/24/03
DATE

APPENDIX

Witnesses:

For Petitioner

Victor R. Demming
Michael J. Steele

For Respondent

Michael Arizechi

Exhibits:

Petitioner

P-1 Irvington BOE Retail Appropriations Budget 2003-2004

P-1
a-b Irvington BOE Selected Salary Budget 2003-2004

P-1c Irving BOE Analysis of State Program Spending

P-1d Irvington BOE Analysis of State Program Spending

P-1e Irvington BOE Retail Appropriations Budget 2003-2004

P-2 Irvington BOE Current and Revised Renewal Rates Health Benefits 2003-2004

P-3 Rationale for Textbook Purchases

Respondent

R-1 Letter from Gordon MacInnes, dated August 27, 2003

R-2 Irvington BOE *Abbott* District Budget Review

R-3 Irvington BOE Budget 2002-2003

R-4 Irvington BOE School Budget Statement 2002-2003

OAL DKT. NO. EDU 5495-03
AGENCY DKT. NO. 192-6/03

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX 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's exceptions with respect to salary increases and retiree/employee bonuses were duly submitted in accordance with the schedule established in response to the Court's order for expedition, and no reply was filed by the Board.[1]

Initially, the Commissioner concurs with the Administrative Law Judge (ALJ) that the "maintenance" standard established by the Court, and embodied in implementing regulation, requires programs, services and positions to have been actually provided or filled in 2002-03 in order to be aided for 2003-04. Thus, the Commissioner agrees that amounts attributable to approved and budgeted, but unfilled, 2002-03 positions were properly deducted from the District's 2003-04 "maintenance" budget, as were funds for the purchase of textbooks approved as part of the District's long-range curriculum plan but eliminated from the 2002-03 school budget.

[1] The Board attempted to submit, on October 14, 2003, exceptions to the Initial Decision, briefly reiterating the Board's position and bearing a face date of October 10, 2003. However, pursuant to the ALJ's direction and a telefaxed notice from the Bureau of Controversies and Disputes, exceptions in this matter were due on October 1, 2003; indeed, they would have been due on October 8, 2003 even under normal OAL rules, *N.J.A.C.* 1:1-18.4. Accordingly, they are not considered herein.

With respect to increases for salaries, however, the Commissioner does not agree with the ALJ's analysis. The Department's overall charge in this matter was to determine the level of 2003-04 funding that would enable the District to continue in a "maintenance" mode, that is, to implement in 2003-04 the programs, services and positions provided in 2002-03. While it is true that dollar amounts actually paid out for staffing prior to June 30, 2003 will not perfectly predict the cost of providing comparable staffing in the next, it is *equally* true that originally budgeted amounts and other similar projections are no less imprecise. Thus, in the Commissioner's view, a methodology which preliminarily establishes the 2003-04 cost of providing positions at "maintenance" levels by determining, as nearly as possible without benefit of audit, the actual approved cost of providing them in 2002-03 and then allowing for reasonable, nondiscretionary adjustments, is a uniform, fair and rational method for estimating future expenditures which cannot otherwise be determined with any degree of precision.

In the present instance, the Commissioner finds that applying the District's highest currently contracted increase percentage of 5% to actual salary expenditures for 2002-03 was a reasonable method of projecting preliminary salary costs for 2003-04. The Commissioner is unpersuaded by the Board's argument that this method does not take into account vacancies, retirements, substitutes and positions filled for only part of the year, since variances of these types occur every year and a preliminary district-wide salary budget is appropriately based on the assumption that staffing is a flexible and continuous process, with ebbs and flows that, absent specific evidence to the contrary, generally permit the projection of one year's experience onto the next. To the extent that results may be imperfect, even after adjustment following audit, *N.J.A.C.* 6A:10-3.1(g) provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

Additionally, although the record is not entirely clear on this point, to the extent that the Board is seeking funding levels allowing for increases greater than the currently contracted 5% in anticipation of upcoming collective negotiations, such increase cannot properly be considered a "non-discretionary" cost appropriate for State support in a "maintenance" year occasioned in significant part by the need for fiscal austerity.

Finally, the Commissioner cannot agree with the ALJ that additional amounts claimed by the Board to be contractually due for retirees and certain transportation employees must be included within the District's maintenance budget. As correctly noted by the Department, the record lacks "even a scintilla of documentary evidence" to support the Board's claims in this regard, for which it bears the burden of proof. (Department's Exceptions at 4) To the extent that such obligations do, in fact, exist and payment of them in 2003-04 may result in fiscal need, the Commissioner again notes that *N.J.A.C.* 6A:10-3.1(g) provides a mechanism for the Board to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

Accordingly, for the reasons set forth herein, the Initial Decision of the OAL is adopted except insofar as it recommends inclusion of salary increases and retiree/employee bonuses in the District's maintenance budget. The Petition of Appeal, therefore, is dismissed in its entirety.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

* 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.

5 19-03

579-03

BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court. The District further contended that the Department miscalculated its fund balance (surplus).

The ALJ found that the rule duly promulgated to implement the Court's order for "maintenance" controlled in this proceeding, and that the Office of Administrative Law (OAL) lacked jurisdiction to determine its validity. The ALJ ordered correction of the District's fund balance and adjustment of the District's "maintenance budget" to allow for salary and health benefit increases and funding for certain costs associated with Whole School Reform (WSR).

The Commissioner adopted the ALJ's decision with respect to OAL jurisdiction and error in calculation of the Board's fund balance, but rejected the Board's claims for increases in salary and health benefit accounts, as well as its claims that the Department based its calculations on erroneous figures and improperly excluded the unpaid balance on the District's WSR contract.

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.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5498-03
AGENCY DKT. NO. 194-6/03

BOARD OF EDUCATION THE CITY OF ORANGE, ESSEX COUNTY,
Petitioner,

v.

THE NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent.

Chandra L. Rainey Cole, Esq., for Petitioner
(Love and Randall, attorneys)

Deborah Gnatt, Deputy Attorney General, for Respondent
(Peter C. Harvey, Attorney General State of New Jersey, attorney)

Record Closed: September 17, 2003 Decided: September 24, 2003

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

The City of Orange Board of Education (Petitioner/Orange), an urban special needs *"Abbott"* school district, appeals the Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional *Abott v. Burke* State Aid Award issued by the New Jersey State Department of Education (Respondent/DOE) via letter dated August 27, 2003. *N.J.S.A.* 18A: 7F-3; *see also N.J.A.C.* 6A: 10-1.1 *et seq.*

PROCEDURAL HISTORY AND STATEMENT OF FACTS

On March 24, 2003, the Commissioner of Education (Commissioner) moved before the Supreme Court for an order modifying the decision in *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V). See also Abbott v. Burke,* 172 *N.J.* 294 (2002) (*Abbott IX*). The Commissioner requested that the discretionary Additional *Abbott v. Burke* State Aid (supplemental aid) be limited in *Abbott* districts in 2003-2004 to provide an amount sufficient to support those programs, positions and services in the districts' approved budgets for 2002-2003. On April 8, 2003, the Education Law Center cross-moved for an order setting an expedited schedule for the Department of Education (DOE) decision on each district's budget, related appeals and requiring the DOE to conduct a formal evaluation of the implementation of Whole School Reform. On April 29, 2003, the Supreme Court ordered the DOE and the Educational Law Center to participate in mediation before the Honorable Philip S. Carchman, J.A.D., in an attempt to resolve issues raised by their motions. During the mediation, the parties resolved all issues except the 2003-2004 budget process. The parties agreed to an expedited schedule for approvals and appeals, which started with a May 30, 2003 deadline for the DOE review and approval of school district budgets. Districts' appeals from the DOE's reviews were to be transmitted to the Office of Administrative Law, and administrative law judges were to issue initial decisions within 50 days of the appeal. The Commissioner was to issue final decisions within 25 days of the initial decisions. On May 20, 2003, the Supreme Court issued an order incorporating the parties' mediation agreement and providing that the schedule would remain in effect until further order of the Court.

On May 30, 2003, the DOE issued decisions on the *Abbott* districts' budgets using the maintenance standard on which the DOE had requested court approval. Twenty-three *Abbott* districts filed appeals on the budget decisions and all appeals were transmitted to the Office of Administrative Law. Each of the twenty-three appeals raised the issue of the proper standard for approving the budgets for 2003-2004.

The Orange school district, Petitioner in this case, received a May 30, 2003 letter from the DOE's Assistant Commissioner Division of Abbott Implementation, which

provided notice that the DOE had completed its initial review of the district's 2003-2004 expenditure budget dated April 5, 2003, that the expenditure budget was approved except as noted in the letter. On June 6, 2003, the Orange district's verified petition of appeal was filed with DOE. *N.J.S.A.* 18A:6-9. The DOE transmitted the contested case to the Office of Administrative Law, where it was filed on June 9, 2003. *N.J.S.A.* 52:14B-2(b). On June 12, 2003, the Department's answer was filed in the Office of Administrative Law. The case was originally scheduled for August and mid-September hearing dates, and thereafter rescheduled for September 2, 3, 8, and 9 to comply with modified Supreme Court orders. Prehearing conferencing for the purpose of identifying issues and witnesses was completed on September 2 and 3, and hearings were held on September 8 and 9, 2003. The record was closed on September 17, 2003 upon receipt of the parties' posthearing briefs.

On June 24, 2003, the Supreme Court issued an order approving the mediated agreement and scheduling argument for July 10, 2003 on the remaining issue of the 2003 - 2004 budget process. On July 1, 2003, the DOE moved for an order amending the schedule for processing the appeals to allow the Court to rule on the standard in the appeals to the Office of Administrative Law before hearings and issuance of initial decisions. On July 10, 2003, the Supreme Court heard oral argument on the budget process. The Supreme Court granted the DOE's motion and relaxed *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V)* remedies as applied to the 2003-2004 budget process. On July 23, 2003, the Supreme Court issued an order, stating the following:

> 1. The DOE's application to extend the relaxation of remedies granted in *Abbott V* is granted as follows: The DOE shall have the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke* State Aid for the *Abbott* districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order.
>
> 2. The Statewide aggregate amount of Additional *Abbott v. Burke* State Aid shall be presumptively calculated as the total amount of Additional *Abbott v. Burke* State Aid approved for the *Abbott* districts for Fiscal Year 2002-2003, subject to adjustment as required for a maintenance budget. A maintenance budget shall mean

that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.

3. For purposes of calculating Additional *Abbott v. Burke* State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students.) Insofar as any *Abbott* district has not been informed of its total amount of last year's approved Additional *Abbott v. Burke* State Aid, the DOE shall provide written notice of that amount within two weeks of the date of this Order. The DOE's application of the effective and efficient standard in its review of a district's maintenance school budget may result in a reduction to a district's presumptive amount of Additional *Abbott v. Burke* State Aid.

4. Within 30 days of the issuance of this Order, the DOE shall provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget. If the DOE deletes an expenditure from a district's 2002-2003 budget related to the district's non-instructional programs and based on the effective and efficient standard, the DOE must include in the written notice to the district the expenditure deleted along with a specific statement explaining why the program or part thereof is no longer effective and efficient.

5. *Abbott* districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.

6. The Order of the Court dated July 7, 2003, modifying the Court's scheduling Order of May 20, 2003 in order to provide the [OAL] thirty days within which to determine and issue initial decisions in the twenty-three pending budget appeals, is hereby superseded by this Order. The [OAL] shall issue initial decisions on district appeals from the DOE's preliminary maintenance budget figures for the 2003-2004 school year within 30 days of the dates of those decisions as set forth in Paragraph 4 of this Order.

7. To the extent that monies are deleted by the DOE in the districts' non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an *Abbott* district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

Paragraph three of the July 23, 2003 Supreme Court order specifically sets forth that the DOE is to promulgate an emergency regulation for the purpose of setting the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs - office/administrative expenditures and programs, positions, services and/or expenditures that are not school-based or directly serving students. In the same paragraph, the Supreme Court advises districts that the DOE's application of the effective and efficient standard in its review of a district's maintenance school budget may result in a reduction to a district's presumptive amount of Additional *Abbott v. Burke* State Aid.

On August 22, 2003, the DOE, relying on the Fiscal Year 2004 Appropriations Act and paragraph three of July 23, 2003 Supreme Court order, promulgated emergency regulations amending *N.J.A.C.* 6A:10, including *N.J.A.C.* 6A:10-1.2, -3.1, -4.2, and -4.7. The regulations became effective August 22, 2003, and will expire June 30, 2004. *N.J.A.C.* 6A:10-1.2 of the emergency regulation states:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke.* Maintenance also does not include non-recurring 2002-2003 expenditures.

On August 27, 2003, the Commissioner issued decision letters establishing a preliminary maintenance budget figure and the amount of additional supplemental funding needed to support Petitioner's school district budget. In summary the Commissioner's letter advised Petitioner that instructional and non-instructional programs were approved, but reductions would be made in the general fund surplus and outstanding 2002-2003 Account Receivables in Additional *Abbott v. Burke* State Aid to determine the new amount of the budgeted fund balance.

ISSUES

1. Does the Office of Administrative Law have jurisdiction to challenge the validity and applicability of the emergency regulation definition of Maintenance budget, as set forth in *N.J.A.C.* 6A:10-1.2?

2. Does the DOE's Maintenance budget definition for maintaining a funding level in 2003-2004 which will support approved and provided programs, services and positions from 2002-2003, disturb previously approved

appropriations which cannot be disbursed until the completion of WSR Developer Contracts?

3. Was an error made by the independent auditor's use of the original budget number, instead of the revised budget number, when computing Petitioner's maintenance budget in preparation for issuance of the Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional *Abbott v. Burke* State Aid Award?

4. Was there a miscalculation by the independent auditors of Petitioner's fund balance?

5. Are salary and health benefits increases subject to the conditions for non-discretionary expenditures, as set forth in *N.J.A.C.* 6A:10-1.2?

6. Is reinstatement of non-instructional positions for the purpose of complying with Whole School Reform subject to the Maintenance budget definition set forth in *N.J.A.C.* 6A:10-1.2?

LEGAL ANALYSIS AND FINDINGS

The DOE presented a global argument against Petitioner's pursuit of this contested case. The DOE contends that the August 27, 2003 letter contains figures which are preliminary and subject to review pursuant to *N.J.S.A.* 18A: 23-1, *et seq.* which mandates the completion of a Comprehensive Annual Financial Report (CAFR) for the period ending June 30, 2003. CAFR is an audit, performed by a registered municipal accountant or a certified public accountant who is licensed as a public school accountant for New Jersey. The DOE contends that the numerical discrepancies in calculations which ultimately was the cause for subsequent inaccuracies in budget surplus and supplemental fund figures should be left unresolved until November 2003 when the CAFR is scheduled for completion.

Petitioner argued the appropriateness of proceeding with a full hearing to protect all claims of the school district. Petitioner contends that the right to an appeal in the Office of Administrative Law is for the purpose of establishing a complete record of the facts and relevant evidence regarding inaccuracies in calculations in the district's Maintenance budget. Making the record is crucial for preserving claims of which budget categories are inaccurate and what impact the inaccuracies have on the fund budget. Petitioner refuted the DOE's "wait and see after the CAFR" approach and argued that the Office of Administrative Law must conduct a thorough hearing on all issues raised throughout the entire budget, both factual and legal. *See* 26 *New Jersey Practices, Administrative Law and Practice*, Section 3.8 (2d. ed. 2000), regarding the jurisdiction of the Office of Administrative Law to hear and determine constitutional questions when necessary to decide hearing issues.

OFFICE OF ADMINISTRATIVE LAW JURISDICTION TO DETERMINE VALIDITY AND APPLICABILITY OF REGULATIONS

Petitioner contends that the *N.J.A.C.* 6A:10-1.2 "maintenance budget" definition is contrary to the New Jersey Supreme Court's Order; that its maintenance budget should be considered its approved 2002-2003 budget; and that it is not limited to expenditures for programs, services and positions, approved and actually provided, and documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Petitioner contends that to the extent the regulation's definition is contrary to the Supreme Court's order, it is inapplicable in the Office of Administrative Law.

The Respondent contends that the *N.J.A.C.* 6A:10-1.2 "maintenance budget" definition is consistent with the Supreme Court's order. It argues that the school district's contention is essentially a challenge to the regulation, and that, consistent with *R.* 2:2-3(a)(2), such a challenge must be brought in the Appellate Division of the Superior Court.

In *Board of Education of the City of Asbury Park v. New Jersey Department of Education,* OAL Dkt. EDU 4095-03, the Honorable John R. Tassini, ALJ, entered an Order dated September 4, 2003, relative to the maintenance budget. Judge Tassini

concluded that the school district's contention is essentially a challenge to the validity of the above-cited regulation, and based his finding on *R.* 2:2-3(a)(2). In *Board of Education of the Township of Neptune v. New Jersey Department of Education,* OAL Dkt. EDU 4096-03, the Honorable Joseph F. Martone, ALJ, entered an Order dated September 10, 2003 and concurred with Judge Tassini's findings on the maintenance budget. In *Wendling v. New Jersey Racing Commission,* 279 *N.J. Super.* 477, 485 (App. Div. 1995), the court held that the Appellate Division and not the Office of Administrative Law has jurisdiction for a challenge to the validity of a rule; in *In re 1999-2000 Abbott Implementing Regulations, N.J.A.C.* 6:19A-1.1 *et seq.,* 348 *N.J. Super.* 382 (App. Div. 2002), the Appellate Division heard a challenge to rules implementing *Abbott* decisions.

Prior to this hearing, Petitioner Orange school district had not challenged the regulation in the Superior Court Appellate Division to determine validity, as per *R.* 2:2-3 (a)(2). The Rule provides that an appeal to challenge the validity of any regulation promulgated by a state administrative agency should be brought in the Superior Court, Appellate Division. Therefore, I **FIND** that the Office of Administrative Law has no jurisdiction to rule on the issue of validity or applicability of a regulation and that *N.J.A.C.* 6A:10-1.2 is the applicable standard in this case.

WHOLE SCHOOL REFORM DEVELOPER CONTRACTS

The Maintenance Definition in *N.J.A.C.* 6A:10-1.2 does not alter the exceptions in paragraph two of the July 23, 2003 Supreme Court order in regard to the continued implementation of paragraph 2c of the June 24, 2003 Supreme Court order which permits Whole School Reform contracts in certain circumstances, irrespective of the timing for the promulgation of regulations governing that provision. Petitioner's Whole School Reform contract was ongoing during the 2002–2003 school year and has not been completed. Petitioner's concern is that the encumbrance not be reduced by the amount of the outstanding contract balance. The balance of the contract cannot be paid until the work is complete. I **FIND** that the exception for Whole School Reform as set forth in the July 23, 2003 Supreme Court order and *N.J.A.C.* 6A:10-1.2 provide a safeguard for the situation presented by Petitioner.

INDEPENDENT AUDITOR'S ERROR

The testimony was uncontested regarding a mistake made by the independent auditors assigned to review Petitioner's records for the purpose of establishing the preliminary maintenance budget.

Adekunle James, Business Administrator and School Board Secretary for the City of Orange Board of Education, previously worked in the district for nine years as an accountant and fifteen months as the Assistant Business Administrator. He prepared Petitioner's budgets for 2001-2002 and 2002-2003 **(Exhibits P-1, P-2, P-3)**. The Business Administrator testified that when the independent auditors prepared recalculations for the Preliminary Maintenance Budget Figure for 2003-2004 they used several original budget numbers instead of the revised budget numbers. He presented a letter from the DOE dated February 24, 2003, which showed the previous years general fund surplus of $1,723,965 deducted from the district's Abbott Aid for that year **(Exhibit P-7)**. The sum of $1,723,965 is the surplus amount which the DOE wants to reduce in 2003-2004. The Business Administrator spoke with the DOE's budget examiner regarding the use of the previous years figures and the budget examiner spoke with the independent auditors. The independent auditors acknowledged the error.

Michael Arizechi, the DOE Budget Examiner/Manager, is a CPA with an MBA in finance and a BA in accounting. He has served as senior accountant with the Newark Board of Education for three years, and as Budget Manager with the DOE for five years. He is responsible for reviewing the initial budgets of the school districts which are received February 25th of every year, for revision reviews, recommendation for approvals and line item change approvals. The Budget Examiner confirmed his awareness of an error made by the independent auditors and his discussions with them regarding their use of wrong budget figures. The Budget Examiner testified that the auditors acknowledged a $1,723,965 miscalculation, and the occurrence of "double-dipping", since the same surplus amount had been added twice. During the OAL hearing the auditors were contacted and they requested a copy of the February 24, 2003 letter to review before re-confirming the error **(Exhibit P-7)**. Based on the

evidence and testimony presented on the issue of error in fund surplus calculations due to the use of incorrect budget figures by the independent auditor, I **FIND** that the Petitioner's budgeted fund balance is inaccurate and therefore Petitioner's need for discretionary Additional *Abbott v. Burke* State Aid should be reassessed.

SUBSTANTIATION OF NON-DISCRETIONARY EXPENDITURES FOR SALARY AND HEALTH BENEFITS

Adekunle James, Petitioner's Budget Administrator, testified that the DOE did not take into account Retirements, Vacant positions and Substitute teacher pay rates when determining the dollar amount to be used when calculating the contracted five-percent "across the board" **salary increase**. Petitioner argued that where positions were not held last year for the entire year, there will be no money to fund a full year's position in 2003-2004. Petitioner restated the argument for use of the Supreme Court definition of the "maintenance budget" when finding it apparent that the district's budget will be reduced if the DOE's Maintenance Budget definition in *N.J.A.C.* 6A:10-1.2, approved and provided service budget figure for the 2002-2003 year, is used to calculate the budget need for 2003-2004. Testimony disclosed Petitioner's violation of Whole School Reform requirements with second graders and teachers in Parker Avenue School, because of an inability to currently comply with the mandates for achieving a plan for class size reduction, as per *N.J.A.C.* 6A:24-4.1(j)9. Regarding **health benefits**, the Budget Administrator testified that the benefits have increased for the last three years, inclusive of 2002-2003 when a 21-percent increase was insufficient to cover employee benefits. A line item change was approved in 2002-2003 to enable the district's payment of health and dental benefits.

Health Benefit Increases
(Exhibits P-8, P-9, P-10)

Year	Budgeted Benefits	Approved/Provided (Actual Expenditure)	Percentage Increase From Actual Expenditure In Previous Year
2002-2003	4,692,232	5,665,147.47	15.4%
2001-2002	4,618,665	4,793,304.81	22.13%
2000-2001	2,904,300	3,732,155.93	

Michael Arizechi, Respondent's Budget Examiner/Manager testified that the calculation for **salary increases** was accomplished by taking the actual expenditure from the previous year and increasing it by the 5% contracted percentage rate. *N.J.A.C.* 6A:10-1.2 "Maintenance budget" provides for a 2003-2004 school budget funded at a level such that the district can implement 2002-2003 approved and *provided* programs, services, and positions and includes documented increases in non-discretionary expenditures (contracted salaries, health benefits, and special education tuition) and adjustments for actual 2002-2003 expenditures. In regard to **health benefits**, the Budget Examiner/Manager testified that 14.5% was used to calculate all health benefits.

Based on the requirements of the governing regulation *N.J.A.C.* 6A: 10-1.2, I **FIND** with respect to **salary increases** that Petitioner must specifically identify its right to an exception under paragraph 2c of the June 24, 2003 Supreme Court order, as well as explicitly document the inability to currently comply with the mandates of Whole School Reform in achieving a plan for class size reduction, as per *N.J.A.C.* 6A:24-4.1(j)9:

> A plan shall be in place to continue to reduce class size by September 2002 to 1:21 for grades K-three and 1:23 for grades four to eight, and 1:24 for grades nine through twelve.

I further, **FIND**, in regard to **health benefits** that based on the "Maintenance budget" definition of maintenance non-discretionary expenditure funding levels, at the same levels approved and provided in 2002-2003, as per *N.J.A.C.* 6A: 10-1.2, that an adjustment in Petitioner's health benefits budgetary increase, so as to reflect what was approved and provided in 2002-2003, is warranted.

REINSTATEMENT OF NON-INSTRUCTIONAL POSITIONS TO MEET WHOLE SCHOOL REFORM AS PER *N.J.A.C.* 6A: 10-1.2

The July 23 Supreme Court order requires in part, in paragraph three and paragraph seven:

> 3. For purposes of calculating Additional *Abbott v. Burke* State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students.) ... [Emphasis added.]
>
> 7. To the extent that monies are deleted by the DOE in the districts' non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an *Abbott* district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

The DOE promulgation is the emergency regulation set forth in *N.J.S.A.* 6A:10-1.2, and to the extent that paragraph 2c of the June 24, 2003 Supreme Court order requires reinstatements to comply with Whole School Reform, the necessary non-instructional programs, positions and services should be restored; also funding for non-instructional programs should be applied for by Petitioner and awarded by the DOE upon a showing of need, as instructed per Supreme Court order of July 23, 2003 at paragraph 7.

Based on the foregoing, I **FIND** that the issue of reinstatement of non-instructional positions to meet Whole School Reform is governed by the terms in *N.J.A.C.* 6A:10-1.2 and paragraph seven of the July 24, 2003 Supreme Court order and will be determined in accord with and upon Petitioner's showing of need to effectuate Whole School Reform or other needed programs and services.

CONCLUSIONS

Based on the evidence, testimony presented and the findings set forth hereon, I make the following **CONCLUSIONS**:

1. New Jersey Court Rules - *R.* 2:2-3(a)(2) provides that an appeal to

challenge the validity of any regulation promulgated by a state administrative agency should be made in the Superior Court Appellate Division; and therefore the Office of Administrative Law does not have jurisdiction to challenge the validity and applicability of the emergency regulation definition of Maintenance budget, as set forth in *N.J.A.C.* 6A:10-1.2.

2. *N.J.A.C.* 6A:10-1.2 provides for the protection of previously approved appropriations which can not be disbursed until the completion of WSR Developer Contracts.

3. An error was made by the independent auditor's use of the original budget number, instead of the revised budget number when computing Petitioner's maintenance budget in preparation for issuance of the Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional *Abbott v. Burke* State Aid Award.

4. There is a miscalculation made by the independent auditors' of Petitioner's discretionary fund balance.

5. Salary and health benefits increases are subject to the terms for non-discretionary expenditures, as set forth in *N.J.A.C.* 6A:10-1.2.

6. Reinstatement of non-instructional positions for the purpose of complying with Whole School Reform is subject to the definition set forth in *N.J.A.C.* 6A:10-1.2.

ORDER

Based upon the foregoing, it is hereby **ORDERED:**

1. That the definition of "maintenance budget" set forth in *N.J.A.C.* 6A:10-1.2 is applicable in this matter.

2. That Petitioner's previous approved funding allocation for programs, positions and services provided under Whole School Reform contracts and pursuant to paragraph 2c of the Supreme Court order of June 24, 2003 in *Abbott v. Burke* (and as stated in *N.J.A.C.* 6A:10-1.2) shall not be added, to determine fund surplus.

3. That Petitioner's budgeted fund balance error be corrected and a reassessment of Petitioner's need for discretionary Additional *Abbott v. Burke* State Aid be made using the corrected fund balance.

4. That Petitioner's salary increases incident of Whole School Reform and non-discretionary salary expenditures be complied with insofar as the increases meet the exception requirements of paragraph 2c of the Supreme Court order of June 24, 2003 in *Abbott v. Burke* (and as stated in *N.J.A.C.* 6A:10-1.2).

5. That Petitioner's health benefits budget be adjusted so as to reflect the amount, which was approved and provided in 2002-2003.

6. That Petitioner's request for reinstatement of non-instructional positions to meet Whole School Reform be complied with insofar as the reinstatements meet the exception requirements of paragraph 2c of the Supreme Court order of June 24, 2003 in *Abbott v. Burke* (and as stated in *N.J.A.C.* 6A:10-1.2).

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to 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.

September 24, 2003
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

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

9/24/03
DATE

E-mailed Initial Decision to the parties on:

9/24/03
DATE
cml

APPENDIX

WITNESSES

For Petitioner:

Adekunle James, Business Administrator/School Board Secretary
Orange Board of Education

For Respondent:

Michael Arizechi, Budget Examiner
New Jersey Department of Education

EXHIBITS

For Petitioner:

P-1 Budget Orange Board of Education July 11, 2001

P-2 Budget Orange Board of Education March 20, 2002

P-3 Budget Orange Board of Education March 11, 2003

P-4 New Jersey Department of Education Budget Breakdown August 27, 2003

P-5 State Auditors Report Orange Township Public Schools Abbott District Budget Review

P-6 Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional *Abott v. Burke* State Aid Award August 27, 2003

P-7 Revision Letter from Assistant Commissioner to Orange Township Interim School Superintendent February 24, 2003

P-8 Total Benefits 2002-2003

P-9 Total Benefits 2001-2002

P-10 Total Benefits 2000-2001

P-11 Dental Benefits Invoices

P-12 State Health Benefits Plan Enrollment

P-13 Account Balances For Benefits

P-14 New Positions Re-installment Non-Instructional Positions May 20, 2002

P-15 Required Justification for2003-2004 Budgeted Instructional FTE May 5, 2003

P-16 Original approved Budget Orange Board of Education 2002-2003

For Respondent:

None

OAL DKT. NO. EDU 5498-03
AGENCY DKT. NO. 194-6/03

BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX 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. Exceptions were filed by both the Board of Education (Board) and the Department of Education (Department), as was a reply by the Board to the Department's exceptions, and all were considered by the Commissioner in reaching his decision herein.

As a preliminary matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that hearing of this matter need not have awaited completion of the District's Comprehensive Annual Financial Report (CAFR), as argued by the Department. Within the appeal framework established by the Court, the Board was clearly entitled to make, prior to the school year in question, the factual and legal record necessary to preserve the substance of its claims, with final adjustments made following audit.

The Commissioner also concurs with the ALJ that *N.J.A.C.* 6A:10-1.2, the regulation duly promulgated to implement the Court's July 23, 2003 order, must control in the instant proceeding, and that the OAL does not have jurisdiction to determine its

validity, such determination being solely within the purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott,* 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n.*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). However, even if the Commissioner were to accept, *arguendo*, the Board's contention that a "choice of law" may be made without passing on the validity of the rule itself, the Commissioner here opines, to the extent that he may do so in an administrative proceeding, that the Department's definition of "maintenance budget," as set forth in *N.J.A.C.* 6A:10-1.2, is entirely consistent with the language and intent of the Court, with no conflict between it and the underlying order.

The Commissioner rejects, however, the ALJ's apparent acceptance of the Board's contention that the Department erroneously used "original" rather than "revised" budget figures in calculating the District's maintenance budget. Although the ALJ appears to have confused and conflated this issue with a more specific error in surplus calculation, as discussed below, the Commissioner agrees with the Department's position that, in making the determination under appeal herein, in the absence of precise information of the type only available through the CAFR, it was appropriate to use the approved Revised School District Budget Statement for 2002-03, dated July 12, 2002, rather than the *unapproved* Revised School District Budget Statement for 2003-04, dated April 5, 2003.

In this regard, the Commissioner observes that the Department's charge in this matter was to determine the level of 2003-04 funding that would enable the District to continue in a "maintenance" mode, that is, to implement in 2003-04 the programs, services and positions provided in 2002-03. While it is true that dollar amounts paid out prior to June 30, 2003 will not necessarily reflect the actual costs of the programs, services and

positions provided that year, nor can they perfectly predict the actual cost of providing them in the next, it is *equally* true that originally budgeted amounts and other similar projections are no less imprecise. Thus, in the Commissioner's view, a methodology which preliminarily establishes the 2003-04 cost of providing programs, services and positions by determining, as nearly as possible without benefit of audit, the actual approved cost of providing them in 2002-03 and then allowing for reasonable, non-discretionary adjustments, is a uniform, fair and rational method for estimating future expenditures which cannot otherwise be determined with any degree of precision. To the extent that results may be imperfect, even after adjustment following audit, *N.J.A.C.* 6A: 10-3.1(g) provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant. Thus, the Commissioner wholly endorses the Department's fundamental methodology, subject to the correctness of its application based on the evidence presented in any particular instance where its results are disputed.

Turning, then, to the more specific issues raised by the Board, the Commissioner initially rejects the ALJ's conclusion that the Board is entitled to include the balance of its Whole School Reform (WSR) contract amount as part of its maintenance budget. Contrary to the ALJ's finding, the exception provided by the Court in Paragraph 2c of its June 24, 2003 order, which expressly refers to *reinstatement* of WSR in certain schools *not having a WSR contract in 2002-03*, cannot apply to the Board's claim herein, which is manifestly based on the existence of an ongoing WSR contract under which services were provided in 2002-03. Since no evidence was presented by the Board that any portion of that contract for services actually provided in 2002-03 remains unpaid so as to

qualify as a 2002-03 expenditure, the Department correctly excluded the contract balance, as reflecting services not yet provided, from its maintenance budget calculation.

The Commissioner does concur, however, that an error in calculation of the District's surplus was made. It is clear on record and uncontested by the Department that $1,723,965 already deducted from the Board's 2002-03 additional State aid should not have been reflected in the Department's calculation of excess surplus for 2003-04, so that the fund balance to be appropriated in the District's 2003-04 revised budget should be adjusted downward from $5,813,312 to $4,089,347. However, this error in itself results in no entitlement to additional *Abbott v. Burke* State aid, since the Board's excess surplus is still well above the level that would entitle it to such aid.

With respect to increases for salaries and health benefits, the Commissioner does not agree with the ALJ that an increase should be granted to the Board. The Commissioner is unpersuaded by the fact that increases in the cost of health benefits in 2001-02 and 2002-03 were 22.13% and 15.4% respectively, since this alone is insufficient to warrant the conclusion that the 14.5% increase allowed by the Department will not maintain benefits at 2002-03 levels and that an increase of 21% is necessary for this purpose. Similarly, the Commissioner finds, for the reasons more generally set forth above, that applying the District's highest contracted teacher salary increase percentage of 5% to actual salary expenditures for 2002-03 was a reasonable method of projecting preliminary salary costs for 2003-04. The Commissioner is unpersuaded by the Board's argument that this method does not take into account vacancies, retirements, substitutes and positions filled for only part of the year, since variances of these types occur every year and a preliminary district-wide salary budget is appropriately based on the assumption

that staffing is a flexible and continuous process, with ebbs and flows that, absent specific evidence to the contrary, generally permit the projection of one year's experience onto the next.[1]

Finally, with regard to the Board's contention that it requires a further percentage increase in salary amounts to accommodate addition of new positions or restoration of positions eliminated in 2002-03 based on WSR and other regulatory requirements, the Commissioner finds that the "maintenance" standard established by the Court, and embodied in the implementing regulation, requires programs, services and positions to have been actually provided or filled in 2002-03 in order to be included in the maintenance budget for 2003-04, and that, as indicated above, the exception provided by the Court in Paragraph 2c of its June 24, 2003 order does not apply to the Board herein. Additionally, the Commissioner finds that the Board has made no demonstration on the present record that the level of funding provided through the Department's calculations will not support the staff necessary to implement required programs and services. The fact that a particular position, such as a teacher added for reasons of class size, was not included in the maintenance budget does not mean that the position cannot exist; rather, the need for it is expected to be met within existing levels of resources, subject to the ability to seek additional funds under requisite circumstances.[2] [3]

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[1] In this context, the Commissioner reiterates the above-noted availability of a mechanism for Abbott districts to address a need for additional resources pursuant to *N.J.A.C.* 6A:10-3.1(g).

[2] See note 1 above.

[3] To the extent that the ALJ's discussion at pages 12-13 of the Initial Decision might suggest otherwise, the Commissioner notes that no reductions were made to the Board's budget on the basis of ineffectiveness or inefficiency.

Accordingly, for the reasons set forth herein, the Initial Decision of the OAL is rejected except insofar as it concludes that the present matter was appropriately heard prior to audit; that the OAL lacks jurisdiction to determine the validity of the rule promulgated to implement the order of the Court; and that an error occurred in calculation of the Board's surplus so as to reduce the amount applied by the Department to support the 2003-04 budget. However, in light of the Commissioner's determinations on the Board's specific claims above, no recalculation of additional *Abbott v. Burke* State aid is directed as a result of the incorrect allocation, since the error does not, in itself, alter the Board's eligibility for such aid.[4]

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[4] The Board's claim to the contrary is based on its contention that, taken together, use of "revised" figures and proper calculation of salaries, health benefits, *etc.*, as requested herein, will substantially reduce the Board's alleged "surplus" so as to render the Board eligible for additional *Abbott v. Burke* State aid. (Board's Reply to Department's Exceptions at 4)

[5] 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.

580-05

BOARD OF EDUCATION OF THE TOWN OF HARRISON, HUDSON COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 "maintenance budget," alleging that the regulatory definition of "maintenance budget" is invalid because it is inconsistent with the terms of the Supreme Court's July 23, 2003 Order. The District further challenged the exclusion from its maintenance budget of the cost of two positions, approved but not filled in the 2002-03 school year, and the cost of providing health care coverage to 20 additional hourly paid cafeteria aides.

The ALJ initially determined that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. The ALJ next found the Department's quantitative method of implementing its regulatory definition of "maintenance budget" to be inconsistent with the literal language of the regulation and that in the Supreme Court's Order; he, therefore, denied Department adjustments reducing the District's 2002-03 budget. With respect to salaries for two positions budgeted in 2002-03 but not filled, the ALJ concluded that, pursuant to the "maintenance" standard, programs, services and positions must have been actually provided or filled in 2002-03 in order to be funded in 2003-04. The ALJ, likewise, denied the District's claim of funding for health care coverage for hourly cafeteria aides as the record did not contain documentation in support of such need.

The Commissioner adopted in part and rejected in part the Initial Decision. First, he concurred with the ALJ that the OAL does not have jurisdiction to determine the validity of the Department's regulation. Next, however, the Commissioner, specifically found that the Department's implementation of its regulation was proper. He recognized that, while it may be technically correct that merely looking at dollar amounts paid prior to June 30, 2003 may not necessarily reflect the actual costs of programs, *etc.*, it is, likewise, true that budgeted amounts do not necessarily reflect the costs of programs, *etc.*, provided. The Commissioner concluded that a methodology which begins by estimating the 2003-04 cost of providing the same programs, services and positions by looking at the actual cost of providing these for 2002-03 and then adds the projected costs of reasonable, nondiscretionary expenditures and adjustments is a reasonable method for estimating future costs which cannot otherwise be determined with any degree of precision. The Commissioner, therefore, restored the Department's adjustments reducing the District's spending funds by $1,165,331 and $889,380, respectively. The Commissioner concurred with the ALJ that sums budgeted for positions not filled in 2002-03 and health care coverage for hourly cafeteria aides were properly deducted from the District's 2003-04 "maintenance" budget.

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.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5494-03
AGENCY DKT. NO. 195-6/03

BOARD OF EDUCATION OF THE
TOWN OF HARRISON,
HUDSON COUNTY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT
OF EDUCATION,
Respondent.

Michael R. Pichowicz, Esq., for petitioner

Pamela N. Ullman, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 23, 2003 Decided: September 24, 2003

BEFORE **RICHARD McGILL**, ALJ:

The Board of Education of the Town of Harrison ("petitioner") has various responsibilities related to the Harrison School District ("District") including preparation and submission of a K-12 budget for the 2003-04 school year and an application for Additional

Abbott v. Burke State Aid ("supplemental aid") for programs, positions and services needed for the District's students. The District is an Abbott district as defined in *N.J.S.A.* 18A:7F-3 and *N.J.A.C.* 6A:24-1.2. After receipt of a decision dated May 30, 2003, by the New Jersey State Department of Education ("respondent") related to the District's 2003-04 K-12 budget and application for supplemental aid for the 2003-04 school year, petitioner filed a verified petition of appeal with the Commissioner of Education. As the result of additional proceedings as described below, respondent denied petitioner's request for supplemental aid. Petitioner now challenges that denial.

BACKGROUND AND PROCEDURAL HISTORY

On March 24, 2003, the Commissioner moved before the New Jersey Supreme Court for relief from some of the mandates of *Abbott v. Burke*, 153 *N.J.* 480 (1998) ("*Abbott V*"). Specifically, the Commissioner requested that discretionary supplemental aid be limited in 2003-04 to providing support for those programs, positions and services in the districts' approved budgets for 2002-03.

On April 8, 2003, the Education Law Center responded to that motion and also cross-moved for relief including a request for an expedited schedule for the review and approval of Abbott district budgets and appeals therefrom. As the result of mediation, the parties agreed to an expedited schedule for budget approvals and appeals. In accordance with the schedule, respondent was to issue its determinations in regard to district budgets by May 30, 2003. The agreement further provided for a review process with hearings before the Office of Administrative Law and final decision by the Commissioner. On May 20, 2003, the Court entered an order incorporating the agreement.

On May 30, 2003, respondent rendered decisions with respect to all of the Abbott districts using the maintenance standard for which it had requested approval from the Court. Twenty-three districts including petitioner filed appeals from those determinations. Petitioner's appeal

was transmitted to the Office of Administrative Law on June 9, 2003, for determination as a contested case.

Petitioner's appeal along with all of the others raised the issue of the proper standard for approving the budgets for the 2003-04 school year. On June 24, 2003, the Supreme Court issued an Order scheduling oral argument for July 10, 2003, concerning the standard to be used in the 2003-04 budget process. On July 23, 2003, the Supreme Court issued an Order approving a maintenance standard as set forth therein for the 2003-04 budget process. The Court also directed the promulgation of emergency regulations and established a schedule for further proceedings.

On August 22, 2003, the Commissioner promulgated emergency regulations as directed in the Court's Order. A key provision of the emergency regulations is a definition of "maintenance budget" as the standard for reviewing the applications of Abbott districts for supplemental aid for the 2003-04 school year.

On August 27, 2003, respondent issued decisions establishing a preliminary maintenance budget figure and the amount of additional supplemental funding needed to support that budget for each of the twenty-three appealing districts including petitioner. The determination with respect to petitioner was that it did not have a need for additional supplemental aid. By letter dated August 28, 2003, to the undersigned, petitioner requested a prehearing conference in effect indicating an intention to continue with the appeal.

After a prehearing conference on September 4, 2003, a hearing was conducted on September 10 and 11, 2003, at the Office of Administrative Law in Newark, New Jersey. The briefs of the parties were received on September 15, 2003. On September 16, 2003, the Education Law Center filed a motion to participate as *amici curiae*. A brief was attached to the motion, which was unopposed and was granted by Order dated September 23, 2003.

ISSUES

The issues in this proceeding are whether petitioner should receive supplemental aid for 2003-04 school year and, if so, the amount thereof. Petitioner's main contention relates to the standard to be utilized to establish a maintenance budget in this proceeding. According to petitioner, the regulations adopted by the Commissioner on August 22, 2003, including in particular the definition of a "maintenance budget" are invalid because they are inconsistent with the terms of the Supreme Court's Order dated July 23, 2003. The parties also differ as to the inclusion of various expenditures in a maintenance budget for the 2003-04 school year.

SUMMARY OF EVIDENCE

Each party to this proceeding presented one witness. Business Administrator Peter Higgins testified for petitioner, while respondent called Stanley J. Ferdinand, whom it employs as a budget examiner, as its witness. While petitioner proceeded first at the hearing, the differences between the positions of the parties will be more readily understandable with respondent's evidence summarized first.

Mr. Ferdinand first explained the budget process as applied to the 2002-03 school year. During the prior school year, each school district submits its budget in two parts. The two parts include the district budget and the school-based budget. The latter is a component of the former. The budget was fully approved in May 2002. In November 2002, a Comprehensive Annual Financial Report (CAFR) provided an analysis of the prior school year. The analysis did not show a need for additional supplemental aid.

The review of petitioner's budget for the 2003-04 school year began in March 2003. Respondent reviewed petitioner's budget applying the maintenance concept meaning that the same level would be allowed for the 2003-04 budget year as for the 2002-03 school year. A determination dated May 30, 2003, approved petitioner's budget with the following three exceptions: (1) requested new restored positions in the school-based budget and at the district

level in the amount of $387,620, (2) health benefits, and (3) special education tuition. Petitioner appealed this determination.

Subsequent to the issuance of the Supreme Court's Order on July 23, 2003, the budgets were reviewed again applying a different standard. The key difference was that respondent looked at the actual spending level by the school district as the base line amount for the maintenance budget. This review led to a new determination which voided the letter dated May 30, 2003. The determination dated August 27, 2003, did not include any new positions which were not part of the expenditures for the 2002-03 school year.

The need for supplemental aid equals expenditures minus available revenues. Petitioner's adjusted 2002-03 budget was $25,434,867. This amount was reduced by $1,165,331 and $889,380 to reflect the actual level of expenditures in spending funds eleven and fifteen, respectively. The net effect is to reduce the base 2002-03 budget to $23,380,156. Various adjustments increasing the budget include $1,122,829 for contracted salaries, health benefits at $421,822, special education at $575,559, and the Consumer Price Index (CPI) at 2.1 percent for $134,967. The subtotal of the adjustments including various items not mentioned above was $2,620,739. Addition of the subtotal to the base 2002-03 budget produced a total maintenance budget of $26,000,895. In comparison, the total budgeted revenues available for the 2003-04 school year were $26,992,469. The difference indicates that the need for supplemental aid amounted to a negative $991,574.

The calculation of the maintenance budget does not limit petitioner's expenditures to that amount. However, petitioner's expenditures cannot exceed it revenues. Petitioner can achieve savings by means other than cutting positions, programs or services.

Mr. Higgins testified that the respondent's determination dated May 30, 2003, approved petitioner's budget for the 2003-04 school year with three exceptions. One of the exceptions related to the sum of $387,620 for several new positions which were approved by respondent but were not included in the budget for 2002-03 at the time of preparation of the budget for the 2003-

04 school year. Another major adjustment is necessary for health benefits. Respondent used $421,822 as the adjustment for health benefits. This figure must be increased by $213,756 to $635,578 to reflect health benefits for additional workers.

In terms of respondent's analysis, petitioner accepts the amount of $25,434,867 as the adjusted 2002-03 budget. However, petitioner strenuously opposes the reductions of $1,165,331 and $889,380 to reflect sums approved but not spent in funds eleven and fifteen, respectively.

Mr. Higgins explained that respondent relied on a document known as the Board Secretary's Report, which contains numerous line items from the budget. For each line, the Board Secretary's Report shows the amount of unspent funds, which is the difference between the figure approved in the budget and the actual expenditure. Respondent derived its adjustments by taking the total of these columns for funds eleven and fifteen.

The largest component of the reduction relates to contracted salaries for teachers who took leaves for various reasons. The teachers were not paid while on leave and were replaced by substitutes at a substantially lower cost. However, there were no reductions in positions, programs or services as a result of those leaves. Moreover, there is no assurance whatsoever that teachers will take the same number of leaves or that there will be equal savings during the 2003-04 school year.

Another major component of the unspent funds relates to grants. During the school year, the school district typically receives grants from various sources. To the greatest extent possible, expenditures are charged to grants rather than the school district budget. This practice results in unspent funds relative to the budgeted amounts. However, because the school district does not know whether it will receive any grants at the time that the budget is prepared, grants are not included therein. By reducing the 2003-04 budget to the level of actual expenditures in the 2002-03 school year, respondent assumes in effect that petitioner will receive grants in the same amounts during the 2003-04 school year. According to Mr. Higgins, this assumption is unsound since there is no assurance that petitioner will receive grants in the same amounts.

The Board Secretary's Report contains numerous lines with unspent funds. Mr. Higgins addressed only the larger amounts. Other unspent funds reflected utility costs which were lower than the budgeted amounts. Mr. Higgins could not explain the lower amounts and opined that it would be unsound to assume that the same savings would occur during the 2003-04 school year.

Mr. Higgins acknowledged that there was one position that was approved but not filled during the 2002-03 school year. That position was for an athletic trainer at a cost of $50,750. In addition, after the position went unfilled, petitioner budgeted $9,000 for a per-event athletic trainer. This position also was not filled by petitioner.

To summarize petitioner's position, the adjusted 2002-03 budget would be $25,434,867. Petitioner would not reduce this figure for unspent funds in the amounts of $1,165,331 and $899,380 in spending funds eleven and fifteen, respectively. With respect to the other adjustments for which respondent determined a subtotal of $2,620,739, petitioner would differ only with respect to health benefits. In addition to respondent's adjustment of $421,822, petitioner would add $213,756 to reflect coverage for twenty additional hourly-paid cafeteria aides. These are not new hires but rather existing employees who will begin to receive coverage. The total adjustment for health benefits would be $635,578. With this adjustment, the subtotal is $2,834,495, and the total expenditures under a maintenance budget for 2003-04 would be $28,269,362. Net of all revenues, petitioner's request supplemental aid is $436,265 for the 2003-04 school year.

LAW AND ANALYSIS

Supplemental aid is a component of the relief ordered by the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480, 525-26 (1998) ("*Abbott V*"). Respondent obtained approval from the Court to provide Abbott districts with a maintenance budget for the 2002-03 school year. *Abbott v. Burke*, 172 *N.J.* 294 (2002). As noted above, respondent sought approval from the Court to extend the relaxation of remedies and to continue to provide a maintenance budget for the 2003-

04 school year. By Order dated July 23, 2003, the Court granted respondent's application. In the second numbered paragraph of that Order, the Court defined a maintenance budget as follows:

> A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.

On August 22, 2003, the Commissioner filed amendments to certain regulations pertaining to Abbott districts. As amended, *N.J.A.C.* 6A:10-3.1(c) provides in part as follows:

> The Department shall review the district-wide budget to determine if all available resources, reallocations and other factors have been incorporated and that the budget is a maintenance budget that contains only those programs, positions and services approved and provided in 2002-2003. The Department shall review the maintenance budget to ensure that all non-instructional expenditures are effective and efficient.

An amended definition of "maintenance budget" states as follows:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet Paragraph 2c of the Supreme Court's order of June 24, 2003 in Abbott v. Burke. Maintenance also does not include non-recurring 2002-2003 expenditures. [*N.J.A.C.* 6A:10-1.2.]

Petitioner's main argument is that the definition of "maintenance budget" in the new regulations is inconsistent with the Supreme Court's Order dated July 23, 2003, and therefore invalid. The key difference relates to a provision of the Court's Order which refers to "current approved programs, services, and positions." According to petitioner, the regulation modifies this language to read "2002-2003 approved *and provided* programs, services, and positions." [Emphasis supplied.]

Respondent contends that the Office of Administrative Law does not have jurisdiction to invalidate a regulation. According to respondent, jurisdiction is vested in the Appellate Division of Superior Court pursuant to New Jersey Court Rule 2:2-3(a), which provides in pertinent part as follows: "appeals may be taken to the Appellate Division as of right ... (2) to review the validity of any rule promulgated by an agency ...."

It is well established that the Appellate Division rather than the Office of Administrative Law is the proper forum in which to challenge the facial validity of an administrative regulation. *E.g., Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Therefore, petitioner's challenge to the validity of the new regulations will not be considered in this proceeding.

Nonetheless, there are two related issues concerning the new regulations which must be considered in this proceeding. One issue involves the proper interpretation of the definition of "maintenance budget" in the new regulations. The other issue is whether the quantitative methodology employed by respondent in establishing maintenance budgets is consistent with the verbal standards contained the regulation and the Supreme Court Order. It seems evident that the language in the new regulation could readily be interpreted in a manner consistent with the Supreme Court's Order. The important questions are whether the new regulation will be interpreted to require or permit use of the quantitative methodology employed by respondent and, if so, whether that method is consistent with the verbal standard in the new regulation and in the Supreme Court Order.

As described above, respondent reduced the approved budget for the 2002-03 by the amount of unspent funds. This quantitative approach in effect means that the maintenance budget for the 2003-04 school year will be limited to funds approved and actually spent during the 2002-03 school year. Thus, the quantitative method differs from the verbal standards in two key respects. First, the expression "programs, services, and positions" contained in the Supreme Court Order and in the new definition of "maintenance budget" in the amended regulations is in effect replaced by "funds." Second, the expressions "current approved" from the Supreme Court Order and "approved and provided" from the regulations are in effect replaced with "approved and actually spent."

There are two main difficulties with a quantitative methodology which equates to standard which could be stated as "funds approved and actually spent during the 2002-2003 school year." First, there is no support for this standard in the language of the Supreme Court Order or in the definition of "maintenance budget" in the new regulation. Second, this quantitative approach provides no assurance that a school district will be able to implement its current approved programs, services, and positions. It follows that the quantitative methodology used by respondent in this proceeding is inconsistent with the applicable verbal standards, and therefore, its utilization in this proceeding is impermissible. With respect to the specific changes made by respondent to petitioner's maintenance budget for the 2003-04 school year, this conclusion means that the adjustments reducing spending funds eleven and fifteen by $1,165,331 and $889,380, respectively, should not be approved in this proceeding.

Before addressing the other issues raised by the parties, it is appropriate to summarize the proper interpretation of the definition of "maintenance budget" in the new regulation and the Supreme Court Order. The starting point is that the maintenance budget will include expenditures at a level such that the school district can implement current approved programs, services and positions in the 2002-03 budget. The base amount will be reduced by the costs of programs, positions and services that were not in fact provided during the 2002-03 school year. The base amount will be adjusted for documented increases in non-discretionary expenditures such as contracted salaries, health benefits and special education tuition. Further, any new

programs, positions or services will be eliminated with limited exceptions not applicable to this proceeding. Finally, the base amount will be reduced by the costs of any non-instructional programs which lack effectiveness and efficiency.

The parties agree that the starting point for analysis is a budget in the amount of $25,434,867. As noted above, the adjustments reducing the 2002-03 budget by $1,165,331 and $889,380 should not be made in this proceeding.

The next step is to reduce this amount by the costs of programs, positions and services that were not in fact provided during the 2002-03 school year. In its budget for the 2002-03 school year, petitioner included the sum of $50,750 as the salary of an athletic trainer. This position was not filled by petitioner. Later in the school year, petitioner budgeted $9,000 for a per-event athletic trainer. This position also was not filled by petitioner. It follows that the sum of $59,750 should be excluded from petitioner's maintenance budget for the 2003-04 school year.

The next step is to increase the base amount by documented increases in non-discretionary expenditures such as contracted salaries, health benefits and special education tuition. The item in dispute concerns health benefits. Respondent increased health benefits by $421,822. Petitioner would increase health benefits by an additional $213,756 to reflect the cost of providing health coverage for hourly cafeteria aides. Petitioner maintains that it is required by federal law to provide this coverage.

The difficulty with this item is that petitioner has not provided any documentation. In fact, petitioner provided no citation to federal law, no determination by any authority that coverage was required or any analysis supporting its position. It follows that the additional increase of $213,756 in health benefits as proposed by petitioner cannot by approved due to a lack of documentation.

Petitioner originally proposed new restored positions at a total cost of $387,620. Those positions were not approved in respondent's letter dated May 30, 2003. These positions should not be approved under the standard for a maintenance budget. It is the undersigned's understanding that this amount is not included in the maintenance budget for the 2003-04 school year.

The final step involves a reduction by the costs of any non-instructional programs which lack effectiveness and efficiency. In order to implement this type of reduction, respondent must follow procedures set forth in *N.J.A.C.* 6A:10-3.1.

During the hearing, there was testimony concerning expense items which could be viewed as ineffective or inefficient. However, respondent did not follow the appropriate procedures or propose any specific adjustments. Under the circumstances, no adjustments will be made to petitioner's maintenance budget to eliminate ineffective or inefficient expenditures.

In this regard, it is noteworthy that the parties devoted a substantial portion of the limited time available for this proceeding to argument concerning the appropriate standard for a maintenance budget. It may well be that with additional time petitioner could document a need for additional health benefits or that respondent could demonstrate that petitioner has made expenditures on ineffective or inefficient non-instructional programs.

Petitioner requested supplemental aid in the amount of $436,265. Based on the above analysis, this amount must be reduced by $59,750 and $213,756, leaving a net amount of $162,759.

During the hearing, petitioner contended that it would have to cut programs, positions or services if it did not receive approval of the full amount of its request for supplemental aid. However, as the result of cross-examination, it became apparent that there are sources of potential savings such that a reduction in petitioner's request for supplemental aid will not require elimination of currently approved programs, positions or services.

Based upon the above, I **FIND** and **CONCLUDE** that petitioner should receive supplemental aid in the amount of $162,759 for the 2003-04 school year. Accordingly, it is **ORDERED** that petitioner's application for supplemental aid is approved in a reduced amount of $162,759.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to 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 recommendation 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.

Sept. 24, 2003
DATE

RICHARD McGILL, ALJ

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

9/24/03
DATE

E-mailed Initial Decision to the parties on:

9/24/03
DATE

cml

APPENDIX

WITNESS LIST

For petitioner:

Peter Higgins

For respondent:

Stanley J. Ferdinand

EXHIBIT LIST

P-1	Letter dated May 30, 2003, from Gordon MacInnes to O. John DiSalvo	Evidence
P-2	School District Budget Statement for School Year 2003-2004	Evidence
P-3	School District Budget Statement for School Year 2002-2003	Evidence
P-4	Letter dated August 27, 2003, from Gordon MacInnes to O. John DiSalvo	Evidence
P-5	Maintenance and Supplemental Aid Determination	Evidence
P-6	Board Secretary's Report for school year ended June 30, 2003	Evidence

P-7	Maintenance and Supplemental Aid Determination revised by Harrison Board of Education	Evidence
P-8	Schedule entitled "Salaries"	Evidence
P-9	Order of Supreme Court of New Jersey Dated July 23, 2003	Identification
P-10	Work papers	Identification
P-11	Work papers	Identification
P-12	School District Budget Statement for School Year 2003-2004 Revenues	Evidence
R-1	Letter dated February 24, 2003, from Gordon MacInnes to O. John DiSalvo	Evidence

OAL DKT. NO. EDU. 5494-03
AGENCY DKT. NO. 195-6/03

BOARD OF EDUCATION OF THE TOWN OF HARRISON, HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-2004 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of Harrison and those of the Department, along with the Department's reply exceptions were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner determines to adopt in part and reject in part the Initial Decision of the OAL. Initially, the Commissioner notes that the Administrative Law Judge (ALJ) correctly recognizes that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R.2:2-3(a); *see, also, Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n.*, 279 *N.J. Super.* 477, 485 (App. Div. 1995).

The ALJ next undertakes to address the issue of whether the Department's quantitative method of implementing its regulatory definition of "maintenance budget" is inconsistent with the literal language contained in the regulation and in the Supreme Court's Order of July 23, 2003. The ALJ concludes that the Department's methodology has, in effect, inappropriately substituted the phrase "funds approved and actually spent during the 2002-2003 school year" for the Supreme Court language authorizing funding for "current approved" programs, services and positions and for the regulatory language "approved and provided." The Commissioner observes that while it may be technically correct that merely looking at dollar amounts paid out prior to June 30, 2003 will not necessarily reflect actual costs of programs, services and positions provided, *i.e.*, payment for items actually provided prior to June 30 may not actually have been made by June 30, it is also true that the budgeted amount, likewise, does not necessarily reflect actual costs of programs, *etc.*, provided. Therefore, the ALJ's abrupt conclusion that the budgeted amounts for lines 11 and 15 must be reinstated does not follow from his analysis. Those services, programs and positions, which were provided and which are reflected on lines 11 and 15, were provided at an actual cost which was less than the budgeted cost. The Commissioner concludes that a methodology which begins by estimating the 2003-2004 cost of providing the same programs, services and positions by looking at the actual cost of providing these for 2002-2003 and then adds the projected costs of reasonable, nondiscretionary expenditures and adjustments is a reasonable method for estimating future costs which cannot otherwise be determined with any degree of precision.

In light of the above, the Commissioner finds the Department's implementation methodology entirely consistent with both the verbal standards articulated in the regulation and the Court's order. The ALJ's interpretation of "maintenance budget" on pages 10-11 of his

decision is hereby clarified to so reflect. It must also be remembered, that if funds provided pursuant to the Department's utilized methodology prove to be insufficient because of unforeseen circumstances arising during the budget year, *N.J.A.C.* 6A:10-3.1(g) provides a mechanism for addressing the need for additional supplemental funding. The Commissioner, therefore, restores the Department's adjustments reducing spending funds for lines 11 and 15 by $1,165,331 and $889,380, respectively.

With respect to the sums budgeted in 2002-2003 for the salary of an athletic trainer ($50,750) and that of a per-event athletic trainer ($9,000), positions which were not filled in that year, the Commissioner concurs with the determination of the ALJ. Pursuant to the "maintenance" standard, programs, services and positions must have been actually provided or filled in 2002-2003 in order to be aided for 2003-2004, so that the $59,750 approved and budgeted for these unfilled positions was properly deducted from the District's 2003-2004 "maintenance" budget.

Turning to the last issue in dispute herein, health coverage for hourly cafeteria aides, the Commissioner is in agreement with the ALJ that this item must be denied for lack of documentation in the record to support the District's assertion that this represents a non-discretionary expenditure.[1]

Accordingly, the Initial Decision of the OAL is adopted in part and rejected in part. The Commissioner directs that the District's need for supplemental aid be recalculated in

[1] It is noted that the District, for the first time in its exceptions, attempted to submit supplementary documentation in support of this item. Submission of new evidence not presented at hearing in a party's exceptions is specifically prohibited by *N.J.A.C.* 1:1-18.4 and, consequently, the District's materials in this regard were not considered herein.

accordance with the above determinations. The instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[2] 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.

573-03

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Abbott district claimed the Department erroneously calculated its presumptive supplemental funding award for the 2002-03 school year and wrongfully reduced aid by the amount of the district's surplus in excess of 2%, which the Department prevented it from expending for additional supplemental programs or services. District also sought aid above presumptive level based on claims that loss of unfunded programs and services impaired core elements and essential enhancements of whole school reform.

The ALJ found that, with one exception, the Department correctly calculated district's presumptive aid award in accordance with Court directives and that the district did not meet the burden necessary to establish on appeal that further funding was necessary. ALJ sustained the Department's actions with respect to excess surplus, but found that the Department erred in not providing additional aid for the district's actual and documented expenditures for the second half-day of kindergarten. The ALJ directed the parties to calculate this amount and ordered the Department to disburse the requisite aid.

The Commissioner adopted the ALJ's decision, with clarification, in all respects except funding for the second half-day of full-day kindergarten. Commissioner agreed with the Department that aid was to be calculated on the basis of an underlying budget which must provide for full-day kindergarten, not increased by the dollar amount of second half-day kindergarten expenditures. 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.

October 9, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 727-03 and
EDU 728-03
AGENCY DKT. NOS. 46-2/03 AND
122-4/02

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

James T. Hundley, Esq., co-counsel for petitioner (Hundley Parry, attorneys)

Richard E. Shapiro, Esq., for petitioner

Michael C. Walters, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: June 4, 2003 Decided: June 25, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In the first of these matters, assigned OAL Dkt. No. EDU 727-03, petitioner appeals the determination of respondent made by Assistant Commissioner MacInnes in his letter of January 6, 2003, which identifies a general fund surplus in excess of two percent in the amount of $817,018 and, in accordance with fiscal year 2002-2003 Appropriations Act, reduced petitioner's *Abbott* State Aid Award by that amount. Petitioner also challenges the action taken by respondent by Assistant Commissioner MacInnes in his letter of January 15, 2003, refusing to approve any additional expenditures of undesignated general fund balance exceeding two percent for use in supplemental programs and/or services, based on the fiscal year 2002-2003 Appropriations Act.

In the second of these matters, assigned OAL Dkt. No. EDU 728-03, petitioner appeals respondent's actions of March 26, 2002, which certifies petitioner's fiscal year 2002-2003 line 00284 *Abbott v. Burke* Budget fiscal year 2001-02 funding level of $6,518,318 and the action of Assistant Commissioner MacInnes in his letter of June 17, 2002, further reducing the funding to $5,844,432.

The matters were assigned to me on April 17, 2003, and after a number of telephone conferences and settlement conferences, the matter was scheduled for hearing and was heard on April 17, May 1 and May 5, 2003. At the conclusion of the hearings, the record remained open at the joint request of the parties in order to afford them the opportunity to provide post hearing briefs. After these were received following some brief extensions, the record was closed on June 4, 2003.

FACTUAL DISCUSSION

The following is not intended to be a verbatim recitation of the testimony. It is intended to identify and summarize relevant portions of the testimony of the witness and the evidence presented in this matter.

Abbott ex rel. Abbott v. Burke, 172 N.J. 294 (2002)

By way of background, it is noted that on April 18, 2002, the New Jersey Department of Education (DOE), with the consent of the Education Law Center, filed a motion for relaxation of the *Abbott IV* and *Abbott V* remedies for the 2002-2003 school year. By order dated June 11, 2002, the Supreme Court denied the DOE's request for authorization to preclude any district appeals seeking supplemental funding for 2002-2003 in excess of 2001-2002 funding,

> . . . subject to the DOE's authority presumptively and preliminarily to establish districts' supplemental funding for 2002-2003 at the level of expenditures contained in the 2001-2002 K-12 DOE approved district budget, as increased by actual and documented 2001-2002 expenditures for the second half of kindergarten, as modified by DOE to take into account 2001-2002 actual expenditures and available revenues based on the district annual audits; . . .
>
> *Abbott ex rel. Abbott v. Burke,* 172 *N.J.* 294, 297 (2002). (*Abbott IX)*

The Court did grant the DOE's request for one year to afford districts flexibility to eliminate, reduce or limit growth of certain specified whole school reform enhancements, and to eliminate, modify and make educationally appropriate decisions about staffing and positions subject to the *Abbott* districts "right of appeal based on educational need related to impairment of the core elements of whole school reform and essential enhancements thereof . . . " *Id.* at 298.

Testimony of David A. Mooij, School District Business Administrator

The first witness to testify for petitioner was David A. Mooij, Business Administrator for the Neptune Township School District (Neptune). Mr. Mooij testified that Neptune became an *Abbott* school district in 1999. He was involved in the preparation of the school district's 2001-2002 and 2002-2003 budgets. He identified a school district budget statement for the school year 2002-2003 which set forth the various categories of *Abbott v. Burke* Aid (P-1). He testified that in 2000-2001 there was no *Abbott v. Burke* supplemental aid because the school district was preparing whole school reform and, therefore, no request was made. He was involved in

preparation of the application for supplemental aid for 2001-02 and he explained that the DOE established a minimum tax levy.

In the winter of 2001-02, Mooij was involved in the preparation of the 2002-2003 budget. He attended a meeting with an assistant commissioner in March 2002, and was told that nothing had been determined yet with respect to the level of *Abbott v. Burke Aid*. He identified a letter of March 11, 2002, which suggested that school district assume the same level of funding of the current school year for the 2002-03 school year (P-2, Exhibit 12). However, as of that date, the school district was about to finalize the budget containing additional *Abbott v. Burke Aid* in the amount of $8,402,328. This was approximately two million dollars more than the prior year. Neptune took no action to change its application because there had been nothing definite received from the DOE.

Neptune received correspondence from the DOE concerning *Abbott* preschool expansion aid funding (P-2, Exhibit 14). Neptune also received a memo of March 18, 2002 (P-2, Exhibit 15) setting forth emergency procedures to adjust the school district's budgets. In this memo, it was stated that the Department has determined that *Abbott* districts will receive additional *Abbott v. Burke* State Aid (Supplemental Funding) capped up to 2001-2002 levels with the actual amount determined following Department review of district budgets in collaboration with districts. Because there is no specific funding level determined by this items of correspondence, no action was taken by Neptune on line 00284 of its budget until there were definitive amounts announced by the DOE.

A public hearing on the budget was held on March 26, 2002, and the school board approved the proposed budget for submission to the voters at the annual school election (P-1, Exhibit 17). This budget was submitted to the voters and was narrowly approved.

On March 27, 2002, Neptune received a faxed memo from the DOE (P-2, Exhibit 18) directing that Neptune submit a second and balanced budget by April 1, 2002. As a result of this, Neptune reduced funding to the 2001-2002 level and prepared a second budget. (P-3). This anticipated additional *Abbott v. Burke* aid on line 00284 in the amount of $6,518,318, is the same amount as provided in the prior school year. Based on the instructions by the DOE, Neptune's

business division advised the superintendent to reduce programs commensurate with the reduction in appropriations. As a result of the school district revision, a reduction of 1.9 million dollars in *Abbott v. Burke* state aid was required and no procedures existed to make-up the loss of this aid. There were no additional opportunities for the board of education to meet.

It was only as a result of a letter of June 17, 2002 (P-4) that Neptune was placed on some type of official notification that not only was the funding level not the same as the prior year, but was further reduced by an additional $860,000 to $5,844,432. Mr. Mooij testified that there was no official communication from the DOE concerning this figure prior to June 17, 2002. There is also no understanding as to how this figure was arrived at. It was understood that there was a $250,000 fund balance carry-over which Neptune applied in both of its budget submissions (P-1 and P-3).

As a result of the June 17, 2002 letter (P-4), further reductions were made in the appropriations by Dr. Lake. This is contained in the August 13, 2002 revised school district budget (P-5) and this matches the letter of June 17, 2002 (P-4). This was approved by the DOE by letter dated September 30, 2002 (P-6).

Mr. Mooij reported a further reduction in *Abbott* funding as a result of the school district's Comprehensive Annual Financial Report (CAFR) or annual audit, which identified a general fund surplus of $817,018 in excess of two percent. Based on the fiscal year 2002-03 Appropriations Act, the Commissioner is permitted to reallocate a school district's undesignated general fund balances in excess of two percent. Thus, the *Abbott v. Burke* State Aid was reduced by this amount. Mr. Mooij explained that *Abbott* districts can only carry two percent and this two percent cap was started in fiscal year 2001-2002. As a result, the *Abbott* funding was reduced to $5,027,000. Mr. Mooij explained that the cause of this surplus was the result of having received notification in March 2002 of *Abbott* Parity Aid Payback of $862,000 which had been returned to Neptune. However, because Neptune was unaware of its receipt, the Parity Aid was not expended and was included in surplus. As a result, the DOE reduced Neptune's 2002-2003 *Abbott* funding. In March 2002, Neptune requested a hardship appeal seeking relief from this further reduction. There was no communication from the DOE as to this appeal and as a result, expenditures were stopped, and Neptune had a serious cash flow problem.

Mr. Mooij testified that the actual and documented costs of the half-day of kindergarten in 2001-2002 could have been readily determined by Neptune at the end of school in June 2002 without the need to wait for the CAFR in November 2002. Since the DOE never requested this information from Mr. Mooij, the DOE never determined the actual expenditures for the half day of Neptune's kindergarten program in the 2001-02 school year or increased 2002-2003 supplemental funding by that amount.

Testimony of Dr. Michael T. Lake, Neptune Superintendent of Schools

Dr. Michael T. Lake, Neptune's Superintendent of Schools, testified to the preparation of the 2002-2003 school year budget. Neptune has one early childhood center, five elementary schools, one middle school and one high school. It used a centralized approach to budget preparation as recommended by the DOE. It has an elaborate budgeting process with school-based budgets proposed by school management teams. As the Superintendent, Dr. Lake works closely with the school principals who generate a budget document from each school site. Neptune considers the needs of the children as sacrosanct. He coordinates these budgets with the DOE's *Abbott* advisers.

With respect to the budget in question, Dr. Lake indicated it was a very difficult time and he received mixed messages from the DOE. However, if budget guidance from the DOE was not in writing, Neptune would not follow that guidance, and the Superintendent would not be guided by rumor or hearsay. Thus, Neptune prepared an initial school budget calling for additional or supplemental *Abbott v. Burke* Aid of $8,400,000. He indicated that this was arrived at after he made significant cuts in the management team proposals. The DOE subsequently notified Neptune of the reduction of available funds to $6.5 million, and the school district was again required to reduce expenditures. There were extensive reductions in whole school reform budgets. There were reductions in personnel, computers, textbooks, parent training, etc. The cuts were from the trivial to the major. There was a wide range of cuts and Neptune ended up with a rather bare bones approach to the needs of the children. He noted that the DOE's letter of June 17, 2003 (P-4), also only gave estimated figures. When he received this, he could not believe that he would receive this letter giving estimated revenues and requiring reductions by June 24,

2002. It would take longer than the minimal number of days the district was provided to make these reductions, and he advised Assistant Commissioner MacInnes by letter dated June 21, 2002, that this could not be accomplished by June 24, 2002.

As a result of Dr. Lake's review of the budget and making significant reductions, Neptune's budget was brought into compliance with DOE's spending levels. He outlined the personnel reductions in a letter dated July 22, 2002 (P-10). The personnel reductions involved 17 paraprofessional positions, seven teaching positions, including one at the middle school, one at the high school, and five elementary, one career counselor in the middle school, one substance abuse counselor in the high school, two social workers and two special education teaching positions.

Dr. Lake testified that the impact of these reductions was disastrous. The school district had totally embraced whole school reform, but as a result of this, there was a quantum leap backwards. He was at wit's end to prepare this revised budget, and it reduced the educational mission of the school district

Dr. Lake testified to the specific reductions. Under the Comer Model, each school is required to have two paraprofessional positions. He explained that the classes are large. Neptune continues to employ paraprofessionals but there are 17 less than last year, even though the enrollment has increased by 200 pupils. The average class size has gone up, and *Abbott* requires an average class size of 18 in grades K through 2 and 21 in grades 3 through 5, but the school district has gone backwards. The seven teachers are Comer facilitators, but there are seven less teachers this year than last year. Career counselors in the middle schools are also required *Abbott* positions. Last year, there were two and this year there is only one. One social worker per school is required, but this was reduced to five in total. Substance abuse counselors are recommended to be one at the middle school and one at the high school, but this was reduced to a total of one. With regard to resource room and special education teachers, the school district was attempting to reduce class sizes, but had to cut back. Resource room class sizes now comply with the special education code requirements.

The effect on the education program was that the school district rolled back to pre-*Abbott* days. Classes are oversized and children are not getting services. Kindergarten through twelfth grade children have suffered.

Dr. Lake testified that as a result of the DOE's June 17, 2002 determination as to supplemental aid, Neptune was required to eliminate the following positions in the 2002-03 budget: 17 paraprofessionals; seven teaching positions; one career counselor; one substance abuse counselor; two social workers; and two special education teachers (P-10). Neptune also had to cancel orders for replacement science books for grades 7-8 and for a new K-5 spelling program in order to replace a 15-year old program that does not conform to the New Jersey Core Curriculum Content Standards (CCCS) (P-11). Neptune also was not able to make the final payment on the lease/purchase of obsolete, seven-year-old computer hardware used for computer-assisted instruction . (P-11) Dr. Lake testified that the payoff of the lease/purchase agreement would have reduced the need for State funding.

Dr. Lake testified that Neptune did not become aware of the reduction in DOE funding until after the local tax share had been approved by the board of education and submitted for placement on the ballot. Thus, there was no opportunity to make up any shortfall.

Dr. Lake also testified concerning the specific reductions in the budget that resulted from the DOE's determination as to supplemental funding. He testified that Neptune determined that there was an educational need for those positions, programs and services, and they were all part of the 2001-2002 budget. However, Neptune was required to eliminate them in 2002-2003 because of the reduction in additional *Abbott v. Burke* State Aid.

Dr. Lake's testimony as to the effect of the reduction in additional *Abbott v. Burke* State Aid may be broken down into nine categories as follows:

Elimination of 17 Paraprofessionals. Dr. Lake testified that 10 of the 17 paraprofessionals are required by the Comer Model and were to assist with early literacy classes in grades 1-3. Neptune's early literacy program consisted of 90-minute blocks of time for reading instruction, and the paraprofessionals were to assist the teacher by providing small group

and individualized instruction. Dr. Lake testified that the district and the Comer developer had determined that these positions were needed to deliver the educational services necessary to address literacy problems in Neptune's elementary schools. As a result of the unavailability of these aides, Neptune has abandoned the grades 1-3 reading groups in the 2002-03 school year. The other seven paraprofessionals were to be assigned to the full-day kindergarten program to provide individualized support with readiness skills and other individualized instruction. Dr. Lake stated that the principals at each of the elementary schools have reported the adverse impact on the development of kindergarten students as a result of the elimination of these positions, an increase in referrals to the child study teams and an increase in discipline problems because of the loss of paraprofessional assistance in kindergarten classes.

Apparently, when Dr. Lake was questioned about the facilitators by the DOE's representative, Ms. Fair-Davis, he responded to the effect that they had been retained by Neptune. Dr. Lake explained that he understood the question to be whether facilitators-teachers had been retained, not the distinct position of facilitators. He did not indicate to Ms. Fair-Davis that the retained facilitators/teachers were solely performing teaching functions. Ms. Fair Davis then noted in her checklist that facilitators/teachers had been maintained in each elementary school. (R-17).

Elimination of Seven Teaching Positions. Dr. Lake testified that five instructional facilitators at the elementary schools, one at the middle school and one at the high school were eliminated. Petitioner asserts that the elementary school facilitators are required by the Comer Model and, under the DOE's directives, are a core element of whole school reform (P-4 page 2). The facilitators receive special training to assist classroom teachers in the implementation of the Comer Model and work closely with the staff, parents and community to establish a climate for academics. They also provide early intervention for students with social, personal and academic difficulties. Dr. Lake stated that without these facilitators, a core element of the Comer Model is not being properly implemented in Neptune. Because of funding cuts, these individuals were assigned to classroom teaching responsibilities. Dr. Lake also testified about the need for facilitators in the middle school and high school. They worked closely with the social workers and guidance counselors on interventions for at risk students and with parents on problems that interfered with a student's educational progress. If the problems of these students are not

addressed, the problems escalate and the students eventually spin out of control. Because these facilitators are no longer available, there is a reduction in staff to respond to students who are experiencing difficulties.

On cross-examination, Dr. Lake was asked why the August 13, 2002 budget (R-12) contains the same number of teaching positions for the 2002-2003 school year as the 2001-2002 school year. He indicated that while the positions may have remained in the budget there was no funding for the positions.

Career Counselor. Dr. Lake testified that this is also a required position under the Comer Model implemented in the middle school. Dr. Lake testified that only 56% of students in the school system advance to a two-four-year college. Most of the other students require early preparation for various workplace vocations. The career counselor would cycle through middle school classrooms to provide necessary vocational and career information, to assist students to explore career opportunities, and to help students develope job-seeking skills.

Substance Abuse Counselor. Dr. Lake testified that Neptune previously had full-time substance abuse counselors at both the middle school and the high school. This was a certificated staff member who is needed to deal with students who are substance abusers. Neptune has a large population of students that are medically and emotionally troubled and the substance abuse counselor meets with these students individually or in groups on a daily basis. There is now only one substance abuse counselor who must divide time between the middle school and the high school.

Two Social Workers. Dr. Lake testified that social workers are certificated staff members required under the Comer whole school reform model. One of their principal responsibilities is to work in the community after regular school hours to address student needs and to strengthen the connections between the community and the school. They also assist parents who need help and address student problems that impair student attendance and learning readiness.

Two Special Education Teaching Positions. Dr. Lake testified that although Neptune's resource room class sizes comply with applicable requirements, these positions were necessary to

properly serve students with special education needs. There is a diminished level of individual services provided to special education students in the 2002-2003 school year which impedes Neptune's ability to implement properly the Individualized Educational Program (IEP) for all the high school students with special education needs and places Neptune at risk of violating special education laws.

Textbooks. Dr. Lake testified that Neptune is currently utilizing a fifteen-year-old spelling program for grades K-6 which does not conform to the CCCS. Neptune also requested funding for a new science program for grades 7-8, and the current science textbook does not conform to the requirements of the CCCS. Dr. Lake indicated that the replacement textbooks are needed for the proper instructional implementation of the CCCS in the district.

Lease-Purchase Payment. Dr. Lake testified that Neptune also requested funding to make the pay-out on a five-year lease purchase for computer hardware. He explained that by making this payment now, Neptune can not only save the State money and be more efficient, but also it will be able to initiate the necessary steps to replace out-dated computer equipment for classroom instructional purposes.

Reallocation of general fund surplus from 2001-2002 in excess of two percent. After the DOE received Neptune's CAFR, the DOE required the District to reallocate the general fund surplus from 2001-2002 which exceeded two percent, or $817,018 to the 2002-03 budget. The DOE correspondingly reduced the award of Additional *Abbott v. Burke* State Aid for 2002-2003 by that amount. (P-7)

Neptune's annual audit or CAFR revealed $817,018 in general fund surplus in excess of two percent for the school year ending June 30, 2002. (R-10). By letter dated November 19, 2002, (P-11), Neptune requested approval to permit it to transfer $750,000 from its 2001-2002 free balance audit account to the school district's budget. (P-11). On January 6, 2003, the DOE notified Neptune that Neptune must appropriate the $817,018 in general fund surplus in excess of two percent into the 2002-2003 district budget, and the DOE would reduce Neptune's Additional *Abbott v. Burke* State aid by that same amount because Neptune's educational program contained in the August 13, 2002 budget "was evaluated to ensure all the core components required by the

Court had been included." (Verified Petition of Appeal, dated February 3, 2003, Exhibit D). By separate letter dated January 6, 2003, the Department modified Neptune's estimated Additional *Abbott v. Burke* State aid, and directed Neptune to appropriate the $817,018 in General Fund surplus into the 2002-2003 district budget. (P-7). At the same time, the DOE notified Neptune that its Additional *Abbott v Burke* State aid would be reduced by $817,018. Thus, there would be no change to the overall amount of the August 13, 2002 budget approved by the DOE. On January 15, 2003, Assistant Commissioner MacInnes rejected Dr. Lake's proposal to use $750,000 of the general fund surplus for programs and services which Neptune claimed were needed in the school district for the 2002-2003 school year. (Verified Petition of Appeal, Exhibit D).

Testimony of Glenn Forney, former DOE Budget Manager to the Neptune School District

Glenn Forney testified for respondent DOE. Mr. Forney was previously assigned as a DOE Budget Manager to the Neptune School District, and now serves as Acting Assistant Director of Fiscal Review and Improvement for Abbott Implementation. He testified that, consistent with the Supreme Court's June 11th Order, the DOE accurately calculated Neptune's estimated Additional *Abbott v Burke* State aid for the 2002-2003 school year as reflected in the Department's June 17, 2002 letter (P-4).

Mr. Forney testified that the DOE's calculation (R-9) presumes that the revenues in Neptune's 2001-2002 K-12 budget must equal expenditures. The DOE used revenues rather than expenditures in its calculation because the calculation occurred before information on actual expenditures was available.

Mr. Forney calculated Neptune's 2001-2002 PreK-12 DOE approved budget based on the budgeted revenues derived from the August 13, 2002 budget (R-9). Based on the budgeted revenues, Neptune's PreK-12 DOE approved budget in 2001-2002 was $60,054,725 (R-9). Mr. Forney then factored out the costs of Neptune's preschool program for three- and four-year olds in order to determine Neptune's 2001-2002 K-12 DOE approved budget. Based on Neptune's DOE approved early childhood plan for 2001-2002, the cost of Neptune's preschool program was $5,852,885. Once this amount was factored out, Mr. Forney determined that Neptune's 2001-

2002 K-12 DOE approved budget was $54,201,840. (R-9) This amount became the targeted amount and Mr. Forney then determined the amount of Additional *Abbott v Burke* State aid necessary to reach Neptune's K-12 budget for 2002-2003 of $54,201,840. He totaled Neptune's budgeted revenues derived from the August 13, 2002 budget with the exception of Additional *Abbott v Burke* State aid, and factored out the costs of Neptune's preschool program for three- and four-year olds in order to determine Neptune's 2002-2003 K-12 DOE approved budget. Based on Neptune's DOE approved early childhood plan for 2002-2003, the cost of Neptune's preschool program was $6,408,810. Once this amount was factored out, the DOE determined that Neptune needed $5,844,432 in Additional *Abbott v Burke* State aid to establish 2002-2003 revenues at the level of expenditures contained in the 2001-2002 K-12 DOE approved district budget.

Mr. Forney testified that, because the DOE's calculation included the full amount of kindergarten costs in the 2001-2002 school year, it was unnecessary to increase the K-12 DOE approved budget for the second half-day of kindergarten.

In response, Neptune made reductions to the budget (P-10), and submitted a budget dated August 13, 2002, incorporating those reductions, that included Additional *Abbott v. Burke* State aid in the amount of $5,844,432 (P-5). The Department contends that the amount of reductions made by Neptune did not coincide with the amount of reductions necessary to be in compliance with DOE's letter of June 17, 2002 (P-4), and the Supreme Court's June 11, 2002 order. The DOE has taken the position that Neptune was required to make reductions in the amount of $673,886, but, according to the testimony of Dr. Lake, Neptune made reductions of approximately $1,209,000.

There is no provision in this calculation (R-9) for the increase in funding for the second half of kindergarten mentioned in *Abbott IX*. In response to questioning why there was no mention of the half-day of kindergarten in the calculation, and the absence of any line item for the second half of kindergarten in the 2002-03 revenue column, Mr. Forney testified that the funding was included in the 2002-2003 budget calculated by the DOE. He assumed that since Neptune had funded the half-day of kindergarten in 2001-2002 out of the revenues available to the school district in that year, the half-day of kindergarten could be funded with the same level

of revenues in 2002-2003. Mr. Forney denied that the DOE was required under *Abbott IX* to increase the amount of supplemental funding in 2002-2003 to include funding from the DOE for the half day of kindergarten. Based on this interpretation, the DOE never requested that Neptune provide to the DOE the actual and documented costs of the half-day of kindergarten in 2001-2002.

Testimony of Jami Fair-Davis, Acting Manager, Program Improvement Regional Center – Central.

Ms. Jami Fair-Davis, Acting Manager, Program Improvement Regional Center – Central, testified to the process by which Neptune's proposed budget was reviewed. First she reviewed Neptune's August 13, 2002 budget to determine whether the budget contained sufficient funds to fully implement the approved early childhood preschool program and the core components of whole school reform (WSR) in compliance with the letter from Assistant Commissioner MacInnes (P-4). After she looked at Neptune's budget submissions, she corresponded with Dr. Lake with any questions and concerns that she had. She identified her first e-mail to Dr. Lake asking about any losses in staff (R-14). She received a response from Dr. Lake (R-15). There was additional correspondence which addressed her concerns but did not clarify the situation. She then contacted Dr. Lake by telephone and worked through the checklist with him on September 26, 2002 (R-16). His responses are in parenthesis on the checklist. As a result of her conversation with Dr. Lake she came away with no concerns about the program being implemented in accordance with the Abbott requirements.

Ms. Fair-Davis also testified that she was aware of the testimony of Dr. Lake, that Neptune had adopted and implemented the Comer Model in all of its schools. Dr. Lake also testified at length on the need for certain programs and services for Neptune students to avoid impairment of the core elements of the Comer Model and the essential enhancements thereof. She testified that she became familiar with the Comer Model and with the School Reform Handbook. She explained that the Comer Model does not require specific positions, but rather requires compliance with principles. For example, the Comer Model requires social services but does not require a social worker. The Comer Model suggests that a half-time district facilitator be provided for each school.

Ms. Fair-Davis testified that she understood from discussions with Dr. Lake that Neptune had in place the core elements and essential enhancements that the DOE determined should be funded in 2002-2003. She admitted that she never discussed with the Comer developer what components Comer considered to be the core elements and essential enhancements of their whole school reform models at the elementary, middle and high school levels. Ms. Fair-Davis testified that the DOE determined the components that would be funded in the 2002-2003 school year. She filled out a checklist to determine that the core elements and essential enhancements had been adequately funded in Neptune. She admitted that she did not inquire of Dr. Lake whether the Comer Model had been customized by the developer in Neptune to meet the school district's particular needs or whether other core elements and essential enhancements were part of the Comer Model adopted by the District. Ms. Fair-Davis also did not assess whether Neptune had an educational need under *Abbott IX* for any programs and services that were outside the components listed by the DOE in its directives to Neptune.

Ms. Fair-Davis' testimony is that after a careful review of Neptune's budget, which included several communications with Dr. Lake, she confirmed that each of the core components and essential enhancements of WSR set forth in P-4 were maintained (R-16). Based on this, the DOE conditionally approved Neptune's budget. (P-6).

Ms. Fair-Davis testified that when she questioned Dr. Lake as to whether the facilitators had been retained by Neptune, he responded in the affirmative. Ms. Fair Davis then noted in her checklist under "Maintain WSR Facilitators" that "facilitators/teachers maintained in each elementary school." (R-17). She admitted that she made no effort to follow-up on her inquiry to determine how the "facilitators/teachers" could function as facilitators, nor did she take any action after she was notified in writing that the facilitators were functioning solely as teachers. (R-5).

Yut'Se Thomas, the Director of the DOE's Office of School Funding, was also called as a witness. However, her brief testimony was not relevant to the issues before me in this matter.

ISSUES TO BE DECIDED

Based on the arguments of the parties at the hearing and their respective post-hearing submissions, I believe that the issues in this matter are:

1. As a preliminary matter, does *Abbott ex rel. Abbott v. Burke,* 172 *N.J.* 294 (2002) (*Abbott IX*) utilize a different legal standard in school district appeals from the denial of funding for positions, programs and services "related to" the core elements of whole school reform (WSR) and essential enhancements thereof, and that if the school district is able to demonstate that programs and services address social and personal problems that impair learning, those programs and services must be funded?

2. Did Neptune establish its entitlement to additional *Abbott v. Burke* State Aid for or during the 2002-2003 school year?

3. Whether *Abbott IX* requires that districts receive funding from the DOE for the second half-day of kindergarten?

4. Whether the DOE's denial of Neptune's request to use its general fund surplus in excess of two percent for various purposes violated the legal standard established in *Abbott IX,* and is also arbitrary and capricious because it was based on a fundamental misreading of the fiscal year 2003 Appropriations Act.

LEGAL DISCUSSION AND ANALYSIS

I will now attempt to address the issues raised by the parties in this matter.

Issue 1: Does Abbott IX extend the school district's appeal right so as to require the funding of programs or services whose elimination or reduction damages, weakens or diminishes the core elements and essential enhancements of the whole school reform model?

Attorney for petitioner argues that in *Abbott ex rel. Abbott v. Burke,* 172 *N.J.* 294 (2002), or *Abbott IX,* the Supreme Court established a new legal standard for consideration of supplemental funding appeals. He asserts that the Court ruling held that *Abbott* districts had the right to appeal K-12 supplemental funding decisions "based on educational need related to impairment of the core elements of whole school reform and essential enhancements thereof..." (*Abbott IX* at 298). He argues that in deciding the DOE's motion to stay further increases in *Abbott v. Burke* funding, the Court refused to accept the DOE's narrow formulation and it held that a district could appeal the denial of funding for positions, programs and services "related to" and not limited to the core elements of whole school reform and essential enhancements thereof. He additionally argues that by including "impairment" in the standard, the Court indicated that the appeal right extends to programs or services whose elimination or reduction damages, weakens or diminishes the core elements and essential enhancements of the whole school reform model. Therefore, he contends that a school district's appeals rights in such proceedings are significantly broader.

Attorney for the DOE argues that such a standard would be contrary to previous *Abbott* decisions as well as the regulations implementing the *Abbott* decisions. He argues that the Supreme Court has clearly stated that *Abbott* districts must be able to demonstrate a need for supplemental programs, relying on *Abbott V*, 153 *N.J.* at 517, and that this standard is articulated in the regulations implementing the *Abbott* decisions. He asserts that petitioner herein must provide evidence demonstrating that the programs and positions were effective and efficient in addressing the particularized needs of Neptune's students, and relies on the fiscal year 2003 Appropriations Act which requires the Commissioner to ensure that all *Abbott* funds are used in an effective and efficient manner. He contends that Neptune must demonstrate that any particularized needs cannot be addressed through existing programs and positions, referring to *N.J.A.C.* 6A:24-5.2(a)(6) and (7) which require *Abbott* districts to demonstrate that a supplemental program or service does not duplicate or overlap with existing programs and services. He also asserts that an *Abbott* district must also demonstrate that the positions and programs, in previous school years, effectively addressed any particularized needs of its students, referring to *N.J.A.C.* 6A:24-5.2(a)(4) which requires *Abbott* districts to demonstrate that a supplemental program or service is documented by evidence that the program or service for success in the school and/or in other schools with similar characteristics and is proven to address

the identified need. Finally, respondent argues that an *Abbott* district must provide documentary evidence such as a "needs assessment" demonstrating that its students had particularized needs, referring to *N.J.A.C.* 6A:24-5.1 *et seq*. Respondent relies on *Board of Education of the City of Elizabeth v. New Jersey Department of Education,* OAL Dkt. NO. EDU 5574-01, decided November 19, 2001, in support of its position

I agree with the position being taken by respondent DOE as to this issue. The purpose of the Supreme Court's decision in *Abbott IX* was to address fiscal concerns raised by the State of New Jersey, not to deal with the substance of *Abbott* appeal procedures. There is no discussion in *Abbott IX* which may be construed as changing the regulatory framework established by the DOE for dealing with *Abbott* appeals. To construe *Abbott IX* to change the focus or framework for *Abbott* appeals would be contrary to the entire purpose and intent of *Abbott IX.* Its clear intent was to deal with fiscal exigencies in a manner that would not only permit the Department to deal with those exigencies, but also provide to school districts the right to appeal in order to deal with their individual needs. I **FIND** that the Supreme Court's order in *Abbott IX* does not relieve the appealing school district of its obligation and responsibility to comply with the requirements of duly adopted regulations in order to establish its entitlement to additional funding. In such cases, the determinations of the school district as to the particularized needs of its students are entitled to deference as long as such determinations are supported by the data or assessments required by the regulations. See, *Board of Education of the City of Elizabeth v. New Jersey Department of Education, supra.,* OAL Dkt. NO. EDU 5574-01, decided November 19, 2001.

Issue 2: Did Neptune establish its entitlement to additional Abbott v. Burke State Aid for the 2002-2003 school year?

Attorney for petitioner framed the issues related to funding as whether the DOE erroneously and unconstitutionally deprived Neptune of adequate Additional *Abbott v. Burke* State Aid to address critical needs of Neptune's disadvantaged students during the 2002-2003 school year?

The only witness to testify in support of the educational need for the requests that are

under consideration in this matter was Dr. Michael T. Lake, Neptune's Superintendent of Schools. He testified that the school district fully embraced whole school reform and that the school district prepared its initial budget through management team proposals. As a result of the DOE funding at a level equal to the prior year, the school district was required to make extensive reductions in WSR budgets in personnel, computers, textbooks, parent training and other related areas. Personnel reductions involved 17 paraprofessional positions, seven teaching positions, including one at the middle school, one at the high school and five elementary teachers, one career counselor in the middle school, one substance abuse counselor in the high school, two social workers, and two special education teachers.

Dr. Lake testified that the impact of these reductions on Neptune was disastrous and amounted to a step backwards. The paraprofessionals had been intended to assist regular education teachers with implementation of reading programs. The inability to hire special education teachers resulted in resource room class sizes increasing, but still being in compliance with regulations implementing the federal Individuals with Disabilities Education Act. The school district was also required to cancel orders for replacement science books for grades seven and eight, and a new K-5 spelling program to replace an existing 15-year-old program that he asserts does not conform to New Jersey's CCCS. The school district was also unable to make a final payment on the lease purchase of obsolete computer hardware and if such payment had been made, it would have reduced the need for State funding.

Dr. Lake testified that 10 of the 17 eliminated paraprofessionals are required by the Comer Model to address literacy problems in Neptune's elementary schools by providing small group and individualized instruction. As a result of the unavailability of these aides, Neptune has abandoned the grades 1-3 reading groups in the 2002-2003 school year. The other seven paraprofessionals were to be assigned to provide individualized support with readiness skills and other individualized instruction to the full-day kindergarten program, and that the principals at each of the elementary schools have reported the adverse impact on the development of kindergarten students as a result of the elimination of these positions, an increase in referrals to the Child Study Teams and an increase in discipline problems.

On cross-examination, Dr. Lake was questioned why the August 13, 2002 budget (R-12)

contains the same number of teaching positions for the 2002-2003 school year as the 2001-2002 school year. He indicated that while the position may remain in the budget there was no funding for the positions.

Dr. Lake testified that Neptune was required to eliminate five instructional facilitators at the elementary schools, one at the middle school and one at the high school. He testified that the elementary school facilitators are required by the Comer Model and are a core element of whole school reform (P-4 page 2). They are specially trained to assist classroom teachers and work closely with the staff, parents, social workers, guidance counselors and community, and provide early intervention for students with social, personal and academic difficulties. Without these facilitators, a core element of the Comer Model is not being properly implemented in Neptune.

However, when Dr. Lake was questioned about the facilitators, he responded that they had been retained by Neptune. He later explained that he understood the question to be whether the individuals who were to be assigned the duties of facilitators had been retained, not the positions of facilitators. He did not explain to Ms. Fair-Davis that the retained facilitators/teachers were solely performing teaching functions. However, Ms. Fair Davis then noted in her checklist under "Maintain WSR Facilitators" that "facilitators/teachers maintained in each elementary school." (R-17).

Respondent contends that Ms. Fair-Davis made no effort to follow-up on her inquiry to determine how the "facilitators/teachers" could function as full-time facilitators, as required by the Comer Model and the DOE, nor did she take any action after she was notified in writing that the facilitators were functioning solely as teachers. (R-5). Dr. Lake testified that career counselor is a required position under the Comer model, to provide necessary vocational and career information, to assist students to explore career opportunities, and to help students develop job-seeking skills.

Dr. Lake testified that Neptune previously had full-time substance abuse counselors at both the middle school and the high school to deal with students who are troubled and are substance abusers. There is now only one substance abuse counselor who must divide time between the middle school and the high school.

Dr. Lake testified that social workers are required under the Comer Model to address student needs, strengthen the connections between the community and the school, assist parents who need help and address student problems that impair attendance and learning readiness.

Dr. Lake testified to the need for two special education teachers, even though Neptune's resource room class sizes comply with the applicable requirements of the regulations implementing the IDEA.

Dr. Lake testified that Neptune's fifteen-year-old spelling program for grades K-6 and the current science textbook does not conform to the requirements of the CCCS, and that replacement textbooks are needed to implement the CCCS.

Dr. Lake testified that Neptune also requested funding to pay off a five-year lease purchase for computer hardware. He explained that by making this payment now, Neptune can not only save the State money and be more efficient, but also it will be able to initiate the necessary steps to replace out-dated computer equipment for classroom instructional purposes.

Despite the extensive detail provided in the testimony of Dr. Lake, I **FIND** that his testimony, while credible, was anecdotal and conclusory, and that petitioner supplied no specific facts or documentary evidence as required by the applicable regulations.

N.J.A.C. 6A:24-7.1(b) provides that an application for additional *Abbott v. Burke* State aid is required to include a demonstration that resources are insufficient to support all programs required by *Abbott V* or *Abbott VI,* and further reallocation would weaken the district's foundational education programs; and/or the board has determined that resources are insufficient to support Department-approved supplemental program(s) or service(s) and further reallocation would weaken the district's foundational education programs.

N.J.A.C. 6A:24-5.1(b) requires a determination whether a particularized need exists by first undertaking a needs assessment including:

1. An assessment of student achievement in meeting CCCS and identification of

particular populations of students not meeting such standards;

2. Where the CCCS are not being met, a determination that failure of those students is caused by particularized needs which are not capable of being addressed by existing WSR or required secondary programs at the school level, and an explanation as to why the existing WSR or required secondary programs are insufficient to meet the identified need(s);

3. An inventory of currently used programs and services targeted to the area(s) of need, together with an assessment of their effectiveness and efficiency in meeting such need, and an explanation as to why they are insufficient to meet the identified need(s); and

4. A review of community resources which could be used to address the identified area(s) of need and an explanation as to how they are being used or why they are not being used.

N.J.A.C. 6A:24-5.1(c) provides that if a particularized need is found, recommended appropriate supplemental programs and services are required to be documented by evidence that the programs and services have worked successfully in the school and/or in other schools with similar characteristics and proven to address the identified need, the proposed plan for the program is to be submitted to the Department for approval in accordance with the provisions of *N.J.A.C.* 6A:24-5.2. If resources are insufficient to support the supplemental programs or services approved pursuant to *N.J.A.C.* 6A:24-5.2 after all possible reallocation at the school and district levels have been made, the board shall apply to the Department for additional State aid in accordance with the requirements of *N.J.A.C.* 6A:24-7.

N.J.A.C. 6A:24-9.6(c) provides that in rendering decisions on such applications, the same standards shall apply as are set forth for Department review in the operative rules for the type of application in dispute. The burden of proof is on the petitioning party to demonstrate that these standards were met by the applicant notwithstanding the Department's determination to the contrary. The record on appeal consists of the documents and information submitted to the Department in support of the application and any additional information relied upon by the Department in making the determination at issue.

In this case, there is conflicting testimony as to the actual requirements of the Comer

Model which was adopted by Neptune. Dr. Lake testified that ten of the eliminated paraprofessionals are required by the Comer Model to address literacy issues. However, there is no indication that literacy issues cannot be addressed in some other manner. Both parties apparently agree that facilitators are required by the Comer Model, but it is entirely unclear to me whether the positions have been budgeted and funded, but not filled, or whether they have been eliminated. Dr. Lake testified that positions such as career counselors and substance counselors are required by the Comer Model, but Ms. Fair-Davis testified that what Comer requires is that social work and counseling be provided, but that specific positions are not required by the Comer Model. Dr. Lake testified that two additional special education teachers were necessary, but there is no justification for this alleged need.

In addition, there is no testimony or documentation of a needs assessment as specified as *N.J.A.C.* 6A:24-5.1(b). There was no evidence of an assessment of student achievement or identification of students not meeting CCCS. There is no evidence that the failure of those students not meeting CCCS is caused by particularized needs which are not being addressed by existing WSR or required programs. There is no documentation that the supplemental programs and services requested by the school district are programs and services that have worked successfully in the district or in other schools as required by *N.J.A.C.* 6A:24-5.19(c). There is no demonstration that existing resources are insufficient to support all programs required by *Abbott V* or *Abbott VI*, and that further allocation would weaken the district's foundation education programs, as required by *N.J.A.C.* 6A:24-7.1(b). As specified by *N.J.A.C.* 6A:24-9.6(c), the burden of proof is on the school district to demonstrate that the standards set forth in the regulations were met by the district notwithstanding the DOE's determination to the contrary. I **FIND** that the Neptune school district has failed to meet its required burden of proof in this matter so as to support its appeal.

ISSUE 3: Whether Abbott IX requires that Neptune receive funding from the DOE for the second half-day of kindergarten?

In *Abbott IX, supra,* 172 *N.J.* at 296, the Court stated that the DOE represented that full-day kindergarten and half-day pre-school programs for three and four-year-olds will be maintained and enhanced. The DOE requested the right to limit additional *Abbott v. Burke* State

Aid (supplemental funding) for 2002-2003 for each Abbott district to the expenditures contained in the 2001-2002 K-12 DOE-approved district budget as increased by actual and documented 2001-2002 expenditures for the second half of kindergarten, as modified by DOE to take into account 2001-2002 actual expenditures and available revenues based on the district's annual audits. The Court then ordered that the DOE's request for authorization to preclude any district appeals seeking supplemental funding for 2002-2003 in excess of 2001-2002 funding was

> . . . denied subject to the DOE's authority presumptively and preliminarily to establish districts' supplemental funding for 2002-2003 at the level of expenditures contained in the 2001-2002 K-12 DOE-approved district budget, as increased by actual and documented 2001-2002 expenditures for the second half of kindergarten, as modified by DOE to take into account 2001-2002 actual expenditures and available revenues based on the district annual audits.
>
> [*Id.* at 297.]

The critical issue is whether this language requires the DOE to assume the entire cost of funding for the second half-day of kindergarten.

There is no question that the DOE did not increase Neptune's 2002-2003 supplemental funding with documented expenditures for the second half of kindergarten as the school district argues it was obligated to do. The school district relies on what it asserts is the clear intent of the language that the DOE is responsible for funding of the second half-day of kindergarten.

In its reply, the DOE takes the position that the purpose of this language was to ensure that all *Abbott* districts would receive sufficient funding for full-day kindergarten. It asserts that while this is not the case in Neptune, the DOE had a concern that other *Abbott* districts' K-12 budget would only contain the cost for a half-day of kindergarten. This was not the case with Neptune because Neptune's K-12 DOE approved budget included the cost of full-day kindergarten. It asserts that the language in the Supreme Court order would ensure that every *Abbott* district receives sufficient funding for full-day kindergarten. It also asserts that the DOE's calculation of Neptune's additional *Abbott v. Burke* State Aid for 2002-2003 included the costs of full-day kindergarten.

The DOE argues that because of the method by which the DOE calculated Neptune's K-12 DOE approved budget, had the DOE increased the K-12 DOE approved budget by the costs of the second half-day of kindergarten, as suggested by petitioner, the DOE would have "double-counted" the costs of Neptune's second half-day of kindergarten. Accordingly, consistent with the Supreme Court's June 11th Order, the DOE accurately calculated Neptune's estimated Additional *Abbott v. Burke* State aid for the 2002-2003 school year as reflected in the Department's June 17, 2002 letter, P-47 Consistent with the Supreme Court's June 11, 2002 Order, the DOE modified Neptune's estimated Additional *Abbott v. Burke* State aid for 2002-2003 by Neptune's 2001-2002 actual expenditures and available revenues based on the district annual audits. *See* P-7.

It is not disputed that the Supreme Court's order of June 11, 2002, requires the DOE to establish districts' supplemental funding for 2002-2003 at the same level of expenditures contained in the 2001-2002 K-12 DOE approved district budget. However, the order also requires that districts' supplemental funding for 2002-2003 be increased by actual and documented 2001-2002 expenditures for the second half of kindergarten. This portion of the order, standing alone, requires that districts receive funding from the DOE for the second half-day of kindergarten, and makes no express or implied reference to the situation where a school district may have provided its own funding for this purpose in the prior school year.

The only question is what is the effect of the final clause of that sentence, ". . . as modified by DOE to take into account 2001-2002 actual expenditures and available revenues based on the district's annual audits; . . ." In my opinion, this additional language is inserted simply to make clear that if actual expenditures were less than the amounts budgeted or appropriated, and if available revenues exceeded the amounts anticipated based on the district's annual audits, the funding level would be reduced to reflect a reduction in actual expenditures or an increase in available revenues. To my mind, and in my interpretation, this additional clause has no effect of the directive of the Supreme Court to the DOE to increase the supplemental funding of school districts for 2002-2003 by an amount required to cover the cost of the second half of kindergarten. The fact that a school district may have budgeted and provided for the second half-day of kindergarten in the 2001-2002 school year is irrelevant. Therefore, I **FIND**

and **CONCLUDE** that the respondent is obligated to pay to the petitioner herein supplemental funding for 2002-2003 in an amount reflecting the actual and documented 2001-2002 expenditures for the second half of kindergarten.

It is noted that neither the DOE nor Neptune supplied the actual and documented amount of expenditures for the second half of kindergarten. Thus, the parties should be required to calculate this amount in order to carry out the directive of the Supreme Court.

ISSUE 4: Whether the DOE's denial of Neptune's request to use its general fund surplus in excess of two percent for various purposes violated the legal standard established in Abbott IX and is also arbitrary and capricious because it was based on a fundamental misreading of the fiscal year 2003 Appropriations Act.

Neptune sought approval to use its general fund surplus in excess of two percent for science textbooks, the rehiring of ten paraprofessionals, the rehiring of two social workers, the purchase of new K-5 spelling programs, and for acceleration of the final payment of the lease/purchase agreement for computer hardware. This request was denied based on language in the Fiscal Year 2003 Appropriations Act.

Neptune argues that the plain language of the Act only requires that, in setting the final amount of *Abbott v. Burke* supplemental aid, the Commissioner "shall consider" among other things, "a reallocation of the district's undesignated general fund balances in excess of two percent." Neptune argues that the Legislature did not require the Commissioner to reallocate the undesignated fund balance if the district needed the funds for educationally needed programs and services under *Abbott IX.* Therefore, Neptune argues that it was not only appropriate, but mandated by *Abbott IX* for the DOE to authorize the district to utilize the general fund excess for the positions, programs, and services needed in Neptune. Thus, Neptune asserts that the DOE's refusal violated the legal standard established in *Abbott IX* and is also arbitrary and capricious because it was based on a fundamental misreading of the fiscal year 2003 Appropriations Act.

I have previously found that *Abbott IX* does not create a new legal standard, and that, as specified by *N.J.A.C.* 6A:24-9.6(c), the burden of proof is on the school district to demonstrate

that the standards set forth in the regulations were met by the district's funding application, notwithstanding the Department's determination to the contrary. I also found that Neptune failed to meet its required burden of proof in this matter. These findings also applies to Neptune's request to utilize the general fund excess over two percent for the positions, programs, and services needed in Neptune.

With respect to Neptune's contention that the DOE's refusal is also arbitrary and capricious because it is based on a fundamental misreading of the fiscal year 2003 Appropriations Act, it is necessary to review that Act. The 2003 Appropriations Act provides:

> The Commissioner of Education shall not authorize the disbursement of funds to any "Abbott district" until the commissioner is satisfied that all educational expenditures in the district will be spent effectively and efficiently in order to enable those students to achieve the core curriculum content standards. The commissioner shall be authorized to take any necessary action to fulfill this responsibility, including but not limited to, the adoption of regulations pursuant to P.L.1968, c.410 (C.52:14B-1 et seq.), related to the receipt and/ or expenditure of State aid by the "Abbott districts" and the programs, services and positions supported thereby. * * * .
>
> The amount appropriated hereinabove for Additional Abbott v. Burke State Aid will provide additional resources to "Abbott districts" and will be distributed by district in an amount that shall not exceed the amount necessary for the district to maintain spending for its K-12 programs at the level authorized and expended by each district in 2001-2002. Before the Commissioner of Education establishes the final district award, he shall first review the budgets and any other financial statements, including the annual audit filed pursuant to N.J.S. 18A:23-1, of each "Abbott district" that has requested Additional Abbott v. Burke State Aid. Any district that fails to submit the required documentation or fails to submit its annual audit by November 15, 2002 may have its State aid withheld upon the commissioner's request to the Director of the Division of Budget and Accounting. In establishing the final award amount, the commissioner shall consider all of the district's available resources and any appropriate reallocations, including, but not limited to, a reallocation of the district's undesignated general fund balances in excess of two percent.

The clear intent of the foregoing statutory language is to require the Commissioner to review all of the resources of Abbott districts and to be satisfied that all educational expenditures in such districts will be spent effectively and efficiently in order to enable students to achieve the CCCS. The Act authorizes the Commissioner to take any necessary action to fulfill this responsibility. This includes taking into consideration all of the district's available resources and making any appropriate reallocations, including a reallocation of the district's undesignated general fund balances in excess of two percent. In this case, I **FIND** that the actions of the DOE in reallocating Neptune's undesignated general fund balances in excess of two percent was entirely consistent with the intent and purpose of the 2003 Appropriations Act, and should be **AFFIRMED**.

DECISION AND ORDER

Based upon the foregoing findings and conclusions, it is hereby **ORDERED** pursuant to *Abbott ex rel. Abbott v. Burke*, 172 *N.J.* 294 (2002), that respondent DOE is obligated to pay to the petitioner herein supplemental funding for the 2002-2003 school year in an amount reflecting the actual and documented 2001-2002 expenditures for the second half-day of kindergarten. In order to implement this determination, the parties are **ORDERED** to calculate the amount of petitioner's actual and documented 2001-2002 expenditures for the second half-day of kindergarten in order to carry out the directives of the Supreme Court. It is further **ORDERED** that, with the exception of the funding for the second half-day of kindergarten, petitioner has failed to meet its required burden of proof to establish its entitlement to additional *Abbott v. Burke* State Aid for the 2002-2003 school year, and its appeal as to this is hereby **DENIED** and **DISMISSED**. It is further **ORDERED** that respondent's denial of petitioner's request to use its 2001-2002 general fund surplus in excess of two percent for various purposes did not violate either *Abbott IX* and is not arbitrary and capricious, but is consistent with the fiscal year 2003 Appropriations Act, and is hereby **AFFIRMED,** and petitioner's appeal is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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 25, 2003
DATE

JOSEPH F. MARTONE, ALJ

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

6/26/03
DATE

Mailed to Parties:

JUL 1 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE,
OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX:

LIST OF WITNESSES:

For petitioner:

David A. Mooij
Dr. Michael T. Lake

For respondent:

Glenn Forney
Jami Fair-Davis
Yut'Se Thomas

LIST OF EXHIBITS:

For petitioner:

P-1 Proposed Neptune School District Budget for 2002-2003, page A2

P-2 The following exhibits attached to P-2 were marked in evidence:

Exhibit 12	DOE guidance memo dated March 11, 2002
Exhibit 14	DOE memo dated March 18 2002
Exhibit 15	DOE memo dated March 18, 2002
Exhibit 17	Neptune Board of Education Budget Resolution
Exhibit 18	Memo from Assistant Commissioner MacInnes dated March 26, 2002

P-3 Proposed Neptune School District Budget for 2002-2003, April 22, 2002, page A2

P-4 Letter from Assistant Commissioner MacInnes to Dr. Lake, dated June 17, 2002

P-5 Proposed Neptune School District Budget for 2002-2003, August 13, 2002, page A2

P-6 Letter from Assistant Commissioner MacInnes to Dr. Lake, dated September 30, 2002 – budget approval letter

P-7 Assistant Commissioner MacInnes' letter to Dr. Lake, dated January 6, 2003

P-9 Dr. Lake letter to Assistant Commissioner MacInnes, dated June 21, 2002

P-10 Dr. Lake letter to Assistant Commissioner MacInnes, dated July 22, 2002

P-11 Dr. Lake letter to Assistant Commissioner MacInnes, dated November 19, 2002

P-12 Report of the Secretary to the Board of Education for the period ending February 28, 2003

P-13 SDP Implementation Life Cycle (Comer Model)

P-14 Whole School Reform Budget documents

For respondent:

R-1 Department of Education Expenditure Report, dated April 16, 2003

R-2 Annual Audit, Schedule B3, page 1

R-3 Proposed Neptune School District Budget for 2002-2003, August 13, 2002, page A3

R-4 Supplemental Certification of Michael T. Lake, dated May 23, 2002

R-5 Dr. Lake letter to Ms. Fair-Davis, dated September 23, 2002

R-6 E-mail from Dr. Lake to Ms. Fair-Davis, dated September 13, 2002

R-7 Proposed Neptune School District Budget for 2002-2003, August 13, 2002, page A4

R-8 School District's Supporting Documentation for Technology Lease Purchase Obligation

R-9 Printout of Excel spreadsheet setting forth calculations by DOE implementing *Abbott IX*

R-10 Audit Questionnaire for 2001-02 for Neptune

R-11 Components of school district budget, dated August 13, 2002

R-12 Components of school district budget for 2002-2003

R-13 Face page of report of the secretary to the Board of Education for period ending February 28, 2003

R-14 E-mail from Ms. Fair-Davis to Glenn Forney, dated August 30, 2002

R-15 Letter from Dr. Lake to Ms. Fair-Davis, dated September 4, 2002

R-16 District Budget Review Checklist as of September 26, 2002

OAL DKT. NOS. EDU 727-03 AND EDU 728-03 (CONSOLIDATED)
AGENCY DKT. NOS. 46-2/03 AND 122-4/02

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH 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 accordance with *N.J.A.C.* 1:1-18.4 and extensions duly requested and granted, exceptions were filed by both the Board of Education (Board) and the Department of Education (Department), as were replies by each to the other's exceptions.[1]

In its exceptions, the Board first contends that the Administrative Law Judge (ALJ) erred in failing to recognize that the Department was required to "level fund" the district, that is, to establish presumptive and preliminary supplemental funding for 2002-03 at the amount of supplemental funding provided in 2001-02. Had the Department done so, the Board observes, its presumptive aid amount would have been $6,518,318 rather than $5,844,432. (Board's Exceptions/Reply at 6-7)

The Board further argues that the ALJ erred in concluding that *Abbott IX, supra*, did not establish a new legal standard for 2002-03 supplemental funding requests. The ALJ should not, the Board contends, have applied the "particularized need" standards of

[1] The Board, with the consent of the Department, incorporated its exceptions and reply into a single submission.

regulations expressly suspended for 2002-03 school year, since it is impossible both "to have a time-out from the Abbott K-12 regulatory requirements for one year and to assume that those very same requirements are still in place." Moreover, the Board continues, the ALJ failed to recognize that the Court imposed a *more* rigorous burden on Abbott districts for the 2002-03 school year, not less; under the Court's order, districts were *not* permitted to show student need for an unlimited breadth of supplemental programs and services, but were instead restricted to showing an *educational* need related to *impairment of essential aspects of a district's whole school reform model.* There is no basis, the Board avers, for the ALJ to have substituted the suspended regulatory framework of "particularized need" for the Court's clearly expressed standard, and the Commissioner should, with the exception of the Board's claim for grade 7-8 replacement science books and a new K-5 spelling program, which should be granted directly on the present record, remand this matter to the ALJ for findings under the correct standard. (*Id.* at 7-10, quotation at 7-8)[2]

For its part, the Department agrees with most of the ALJ's findings and conclusions, but takes exception to that portion of the Initial Decision holding that the Department is required to provide supplemental funding to the Board in an amount reflecting actual and documented 2001-02 expenditures for the second half of full-day kindergarten. As it did before the ALJ, the Department argues that it based its preliminary supplemental aid calculation on a budget which included full-day kindergarten expenditures, so that it would amount to "double-counting" to give the Board additional aid based on such expenditures. The Department further notes that it modified its preliminary calculation based on the annual audit of the district's K-12 budget, so that actual and documented 2001-02 kindergarten expenses have, in fact, already been taken into account in the district's aid entitlement.

[2] The Board did not take exception to the conclusions of the Initial Decision with respect to the excess surplus question. (Issue 4, Initial Decision at 26-28)

Finally, the Department cites to *Sloan v. Klagholz*, 342 *N.J. Super.* 385, 395-96 (App. Div. 2001) for the proposition that retroactive monetary relief should not be granted where such relief would have no impact on the school year in question. (Department's Exceptions at 1-6)

In reply to the Board's exceptions, the Department first posits that the Supreme Court in *Abbott IX, supra,* explicitly authorized supplemental funding for 2002-03 at the level of *expenditures* contained in the 2001-02 approved K-12 district budget, *not* at the level of 2001-02 *aid*; therefore, "level funding" is not required in the sense claimed by the Board, and the Department's calculation was accurate. (Department's Reply at 1-2)

The Department next addresses the Board's contention that the ALJ used the wrong standard of proof in assessing the Board's claims for increased aid. While agreeing that the regulations incorporating "particularized need" requests were, in fact, suspended for the 2002-03 school year, the Department contends that the burden of proof set forth in those rules is nonetheless relevant to the instant appeal because the more rigorous standard established by the Court requires *at least* as great a showing as was required in prior years. Specifically, under applicable Court and legislative directives, programs and positions to be funded in 2002-03 must be demonstrated effective and efficient in addressing students' educational needs, a showing which requires at a minimum that the requested elements not duplicate or overlap with existing programs and services, N.J.A.C. 6A:24-5.2(a) (6) and (7), and that they be shown to have been successful based on documented prior experience, N.J.A.C. 6A:24-5.2(a)(4). As found by the ALJ, the Department continues, the Board submitted no documentary evidence meeting this standard, offering instead anecdotal and conclusory testimony relying essentially on a belief that positions and programs should continue in 2002-03 because they existed in 2001-02. (*Id.* at 2-4)

The Department finally objects to the Board's request that this matter be remanded to the OAL, contending that such a remand would be a waste of time and resources because a complete factual record has already been developed. The Department then analyzes in turn, under the standard proposed by the Board, four major areas of claimed need--paraprofessionals, social workers, grade 7-8 science and K-5 spelling programs, and a lease purchase payment for computer hardware--and concludes in each case that the evidence presented fails to demonstrate impairment of core components and essential enhancements of whole school reform. Thus, the Department urges, even if the Commissioner were to adopt the Board's suggested standard, the Board cannot meet its burden of proof. (*Id.* at 4-11)

In reply to the Department's exceptions, the Board counters that the Court did not state that expenditures for the second half-day of kindergarten were merely to be included in a district's supplemental funding calculation; rather, it stated that the supplemental funding amount must be increased by actual and documented expenditures for this purpose. Additionally, the Board proffers, *Sloan, supra*, is inapposite in the present matter because the Court has established specific appeal processes for Abbott disputes, which nowhere restrict districts' entitlement to retroactive relief once disputes have been resolved; indeed, accepting the Department's argument would mean that an Abbott district's attempt to secure supplemental funding could be thwarted simply by the Department's extension of the appeal process into the following school year, thereby undermining the entire Abbott appeal framework. (Board's Exceptions/Reply at 10-12)

Upon his own review and consideration, the Commissioner first concurs with the ALJ that the Department correctly calculated the Board's level of presumptive aid. Like the ALJ, the Commissioner finds that the Court in *Abbott IX, supra,* specifically authorized preliminary supplemental funding for 2002-03 at the level of *expenditures* contained in the

prior year's approved K-12 district budget, expressing neither a promise nor an expectation that districts would necessarily receive the same dollar amount of aid as in the preceding year.

The Commissioner further concurs that nothing in *Abbott IX* suggests that the Court intended, as part of its one-year suspension of the overall Abbott regulatory framework, to invalidate the established standard of proof for supplemental funding requests. Rather, as found by the ALJ, the Court agreed to allow a period of maintenance and re-assessment in light of State fiscal exigencies and questions about the efficacy of certain remedial measures embodied in the regulations, but was unwilling completely to foreclose Abbott districts from seeking to demonstrate a need for State funding above presumptive levels:

> And the DOE having further requested the ability to preserve the "core elements" of whole school reform as well as certain enhancements of the Success-for-All (SFA) model of whole school reform "tied directly to improving curriculum and instruction under the [Core Curriculum Content Standards] CCCS,"***but to afford districts flexibility to reduce, eliminate or limit growth of other whole school reform enhancements such as technology coordinators and security coordinators,***to authorize districts to eliminate positions and make staffing modifications in various programs such as technology programs, alternative schools, accountability programs, school-to-work and college transition, and to authorize districts to make educational judgments about retaining certain specified positions such as media/ technology coordinator, technology coordinator and drop-out prevention specialist***;
>
> And the Court, although acknowledging the State's fiscal crisis and the motivation underlying defendants' proposal to strictly limit 2002-2003 supplemental funding to 2001-2002 adjusted levels, and although accepting for 2002-2003 budgetary purposes the discretion of the Commissioner of Education preliminarily to set Abbott Districts supplemental funding at such levels but being unwilling to prejudge the merits of an Abbott district's need-based appeal seeking a higher level of supplemental funding;
>
> It is***ORDERED that DOE's request for one year to afford districts flexibility to eliminate, reduce, or limit growth of certain whole school reform enhancements as specified, to eliminate positions and make staffing modifications in various needs-based programs as specified, and to make educationally appropriate decisions about retention of certain positions as specified be and the same hereby is granted subject to the districts' right of appeal based on educational need related to impairment of the core elements of whole school reform and essential enhancements thereof;

> And it is FURTHER ORDERED that the DOE is authorized to impose educationally-appropriate limits on the categories for which needs-based funding requests may be submitted;
>
> And it is FURTHER ORDERED that the DOE may suspend for one year the regulatory requirement for middle schools and high schools to implement whole school reform models, may permit voluntary implementation of models in such schools, and may suspend for one year formal evaluation of whole school reform.
>
> (*Abbott IX* at 296-98, citations omitted)

As the above passage demonstrates, contrary to the Board's contention, the Court did *not* disavow the principles embodied in the rules governing requests for supplemental funding, but, instead, acted to limit the context within which such requests could be made and granted. Within the framework constructed by the Court, then, the ALJ was correct in applying established standards of demonstrated need, effectiveness and efficiency in judging the proofs presented by the Board. For the reasons stated in the Initial Decision, and for the additional reasons stated in the Department's exceptions and post-hearing brief, the Commissioner finds those proofs insufficient to meet the Board's requisite burden, whether expressed specifically in terms of "particularized need" or recognized as inherent in the Court's requirement for "educational need related to impairment of the core elements of whole school reform and essential enhancements thereof."

The Commissioner also agrees with, and adopts in its entirety, the ALJ's discussion on allocation of surplus in excess of 2%. Like the ALJ, the Commissioner finds it entirely proper and appropriate for the Department to have directed reallocation of such funds to support core purposes, rather than permit the Board to seek additional aid for such purposes while using excess surplus for supplemental services not meeting requisite standards of demonstrated need, efficacy and efficiency.

In one area, however, the Commissioner does differ with the analysis and conclusion of the ALJ. On the question of additional State aid for the second-half of full-day kindergarten, so as to cover its entire cost, the Commissioner reads the controlling language of the Court to require not that a district's presumptive amount of aid will be increased by the dollar amount of prior-year expenditures, but that these expenditures must be included in the base budget on which aid is reckoned. The Court directed:

> [T]he DOE's request for authorization to preclude any district appeals seeking supplemental funding***is denied subject to the DOE's authority presumptively and preliminarily to establish districts' supplemental funding for 2002-2003 at the level of expenditures contained in the 2001-2002 K-12 DOE approved district budget, as increased by actual and documented 2001-2002 expenditures for the second half of kindergarten, as modified by DOE to take into account 2001-2002 actual expenditures and available revenues based on the district annual audits***. (*Abbott IX* at 297)

To read this language in the manner suggested by the Board and the ALJ would, as claimed by the Department, result in "double-counting" full-day kindergarten costs for aid purposes, a result surely not intended by the Court. As the Commissioner has found elsewhere, the Court has not held that required Abbott programs must be funded *exclusively* by the State, but rather that the State must ensure that sufficient monies are available to fully fund required programs; thus, in the present context, the State's clear obligation is to provide additional funds so as to bring district revenues to the level necessary to support expenditures, including expenditures for full-day kindergarten, at 2001-02 levels as required by the Court. While the Commissioner, like the Court, recognizes adequate funding as critical to achievement of a thorough and efficient system of public education in Abbott districts, he also recognizes, as did the Court, that such funding is a shared responsibility between the State and the local district, and that he has an obligation to ensure that State and local resources are allocated as efficiently and effectively as possible in meeting that responsibility. *Board of Education of the Town of Phillipsburg, Warren County v. New Jersey State Department of Education*,

decided September 25, 2003; *Board of Education of the Township of Pemberton, Burlington County v. New Jersey State Department of Education*, decided September 25, 2003; *Board of Education of the Township of Neptune, Monmouth County v. New Jersey State Department of Education*, decided September 25, 2003; *Board of Education of the City of Millville, Cumberland County, v. New Jersey State Department of Education*, decided September 25, 2003; and *Board of Education of the City of Passaic, Passaic County v. New Jersey State Department of Education*, decided September 25, 2003.

Accordingly, for the reasons expressed herein, the Initial Decision of the Office of Administrative Law is adopted except insofar as it finds that additional aid is required to fund the second half-day of kindergarten. The Petition of Appeal, therefore, is dismissed in its entirety.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: 10/09/03

Date of Mailing: 10/10/03

[3] Pursuant to *P.L.* 2002, c. 38, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

574-03

C.J.N. AND D.W.N., on behalf of minor child, C.N.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning parents sought reversal of the NJSIAA's decision not to allow their son, who attends private school, to play on a high school tennis team in the Cherry Hill Public School District. Petitioners sought waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws.

The NJSIAA determined that petitioners' son, C.N., who has been diagnosed with Attention Deficit Disorder (ADD), was not eligible to play tennis at Cherry Hill West since petitioners, without involvement by the Cherry Hill Child Study Team, unilaterally determined to place their child in a private school that was neither a Department of Education approved school nor a member of NJSIAA.

The Commissioner found that petitioners were provided the due process to which they were entitled; that the NJSIAA made every effort to provide a full, fair and timely hearing by the Eligibility Appeals Committee; and that NJSIAA's rule was not applied in an inconsistent manner. Since no student, nonpublic or public, attending one school is permitted to play sports for another school, unless assigned by that school to a vocational/technical school, or as a result of the Child Study Team designation of Individualized Educational Plan, the exception requested could affect all NJSIAA member schools and, thus, create situations where proper oversight and administration of NJSIAA rules would be impossible. Moreover, the Greenberg Academy, where C.N. is enrolled, has no relationship whatsoever to the NJSIAA or the Cherry Hill Child Study Team or the Cherry Hill School District. The Commissioner found that the NJSIAA's decision to deny C.N.'s request for waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws was 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.

October 9, 2003

AGENCY DKT. NO. 210-6/03

C.J.N. AND D.W.N., on behalf of minor child, C.N.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	

For Petitioners, Frank P. Cavallo, Jr. (Parker, McCay & Criscuolo, P.A.)

For Respondent, Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter came before the Commissioner of Education on June 9, 2003, by way of a Petition of Appeal seeking reversal of the final decision of the New Jersey Interscholastic Athletic Association (NJSIAA) not to allow petitioners' son, who attends private school at the Center for Education, to play on a high school tennis team in the Cherry Hill public school district. Briefs and the underlying record of proceedings before the NJSIAA were duly submitted in accordance with the provisions of *N.J.A.C.* 6A:3-7.1 *et seq.*, and the record on appeal closed on August 1, 2003.

The material facts and procedural history of this matter are as follows: C.N. is domiciled in the Cherry Hill School District and attended the public schools of the district from Kindergarten through grade nine. By his parents' account, his attendance and interest began to deteriorate in eighth grade, and worsened through ninth grade. C.N.'s pediatrician and a Neuro-Cognitive Learning Consultant referred by the

pediatrician concluded that C.N. suffered from Attention Deficit Disorder (ADD)[1] and recommended that C.N. be provided with modifications and accommodations under Section 504 of the Rehabilitation Act of 1973 (Section 504). Petitioners met with school district officials to discuss C.N.'s situation, but were dissatisfied with the results, which petitioners state were limited to seating C.N. in the front row of class when he did attend school and suspending him when he did not. Accordingly, at the beginning of tenth grade, in the fall of 2002, petitioners unilaterally decided to place C.N. at the Center for Education (Center), where the ADHD students were being educated in a small-class, individualized environment and the Section 504 accommodations recommended for C.N. were available, and where C.N. has completed eleventh grade and reportedly improved substantially in both attendance and attainment; at no time did petitioners seek to have C.N. placed by the school district, in the Center or elsewhere, since they believed C.N.'s situation required immediate resolution. When C.N. then sought to participate on the Cherry Hill High School West Tennis Team during the 2002-03 school year, his request was denied by the local school district based on its obligation to abide by operative rules of the NJSIAA. On or about March 3, 2003, a request for eligibility waiver was made to NJSIAA, supported by a letter from the principal of Cherry Hill High School West, and its denial was unsuccessfully appealed to the NJSIAA Eligibility Appeals Committee. The Committee ruled at its meeting of March 5, 2003 and memorialized its decision in a written document on March 13, 2003, which constitutes the final decision now before the Commissioner on appeal.

[1] The record is not entirely clear as to whether C.N.'s diagnosis was Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD), but that distinction is immaterial to the determination herein.

PETITIONERS' POSITION

Initially, petitioners assert that the NJSIAA acted arbitrarily and capriciously when it denied C.N.'s request to participate on the tennis team at Cherry Hill West High School. (Petitioners' Brief in Support of Appeal at 6-7) Citing *Florence County School District Four v. Carter*, 510 *U.S.* 7, 12 (1993); *Bernardsville Board of Education v. J.H.*, 42 *F.*3d 149 (3rd Cir. 1994); and *School Comm. of Burlington Mass. v. Department of Education,* 471 *U.S.* 359 (1985), and pointing to *N.J.A.C.* 6A:14-2.10 and the Individuals with Disabilities Education Act (IDEA), 20 *U.S.C.S.*, 1400 *et seq.*, petitioners argue that parents have the right to place their child in a private school without the consent of their local board of education. (*Id.* at 7) Petitioners point out that a student placed in a private school setting by the Cherry Hill West Child Study Team, or through assignment to a vocational school program, would be permitted to participate in interscholastic sports for Cherry Hill West even where the private school placement resulted in enrollment in a school that is not a member of NJSIAA, because the student remains under the jurisdiction of the assigning school. (*Ibid.*) Thus, petitioners argue, NJSIAA's decision denying petitioners' request effectively acted to punish petitioners for electing not to request public school payment for their son's education or to wait over three months for him to be placed in an institution which may not have achieved success comparable to what has occurred at the Center for Education. (*Id.* at 8)

Secondly, petitioners submit that the NJSIAA violated the Rehabilitation Act of 1973, which provides that no otherwise qualified individual with a disability shall be excluded solely by reasons of his or her disability from participation in, or be denied the benefits of, any program or activity receiving federal financial assistance. (*Id.* at 9)

Citing numerous federal court cases, petitioners maintain that NJSIAA is subject to the Rehabilitation Act and, therefore, required to provide a handicapped individual the opportunity to participate in its programs. (*Id.* at 11) Petitioners contend that C.N. is excluded form participation in the Cherry Hill West High School program solely because of his handicap, since, if C.N. were not handicapped, he would remain a student at Cherry Hill West High School and be entitled to participate in the tennis program. (*Id.* at 12) Therefore, petitioners conclude, the NJSIAA decision must be reversed as violative of the Rehabilitation Act of 1973.

NJSIAA'S POSITION

In presenting its "Statement of Facts," the NJSIAA avers that, contrary to petitioners' assertions that they were required to place C.N. themselves because the Child Study Team was not dealing productively with C.N.'s disability, the hearing before NJSIAA showed otherwise. Citing to testimony and exhibits, NJSIAA contends the school, in fact, carefully developed a plan under Section 504 of the Federal Rehabilitation Act to provide special assistance to C.N., and that the school principal opined that C.N.'s problems were "not so much what was occurring in the classroom, but the travel time which C.N. was experiencing in going from various buildings in a complex housing 1,600 students." NSJIAA further notes that petitioners complained of class sizes, but rejected the district's suggestion of an alternative school having an enrollment of 49 students; and that petitioners' testimony at hearing clearly established the desire not to have their son "stigmatized" by classification as the basis for their reluctance to work with the district child study team to develop an Individualized Education Plan (IEP) for C.N. Finally, NJSIAA notes that the school, through its Principal, recognizes full well

that it can have nothing to do with students not enrolled in the system, yet it somehow believes that participation on the school tennis team should nonetheless be allowed. (NJSIAA Brief at 1-3, quotation at 1)

Citing Dam Jin Koh and Hong Jun Kim v. NJSIAA, 1987 *S.L.D.* 259, *Brady v. NJSIAA*, 96 *N.J.A.R.*2d (EDU) at 980, and *N.J.A.C.* 6A:3-7.4, the NJSIAA points out that the Commissioner's scope of review in NJSIAA determinations is an appellate one; thus, the Commissioner may not overturn an eligibility decision of the NJSIAA absent a finding that it applied its rules in a patently arbitrary, capricious or unreasonable manner. (*Id.* at 5) The NJSIAA asserts that petitioners cannot meet their burden of demonstrating that the NJSIAA Bylaws, Article V, Section 1, or its application violated any federal or state laws or was arbitrary or unreasonable. (*Ibid.*)

Initially, the NJSIAA maintains that this appeal does not implicate any rights under federal law. The Association avers that the federal court decisions cited by petitioners have absolutely no application to the facts of this case, where the challenge is to the requirement that a child, whether disabled or not, be enrolled in a member school to participate in interscholastic sports, since none of the cited decisions supports the right of parents to forsake a school's academic program, while at the same time requiring that school to include their child in its athletic program. (*Id.* at 5-6) The NJSIAA maintains that it has adopted rules, as set forth in its 2002-2003 *NJSIAA Handbook*, to assure that disabled students are fully accommodated to participate in four seasons in any sport, as demonstrated by: 1) the provision that any handicapped or classified student is not required to comply with the Academic Credit Rule and 2) the provision permitting disabled students to participate in interscholastic sports in the seventh and eighth grades

to make certain that they involve themselves in four seasons of a sport before turning 19. (*Id.* at 6-7) The NJSIAA also points out that, although home-schooled students are not eligible to participate in interscholastic sports, a student placed on home instruction under the auspices of the school district is eligible to participate in that district's sports program. (*Id.* at 7)

Secondly, the NJSIAA contends that C.N. participated on the Cherry Hill West tennis team while attending that school and there is no allegation that his disability in any way impeded his participation in interscholastic sports at this member school. (*Ibid.*) The NJSIAA maintains that, if C.N. had remained a student at Cherry Hill West, or if he had been placed by the Cherry Hill School District in an education setting under the district's jurisdiction, then C.N. could have continued to participate in the Cherry Hill School District's interscholastic program; but, instead, his parents decided to place him in a private school outside the Cherry Hill School district's jurisdiction. (*Ibid.*) Thus, C.N.'s inability to participate in interscholastic sports has not been caused by his disability, but, rather, was due solely to a parental decision, made "without any pressure or compulsion from Cherry Hill West or from the NJSIAA," to educate C.N. in a private school. (*Id.* at 7-8)

Additionally, the NJSIAA points out that the Greenberg Academy has no relationship whatsoever to the NJSIAA or the Cherry Hill School District, since the Greenberg Academy has no sports program, is not a member of the NJSIAA, and C.N. was placed at the Greenberg Academy without involvement by the Cherry Hill Child Study Team or the Cherry Hill School District. (*Id.* at 8) The NJSIAA also notes that the NJSIAA is a voluntary association of schools subject to an internal governance

structure established by the member schools themselves. (*Ibid.*) Thus, the NJSIAA posits, the NJSIAA can only function through its member schools who are obligated to administer interscholastic sports at the local level and are responsible for assuring that students are given a physical examination, are under the supervision of certified coaches and adhere to the eligibility standards of the NJSIAA. (*Id.* at 9) The NJSIAA also sets forth the position that Article V, Section 1, of the Bylaws of the NJSIAA, which was adopted in 1978 and requires that a student must be enrolled in a NJSIAA member school to participate in the school's interscholastic athletic program, serves several legitimate interests of the NJSIAA and its member schools, as follows:

1. Each member school is responsible for properly administering and enforcing all NJSIAA rules and regulations, including eligibility rules, to its own students; allowing students to attend one school and compete athletically for another would make proper oversight and administration of rules and regulations impossible.

2. Sports offered by member schools are an integral part of the overall academic and extracurricular program provided for each student enrolled in that school.

3. Allowing students to participate on the athletic teams of other schools would discourage the initiation of appropriate athletic programs by the schools attended by the students and may even encourage schools in difficult financial situations to eliminate programs as a cost saving measure if their students are free to participate in that activity at another school.

4. Allowing a non-enrolled student to participate in a member school's athletic program would wrongfully deny an enrolled student the opportunity to participate in that athletic program at his or her own school. (*Id.* at 10-11)

Moreover, the NJSIAA asserts that *E.L. and N.L., on behalf of R.L. v. NJSIAA,* decided by the Commissioner, August 31, 1998, is controlling; there, as here, petitioning parents voluntarily placed their children in a private school and claimed that

provisions of Article V, Section 1, of the NJSIAA Bylaws infringed on parental choice. (Id. at 11-12) In *E.L.*, the Commissioner found that the four above-enumerated reasons were "sound reasons for the rule as it stands" and the Commissioner further determined that NJSIAA's application of Article V, Section 1, of the NJSIAA Bylaws to deny petitioners' request to allow their son to play ice hockey for the Cranford public high school while enrolled in the Oratory Catholic Preparatory School was neither arbitrary nor unjust since the parental choice had been made by petitioners to enroll their son in a school which did not provide ice hockey. (*Id.* at 12) The Commissioner held that:

> ...That petitioners argue the rule compels them to make a choice with respect to their son's education does not elevate their claim to one of prejudicial or unjust treatment; indeed many parents are similarly faced with having to weigh the varied components of a private or parochial education against those of the public school education. (*Id.* at 12, *citing E.L., supra,* at 7)

Citing cases from court decisions in Maryland, Oklahoma, Montana and Maine, the NJSIAA submits that "courts in other jurisdictions have held that school district policies and requirements which forbid non-enrolled students from participating in pubic school classes or extracurricular programs are permissible if they are rationally related to the school's objectives and interests." (*Ibid.*) In particular, the NJSIAA points out that, in *Kapstein v. Conrad School District*, 931 *P.*2d 1311 (1997), the Montana Supreme Court held that that, in balancing a student's right to participate in public school sports programs with the school district's right to organize and administer its academic and athletic programs, the school district's interest in integrating its academic and extracurricular activities outweighed the private school student's interest in participating in extracurricular activities. (*Id.* at 13-14) Similarly, in *Pelletier v. Maine Principals' Association,* 261 *F. Supp.* 2d 10 (Me. D.C. 2003), the United States District Court upheld

the Maine Principals' Association rule permitting home schooled students to participate in interscholastic athletics, but only at their local public high school, reasoning that "Maine's decision to open the public school athletic programs to home-schooled students without at the same time opening the private school programs does not create a burden on parental choice." (*Id.* at 14-15, *citing Pelletier* at 14)

In conclusion, the NJSIAA readily acknowledges that petitioners have the freedom to choose where their son will be educated, but asserts that petitioners do not have the right, under either state laws or their federal counterparts, to select only the portions of the offered public education which best serve their interests. (*Id.* at 15) The NJSIAA, therefore, contends that its decision in the instant matter must be upheld because it is consistent with the Commissioner's decision in *E.L., supra*, and because the rule in question is rationally related to the legitimate interests of the NJSIAA and its member schools and does not infringe upon petitioners' rights. (*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, the said rules and regulations are deemed school policy and are enforced first by the internal procedures of the NJSIAA.

The Commissioner's scope of review in matters involving the NJSIAA is appellate. *See 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, 183. The Commissioner may not

overturn an action by the NJSIAA in applying eligibility rules absent a finding that the rules were applied 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 Eligibility Appeals Committee. *Dam Jin Koh, supra.* As codified to provide notice of this standard to the public and regulated parties:[2]

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 deficient rests with the person challenging the decision. *Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). It is well-established that:

> 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 Env., N.J.*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

[2] *See*, 31 *N.J.R.* 4173(a) and 32 *N.J.R.* 1177(a).

Upon careful consideration of this matter, and mindful of the applicable standard of review, the Commissioner determines to affirm the NJSIAA's decision denying petitioners' request for a waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws for the reasons set forth below.

Initially, the Commissioner finds that petitioners were provided the due process to which they were entitled and that the NJSIAA made every effort to provide a full, fair and timely hearing by the Eligibility Appeals Committee. Upon review of the testimony and the documentation provided by petitioners and the Cherry Hill School District, it is noted that the Committee voted unanimously to deny petitioners' request for a waiver of Article V, Section 1, of the NJSIAA Bylaws, which states:

> A student, to be eligible for participation in the interscholastic athletic program of a member school, must be enrolled in that school and must meet all the eligibility requirements of the Constitution, Bylaws, and Rules and Regulations, of the NJSIAA. (*NJSIAA Handbook* at 42)

The Committee's decision, memorialized in a written document on March 13, 2003, explains the Committee's reasoning, as follows:

> [1.] There are many students who are not enrolled in a NJSIAA member school, but who are eligible to participate in interscholastic sports, where they have been assigned by that school to a vocational/technical school or as a result of the Child Study Team designation or Individualized Educational Plan. However, these students remain under the jurisdiction of the assigning school. Students who have left the jurisdiction of the member school cannot be eligible to participate on that school's athletic teams.
>
> [2.] To allow any other arrangement would permit parents to enroll in any school of their choice without any oversight by a member school and then participate in that school's team in the unbridled discretion of the student's parents.
>
> [3.] In this case, the student's parents had the ability to have their son assigned to an appropriate placement to deal with his disability. Instead of utilizing the opportunities available through the member school's system,

> including the placement in an alternative school, the parents voluntarily decided to place their son outside of the Cherry Hill School District's jurisdiction, in the Center for Education in Marlton, New Jersey.
>
> [4.] By removing their son from the Cherry Hill West system without any assignment by the District to the private school, the parents made a voluntary determination to remove their son from the ability to participate in interscholastic sports at Cherry Hill West.
>
> [5.] The Committee believes that the parent's motives were certainly laudable and does not in any way question that determination. However, since the choice was totally voluntary and outside the jurisdiction of a member school, there is no basis for granting a waiver of the provisions of Article V, Section 1 of the NJSIAA Bylaws. Accordingly, this student will not be eligible to participate on the Cherry Hill High School West tennis team or any other athletic program at that member school. (NJSIAA's March 13, 2003 Letter memorializing the Committee's decision of March 5, 2003)

Given the explicitness of Article V, Section 1, of the Bylaws and the NJSIAA's articulation of sound reasons for its decision, the Commissioner cannot find that the application of Article V, Section 1, is arbitrary or unjust, as applied to petitioners' son. In so determining, the Commissioner observes that the record is devoid of any allegation that the NJSIAA's rule is being applied in an inconsistent manner. Moreover, since no student, nonpublic or public, attending one school is permitted to play sports for another school,[3] the exception requested here could affect all NJSIAA member schools and, thus, create a situation that would make the proper oversight and administration of NJSIAA rules impossible.

Although the Commissioner completely agrees with petitioners' assertion that they have the right to place their son in a private school at their own expense without the consent of the local board of education, the fact that petitioners have that right does

[3]Article V, Section 1 of the Bylaws has been interpreted to permit students to participate in a school's interscholastic program where students have been assigned by that school to a vocational/technical school or as a result of the Child Study Team designation of Individualized Educational Plan, which did not occur in the instant matter.

not mean that they concomitantly have the right to participate in interscholastic athletics at their local public school while attending a private school that has no relationship to it. As set forth by the Commissioner in *E.L., supra,* at 7, "[t]hat petitioners argue the rule compels them to make a choice with respect to their son's education does not elevate their claim to one of prejudicial or unjust treatment; indeed, many parents are similarly faced with having to weigh the varied components of a private and parochial education against those of the public school education." Moreover, the NJSIAA's determination that non-enrolled students are to be excluded from participating in interscholastic sports in member schools' sports programs is consistent with the findings of courts in other jurisdictions.

Additionally, the Commissioner finds petitioners' argument that C.N. is excluded from participation on the Cherry Hill West tennis team by virtue of his handicap because, absent the handicap, he would remain at Cherry Hill West High School, to be without merit. In so determining, the Commissioner observes that there is no allegation of C.N.'s disability having in any way impeded his participation on Cherry Hill West's tennis team while attending that school; that NJSIAA Bylaws and the Interpretative Guidelines to the NJSIAA Handbook support the NJSIAA's contentions that it has adopted rules to accommodate disabled students to ensure their full participation in interscholastic sports in member schools; and that C.N.'s situation arises not from his disability, but from parental choice freely exercised.

In the instant matter, the Greenberg Academy where C.N. is enrolled has no relationship whatsoever to the NJSIAA or the Cherry Hill School District, and C.N. was enrolled at the Greenberg Academy without any involvement by the Cherry Hill

Child Study Team or the Cherry Hill School District. Under these circumstances, therefore, and for the reasons set forth above, the Commissioner cannot find that the NJSIAA's decision to deny C.N.'s request for waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws was arbitrary, capricious or unreasonable.

Accordingly, the decision of the NJSIAA Eligibility Appeals Committee is sustained and the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 10/09/03

Date of Mailing: 10/10/03

[4] This decision, as the Commissioner's final determination, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3.

575-03

B.R.I., on behalf of minor child, E.I.,

PETITIONER,

V.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent sought reversal of the NJSIAA's decision not to allow his son, who attends private school, to play on a high school tennis team in the Cherry Hill Public School District. Petitioner sought waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws.

The NJSIAA determined that petitioner's son, E.I., a classified student with Tourette Syndrome, was not eligible to play tennis at Cherry Hill West since petitioner, without involvement by the Cherry Hill Child Study Team, unilaterally determined to place his child in a private school that was not a Department of Education approved school nor a member of NJSIAA.

The Commissioner found that petitioner was provided the due process to which he was entitled; that the NJSIAA made every effort to provide a full, fair and timely hearing by the Eligibility Appeals Committee; and that NJSIAA's rule was not applied in an inconsistent manner. Since no student, nonpublic or public, attending one school is permitted to play sports for another school, unless assigned by that school to a vocational/technical school, or as a result of the Child Study Team designation of Individualized Educational Plan, the exception requested could affect all NJSIAA member schools and, thus, create situations where proper oversight and administration of NJSIAA rules would be impossible. Moreover, the Greenberg Academy, where E.I. is enrolled, has no relationship whatsoever to the NJSIAA or the Cherry Hill Child Study Team or the Cherry Hill School District. The Commissioner found that the NJSIAA's decision to deny E.I.'s request for waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws was 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.

10/09/03

AGENCY DKT. NO. 209-6/03

B.R.I.,[1] on behalf of minor child, E.I.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	

For Petitioner, Frank P. Cavallo, Jr. (Parker, McCay & Criscuolo, P.A.)

For Respondent, Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter came before the Commissioner of Education on June 9, 2003, by way of a Petition of Appeal seeking reversal of the final decision of the New Jersey Interscholastic Athletic Association (NJSIAA) not to allow petitioner's son, who attends private school at the Center for Education, to play on a high school tennis team in the Cherry Hill Public School District. Briefs and the underlying record of proceedings before the NJSIAA were duly submitted in accordance with the provisions of *N.J.A.C.* 6A:3-7.1 *et seq.*, and the record on appeal closed on August 1, 2003.

The material facts and procedural history of this matter are as follows: E.I. is domiciled in the Cherry Hill School District and attended the public schools of the District from

[1]Although the Petition of Appeal, when filed, was captioned, *B.R.I. and R.S.I., on behalf of minor child, E.I. v. New Jersey State Interscholastic Athletic Association*, Petitioner R.S.I., E.I.'s mother, did not provide a notarized statement of verification as required by *N.J.A.C.* 6A:3-1.4. By letter of June 10, 2003, Petitioner B.R.I., who was acting *pro se* at the time, was advised that "no verification has been filed by petitioner R.S.I., so that, if she wishes to continue as a petitioner in this matter, such verification must be filed within 10 days of receipt of this notice." In that neither B.R.I. nor R.S.I. responded to this notification nor provided the requested verification, B.R.I. is deemed the sole petitioner in this matter.

grade one through grade ten. By his parent's account, E.I. was put on home instruction by the third marking period in tenth grade as he exhibited clinical depression and school phobia due in part to symptoms of Tourette Syndrome and Auditory Processing Delays which affected his performance and social interactions with other students. In consultation with E.I.'s Neuropsychiatrist and the Cherry Hill High School West Child Study Team, E.I.'s medications were altered and additional medications were administered for the depression and E.I. received counseling to address his school phobia. Thereafter, the medications decreased E.I.'s rage episodes and his depression so that he was able to return to Cherry Hill West in the Fall of his junior year. His tics, however, worsened and, according to petitioner, E.I. was tormented by students at the high school. Additionally, according to petitioner, E.I.'s medications were not being followed as required by E.I.'s Individual Education Program (IEP) and E.I. was becoming more and more anxious at the thought of facing another school day. As a result, at the beginning of November 2002, petitioner unilaterally decided to place E.I. at the Greenberg Academy, sometimes referred to as the Center for Education, where Tourette Syndrome students are educated in an individualized environment. Petitioner claims that E.I.'s tics have lessened; he has been accepted by his classmates without ridicule; he has attended almost every day during the 2002-2003 school year; and he has completed eleventh grade.

It is undisputed that at no time did petitioner seek to have E.I. placed by the school district, in the Center or elsewhere, since he believed E.I.'s situation required immediate resolution. When E.I. then sought to participate on the Cherry Hill High School West Tennis Team during the 2002-03 school year,[2] his request was denied by the local school district based on its obligation to abide by operative rules of the NJSIAA. On or about March 3, 2003, a

[2] E.I. played tennis on the Cherry Hill West High School tennis team during his freshman and sophomore years while attending high school at Cherry Hill West.

request for eligibility waiver was made to NJSIAA, supported by a letter from the principal of Cherry Hill West High School, and its denial was unsuccessfully appealed to the NJSIAA Eligibility Appeals Committee (Committee), where, on March 5, 2003, the Committee conducted a hearing and denied petitioner's appeal. The denial of petitioner's request for an eligibility waiver for E.I. to play tennis for Cherry Hill West High School was memorialized in a written document on March 13, 2003, which constitutes the final decision now before the Commissioner on appeal.

PETITIONER'S POSITION

Initially, petitioner asserts that the NJSIAA acted arbitrarily and capriciously when it denied petitioner's request to participate on the tennis team at Cherry Hill West High School. (Petitioner's Brief in Support of Appeal at 6-7) *Citing Florence County School District Four v. Carter*, 510 *U.S.* 7, 12 (1993); *Bernardsville Board of Education v. J.H.*, 42 *F.*3d 149 (3rd Cir. 1994); *School Comm. of Burlington Mass. v. Department of Education,* 471 *U.S.* 359 (1985) and pointing to *N.J.A.C.* 6A:14-2.10 and the Individuals with Disabilities Education Act (IDEA), 20 *U.S.C.S.*, 1400 *et seq.*, petitioner argues that a parent has the right to place his child in a private school without the consent of their local board of education. (*Id.* at 7) Petitioner points out that a student placed in a private school setting by the Cherry Hill West Child Study Team or by an Individualized Placement Program or through assignment to a vocational school program, would be permitted to participate in interscholastic sports for Cherry Hill West even where the private school placement resulted in enrollment in a school that is not a member of NJSIAA because the student remains under the jurisdiction of the assigning school. (*Ibid.*) Thus, petitioner argues, NJSIAA's decision denying petitioner's request was based on petitioner's

decision not to request payment for his son's education or to wait over three months to be placed in an institution which may not have achieved the success that his placement with the Center for Education has achieved with his son. (*Id.* at 8)

Secondly, petitioner submits that the NJSIAA violated the Rehabilitation Act of 1973, which provides that no otherwise qualified individual with a disability shall be excluded solely by reasons of his or her disability from participation in, or be denied the benefits of, any program or activity receiving federal financial assistance. (*Id.* at 9) Citing numerous federal court cases, petitioner maintains that NJSIAA is subject to the Rehabilitation Act and, therefore, required to provide a handicapped individual the opportunity to participate in its programs. (*Id.* at 11) Thus, petitioner contends, E.I. is excluded form participation in the Cherry Hill West High School program solely because of his handicap. (*Id.* at 12) If E.I. were not handicapped, petitioner contends, he would remain a student at Cherry Hill West High School and, thus, be entitled to participate in the tennis program. (*Ibid.*) Therefore, petitioner concludes, the NJSIAA decision must be reversed as violative of the Rehabilitation Act of 1973.

NJSIAA'S POSITION

In presenting its "Statement of Facts," the NJSIAA avers that E.I. received excellent grades during his attendance at Cherry Hill West High School, maintaining an academic average of all "A's" and "B's," except for one "C" in physical education. (NJSIAA Brief at 3) NJSIAA also avers that, contrary to petitioner's assertions that the Child Study Team was not instituting appropriate modifications to deal with E.I.'s disability, the testimony at hearing was otherwise. (*Ibid.*) Citing to psychologist and Child Study Team member Dr. Gloria Wuhl's testimony, NJSIAA contends that a specific plan had been developed to deal

with E.I.'s medical problems; that E.I. had been placed in an appropriate setting; and that E.I. had been abruptly removed from Cherry Hill West by his parents while the plan for an appropriate placement was being implemented. (*Id.* at 3-4) NSJIAA also points out that Dr. Wuhl testified that the Greenberg Academy has not been approved as an acceptable school by the Department of Education and that E.I.'s transfer to that school came as a surprise. (*Id.* at 4) NJSIAA also points out that the Greenberg Academy does not have a sports program, is not a member of NJSIAA and that the Cherry Hill School District had nothing to do with E.I.'s enrollment in the Greenberg Academy, which is not approved by the Department of Education as a school for the disabled. (*Ibid.*) The NJSIAA asserts that this case, therefore, centers on the question of whether petitioner may compel the NJSIAA to render his son eligible to play on Cherry Hill West's tennis team after petitioner made the voluntary decision to withdraw his son from Cherry Hill West High School and place him in a school having no connection with Cherry Hill West High School. (*Ibid.*)

Citing Dam Jin Koh and Hong Jun Kim v. NJSIAA, 1987 *S.L.D.* 259, *Brady v. NJSIAA*, 96 *N.J.A.R.*2d (EDU) at 980 and *N.J.A.C.* 6A:3-7.4, the NJSIAA points out that the Commissioner's scope of review in NJSIAA determinations is an appellate one; thus, the Commissioner may not overturn an eligibility decision of the NJSIAA absent a finding that it applied its rules in a patently arbitrary, capricious or unreasonable manner. (*Id.* at 5) The NJSIAA asserts that petitioner cannot meet his burden of demonstrating that the NJSIAA Bylaws, Article V, Section 1, or its application violated any federal or state laws or was arbitrary or unreasonable. (*Ibid.*)

Initially, the NJSIAA maintains that this appeal does not implicate any rights under federal law, averring that the federal court decisions cited by petitioner have absolutely no

application to the facts of this case, where the challenge is to the requirement that a child, whether disabled or not, be enrolled in a member school to participate in interscholastic sports, because none of the cited decisions supports the right of a parent to forsake a school's academic program, while at the same time requiring that school to include his child in its athletic program. (*Id.* at 5-6) The NJSIAA maintains that it has adopted rules, as set forth in its 2002-2003 *NJSIAA Handbook*, to assure that disabled students are fully accommodated to participate in four seasons in any sport, as demonstrated by: 1) the provision that any handicapped or classified student is not required to comply with the Academic Credit Rule and 2) the provision permitting disabled students to participate in interscholastic sports in the seventh and eighth grades to make certain that they involve themselves in four seasons of a sport before turning 19. (*Id.* at 6-7) The NJSIAA also points out that, although home-schooled students are not eligible to participate in interscholastic sports, a student placed on home instruction under the auspices of the school district is eligible to participate in that district's sports program. (*Id.* at 7)

Secondly, the NJSIAA contends that E.I. participated on the Cherry Hill West tennis team for two years while attending that school and there is no allegation that his disability in any way impeded his participation in interscholastic sports at this member school. (*Ibid.*) The NJSIAA maintains that, if E.I. had remained a student at Cherry Hill West, or if he had been placed by the Cherry Hill School District in an education setting under the district's jurisdiction, then E.I. could have continued to participate in the Cherry Hill School District's interscholastic program but, instead, the parent decided to place his son in a private school outside the Cherry Hill School district's jurisdiction. (*Ibid.*) Thus, the cause of E.I.'s inability to participate in interscholastic sports is not his disability but, rather, was due solely to a parental decision made

"without any pressure or compulsion from Cherry Hill West or from the NJSIAA." to educate E.I. in a private school. (*Id.* at 7-8)

Additionally, the NJSIAA points out that the Greenberg Academy has no relationship whatsoever to the NJSIAA or the Cherry Hill School District as the Greenberg Academy has no sports program, is not a member of the NJSIAA and E.I. was placed at the Greenberg Academy without involvement by the Cherry Hill Child Study Team or the Cherry Hill School District. (*Id.* at 8) The NJSIAA also notes that the NJSIAA is a voluntary association of schools subject to an internal governance structure established by the member schools themselves. (*Ibid.*) Thus, the NJSIAA posits, the NJSIAA can only function through its member schools who are obligated to administer interscholastic sports at the local level and are responsible for assuring that students are given a physical examination, are under the supervision of certified coaches and adhere to the eligibility standards of the NJSIAA. (*Id.* at 9) The NJSIAA also sets forth the position that Article V, Section 1, of the Bylaws of the NJSIAA, which was adopted in 1978 and requires that a student must be enrolled in a NJSIAA member school to participate in the school's interscholastic athletic program of that school, serves several legitimate interests of the NJSIAA and its member schools, as follows:

> 1. Each member school is responsible for properly administering and enforcing all NJSIAA rules and regulations, including eligibility rules, to its own students; allowing students to attend one school and compete athletically for another would make proper oversight and administration of rules and regulations impossible.
>
> 2. Sports offered by member schools are an integral part of the overall academic and extracurricular program provided for each student enrolled in that school.
>
> 3. Allowing students to participate on the athletic teams of other schools would discourage the initiation of appropriate athletic programs by the schools attended by the students and may even

encourage schools in difficult financial situations to eliminate programs as a cost saving measure if their students are free to participate in that activity at another school.

4. Allowing a non-enrolled student to participate in a member school's athletic program would wrongfully deny an enrolled student the opportunity to participate in that athletic program at his or her own school. (*Id.* at 10-11)

Moreover, the NJSIAA asserts that *E.L. and N.L., on behalf of R.L. v. NJSIAA,* decided by the Commissioner, August 31, 1998, where, as in this case, petitioning parents voluntarily placed their children in a private school and claimed that provisions of Article V, Section 1, of the NJSIAA Bylaws infringed on parental choice, is controlling. (Id. at 11-12) In *E.L.,* the Commissioner found that the four above-enumerated reasons were "sound reasons for the rule as it stands" and the Commissioner further determined that NJSIAA's application of Article V, Section 1, of the NJSIAA Bylaws to deny petitioners' request to allow their son to play ice hockey for the Cranford public high school when he was enrolled in the Oratory Catholic Preparatory School was neither arbitrary nor unjust since the parental choice had been made by petitioners to enroll their son in a school which did not provide ice hockey. (*Id.* at 12) The Commissioner held that:

> ...That petitioners argue the rule compels them to make a choice with respect to their son's education does not elevate their claim to one of prejudicial or unjust treatment; indeed many parents are similarly faced with having to weigh the varied components of a private or parochial education against those of the public school education. (*Id.* at 12, *citing E.L., supra,* at 7)

Citing cases from court decisions in Maryland, Oklahoma, Montana and Maine, the NJSIAA submits that "courts in other jurisdictions have held that school district policies and requirements which forbid non-enrolled students from participating in pubic school classes or extracurricular programs are permissible if they are rationally related to the school's objectives

and interests." (*Ibid.*) In particular, the NJSIAA points out that, in *Kapstein v. Conrad School District*, 931 *P.*2d 1311 (1997), the Montana Supreme Court held that that, in balancing the students' right to participate in public school sports programs with the school district's right to organize and administer its academic and athletic programs, the school district's interest in integrating its academic and extracurricular activities outweighed the private school students' interest in participating in extracurricular activities. (*Id.* at 13-14) Similarly, in *Pelletier v. Maine Principals' Association,* 261 *F. Supp.* 2d 10 (Me. D.C. 2003), the United States District Court upheld the Maine Principals' Association rule that permitted home schooled students to participate in interscholastic athletics, but only at their local public high school, reasoning that "Maine's decision to open the public school athletic programs to home-schooled students without at the same time opening the private school programs does not create a burden on parental choice." (*Id.* at 14-15, *citing Pelletier* at 14)

In conclusion, the NJSIAA acknowledges that petitioner has the freedom to choose where his son will be educated, but asserts that petitioner does not have the right, under either state laws or constitution or their federal counterparts, to select only the portions of the offered public education which best serve his interests. (*Id.* at 15) The NJSIAA, therefore, contends that its decision in the instant matter must be upheld in that it is consistent with the Commissioner's decision in *E.L., supra.;* the rule in question is rationally related to the legitimate interests of the NJSIAA and its member schools, and the eligibility rule does not infringe upon petitioner's rights. (*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, the said rules and regulations are deemed school policy and are enforced first by the internal procedures of the NJSIAA.

The Commissioner's scope of review in matters involving the NJSIAA is appellate. *See 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, 183. The Commissioner may not overturn an action by the NJSIAA in applying eligibility rules absent a finding that the rules were applied 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 Eligibility Appeals Committee. *Dam Jin Koh, supra.* As codified to provide notice of this standard to the public and regulated parties:[3]

> 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).

[3] *See*, 31 *N.J.R.* 4173(a) and 32 *N.J.R.* 1177(a).

The burden of proof that an action was thus deficient rests with the person challenging the decision. *Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). It is well-established that:

> 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 Env., N.J.*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

Upon careful consideration of this matter, and mindful of the applicable standard of review, the Commissioner determines to affirm the NJSIAA's decision denying petitioner's request for a waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws for the reasons set forth below.

Initially, the Commissioner finds that petitioner was provided the due process to which he was entitled and that the NJSIAA made every effort to provide a full, fair and timely hearing by the Eligibility Appeals Committee. Upon review of the testimony and the documentation provided by petitioner and the Cherry Hill School District, it is noted that the Committee voted unanimously to deny petitioner's request for a waiver of Article V, Section 1, of the NJSIAA Bylaws, which states:

> A student, to be eligible for participation in the interscholastic athletic program of a member school, must be enrolled in that school and must meet all the eligibility requirements of the Constitution, Bylaws, and Rules and Regulations, of the NJSIAA. (*NJSIAA Handbook* at 42)

The Committee's decision, memorialized in a written document on March 13, 2003, explains the Committee's reasoning, as follows:

> [1.] There are many students who are not enrolled in a NJSIAA member school, but who are eligible to participate in interscholastic sports, where they have been assigned by that school to a vocational/technical school or as a result of the Child Study Team designation or Individualized Educational Plan. However, these students remain under the jurisdiction of the assigning school. Students who have left the jurisdiction of the member school cannot be eligible to participate on that school's athletic teams.
>
> [2.] To allow any other arrangement would permit parents to enroll in any school of their choice without any oversight by a member school and then participate in that school's team in the unbridled discretion of the student's parents.
>
> [3.] In this case, the student's parents had the ability to have their son assigned to an appropriate placement to deal with his disability. Instead of utilizing the opportunities available through the member school's system, including the placement in an alternative school, the parents voluntarily decided to place their son outside of the Cherry Hill School District's jurisdiction, in the Center for Education in Marlton, New Jersey.
>
> [4.] By removing their son from the Cherry Hill West system without any assignment by the District to the private school, the parents made a voluntary determination to remove their son from the ability to participate in interscholastic sports at Cherry Hill West.
>
> [5.] The Committee believes that the parent's motives were certainly laudable and does not in any way question that determination. However, since the choice was totally voluntary and outside the jurisdiction of a member school, there is no basis for granting a waiver of the provisions of Article V, Section 1 of the NJSIAA Bylaws. Accordingly, this student will not be eligible to participate on the Cherry Hill High School West tennis team or any other athletic program at that member school. (NJSIAA's March 13, 2003 Letter memorializing the Committee's decision of March 5, 2003)

Given the explicitness of Article V, Section 1, of the Bylaws and the NJSIAA's articulation of sound reasons for its decision, the Commissioner cannot find that the application

of Article V, Section 1, is arbitrary or unjust, as applied to petitioner's son. In so determining, the Commissioner observes that the record is devoid of any allegation that the NJSIAA's rule is being applied in an inconsistent manner. Moreover, since no student, nonpublic or public, attending one school is permitted to play sports for another school,[4] the exception requested here could affect all NJSIAA member schools and, thus, create a situation that would make the proper oversight and administration of NJSIAA rules impossible.

Although the Commissioner completely agrees with petitioner's assertion that he has the right to place his son in a private school at his own expense without the consent of the local board of education, the fact that petitioner has that right does not mean that he concomitantly has the right to participate in interscholastic athletics in his local public school while attending a private school that has no relationship to the local public school. As set forth by the Commissioner in *E.L., supra,* at 7, "[t]hat petitioners argue the rule compels them to make a choice with respect to their son's education does not elevate their claim to one of prejudicial or unjust treatment; indeed, many parents are similarly faced with having to weigh the varied components of a private and parochial education against those of the public school education." Moreover, the NJSIAA's determination that non-enrolled students are to be excluded from participating in interscholastic sports in member schools' sports programs is consistent with the findings of courts in other jurisdictions.

Additionally, the Commissioner finds petitioner's argument that E.I. is excluded from participation on the Cherry Hill West tennis team by virtue of his handicap because, absent the handicap, he would remain at Cherry Hill West High School, to be without merit. In so

[4]Article V, Section 1 of the Bylaws has been interpreted to permit students to participate in a school's interscholastic program where students have been assigned by that school to a vocational/technical school or as a result of the Child Study Team designation of Individualized Educational Plan, which did not occur in the instant matter.

determining, the Commissioner observes that there is no allegation that E.I.'s disability in any way impeded his participation on the tennis team for the two years he was on Cherry Hill West's team while attending that school. Additionally, as the NJSIAA points out, the NJSIAA Bylaws and the Interpretative Guidelines to the NJSIAA Handbook support the NJSIAA's contentions that it has adopted rules to accommodate disabled students to ensure their full participation in interscholastic sports in their member schools' sports programs and that E.I.'s situation arises not from disability, but from parental choice.

In the instant matter, the Greenberg Academy where E.I. is enrolled has no relationship whatsoever to the NJSIAA or the Cherry Hill School District and E.I. was enrolled at the Greenberg Academy without any involvement by the Cherry Hill Child Study Team or the Cherry Hill School District. Under these circumstances, therefore, and for the reasons set forth above, the Commissioner cannot find that the NJSIAA's decision to deny E.I.'s request for waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws was arbitrary, capricious or unreasonable.

Accordingly, the decision of the NJSIAA Eligibility Appeals Committee is sustained and the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 10/09/03

Date of Mailing: 10/10/03

[5] This decision, as the Commissioner's final determination in this matter, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3.

581-03

BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court. The District also asserted that the Department inappropriately excluded the District's encumbrance figure of $78,890 on the maintenance budget worksheet and that the Department must recalculate the District's excess surplus based on the District's revised calculations, until the Comprehensive Annual Financial Report (CAFR) established otherwise. The District also maintained that the Department must issue a revised preliminary maintenance budget and estimated Additional *Abbott v. Burke* State Aid Award based on adjustments to the reserve and fund balances made after the filed June 30, 2003 Board Secretary's Report.

The ALJ found that the Department appropriately applied the duly promulgated rule implementing the Court's order for "maintenance," and determined that any adjustments to the encumbrances and excess fund balance for the 2002-03 budget based on the District's recalculations and revised information be effectuated within the context of the audit in preparation for the CAFR and the CAFR review.

The Commissioner adopted the Initial Decision, clarifying that the District's encumbrances were properly excluded as a budget expense for 2002-03 by the Department and concurring that any adjustments to the District's maintenance budget be made based on the CAFR review.

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.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4094-03

AGENCY DKT. NO. 185-6/03

BOARD OF EDUCATION OF
THE CITY OF BURLINGTON,

Petitioner,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Dianna Rosenheim, Deputy Attorney General, for respondent (Peter Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 25, 2003 Decided: September 26, 2003

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

STATEMENT OF THE CASE

The City of Burlington School District is an Abbott District, as defined by *N.J.S.A.* 18A:7F-3 and *N.J.A.C.* 6A:24-1.2. Petitioner Board of Education appeals from respondent Department of Education's Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid Award, dated August 27, 2003.

The issues raised by the district primarily concern the manner of accounting for encumbrances payable as of June 30, 2002, and calculating the amount of excess surplus. The district also contends that the Department has not properly defined maintenance budget, *N.J.A.C.* 6A:10-1.2, but the district has simply asked, without objection, that this legal issue be preserved for appeal.

PROCEDURAL HISTORY

The Department moved before the Supreme Court on March 24, 2003, for an order modifying the remedies in *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V). See also Abbott v. Burke,* 172 *N.J.* 294 (2002) (*Abbott IX*). The Department requested that the discretionary Additional *Abbott v. Burke* State Aid (supplemental aid) that it would be required to provide to Abbott districts in 2003-2004 be limited to an amount sufficient to support those programs, positions and services in the districts' approved budgets for 2002-2003. On April 8, 2003, the Education Law Center cross-moved in part for an order setting an expedited schedule for the Department's decisions on districts' budgets. On April 29, 2003, the Supreme Court ordered the Department and the Education Law Center to participate in mediation before the Hon. Philip S. Carchman, J.A.D., to attempt to resolve issues raised by their motions.

Mediation resolved all issues except the 2003-2004 budget process, so the Department's motion for an order extending by an additional year the one-year relaxation of remedies granted in *Abbott IX* remained outstanding. The parties agreed to an expedited schedule for budget approvals and appeals, beginning with the Department's reviews and approvals of districts' budgets by May 30, 2003. Districts' appeals from the Department's reviews were to be transmitted to the Office of Administrative Law, where administrative law judges were to issue initial decisions within 50 days of the appeal. The Commissioner of Education was to issue final decisions within 25 days of the initial decisions. On May 20, 2003, the Supreme Court issued an order incorporating the parties' mediation agreement and providing that the schedule would remain in effect until further order of the Court.

On May 30, 2003, the Department issued decisions on the *Abbott* districts' budgets. In this matter, Assistant Commissioner Gordon MacInnes, Division of Abbott Implementation, notified the district that the Department had completed its initial review of the district's 2003-

2004 expenditure budget dated April 15, 2003. The district was further notified that the expenditure budget conformed with the maintenance standard set forth in the Department's guidance of February 14, 2003, and was approved except as noted in the letter:

> The following items could not be approved because the DOE does not have sufficient information at this time to determine actual need:
>
> Health benefits will be approved when the actual amount of the cost from January 2004 to June 2004 is known.
>
> Since special education tuition costs cannot be precisely projected, the district should base its estimate on 2002-2003 actual expenditures with the understanding that these expenditures will be adjusted based upon actual enrollment/costs.

Assistant Commissioner MacInnes' letter further advised the district that

> The amount of Additional Abbott v. Burke State aid necessary to support your approved budget cannot be determined with precision at this time due to a variety of factors including the inability to determine the exact amount of the school district's available revenues for 2003-2004 such as unbudgeted surplus which will be informed by an ongoing comprehensive analysis of expenditures being done by the Treasurer, the potential savings identified by the Treasurer that may be forthcoming from areas such as debt refinancing for early retirement and school construction and the outcome of any appeal. A payment schedule for Additional Abbott v. Burke State aid will be provided to your district once the Commissioner has issued final decisions on the budget appeals and, as in past years, that payment schedule will be subject to adjustment based on the annual audit filed pursuant to *N.J.S.* 18A:23-1.

On June 5, 2003, the district's verified petition of appeal was filed with the Department. The Department transmitted the contested case to the Office of Administrative Law on June 9, 2003. *N.J.S.A.* 52:14B-2(b). On June 12, 2003, the Department's answer was filed in the OAL. By letter Order dated June 18, 2003, I directed the parties to prepare for a hearing to commence on July 14, 2003.

On June 24, 2003, the Supreme Court issued an order approving the mediated agreement

and scheduling argument on the Department's motion for an order extending the relaxation of remedies granted in *Abbott IX.* On July 1, 2003, the Department moved for an order amending the schedule for processing appeals to allow the Court to rule on the applicable standard before hearings and issuance of initial decisions. On July 10, 2003, the Supreme Court heard oral argument on the budget process. On that date, the Department requested an adjournment of the scheduled hearing to await the Supreme Court's ruling on the maintenance standard. I held a telephone conference with counsel and the adjournment was granted.

By Order dated July 23, 2003, the Supreme Court granted the Department's application to extend the relaxation of remedies granted in *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V).* The Department was authorized to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional Abbott v. Burke State Aid for the Abbott districts. The Court defined a maintenance budget and directed that the Department promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. Among other conditions, the Court's Order established a schedule for the Department to provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding needed to support the currently approved budget. The Order also superseded its earlier modified scheduling Order to require that the Office of Administrative Law issue initial decisions on district appeals from the Department's preliminary maintenance budget figures for the 2003-2004 school year within 30 days of the date of the Department's Notices.

The Department of Education's Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid Award (Exhibit J-1) is dated August 27, 2003. The possible issues on appeal were discussed in a telephone conference on September 3, 2003, and the matter was scheduled to be heard on September 16, 2003. After evaluating discovery, counsel for petitioner district provided a more specific list of issues by letter dated September 8, 2003.

By letter dated September 14, 2003, counsel for petitioner advised that he had mistakenly scheduled himself for the September 16, 2003, hearing when he had a hearing in Newark on

another Abbott appeal the same day. At his request, the matter was rescheduled for September 18, 2003, at 2:00 p.m. On the new hearing date, petitioner's witnesses were not available. Counsel then agreed that the hearing would be held on the afternoon of September 24, 2003, after they completed another hearing that day in Newark. The hearing was commenced in the afternoon and completed on the evening of September 24, 2003, and the record remained open for submission of letter briefs by the close of business the following day.

DISCUSSION

The Department's Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid Award (Exhibit J-1), dated August 27, 2003, provides:

> Pursuant to the July 23, 2003 Order of the Supreme Court of New Jersey in Abbott v. Burke, the Department has determined that your district's preliminary maintenance budget figure for the 2003-2004 school year is $23,571,893.00, inclusive of the district's General Fund Budget and restricted ECPA and DEPA revenue accounts. This number reflects the instructional and non-instructional programs approved and provided in the 2002-2003 school year and includes increases to the 2002-2003 budget to reflect non-discretionary costs and adjustments to the 2002-2003 budget based on actual 2002-2003 expenditures as informed by information provided the accounting firm retained by the Treasurer to review you district's financial information. A copy of the information provided by that accounting firm is available upon request.
>
> The Department has further reviewed the revenues available to your district for the 2003-2004 school year. The Department has identified an additional $500,488 in fund balance that must be appropriated in the district's 2003-2004 revised budget. Initially, the Department of Education identified a projected excess surplus balance of $1,379,846 based on information contained in the district's June 30, 2003 Board Secretary's report. This amount is reduced by $440,000, which is 2% of the undesignated fund surplus. This amount was further reduced by the amount currently budgeted for fund balance in the district's 2003-2004 budget ($200,000). Additionally, this amount is reduced by the outstanding 2002-2003 Account Receivable in Additional Abbott v. Burke Aid ($239,358). Accordingly, the district should revise line 121 in their 2003-2004 budget to reflect the new amount of budgeted fund balance of $700,488 (increase of $500,488).

Projected Surplus balance at June 30, 2003	$1,379,846
2% required Surplus	440,000
Potential excess surplus	939,846
Budgeted fund balance recap	200,000
Fund balance to be budgeted	739,846
Less: Receivable A v B	(239,358)
Line 121 – additional	500,488
New Line 121	$700,488

Based on the revenues available to your district for 2003-2004, your district's estimated need for discretionary Additional Abbott v. Burke State Aid is determined to be $1,215,216.00. A revised 2003-2004 budget, consistent with this letter, must be provided to the Department no later than September 26, 2003. It should be noted that the preliminary maintenance budget and the estimated need for discretionary Additional Abbott v. Burke State aid will be subject to further adjustment after submission by your district of the 2002-2003 CAFR.

The parties agreed that petitioner district would proceed with its proofs first. Assistant School Business Administrator Ingrid Walsh testified that she has held that position with the district for three years. Previously, she served as an auditor with professional accounting firms, specializing in municipal and school district audits. Ms. Walsh is familiar with the Notice of August 27, 2003, and also with the revised Maintenance Budget Worksheet admitted into evidence as Exhibit J-2. According to Ms. Walsh, the Worksheet shows revisions made after conversations with Keith Costello, the Department's Budget Manager for petitioner school district.

Ms. Walsh testified that she prepared the Board Secretary's report to the Board of Education for the 12 month period ending June 30, 2003. The version of the report admitted into evidence as Exhibit P-1 is not the first version. According to Ms. Walsh, she did a "soft close" in July 2003, and then did adjustments after doing an internal audit for errors. She reviewed all relevant data and input changes as needed for a year-end closing. On page two of the report, in the Liabilities and Fund Equity portion, there is an entry for $78,890 appropriated as a reserve for

encumbrances. Ms. Walsh testified that this amount was found in the initial "soft close" and she reviewed all the bills, no change was needed.

Exhibit P-2 is the district's Open Purchase Order Report by Vendor Name. It was Ms. Walsh's testimony that items or services received by the district are included in accounts payable, but items not received or partially received, or services not completed, are reflected as open orders or encumbrances in the Open Purchase Order Report. The total of $78,890 for open encumbrances is found on the last page of the document. Ms. Walsh itemized the open encumbrances in a Schedule of Encumbrances Payable for the Year Ended June 30, 2003 (Exhibit P-3). She acknowledged that the entry for $40,000 represented her estimate that an $80,000 contract was half completed; it is a two-year project. Ms. Walsh testified sincerely that she used the Department's audit guidelines to determine the open encumbrances.

Ms. Walsh does not agree with the Department's calculation of excess surplus. In her opinion, the Department's figure of $500,488 is too high. The district's Excess Surplus Calculation (Unaudited) for the Fiscal Year Ended June 30, 2003, was admitted into evidence as Exhibit P-4. Ms. Walsh calculated 2% of an Adjusted 2003-2003 General Fund Expenditures figure of $20,633.925, or $412,679. To this was added an Extraordinary Aid Allowable Adjustment of $9,263, for a total of $421,942. This amount was subtracted from the Total Unreserved/Undesignated Fund Balance of $758,617, to obtain a figure for Excess Surplus of $336,676. This is $163,812 less than the Department's calculation of excess surplus.

Craig Wilkie has been petitioner district's School Business Administrator since September 2002, and he oversees the Assistant Business Administrator's work. He testified that he is aware of a letter dated September 16, 2003, from Richard Rosenberg, Assistant Commissioner, Division of Finance, Department of Education, to Chief School Administrators, School Business Administrators/Board Secretaries, and Public School Accountants, regarding year-end encumbrances (Exhibit R-1). According to Mr. Wilkie, this letter was issued at some point after Ms. Walsh had completed her work on the Open Purchase Order Report by Vendor Name (Exhibit P-2) and the Schedule of Encumbrances Payable for the Year Ended June 30, 2003 (Exhibit P-3). In his opinion, her work was consistent with the guidelines set forth in Assistant Commissioner Rosenberg's letter, which provides in part that

For the current 2002-03 fiscal year audit as well as future audits, all public school accountants are asked to give utmost consideration to encumbrances on the school district's books at June 30, 200X through a thorough review and analysis of open purchase orders.

Open purchase orders at June 30, 200X should be classified into the following two categories for review and classification:

1. Category one represents purchase orders for which the goods have been received or the services have been rendered at June 30th that have not been paid. These purchase orders must be expensed in the current audit period, the related encumbrances reversed, and a liability (accounts payable) established. If the invoice has not been received the amount must be estimated. In accordance with GAAP, an expenditure is recorded when goods are received or services rendered.
2. Category two represents purchase orders which will be honored in the subsequent year. These purchase orders will be rolled over into the next fiscal year and will be shown in the June 30th general fund balance sheet as a reserve for encumbrances. Per NCGA Statement 1, paragraph 91 "encumbrances outstanding at year-end represent the estimated amount of the expenditures ultimately to result **if unperformed contracts in process at year-end are completed. Encumbrances outstanding at year-end do not constitute expenditures or liabilities."**

These purchase orders must be checked for validity, which means, the purchase orders must have a valid contractual agreement (i.e., contain an actual order of goods or services) in place at June 30, 200X. Blanket purchase orders do not constitute valid purchase orders. As a general rule, for other than construction contracts, the liquidation of these orders should be within 60-90 days of the year-end.

In reviewing the 90-day cut-off period during the year-end audit, purchase orders that existed at June 30, 200X but were not liquidated by September 30 should be canceled and not included in the June 30 reservation of fund balance, with the exception of capital or other long term projects. Open purchase orders for items that are: 1) no longer considered necessary; 2) not substantiated with a valid contract; or 3) aged (regardless of materiality) and have been on the books for over 90 days should also be canceled and not included in June 30 reservation of fund balance.

> In addition, per review of the agreed upon procedures performed by several accounting firms for the Abbott school districts that were recently concluded, on several occasions it was noted that expenditures for 2003-04 were being improperly encumbered in the 2002-03 fiscal year. Districts may not have open encumbrances for items related to the next year such as salaries, insurance premiums, etc.
>
> District's account payable, accruals and year-end expenditure cut-off should be thoroughly reviewed with attention given to ensure that valid expenditures for the current year are captured and expenditures for the subsequent year are recorded in the proper accounting period.
>
> For further guidance on year-end reporting and encumbrances please review, Section I – General Compliance, Chapter 5, "Bids & Contracts/Purchasing" and Chapter 8, "Year-End Procedures" of the 2002-03 Audit Program.
> [Emphasis in original].

Keith Costello is a Budget Manager/Examiner for the Department of Education, Office of Abbott Implementation. He is licensed in New Jersey as a Certified Public Accountant, and he previously served approximately 18 years in the Office of State Auditor. Mr. Costello testified that he is aware of Assistant Commissioner Rosenberg's letter regarding year-end encumbrances. It is his surmise that the letter was sent to all school districts.

Mr. Costello acknowledged that the Department's calculation for excess surplus was almost $164,000 more than petitioner district's calculation. Part of this difference is attributable to the $78,890 that the district reserved for encumbrances. That amount was not included in the Department's calculation because the information was not available. In addition, the Department used a different figure to calculate 2% of the fund balance. Mr. Costello did not think that the resulting difference here, between $440,000 and $412,942, was a significant difference between figures that are estimates. He candidly acknowledged that he had no reason to question the district's numbers and they may be accurate. However, he testified that is the Department's position that it should wait until the district's audit and Comprehensive Annual Financial Report to make adjustments.

Mr. Costello testified that the remainder of the difference in the calculations for excess surplus has not been accounted for yet. He explained that at the time the Department did its

calculations, it was not aware of the decreases Ms. Walsh had taken on her Excess Surplus Calculation (Unaudited) for the Fiscal Year Ended June 30, 2003 (Exhibit P-4), such as Capital Reserve in the amount of $949,664. Mr. Costello testified that the revised Maintenance Budget Worksheet, admitted into evidence as Exhibit J-2, is consistent in method with how the Department handled all the other Abbott districts this year. The revisions were worked out with petitioner district, and they reflect decreases in non-recurring federal revenues and salary increases for a couple of positions. These changes are shown under the heading "Adjust," and they total $381,800. When this number is added to the preliminary maintenance budget figure for the 2003-2004 school year set forth in the Notice of August 27, 2003, $23,571,893, the revised preliminary maintenance budget figure is $23,953,693. The new estimated need for supplemental aid is $1,597,016 (Exhibit J-2).

Mr. Costello acknowledged that in past years, the Department has waited for the CAFR to make revenue adjustments. This year, rather than advancing the funds first and then subsequently adjusting downward if necessary, the Department has based the maintenance budget on estimates that it was thought would be agreeable to the districts. He reiterated that he had no reason to question Ms. Walsh's calculations, but he has not had a chance to analyze them. To Mr. Costello's knowledge, the independent accounting firm did not question the district's encumbrance calculations.

The forgoing represents the sum of the evidential record, which is essentially undisputed.

The parties make several legal arguments. Petitioner district contends that the Department must make changes in the maintenance budget worksheet based upon supplemental documentation from the district. The district should not have to wait until the Comprehensive Annual Financial Review for the year ending June 30, 2003, is submitted to the Department and reviewed. Petitioner argues that to delay the determination until the CAFR would directly thwart the Supreme Court's July 23, 2003, Order and prior *Abbott* decisions. Pursuant to the Court's Order, the Department must establish a preliminary maintenance budget figure "consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support the currently approved budget." Included are any documented increases in non-discretionary expenditures, less any claimed inefficiencies (in this case, there are none). The

Department then calculates the revenues available to the district in 2003-2004 and the difference between the available revenues and the adjusted maintenance budget for 2003-2004 must be filled by Additional Abbott v. Burke State Aid.

The changes petitioner district seeks from the Department are inclusion of the district's encumbrance figures on the maintenance budget worksheet; recalculation by the Department of the district's excess surplus based on the district's calculations, until the CAFR establishes otherwise; and provision of a revised preliminary maintenance budget and estimated Additional Abbott v. Burke State Aid Award. The district contends that this request is supported by the Supreme Court's decision in *Abbott v. Burke*, 170 *N.J.* 537, 544 (2002). Addressing the Department's obligation to consider supplemental documentation and to make appropriate plan and budget adjustments in the preschool context, the Court stated: "That cooperative effort is only possible if the DOE staff works with the Abbott districts in the preparation of their plans, and continues through the administrative process to accept supplemental documentation and to assist the districts in curing any deficiencies that have caused the Department to reject any plan." *Id.* Petitioner district has provided supplemental documentation with respect to actual expenditures and encumbrances, and with respect to the excess fund balance. It contends that the Department must now incorporate those revised figures in the maintenance budget worksheet and provide the district with adjusted numbers and revised Abbott v. Burke State Aid based on those numbers.

The Department first asserts that petitioner district bears the burden of proof in this matter and must demonstrate its compliance with the Department's duly adopted regulations in order to establish any entitlement to additional aid. While the Supreme Court's Order of July 23, 2003, provides that the Department shall bear the initial burden of establishing the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the Department's emergency regulations, the Department's Notice of August 27, 2003, reveals that the Department did not reduce petitioner district's maintenance budget based on ineffectiveness or inefficiency. Thus, petitioner bears the burden of proof, pursuant to *N.J.A.C.* 6A:24-9.6(c).

The Department further contends that it properly calculated petitioner's 2003-2004 maintenance budget and Additional Abbott v. Burke State Aid Award. *N.J.A.C.* 6A:10-3.1 sets forth the requirements for Additional Abbott v. Burke Aid, and specifically provides that a district's budget shall only contain "those programs, positions and services approved and provided in 2002-2003." The regulation also provides that the maintenance budget "shall include any documented increase in non-discretionary expenditures including, but not limited to, contracted salary increases, increases in health benefits, and increases in special education." *N.J.A.C.* 6A:10-3.1(d)(4).

With regard to the district's position that $78,890 in encumbrances should be counted now for the 2002-2003 school year expenses, and that the excess fund balance should be $163,812 less, the Department notes that the $163,812 figure includes the $78,890. The encumbrance figure had not been included in the data available to the Department when it issued its Notice of August 27, 2003. The Department further notes that the $163,812 figure also includes the difference in the parties' calculation of the 2% of the fund balance ($440,000 v. $412,942). However, the remaining difference of about $57,000 was not specifically explained and may be attributable to various reserves the district took subsequent to the June 30, 2003 Board Secretary's Report. It is the Department's position that these new numbers, including the district's encumbrance amount that includes estimates, must be audited in preparation of the CAFR, and if correct for the 2002-2003 school year, the budget will be adjusted at that time.

Having considered the evidential record and the parties' contentions, it is my view that petitioner district has failed to establish that it is entitled to the relief that it seeks. While it is clear that the Department was obligated by the Supreme Court's Order of July 23, 2003, to provide in a Notice to the district preliminary maintenance budget figures for the 2003-2004 school year, it is likewise clear that the Department complied with this obligation. The district has subsequently provided revised information. Since the district will soon have an audit and Comprehensive Annual Financial Report completed, it is reasonable that any adjustments to the encumbrances and excess fund balance for the 2002-2003 budget be based upon this review. I so **CONCLUDE**. Thus, I further **CONCLUDE** that this appeal 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 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.

September 26, 2003
DATE

Joseph F. Fidler
JOSEPH F. FIDLER, ALJ

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

9/26/03
DATE

E-mailed Initial Decision to the parties on:

9/26/03
DATE

EXHIBITS

Joint Exhibits:

J-1 Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid Award, dated August 27, 2003

J-2 Maintenance Budget Worksheet

For Petitioner:

P-1 Revised Board Secretary's Report

P-2 Open Purchase Order Report, By Vendor Name

P-3 Schedule of Encumbrances Payable for the Year Ended June 30, 2003

P-4 Excess Surplus Calculation (Unaudited) for the Fiscal Year ended June 30, 2003

For Respondent:

R-1 Year-End Encumbrances letter dated September 16, 2003, from Department to Chief School Administrators, School Business Administrators/Board Secretaries, and Public School Accountants

WITNESSES

For Petitioner:

Ingrid Walsh

Craig Wilkie

For Respondent:

Keith Costello

OAL DKT. NO. EDU 4094-03
AGENCY DKT. NO. 185-6/03

BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department of Education's (Department) decision on its supplemental funding request for the 2003-2004 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board of Education of the Burlington School District's (District) exceptions and the Department's reply thereto were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Initially, with respect to the District's claim in its exceptions that the Administrative Law Judge (ALJ) failed to follow the Supreme Court's definition of "maintenance budget," but, instead, used the "inconsistent definition of 'maintenance budget' in the Department of Education's emergency regulations" (District's Exceptions at 1-2), the Commissioner finds that the Department's application of the regulatory definition of "maintenance budget" set forth at *N.J.A.C.* 6A:10-1.2 in its review and approval of the District's 2003-2004 budget, and the ALJ's utilization of such definition in its consideration of the

District's appeal is entirely appropriate. With respect to this issue, the ALJ in this matter states solely that:

> The district also contends that the Department has not properly defined maintenance budget, *N.J.A.C.* 6A:10-1.2, but the district has simply asked, without objection, that this legal issue be preserved for appeal. (Initial Decision at 2)

The ALJ does not, therefore, directly address the appropriateness of applying the Department's "maintenance definition." Upon review of the record in this matter and upon consideration of the arguments set forth by the District in its exceptions, however, the Commissioner finds that neither the OAL nor the Commissioner have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v.* Vagott, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n.*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Moreover, even if it were to be assumed, *arguendo*, that the OAL and the Commissioner have jurisdiction to determine the validity of the regulation, as argued by the District, the Commissioner finds that the Department's definition of "maintenance budget," as detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003. Consequently, the Department's application of such regulatory definition in its review and approval of the District's 2003-2004 budget is wholly appropriate.

The remaining issues in this appeal are: 1) whether the Department appropriately excluded the District's encumbrance figure of $78,890 on the maintenance budget worksheet; 2) whether the Department should recalculate the District's excess surplus based on the District's revised calculations, until the Comprehensive Annual Financial Report (CAFR) establishes otherwise; and 3) whether the Department must issue a revised preliminary maintenance budget

and estimated Additional *Abbott v. Burke* State Aid Award based on adjustments to the reserve and fund balances made after the filed June 30, 2003 Board Secretary's Report.

Turning first to whether the Department appropriately excluded the District's encumbrance figure of $78,890 on the maintenance budget worksheet, the Commissioner points out that Keith Costello, Budget Manager/Examiner for the Department of Education, Office of Abbott Implementation, testified that, by memo dated September 16, 2003 to all school districts, Assistant Commissioner Richard Rosenberg addressed the procedures to be followed for open purchase orders and encumbrances on the school district's books as of June 30. The September 16, 2003 memo states, in pertinent part:

> Open purchase orders at June 30, 200X should be classified into the following two categories for review and reclassification:
>
> 1. Category one represents purchase orders for which the goods have been received or the services have been rendered at June 30th that have not been paid. These purchase orders must be expensed in the current audit period, the related encumbrances reversed, and a liability (accounts payable) established. If the invoice has not been received the amount must be estimated. In accordance with GAAP, an expenditure is recorded when goods are received or services are rendered.
>
> 2. Category two represents purchase orders which will be honored in the subsequent year. These purchase orders will be rolled over into the next fiscal year and will be shown in the June 30th general fund balance sheet as a reserve for encumbrances. Per NCGA Statement 1, paragraph 91 "encumbrances outstanding at year-end represent the estimated amount of the expenditures ultimately to result *if unperformed contracts in process at year-end are completed. Encumbrances outstanding at year-end do not constitute expenditures or liabilities."* (emphasis in text) (Exhibit R-1, in evidence)

Accordingly, category one purchase orders and the related encumbrances are to be considered 2002-2003 fiscal year expenditures, but category two purchase orders are considered expenditures in the 2003-2004 fiscal year and, thus, are not to be included in the development of a "maintenance budget" for the 2003-2004 school year pursuant to *N.J.A.C.* 6A:10-1.2. The

Commissioner, therefore, concludes that it was entirely appropriate and consistent with Assistant Commissioner Richard Rosenberg's letter of September 16, 2003, *N.J.A.C.* 6A:23-2.2 and *N.J.A.C.* 6A:10-1.2 for the Department to exclude $78,890 in encumbrances from the District's 2003-2004 maintenance budget. As the Department points out:

> Assistant Business Administrator Walsh testified that her encumbrance figure of $78,890 included items not yet received, services not yet performed, and contract estimates.[1] Also included in the encumbrances is an estimate for the legal cost of the ongoing 2003-2004 budget appeal. Some of these are costs for which the correct 2002-2003 amounts were not yet known as of September 24, 2003, the date of the hearing. Thus, it is appropriate to wait for the annual audit of the encumbrances, consistent with the Department's letter of September 16, 2003 to the auditors and business administrators (R-1), before any adjustments are made to include them as prior year expenditures. (Department's Exceptions at 5-6)

In light of the Assistant Business Administrator's testimony that the encumbrance figure of $78,890 includes items not yet received or partially received, services not yet performed, and contract estimates, based on the proofs brought to this record, the Commissioner is unable to determine which, if any, of the District's encumbrances totaling $78,890 have become accounts payable by virtue of the receipt of the encumbered goods or services on or before June 30, 2003 so as to be considered 2002-2003 expenditures. The Commissioner, therefore, concludes that the District's encumbrances were properly excluded as a budget expense for 2002-2003 by the Department, and directs that any adjustments to be made will be based on updated information with respect to the June 30, 2003 encumbrances for the 2002-2003 school budget year in the course of the CAFR review scheduled to begin in November 2003.

Turning to the two remaining questions, whether the Department should recalculate the District's excess surplus based on the District's revised calculations and whether the Department must issue a revised preliminary maintenance budget and estimated Additional

[1] Assistant School Business Administrator Ingrid Walsh testified that $40,000 of this amount represented her estimate that an $80,000 contract was half completed. (Initial Decision at 7)

Abbott v. Burke State Aid Award based on adjustments to the reserve and fund balances made after the filed June 30, 2003 Board Secretary's Report, the Commissioner agrees with the ALJ that any adjustments to the District's maintenance budget be made based on the CAFR review. In so determining, the Commissioner points out that any adjustment with respect to a change of encumbrances to accounts payable as a result of the CAFR review, as directed above, will affect the excess surplus figure, the fund balance[2] and the Additional *Abbott v. Burke* State Aid Award. Moreover, the unresolved discrepancy in the District's excess budget surplus figures and the Department's excess budget surplus figures, *i.e.*, the Department's excess surplus figure is $163,812 higher than the District's calculation, is best resolved within the context of the upcoming CAFR review as the $78,890 that the District reserved for encumbrances and the difference in the parties' calculation of the 2% of the fund balance ($440,000 v. $412,942) account for part of this difference, but the District, who has the burden in this matter, failed to adequately explain the additional difference of about $57,000 or to establish the accuracy of the District's excess surplus figure.

Accordingly, for the reasons expressed therein, the Commissioner adopts the Initial Decision as clarified above.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[2] In that the Commissioner has determined that the Department properly excluded the District's encumbrances as an expense for 2002-2003 and, thus, the Department's calculation of fund balance remains unchanged, it is unnecessary to address the District's request that "the DOE should be required to disburse immediately the Additional Abbott v. Burke State Aid receivable that was eliminated based on the erroneous calculation of fund balance." (District's Exceptions at 21)

[3] 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.

582-03

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Abbott District challenged the Department of Education's determination of excess fund balance as of June 30, 2003, as well as the Department's determination of certain maintenance calculations.

The ALJ recommended adjusting the Department's excess surplus figure by $3.6 million; found that the salaried contracted raises should be calculated in accordance with the District's figures, including a 6.81% increase; the preliminary budget should be adjusted to include the figures for special education for existing and new students, per the District's testimony; the adjustment for Consumer Price Index (CPI) should be adjusted to reflect an additional $122,554; the preliminary budget should include $400,000 for the Special Technical High School and $503,014 for transportation costs and an increase of $24,241 for utilities. The ALJ also found that IDEA funds may be included as revenue.

The Commissioner modified the Initial Decision, finding the Department's determination regarding excess fund balance should be undisturbed, pending receipt of the Comprehensive Annual Financial Report (CAFR); the Department's determination regarding increases for contracted salaries is upheld; the District's maintenance budget should be modified to include a nondiscretionary increase of $859,282, rather than $462,905; the Department's determinations regarding CPI adjustment, the special technical high school and transportation costs should be upheld; and that the ALJ properly determined that revenue adjustments may include IDEA funds and the District's maintenance budget should include an increase of $24,241 for utilities.

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.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4161-03

AGENCY DKT. NO. 198-6/03

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

George F. Hendricks, Esq., for petitioner (Hendricks and Hendricks, attorneys)

Michael Walters, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 24, 2003 Decided: September 25, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an appeal by the petitioner, the Board of Education of the City of New Brunswick, Middlesex County (hereinafter "the Board" or "New Brunswick"), from a "Notice of a Preliminary Maintenance Budget Figure for the school year 2003-2004 and Estimate of Discretionary Additional *Abbott v. Burke* State Aide Award," memorialized by letter of the

Department of Education to the Superintendent of the New Brunswick School District on August 27, 2003. The letter advises that based upon preliminary audits conducted in July of 2003, the respondent (hereinafter "the Department" or "State" or "DOE") has determined that for the 2003-2004 school year New Brunswick is entitled to a maintenance budget of $104,596,723 inclusive of the District's General Fund Budget and restricted by ECPA and DEPA revenue accounts. The State notes that the number, in its view, accurately reflects the instructional and non-instructional programs approved and provided in the 2002-2003 school year including increases to the 2002-2003 budget to reflect non-discretionary costs and adjustments to the 2002-2003 budget based on actual 2002-2003 expenditures. These expenditures were based upon information provided by the accounting firm retained by the Treasurer of the State of New Jersey to review New Brunswick's financial information.

New Brunswick argues that the maintenance budget amount erroneously and insufficiently reflects the actual maintenance budget required for the 2003-2004 school year. The assertion in dollar amount substantially involves the calculation by the Department of a $12,844,173 surplus which it contends was reflected as unspent revenues in the budget for 2002-2003. Although the Comprehensive Annual Financial Report (hereinafter "CAFR") may and probably will subject the maintenance budget to further adjustments, see *N.J.S.A.* 18A:23-1 *et seq.*, this proceeding is mandated at this time by order of the New Jersey Supreme Court. Neither counsel nor I, without having done any additional research, given the exigencies of issuing this decision, was unable to answer the question for ourselves as to the impact of the decision *sub judice* on the CAFR audit and vice versa. The CAFR audit and budget have yet to be finalized and are estimated to be complete within the next few months, thus to some extent making the numbers on the preliminary budget questionable; for purposes of these proceedings, however, the Board and the Department accept these numbers and based upon those calculations, it is the Board's view that the $10,411,708 surplus alleged to have been accrued by New Brunswick for the previous school is incorrect. That for reasons which will be expanded upon later in this decision, much of that alleged "surplus" had been diminished by various encumbrances and accounts payable which were or will be paid by the District to various vendors not later than September 30, 2003. Thus, while the issue is not before me, New Brunswick would argue that the surplus reflected by the audits of the 2002-2003 school year were also erroneous, thus depriving the District of funds *for that year* and the error is compounded by reiterating the

erroneous surplus for the current school year. I shall not address the issue of the surplus for the 2002-2003 school year unless it relates directly to the 2003-2004 budget.[1]

In addition to arguing that the surplus is inaccurate, New Brunswick also argues various inaccuracies contained in the State budget at various line items, *i.e.* salaries, special education programs, the consumer price index adjustment and other aspects of the budget that will be addressed specifically. The bottom line, from New Brunswick's perspective, is that based upon these alleged erroneous figures, the true maintenance budget for the 2003-2004 school year should be $116,094,000, not the projected maintenance budget of $104,596,723 projected by the State. It should also be noted that based upon the audit, no inefficiency or lack of thoroughness was reflected in New Brunswick's program and thus no penalties are associated with the requested budget.

The Department of Education relies primarily if not exclusively on the two audits which had been conducted in July of 2003 and the expertise of the Acting Director of Fiscal Review and Improvement for *Abbott* Implementation, Mr. Glen Forney, an accountant who was personally responsible for devising much, if not all, of the preliminary budget offered by the Department. The State argues that based upon Mr. Forney's testimony and calculations and general accounting practices, the adjustments and figures arrived at were proper, reasonable and fair and should not be altered in any fashion to the benefit New Brunswick; however, the Department does acknowledge the caveat that the preliminary budget will be impacted by changes, if any, resulting from the CAFR audit mentioned earlier. So, for purposes of this hearing and this decision, the only numbers that reasonably are available to work with are those set forth by the Board in its preliminary budget and the testimony and evidence provided by the District which may have been unavailable to the State when the preliminary budget was calculated.

The various key budgetary financial figures are shrouded with ambiguity. On various documents and through various aspects of the testimony, different figures had been used to ascertain, for example, the estimated surplus for the 2002-2003 year, and the actual budget the District allegedly requires. As a result of this ambiguity for me as well as for the reader, it should be noted that two significant numbers were arrived at through stipulation. It had been agreed to

[1] It was stipulated that New Brunswick's adjusted 2002-2003 budget is $110,785,600.

by the parties that irrespective of other numbers reflected in the documents, the surplus alleged as of the date of the hearing is $9,911,707. New Brunswick asserts that the appropriate maintenance budget for the 2003-2004 school year should be $116,094,000.

As noted previously, the matter was initiated by an informal pleading which I deem to be the letter of August 27, 2003 issued by the Department of Education through its Assistant Commissioner, Mr. Gordon MacInnes. The responsive pleading was accepted by both parties to be the letter written not by counsel for New Brunswick, but rather to counsel from the business administrator/board secretary of the District, dated September 4, 2003.

By way of background, on or about July 23, 2003, the Supreme Court of New Jersey granted the State's motion to relax the *Abbott v. Burke* remedies and standard as applied to *Abbott* districts for the 2003-2004 school year budget. *Abbott v. Burke*, 153 *N.J.* 48, 80 (1998) (hereinafter "Abbott V"). In its order of July 23, the Supreme Court states that "The DOE shall have the authority to treat the 2003-2004 school year as a maintenance year for purposes of calculating additional *Abbott v. Burke* State Aid for the *Abbott* districts." July 23, 2003 Order at 4. Further, the order provides that "During 2003-2004, K through 12 programs provided for in the 2002-2003 school year will be continued subject to the conditions set forth in the order." The order than provides a negative definition of a "maintenance budget" indicating that such budget "does not include the restoration of programs, positions, or services, that were reduced in the 2002-2003 program or new programs, positions or services accept in respect to Paragraph 2E of the Court's order of June 24, 2003." *Id.* at 4, 5.

As part of its order, the Department of Education was directed by the Supreme Court to promulgate emergency rules governing the entire *Abbott v. Burke* budgeting process for the 2003-2004 school year. Pursuant to that order, the Department of Education promulgated *N.J.A.C.* 6A:10-1.2 in which the phrase "maintenance budget" is defined as follows:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the

> restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke*. Maintenance also does not include non-recurring 2002-2003 expenditures.

Following a rather protracted and expedited procedural history of this matter as it wended its way through the New Jersey Supreme Court's rulings, the Court finally issued its last order concerning the procedure to be employed and various other aspects of arriving at a maintenance budget on July 23, 2003. Following that Order, the matter was preheard by telephone on August 28, 2003 at which time it was agreed that the earliest possible date for commencement of the hearing was September 9, 2003. Following a half-day discussion with the parties concerning possible resolution of all or part of the matter, the case went forward to hearing and was continued at the earliest time possible for all parties and this judge, Monday, September 15, 2003 and Tuesday, September 16, 2003 at the Office of Administrative Law, Mercerville, New Jersey.

Pursuant to the agreement of the parties, on September 17, 2003, my office received a short stipulation of fact incorporated in a letter submitted by Mr. Hendricks. In addition, by Monday, September 22, 2003, counsel submitted briefs and written argument in support of their respective positions. On September 24, 2003, my office received a brief letter reply to Mr. Michael's submission from Mr. Hendricks. The reply essentially goes to the general assertion raised by the State that the District did not submit proof of the various errors it asserts are contained in the preliminary maintenance budget. Where that assertion has been made by the Deputy Attorney General in respect to specific aspects of the budget, I will address the particulars of the proofs provided.

It should also be noted that on August 22, 2003, the Department of Education sought leave from the Supreme Court for a three-day extension of time to issue decisions on *Abbott* districts' applications for supplemental funding, and on August 26, the Court issued such order granting the Department's request for an extension and thus setting a deadline for the issuance of initial decisions to on or before September 26, 2003.

FACTUAL AND HISTORIC BACKGROUND

To place the case in context, some history of the "*Abbott*" rulings is appropriate. I shall not go back to the original *Abbott I* decision, *Abbott v. Burke*, 100 *N.J.* 269 (1985), nor to its related predecessor, the seminal case of *Robinson v. Cahill*, 118 *N.J. Super.* 223 (Law Div. 1972), other than to say that as a result of these holdings, the State of New Jersey was ordered to set forth remedial measures it determined that must be implemented to ensure that public school children from the poorest (*i.e. "Abbott")* urban communities receive the educational entitlements that the Constitution of New Jersey guarantees them. More specifically, the Court refers to that provision within the New Jersey Constitution which states that:

> [t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of 5 and 18 years.

In passing, of course, the Court ruled as unconstitutional all prior public school funding that had then been in place. Recognizing that educational funding is directly correlated to quality of education and that funding is in most districts primarily generated through real estate tax assessments, the Court concluded that in order to have an even playing field and provide the children of the State with equal protection under the law, State funding must reflect the disparities existing in various urban neighborhoods in terms of available real estate tax assessment funding as compared with those more affluent suburban neighborhoods and that the State, particularly the Legislature, had an unequivocal positive obligation to provide remedial funding to those *Abbott* districts so that a parity of sorts could be achieved, at least through finances, between inner city school systems and those of the generally more affluent school systems in surrounding suburban areas within the State.

Thus, the whole notion of a "maintenance budget" is truly an aberration from the principles that were originally set forth in *Abbott I* following the general seminal holding of *Robinson v. Cahill*. In 2002, four years after the *Abbott V* ruling, the Department of Education, filed a motion seeking a one-year relaxation of the *Abbott V* remedies, "based on concerns about the implementation of the *Abbott IV* and *Abbott V* remedial measures, in combination with the State's current budget crisis." *Abbott v. Burke*, 172 *N.J.* 294, 295 (2002) ("Abbott IX"). Seeking

a one-year cessation of further growth of certain of the *Abbott* remedial measures, the DOE requested: 1) the right to limit additional supplemental funding for 2002-2003 for each *Abbott* district to the expenditures contained in the 2001-2002 K-12 DOE-approved district budget; 2) the authorization to preclude any district appeals seeking funding at a level in excess of that limit; 3) the authority to suspend school-based budgets, school-based need requests and zero-based budgeting; 4) the ability to afford districts flexibility to reduce, eliminate or limit growth of certain whole school reform enhancements such as technology coordinators and security coordinators; 5) the ability to authorize districts to eliminate positions and make staffing modifications in various programs such as technology programs, alternative schools, accountability programs, school-to-work and college transition; and 6) the ability to authorize districts to make educational judgments about retaining certain specified position such as media/technology coordinator, technology coordinator and drop-out prevention specialist. *Id.* at 296-97.

Acknowledging the State's fiscal crisis and the motivation underlying the DOE's proposal to strictly limit 2002-2003 supplemental funding to 2001-2002 adjusted levels, the Court held the Commissioner had the authority preliminarily to establish districts' supplemental funding for 2002-2003 at the level of expenditures contained in the 2001-2002 K-12 DOE approved district budget. *Id.* at 297. However, the Court ruled, the Commissioner did not have the authority to preclude any district appeals seeking supplemental funding for 2002-2003 in excess of the funding, as adjusted, for fiscal year 2001-2002. *Ibid.*

In addition, the Court granted the "DOE's request for one year to afford districts flexibility to eliminate, reduce, or limit growth of certain whole school reform enhancements as specified, to eliminate positions and make staffing modifications in various needs-based programs as specified, and to make educationally appropriate decisions about retention of certain positions as specified ... subject to the districts' right of appeal based on educational need related to impairment of the core elements of whole school reform and essential enhancements thereof." *Id.* at 297-98.

In 2003, the DOE again moved for modification of the Court's *Abbott V* decision. *Abbott v. Burke,* ____ *N.J.* ____, (2003)(slip op. at 2)("*Abbott X*"). After cross-motions were filed by

the Education Law Center (hereinafter "ELC"), the Court ordered on April 29, 2003, "that the ELC and the DOE participate in mediation for the purpose of resolving the issues raised by the parties in their motion and cross-motion." *Ibid.* The mediation resulted in the parties reaching an agreement on all issues except the DOE's application to extend by one additional year the one-year relaxation of remedies granted in *Abbott IX*. *Id.* at 4. The mediated agreement approved by the Court provided in part:

> 4. *Supplemental Programs*
>
> a. Every *Abbott* school shall continue to implement supplemental programs as set forth in the chart entitled "Supplemental Programs in *Abbott* Schools."[2] attached hereto. Although the DOE has not agreed that all of the programs listed on the chart are supplemental or are required by *Abbott V*, the Department has agreed to the inclusion of the contents of the chart in regulations to be adopted;
>
> b. Regulations shall be developed to guide school and district assessment, planning and implementation of needs-driven supplemental programs as set forth in the chart entitled "Supplemental Programs in *Abbott* Schools";
>
> 5. *Supplemental Funding*
>
> a. The DOE 2003-2004 proposed regulations notwithstanding, the DOE represents that its funding proposal relates only to the 2003-2004 school year, and that it does not otherwise seek to modify or limit the right of *Abbott* districts to request supplemental funding for all demonstrably needed programs, services and positions and to appeal the denial of such requests, as provided for in *Abbott V*, 153 *N.J.* at 517-19, 525-27;
>
> b. Regulations shall be developed to implement the provisions of paragraph 5(a);
>
> [*Id.* at 10. *Footnote added.*]

The Court also ordered the sole remaining issue in dispute – the DOE's application to extend by one additional year the one-year relaxation of remedies previously granted in *Abbott IX* – be set down for oral argument. *Id.* at 13.

[2] *See* Memorandum Appendix I for chart.

Following oral argument, the Court issued its Order, *Abbott v. Burke*, ____ *N.J.* ____, (2003)("*Abbott XI*"), dated July 23, 2003. Noting that the DOE has the responsibility to implement firm administrative controls accompanying increased funding to *Abbott* districts to ensure money is spent effectively and efficiently, the Court held the DOE had "the authority to treat the 2003-2004 school year as a maintenance year for purposes of calculating Additional *Abbott v. Burke* State Aid for the *Abbott* districts." *Id.* at 4.

The Court explained that K-12 programs provided for in the 2002-2003 school year would be continued during 2003-2004; and that the Statewide aggregate amount of Additional *Abbott v. Burke* State Aid for 2003-2004 would be calculated as the total amount of Additional *Abbott v. Burke* State Aid approved for the *Abbott* districts for Fiscal Year 2002-2003, subject to adjustment as required for a maintenance budget. *Id.* at 4-5. "A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services." *Id.* at 5.

Moreover, the Court authorized the DOE to reduce a district's presumptive amount of Additional *Abbott v. Burke* State Aid if a districts' "non-instructional programs" were not "effective and efficient." *Id.* at 6. The Court stated, "[f]or purposes of calculating the Additional *Abbott v. Burke* State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs." *Id.* at 5-6. Non-instructional programs were defined as "office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students." *Id.* at 6.

The Court ordered the DOE to provide each district notification of its preliminary maintenance budget figures for the 2003-2004 school year, consisting of the 2002-2003 approved budget and an estimate of the supplemental funding needed to support that currently approved

budget, within thirty days of the issuance of its Order. *Ibid* Moreover, for any expenditure deleted from a district's 2002-2003 budget related to the district's non-instructional programs based on the effective and efficient standard, the DOE was directed to include in the written notice a specific statement explaining why the program or part thereof is no longer effective and efficient. *Id.* at 6-7.

In addition, the Supreme Court also provided that *Abbott* districts could appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard. *Id.* at 7. It is within the context of this background that New Brunswick has appealed the preliminary maintenance budget provided to it by the Department.

BURDEN OF PROOF

In cases heard by the OAL, the Supreme Court indicated that the Department of Education has the burden of moving forward to establish the basis for any proposed reductions to the District's maintenance budget based on the effective and efficient standards set forth in the DOE's emergency regulations. If that initial burden is met, the District shall then bear the burden of demonstrating that any budgetary reductions are not justified under that standard. It is within this framework that we shall examine New Brunswick's appeal.

THE FACTS

Unless otherwise noted, the following is a substantially uncontradicted narrative of the operative facts in these proceedings. If a factual dispute has been presented, I shall set forth its adversarial basis, arrive at an explicit finding of fact and give reasons in support of it.

Accordingly, I **FIND**:

A few caveats to begin: While in no way addressing any issues of bad faith of either party, it must be noted that many of the budgetary determinations are based upon broad projections into the future. The words "crystal ball" were occasionally used during the course of the testimony. A budget is a fluid instrument. It in reality can never be fully determined to be

accurate until after the completion of the budget year when revenues and costs can be fully ascertained. Thus, while the assumption is that both parties acted in good faith, as a non-accountant, the approach that I have taken in assessing the propriety of the maintenance budget offered and that which is disputed by New Brunswick and is to view the entire matter within the context of reasonableness and fairness. Moreover, I have adopted the view that the factual accuracy of the budgetary calculations and formulae are to a great extent based upon which of the parties has a more intimate day-to-day responsibility for those numbers.

In this instance, without casting any aspersions on the gentlemen testifying on behalf of the Department in their capacities of fiscal reviewers of this *Abbott* district, it is clearly my view that the person possessed with the most intimate knowledge of the numbers is Mr. Richard Jannarone, the Business Administrator of the District. Mr. Jannarone convinced me by his spontaneity, almost immediate recollection of detailed numbers, and his passion, that great weight should be accorded to his testimony, and this I have done. Mr. Jannarone lives with the New Brunswick budget, day to day, week to week, month to month, year to year. He appears almost possessed with the need to provide the most accurate and efficient budget that is available within the District. Many of the numbers arrived at by Mr. Jannarone were generated on the night preceding the hearing date. Moreover, I found Jannarone to be a very credible witness. His spontaneity, his direct answers to questions, his willingness to acknowledge ignorance of certain facts when that occurred, his ability to recollect information that had been passed on to the Department months ago through his memory only and accurately setting forth the dates that various reports and information asked for or not was provided to the State was very impressive. In addition, I think that Mr. Jannarone treats his job not merely as a public employee, but as a "calling." He is the third generation school business administrator in his family, two generations before him also reached the level of superintendent. Thus, my reliance on Mr. Jannarone's expertise and knowledge as well as the accuracy of his testimony outweighs much of what was provided by the State – not because the State witnesses were not found to be credible, but because Jannarone was, and continues to be, literally on top of every number that is the basis of this appeal, whereas the State's witnesses were distanced by geography as well as by lack of on the ground experience within the business office and the District itself. Having made these remarks, we shall now address the specifics. It should be reiterated that there has never been a

finding that New Brunswick was in any way inefficient or ineffective in the conduct of its non-instructional programs.

As was noted in the earlier discussion of the history of this matter, pursuant to the August 27, 2003 letter from Assistant Commissioner MacInnes, the District was advised that the preliminary maintenance budget for the 2003-2004 school year would be $104,596,723 inclusive of the District's general fund budget and restricted by ECPA and DEPA revenue accounts. The Department maintains in the letter (R-1) that the number accurately reflects the instructional and non-instructional programs approved and provided in the 2002-2003 school year and includes as well increases to the 2002-2003 budget reflecting nondiscretionary costs and adjustments to the previous year's budget based upon actual 2002-2003 expenditures which was provided to the State Treasurer by information provided to the latter by the accounting firm retained by the State to review New Brunswick's financial information. It is New Brunswick's position that the budget inaccurately reflects a proper maintenance budget for the 2003-2004 school year by approximately $12.5 million. That purported deficit has resulted, in New Brunswick's view, from miscalculation of various line item budgetary matters, as well as by a significant discrepancy by the accountants acting on behalf of the District in conjunction with the Board's experts in ascertaining the purported budgetary surplus which was carried over from the 2002-2003 school year, which amounts to approximately $9,911,707. While the Board argues that much of that surplus may have been accounted for when the initial budgetary calculations were done by the accountants in early July, that they do not accurately reflect the purported surplus today. Much of this discussion surrounds the issue of defining and ascertaining what has either been described as "encumbrances" and "accounts payable." Both are technical accounting theories and concepts which I will make an effort to define for the laymen as best I can later in this decision.

The preliminary and maintenance budget which is the subject matter of New Brunswick's appeal has been entered into evidence as respondent's Exhibit 1. For purposes of ease of discussion, the preliminary budget shall be set forth at this time. It is as follows:[3]

[3] Because of the small font size, my secretary had difficulty in replicating R-1 into the text of the decision. Of course, if any disparity exists between the text and R-1, the latter prevails.

Budget 2002-2003

Line #			
9470	Approved General fund budget 02-03		99,255,989
Less	Local Contribution to Special Revenue		(2,980,494)
2511			
	Add:		
13300	Early Childhood aid		11,768,014
13690	DEPA Aid		2,471,552
13900	Distance Learning network aid		270,539
	Adjusted 02-03 State program budget		110,785,600
	Less:		
Trenton to	Adjust for actual state program spending fund 11, 12, 13		(10,963,245)
do	Adjust for actual state program spending fund 15		(1,880,928)
			(12,844,173)
	Base 02-03 state program budget		97,941,427
	Add/(Subtract) Difference between 02-03/03-04 Plan		
	Less:		
	EC Plan 03-04 as of May 16, 2003	12,900,026	
	EC Plan 02-03	(11,768,014)	
			1,132,012
	Add or deduct: Non-discretionary items:		
	Salaries – Contracted Rate	2,635,526	
	Health Benefits	2,352,640	
	Charter School Tuition	(119,392)	
	Special Education	462,905	
	CPI at 2.11% non-sal net of Util	191,605	
	Utilities rate increases	0	
	Subtotal		5,523,284
If applicable	Adjust For non-recurring items	0	
	non-cash items	0	
	Other	0	
	Decrease in Federal aids	0	
			0
	Subtotal adjustments		6,655,296

	Less:		
	Ineffective/Inefficiencies for items that are applicable in 0203 Irosenfarb Winters) or Budget Managers		0
	FY 03-04 Total State program Budget @ Maint.		**104,596,723**

Budget: 2003-2004

410	Total Gen'l fund Revenues	113,481,748	
	SD8 Adjustment for PSEA recorded incorrectly by district (PSEA at Feb 2003 should be $6,886,524 and district recorded		
360	$4,638,935	2,247,589	
425	ECPA	8,225,520	
BS Report	ECPA Carryforward	142,900	
426	DEPA	2,471,552	
	Subtotal state program aid	126,569,309	
		(31,293,750)	
	Base GF revenue 03-04		95,275,559
	Add/(Subtract): Revenue Adjustments:		
	PSEA adjustment	35,571	
	IDEA	712,780	
	Other: MISC unbudgeted rev	0	
	Excess Fund Balance ($2,673,318 used to offset receivable)	9,911,707	
			10,660,058
	FY 03-04 GF Total Budgeted Revenues Available		105,935,617
	Difference: Need for Supplemental aid		(1,338,894)

Bold items are what must be disclosed per the court.
Ineffective an inefficient terms must be in written form in the final letter to the districts.

[R-1]

The parties have stipulated to the accuracy of the following: Line 9470, Approved General Budget 2002-2003, $99,255,989. They have also stipulated to line items 13300, 13690 and 13900, totaling $110,785,600. The parties have also stipulated as to the amounts apportioned for health benefits and charter schools, which are $2,352,640 and $119,392, respectively. Finally,

the parties have also agreed to the revenues available to the District for the 2003-2004 school year which totals $31,293,750.

I shall first address the issue involving the most significant sum that was excluded from the District's 2003-2004 preliminary budget: the Department concluded that there was an actual surplus of $9,911,707 that the District retained from the 2002-2003 school year. That amount, as such, was deemed to be a surplus and depending upon how one assesses it, reduced the maintenance needs of the District or was already available to the District so that the State could offset State funds by that amount in reaching the appropriate maintenance level for the 2003-2004 school year. It is New Brunswick's position that based upon an erroneous surplus, the actual maintenance budget for the 2003-2004 school year should be $116,094,000.

The individual primarily responsible for testifying in support of the Department's preliminary budget is Mr. Glen Forney. He currently serves as the acting director of the Department's fiscal revenue and improvement section with special emphasis on *Abbott* implementation. He is and has been a State auditor since the early 1980's and holds a bachelor's degree in accounting from Rutgers University. Mr. Forney became more intimately involved with the calculations of the budget when one of his colleagues, Mr. Vincent Mastrocola, a budget manager for two years with the Department and directly assigned to the New Brunswick District since November 2002, was, pursuant to Mr. Forney's testimony, originally assigned to the on-hands calculations but became "unavailable" during certain critical times when the process was conducted. Consequently, Mr. Forney assumed primary responsibility both for the preparation of the actual preliminary budget as well as the substance of the Assistant Commissioner's letter to Dr. Larkin, dated August 27, 2003, which essentially serves as the pleadings in this case and provides bottom line numbers. Forney testified that the budget was prepared in the latter part of August.

ADJUSTMENT FOR 2002-2003 EXCESS SURPLUS

Mr. Forney and the Department assert that approximately $9,911,707 was deemed to be an "adjustment" for purposes of calculating New Brunswick's 2003-2004 budget. The word "adjustment" is ambiguous to the layperson because it doesn't tell you whether the adjustment is

a plus or a minus. It is just referred to as an "adjustment." In this instance, the approximately $10.9 million "adjustment" for excess revenues resulted in a deduction of New Brunswick's 2003-2004 proposed maintenance budget because it is the Department's view that that amount represents money that remained unspent for the 2002-2003 school year and should thus be carried over and utilized by New Brunswick for the current school year budget. Calculations for these alleged unspent revenues are found at Exhibit R-8.

Mr. Forney indicated that the numbers in terms of the adjustment for unspent appropriations were derived from the CPA firm retained by the State to review New Brunswick's budget and from other sources as well. Thus, the 2003-2004 preliminary maintenance budget reflects what the State asserts were the actual expenditures in the 2002-2003 maintenance budget. This hotly contested issue was aggressively and, in my view, successfully disputed by the testimony of New Brunswick's business administrator, Richard Jannarone. Mr. Jannarone, with the District since 1999, has served as the School Administrator and Board Secretary since May of this year and previously served as Assistant Board Secretary and Business Administrator. His role is central in the preparation, creation and the formulation of the District's school budget. He was responsible for constructing the proposed budget for 2003-2004, initially submitted to the Department in December of 2002. The final budget was prepared in late February, early March of 2003. It was without dispute that Mr. Jannarone conducted numerous and on occasion all day meetings following that submission with representatives of the Department, clarifying information where requested, supplementing other information and, pursuant to his testimony, which was not rebutted, answering all questions and making all documents available to anyone from the Department or its authorized subcontractors to examine the finances of New Brunswick. The approximate $10 million surplus was addressed by Mr. Jannarone in a knowledgeable, forthright, intelligent manner.

In order to understand the position of both parties concerning this surplus, it is necessary to have a very fundamental understanding of two accounting concepts. One is "encumbrances" and the other is "accounts payable." The basic definitions of these terms was generally agreed to by the parties off the record. For purposes of accounting, the term "encumbrance" is defined as the receipt of goods or services yet to be paid for. In the instant case, those goods or services must have been provided New Brunswick by June 30, 2003 in order to eliminate them as part of

any excess surplus. "Accounts payable" refers to those goods or services received, in this instance, by New Brunswick *prior* to June 30, 2003 and *paid* for by not later than September 30, 2003. In both instances, the encumbrance, if the definition is satisfied, as well as the accounts payable are considered to be part and parcel of the *2002-2003 budget* and should be reflected in the maintenance budget for the following year.

Mr. Jannarone essentially testified that a significant number of items which were deemed to be a surplus for the 2002-2003 school year and thus added to what was described as excess surplus was in reality accounts payable or encumbrances both of which are in compliance with the requirements that they be included within the 2002-2003 budget and, therefore, excluded as excess surplus for the forthcoming school year. Jannarone explained that it is his practice, as is the practice of most school districts, to submit all outstanding purchase orders in March. In order for those orders to be placed and paid, the business administrator requires an invoice, a voucher accompanied by an affidavit and a receiving report attesting to the fact that whatever had been purchased was indeed received by the district, whether that be goods or services. The bills for these various goods and services are then paid by New Brunswick on a monthly basis following monthly Board approval. He testified further that in March and April of 2003, New Brunswick had experienced significant difficulties in confirming the validity of various bills primarily because of lack of staffing. As a result, some of those bills for goods and services which had been received *prior* to June 30, 2003 (and thus should have been a part of the actual budget of 2002-2003) were treated as accounts payable. Others which could not be readily verified were treated as encumbrances. Jannarone unequivocally stated that the Schedule G of the initial order by the Board CPAs and which contains the $9.9 million surplus is in error. (*See* Exhibit R-8).

On or about July 31, 2003, the New Brunswick Board of Education provided a lengthy document to the Department setting forth all of those goods and services which were either accounts payable and/or encumbered as of that date. It should be reiterated at this time that budgetary computations are fluid. Thus, there are many other encumbrances and accounts payable that reflect goods and services actually received and utilized by the District in 2002-2003 which have yet to be paid and which may be paid by not later than September 30, 2003 and still be attributed to the 2002-2003 budget year. Based upon Mr. Jannarone's testimony, in conjunction with R-83, as well as his calculations up through to the date of the actual hearing

resulting from his obtaining more contemporaneous numbers from the New Jersey Department of Education's website, it was the District's determination that $10,307,496.67[4] represented either reported encumbrances and/or accounts payable such that that sum must be deemed to be monies spent in the 2002-2003 school year, not deemed to be an excess surplus which is carried over to the current school year and, therefore, should be added to the original preliminary budget determinations arrived at by the Board and memorialized in its letter of January 6, 2003. Based upon the actual numbers as they exist at this time (by this time I refer to the date of the last testimonial phase of these proceedings), the encumbrances and account payables which Jannarone asserts were erroneously deemed to be surplus totaled approximately $10,307,496.67. (R-83).

In my judgment, there was no competent evidence that refuted Mr. Jannarone's numbers. His testimony was that he provided all the data and information that was available to him either gratuitously or at the request of the Department concerning every aspect of the budget including the alleged excess surplus, early on during the budgeting process. Moreover, he testified under oath that he had documents and records available (although not produced for evidence) to prove and establish his assertions concerning the excess surplus and to justify the determination of how much of that was really deemed to be accounts payable and encumbrances that should have been deemed part of the actual and approved budget of 2002-2003. Therefore, while I indeed recognize that this figure is a fluid figure subject to change and that CAFR may indeed come to a contrary or disparate result, I **FIND** that the determination by the State Department of Education determining that the District of New Brunswick has an excess surplus of approximately $9,911,707, which therefore must be negatively adjusted to New Brunswick's 2003-2004 revised budget is incorrect. I further **FIND** that the New Brunswick Board of Education has established by a preponderance of the relevant credible evidence that as of the date of the hearing, there was a significantly smaller surplus and that as a consequence the purposed budget provided by the Department to the Board be adjusted to reflect an increase for the 2003-2004 school year, which is reflected by the elimination of the purported excess surplus. The circumstances as I can best ascertain is that of the $9,911,707 which was earmarked by the State as surplus for the 2002-2003 school year, as of the date of the hearing, the evidence demonstrated that New Brunswick

[4] It is my understanding, as previously mentioned, that the actual amount of excess surplus is alleged by the Department to be $9,911,707.

had actually paid $3.6 million of those outstanding encumbrances and/or accounts payable. So, while it is represented, and I have no reason to question it, that by September 30, 2003, there will be no further accounts payable and encumbrances and therefore no surplus, it is my understanding that in this rather triangulated and distorted time line during which these issues are being resolved that I ascertain from the record what the *actual* numbers are now, not in two weeks. Thus, based upon the evidence and testimony, I **CONCLUDE** that New Brunswick has diminished its purported surplus by $3.6 million (remembering again that it is the position of New Brunswick that it will eliminate the entire surplus within the time frame allotted).

During the course of the proceedings, some mention was made of a concept referred to as "backloading" or something to that effect. Since I do not have a transcript of the proceedings, I am unable to specify the particulars of the phrase. Nevertheless, what apparently is meant by this pejorative phrase is to accuse a vendee of waiting until the very end of the fiscal year to create encumbrances. No one directly asserted that New Brunswick was guilty of this practice but, nevertheless, it does appear that many of the encumbrances and accounts payable did result in actions taken close to the end of the school year. For purposes of the issues before me, however, I see no relevance whatever to when those encumbrances were created just as long as the goods and/or services were received before June 30, 2003 and that all encumbrances and/or accounts payable are paid for by September 30, 2003. Therefore, whether there is or is not "backloading" by a school district, in my view and based upon my very limited accounting background, has no relevance at all when it comes to ascertaining the appropriate maintenance budget. Whether it has relevance in other aspects of accounting practice and budgeting is not for me to decide. Therefore, I am **ORDERING** that the $3.6 million figure be used as an adjustment to reduce the purported excess surplus set forth by the Department and shall be added to the projected 2003-2004 budget. Again, I must indicate that there is a certain sense of the bizarre here because we are dealing with numbers that will not be the numbers that are actually ascertained or utilized and will not be the numbers necessarily reflected by the CAFR audit. To that extent, the caveat remains. I shall next address the various other disputes concerning individual budgetary items.

SALARIED CONTRACTED RAISES

The Department's preliminary budget allocates an additional $2,635,526 to the 2002-2003 maintenance budget representing salaries of both teaching staff and non-teaching staff contracted employees of the District for 2003-2004. The representatives of the Department candidly acknowledged that this number was arrived at not through factual examination of the actual salaries of all of the approximately 1,100 employees of the District, but rather by imposing what it deemed to be a reasonable increase of 5% over last year's budgeted salaries.

The Business Administrator of New Brunswick did not base his figures on projections or formulae, but on the actual numbers that he "crunched." It was his unrebutted testimony that for the school year 2003-2004, the actual increase of salaried contracted raises is 6.81%. Based upon that number and his calculations, the District was "shortchanged, by $5,565,193." During the course of his testimony, particularly in respect to this item, Mr. Jannarone made an interesting point. He noted that it was his view that when the *numbers* suited the Department, it used actual data; when the numbers did not suit the Department, it used general policies and formula. While he characterized the Department as acting in "bad faith" by using this selective process, as well as by its conduct in other areas of the computation process, I make no finding in regard to this assertion. In his brief, the DAG argues that the calculations by the District are unreliable and subject to change. *See,* brief, DAG Walters at 8-9. This, of course, can be said of most of the calculations. Nevertheless, the soundness of the Board's analysis in my view provides me with sufficient proof to accept its calculations subject to the CAFR audit.

SPECIAL EDUCATION

The proposed preliminary budget offered by the Department to New Brunswick for the increased costs for 2003-2004 related to classified students was indicated in R-1 to be $462,905. This number, as best as I can ascertain, does not only account for the needs of existing special education students in New Brunswick but the needs of new enrollments commencing 2003-2004 as well. The figure was arrived at by the accountants contracted with the Department based upon average costs of tuition per student which was arrived at through a reasonable projection and the assumption that 17% of the special education students in the District would be required to be

referred for out of district for placement.[5] Reliance was also placed on figures derived from the 2002-2003 budget.

Rather than rely on projections and rather than lumping both existing special education students and new enrollments of special education students together, the District provided calculated figures representing both. These were based upon actual numbers arrived at and crunched by Mr. Jannarone and presumably members of his staff. In commenting upon the documentation provided by the Department in support of its special education maintenance budget (*see* Exhibits R-35 through R-48), Mr. Jannarone testified that in order to reasonably ascertain those increases, it is absolutely essential that there be supportive documents provided which indeed was provided to the Department by New Brunswick. Nevertheless, Jannarone asserts that the State did not calculate existing costs but provided statistical data for new placements only and did not account for tuition increases of those students who have already been classified the District and in need of additional funding, which he estimated to be $859,282. He arrived at this figure by actually sitting down and counting those students who are already in the District and classified and ascertaining as best as he reasonably could the *actual* cost increase for the school year 2003-2004. He also notes that while the State projected new enrollments of classified children to be 13 based upon prior years, as of the date of the hearing, 400 students actually were required to be evaluated by the District's child study team of which approximately 200 would be classified. This reflects an additional group of classified kids numbering 34 and it is based upon this additional figure plus an estimate of 17% of an increase that resulted in Mr. Jannarone's generating the approximately $860,000 figure for existing enrollments. In addition, with respect to new enrollments, the figure that was based upon actual on-hand numbers was arrived at to be $1,234,415. Again, as in previous discussions, when one is confronted with the actual number cruncher and is aware that he has intimate knowledge – perhaps more knowledge than any other human being – of the needs of the District and he is entirely credible, then absent evidence to the contrary, one must accept that evidence over the projected evidence arrived at by auditors who might not even have had a close much less intimate knowledge of what the actual number of classified students and their related costs are. DAG Walters argues that calculation of special education tuition increases "raised new issues." DAG Walters' brief at 11. But that can

[5] The Department has acknowledged that at Page 48 of respondent's Exhibit 36, which reflects special education calculations, there was a minor error resulting in a small increase to the District.

be asserted with respect to many line items. It does not address the merits of the claim and, therefore, I reject it for that reason. Accordingly, I **CONCLUDE** that the preliminary budget be adjusted in favor of New Brunswick to include the figures for special education existing students and new enrollments as set forth by Mr. Jannarone's testimony and memorialized in Exhibit P-9.

CONSUMER PRICE INDEX ADJUSTMENT

There is provision in the law – and this is without dispute – that for purposes of ascertaining a maintenance budget in *Abbott* districts, the consumer price index should be reflected in various line items of the budget. Pursuant to the State's preliminary budget determinations (*see* R-1), it utilized a consumer price index adjustment of 2.11% and applied that to non-salaried accounts in the amount of $191,605. Mr. Jannarone took issue with this particular number and provided testimony and supportive documents which either are evidential or would be made available to the Department or has already been provided to the Department concerning this CPI increase. His testimony, which I believe was not significantly impeached, demonstrates that of the CPI increases calculated by the Department, an omission of $122,554 was made by the auditors, and those calculated omissions may be found on Exhibit P-17 for identification. Those documents support Mr. Jannarone's and the Board's determination that the budgeting for the consumer price index increase was incorrect. Accordingly, I **CONCLUDE** that the proposed 2003-2004 budget offered by the Department shall be adjusted to reflect an additional CPI increase totaling $122,554. Mr. Walters made the same argument of "surprise" here as he did with respect special education tuition. It is rejected here for the same reason.

SPECIAL TECHNICAL HIGH SCHOOL

The District of New Brunswick has a special relationship with the Robert Wood Johnson Hospital and Medical School that has lasted for approximately ten years. That relationship has resulted in the construction and operation of what has been described as a special technical high school located within the District. While this high school was significantly funded by other than District funds by contract for the year 2002-2003, the District contributed $2 million to the special technical high school representing their obligation (perhaps in terms of rental) to the school's ongoing existence. My understanding based upon the testimony was that this is a

special school, if not for gifted children, than for those who might greatly benefit from course offerings not otherwise available in the typical schools in the District. For the school year 2003-2004, Mr. Jannarone noted that the contractual obligation of the District is to pay $2.4 million towards the upkeep of the technical high school.

This cost is reflected nowhere in the Department's preliminary budget; it simply was omitted. Given that there were utterly no proofs offered to contradict the District's position regarding this expenditure, I **CONCLUDE** that the additional $400,000 utilized by the District for the school year 2003-2004 be added to the preliminary budget offered by the Department.

TRANSPORTATION COSTS

Increase in transportation costs, to the best of my knowledge, is not reflected anywhere in the Department's proposed preliminary budget. (R-1). The testimony indicated that while the District utilizes transportation in the same fashion as do most other districts, because of the unusual demographics of New Brunswick, special and bilingual education students have significantly increased over the years. The relevance of this increase is that more transportation requirements are utilized intra-District to transport students from various schools to other schools so as to allow them to take advantage of programs not otherwise available in their assigned school. No evidence was offered by the Department, in my view, to in any way contradict this determination, and based upon the calculations arrived at by the District, it has determined that based upon an increase per educational services and commission on costs of over $5.5 million results in a 9% increase resulting in a dollar amount adjustment in favor of New Brunswick of $503,014 for transportation costs. I **CONCLUDE** that the calculation arrived at for increased transportation costs is reasonable and valid and should be adjusted in favor of New Brunswick in the Department's preliminary budget.

REVENUE ADJUSTMENTS

In its preliminary maintenance budget, the Department calculated that monies specifically earmarked for classified students (IDEA) was received totaling $712,780. The Board disagrees with that calculation and actually indicates that the increase in revenues for IDEA students

totaled approximately $280,000. It acknowledges its error. Irrespective of this mistake, however, the Board argues that based upon the guidelines for fiscal year 2004 respecting budgeting IDEA students (R-10), *no* monies that are earmarked for the IDEA budget can, pursuant to the Department's own policy, be counted as general revenues. The policies are encompassed in Exhibit R-10, the Department's own statements of what can and what cannot be utilized for revenue. It is provided at Page 9 of the exhibit that funds provided for (IDEA) "may not be used to reduce the level of expenditures for the education of students with disabilities made by ... local funds below the level of those expenditures for the preceding fiscal year." On the following page, it is further provided that IDEA monies may not be used as "flow-through funds" to take the place of [...] State and local funds which had been previously utilized to provide FAPE or meet the goal of full educational opportunity. IDEA-B funds are to *supplement* State and local efforts. (R-10 at 10 [emphasis in original]).

It was Mr. Jannarone's testimony that by utilizing the Department's own policies, he and the District ascertained without hesitancy that funds earmarked for IDEA increases which in the proposed budget (R-1) were set at $712,780 cannot be deemed revenue.

The Department argues, both in the course of its testimony and in its post-hearing legal brief, that the position of New Brunswick which asserts that the IDEA Part B revenues must be used for special education purposes only is based upon a misunderstanding of the Department's maintenance calculation. The cost of providing special education programs and services in 2002-2003 is included in the adjusted 2002-2003 State Program Budget, set forth in R-1, in the amount of $110,785,600. The Department increased this amount by $462,905, the estimated increase in special education cost for the 2003-2004 school year. Since, the Department asserts, it included those costs of special education programs and services in the calculation of the maintenance budget, it properly and appropriately included the revenues received to those programs and services. Thus, the Department argues it is not requiring the District to use the IDEA Part B revenues to fund general education programs; rather, the IDEA Part B revenues should be used to fund the special education programs and services included in the maintenance calculation.

In my view, the issue of the application of the policies expressed by New Brunswick which were set forth by the Department must be interpreted in a fashion consistent with the

Department's position. Deference must be accorded the agency with respect to the interpretation of its own policies and/or promulgated rules. Mr. Walters' argument is accepted and, as a result, I **CONCLUDE** that the determination of the Department including IDEA Part B revenue in the calculation of New Brunswick 2003-2004 total budget revenues available be and is hereby **SUSTAINED**.

UTILITIES

As will be noted, the preliminary maintenance budget proposed by the State leaves room for no additional expenditures for the District's utilities. Why no adjustment was made for utilities is unclear; however, it may very well be the case that the District was responsible for failing to provide documentation in that regard to the Department during the course of its audit. In any event, there is no question but that the cost of the utility rate increases – which are significant in the District given its size and numbers of students – was not reflected in the budget and has been increased pursuant to the CPI for the 2003-2004 year in the amount of $24,241. No evidence was offered by the State to contradict these determinations and, accordingly, I **FIND** that the preliminary budget should be adjusted in favor of New Brunswick to reflect the increased cost of utilities pursuant to the CPI.

Based upon a review of the records within these constrained time frames, the analysis of the disputes concerning the preliminary budget has been completed.

It should also be noted in the decision that not only was Mr. Jannarone an impressive witness but so to was Dr. Ronald Larkin, the Superintendent of the New Brunswick School District for the past 23 years. He unequivocally stated – and he seemed entirely candid and forthright – that the District simply cannot run based upon the maintenance budget provided to it by the State of New Jersey. He has already instructed Mr. Jannarone to fix the budget which has already begun to cut back on various summer programs and indicated as well that should that budget (R-1) be approved, the District would come to a halt because it would be unable to fund many of the services and would be required to layoff significant numbers of the approximately 1,100 employees of the District. At one point, while I believe he was exaggerating, he indicated that to live with the budget proposed by the State would leave perhaps Superintendent Larkin and

"maybe" Mr. Jannarone available as the only employees of the District. Mr. Jannarone too struck me as a man who has devoted his life with passion to quality education of the students in his district. And having been "around the block" on budget issues for many, many years, his testimony was striking in its candor and the sad confidence underlying the scenario that would result in Superintendent Larkin's opinion were the budget to remain as it was originally proposed by the Department.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to 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.

9/25/03
DATE

STEVEN C. REBACK, ALJ

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

9/25/03
DATE

E-mailed Initial Decision to the parties on:

9/25/03
DATE

cmo

WITNESSES

For Petitioner:

Richard Jannarone
Dr. Ronald Larkin
Craig Yetman

For Respondent:

Glen Forney
Vincent Mastrocola

EXHIBITS

For Petitioner:

P-1	Portions of a document published by the Department of Education entitled *Abbott* Addendum to the Audit Program 2002-2003 (Pages 47 through 76 inclusive)
P-2	Letter from Assistant Commissioner of Education, Gordon MacInnes to Superintendent Dr. Ronald F. Larkin, January 6, 2003
P-3	Report of the Secretary to the Board of Education of the City of New Brunswick regarding general funding as of June 30, 2003
P-4	Memorandum to *Abbott* Districts from Assistant Commissioner Gordon MacInnes requesting supporting documentation for the FY 2003-2004 budget, March 11, 2003 (2 pages)
P-6	Personnel list of employees within the New Brunswick School District, March 11, 2003 (47 pages)
P-9	Proposed Maintenance Budget for 2003-2004 prepared by the Board of Education of the City of New Brunswick (2 pages) disregard handwritten notations

P-10	Pages 9 and 10 and coversheet of document entitled, Individuals With Disabilities Education Act, Part B, Amendments of 1997, Combined Application for Grants, Guidelines and Forms, Fiscal Year 2004
P-11	Letter from then School Business Administrator/Board Secretary to New Brunswick, Mr. Edward D. Kent, from Gordon MacInnes, Assistant Commissioner, April 9, 2003 (2 pages)
P-12	Salary Guide for teaching staff pursuant to contract for the school years 2001-2002, 2002-2003 and projected 2003-2004 (2 pages) (undated)
P-13	Document essentially identical to P-16 with different handwritten corrections
P-14	Pages 1-8.1 and 1-8.2 of document (the specific pages referred to as Section 1 – General Compliance, Chapter 8, Yearend Procedures), June 3, presumably issued by the State Department of Education
P-16	Preliminary worksheet document referred to as New Brunswick 2003 Schedule A (2 pages) (undated) with handwritten changes

For Respondent:

R-1	What has been deemed by the parties to represent the proposed Preliminary Maintenance Budget for New Brunswick for the 2003-2004 School Year
R-8	Worksheet reflecting adjustment for actual spending of the District, presumably for School Year 2002-2003
R-27	New Brunswick District Budget Review for Fiscal Year 2003-2004 (2 pages)
R-35 through R-48	Calculations provided to the Department from the District concerning special education budgetary items
R-49 through R-70	Accountant's audit requested at the behest of the State Department (24 pages) (undated)

R-75 and R-76	Calculations of the Department and its auditors in respect to increase revenues resulting from monies provided for IDEA and preschool expenses and adjustments
R-81	Scheduled G of New Brunswick's 2003 Projected Surplus (undated)
R-82	Comparison of Revenue Budget versus Actual Budget of New Brunswick as of June 30, 2003 (4 pages) (undated)
R-83	New Brunswick Board of Education's inventory of encumbered and accounts receivables, July 31, 2003 (21 pages)
R-84	Preliminary draft of P-9 (2 pages) (undated)

OAL DKT. NO. EDU 4161-03
AGENCY DKT. NO. 198-6/03

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-2004 school year, and the Initial Decision of the Office of Administrative Law have been reviewed. The parties' exceptions and replies were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner determines to modify the Initial Decision, as set forth below.

BURDEN OF PROOF

Initially, the Commissioner recognizes that the Supreme Court's Order provides that the Department "shall bear the [initial] burden of moving forward to establish the basis for any proposed reductions to the [Abbott] district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations."*** *Abbott v. Burke*, M-976 September Term 2002, at 7. However, as indicated in the preliminary maintenance decision letter dated August 27, 2003, the Department did not reduce the District's maintenance budget

based on ineffectiveness or inefficiency. Therefore, the Commissioner notes, and the District so acknowledges, that the District bears the burden of proving that the Department's calculations were unreasonable or otherwise improper. *N.J.A.C.* 6A:24-9.6(c). See, also, Letter from Peter J. Hendricks to the Administrative Law Judge (ALJ), September 23, 2003; see, also, Petitioner's Reply at 1.

SURPLUS

In its exceptions, the Department maintains its position that the District's excess funding balance as of June 30, 2003 is reasonably estimated at $9,911,707. (Respondent's Exceptions at 5-6) In this connection, respondent contends that the Initial Decision is based on a misunderstanding of its position with respect to encumbrances and accounts payable. Respondent explains:

> An encumbrance is an accounting tool that permits the district to reserve funding for purchase orders that were issued during the 2002-2003 school year, but the goods or services were *not* received by the district as of June 30, 2003. An encumbrance is *not* an expenditure in the 2002-2003 school year, but rather merely a reservation of fund balance, which may be expended in the 2003-2004 school year if the goods and services are received. By contrast, an account payable is an expenditure which is incurred in the 2002-2003 school year for goods and services actually received or provided prior to June 30, 2003.
>
> ***
>
> With regards to those purchase orders for goods and services that have not been received or provided before June 30, 2003, they would be rolled over as encumbrances into [the] 2003-2004 school year. As such these purchase orders are properly excluded from the 2003-2004 maintenance calculation, *i.e.*, approved goods and services actually provided in the 2002-2003 [school year]. (emphasis in text) (*Id.* at 2, 3)

The Commissioner finds that the above explanation is consistent with the record in the matter entitled *Board of Education of the City of Burlington v. New Jersey State Department of*

Education, Commissioner Decision No. 581-03, decided October 20, 2003. Therein, Keith Costello, Budget Manager/Examiner for the Department of Education, Office of Abbott Implementation, testified that, by memo dated September 16, 2003 to all school districts, Assistant Commissioner Richard Rosenberg addressed the procedures to be followed for open purchase orders and encumbrances on the school district's books as of June 30. The September 16, 2003 memo states, in pertinent part:

> Open purchase orders at June 30, 200X should be classified into the following two categories for review and reclassification:
>
> 1. Category one represents purchase orders for which the goods have been received or the services have been rendered at June 30th that have not been paid. These purchase orders must be expensed in the current audit period, the related encumbrances reversed, and a liability (accounts payable) established. If the invoice has not been received the amount must be estimated. In accordance with GAAP, an expenditure is recorded when goods are received or services are rendered.
>
> 2. Category two represents purchase orders which will be honored in the subsequent year. These purchase orders will be rolled over into the next fiscal year and will be shown in the June 30th general fund balance sheet as a reserve for encumbrances. Per NCGA Statement 1, paragraph 91 "encumbrances outstanding at year-end represent the estimated amount of the expenditures ultimately to result *if unperformed contracts in process at year-end are completed. Encumbrances outstanding at year-end do not constitute expenditures or liabilities."* (emphasis in text)

Therefore, the Commissioner finds that "category one" purchase orders and the related encumbrances are to be considered 2002-2003 fiscal year expenditures in applying *N.J.A.C.* 6A:10-1.2, but "category two" purchase orders are considered expenditures in the 2003-2004 fiscal year and, thus, are not to be included in development of a "maintenance budget" for the 2003-2004 school year.

Notably, although there remains a dispute about *the estimated amount* of excess surplus available, if any, the parties herein do not appear to offer opposing methodologies for calculating that figure. Moreover, in its exceptions, the Commissioner notes that the District respectfully suggests "that the exact surplus, in addition to the $3.6M calculated by the Administrative Law Judge, abide a [Comprehensive Annual Financial Report] CAFR audit as originally suggested by the New Jersey Department of Education." (New Brunswick's Exceptions at 1) Consequently, mindful of the District's burden in this matter, the Commissioner determines not to disturb respondent's preliminary calculations at this juncture, subject to receipt of the CAFR in November 2003, whereupon the methodology promulgated by Assistant Commissioner Rosenberg shall be applied.

CONTRACTED SALARIES

The Department reiterates in its exceptions that its salary calculations, contrary to the ALJ's finding, were based on *actual* expenditures for salaries in the 2002-2003 school year, whereas, New Brunswick's calculations were erroneously based on the *budgeted* salaries of individuals on its payroll on March 11, 2003. (Department's Exceptions at 7-8, referencing Exhibits R-27 through R-29, P-9) Respondent continues:

> In fact, after hearing testimony pertaining to the methodology employed by the Department, petitioner changed its proposed methodology and based it on the amount of actual expenditures of salary in 2002-2003 as calculated by the Department. R-84 and P-6 demonstrate that petitioner initially sought an increase for contracted salaries in the amount of $3,746,973. *** However, after the Department testified that *actual* expenditures on salaries in 2002-2003 were used to determine the increase for the non-discretionary contracted salary increase, petitioner changed its calculation, as demonstrated by P-9, by abandoning its request for a 6.81% increase. At that point, petitioner sought an increase of $5,565,193, or a 10.47% increase over 2002-03 actual expenditures on salaries. *** Petitioner arrived at this amount by comparing *actual* expenditures on salaries in 2002-2003 to the amount of

> salaries *budgeted* in 2003-2004 for all individuals employed by petitioner on March 11, 2003. Thus, the 6.81% increase, as initially asserted [by] petitioner, is irrelevant to the methodology. (emphasis in test) (Department's Exceptions at 8-9)

The Department, however, maintains that the District's amended methodology is flawed, in that it takes into account *actual* expenditures in salaries for 2002-2003, but uses amounts *budgeted* in 2003-2004 for individuals employed in the District as of March 11, 2003. Moreover, the Department asserts that "Mr. [Richard] Jannarone agreed that, under the methodology proposed by petitioner, the district could receive such a benefit twice because petitioner's methodology uses *budgeted* salaries for 2003-2004. (emphasis in text) (*Id.* at 9) Furthermore, the Department notes that, using its calculations of actual salary expenditures, and based upon prior conversations with the District, it used 5% as the average contracted rate of increase. (*Id.* at 9-10)

In its replies, petitioner does *not* specifically refute the Department's exception arguments on this issue, but, merely states, "The New Brunswick Board of Education offered detailed proofs on the costs of the contractual maintenance budget. The DOE simply used flat figures and 'estimates.'" (Petitioner's Reply at 1)

Thus, upon consideration of the parties' arguments, particularly those summarized herein, and mindful of the burden of proof, the Commissioner is compelled to conclude that, notwithstanding the credible testimony offered by Mr. Jannarone on this issue, petitioner has not met its burden of demonstrating that the Department's calculation of nondiscretionary salary increase for the 2003-2004 school year, is unreasonable or inconsistent with a maintenance budget, as defined by *N.J.A.C.* 6A:10-1.2. In so finding, the Commissioner recognizes that the Department's overall charge in this matter was to determine the level of 2003-2004 funding that would enable the District to continue in a "maintenance" mode, that is, to implement in 2003-

2004 the programs, services and positions provided in 2002-2003. While it is true that dollar amounts actually paid out for staffing prior to June 30, 2003 will not perfectly predict the cost of providing comparable staffing in the next, it is *equally* true that originally budgeted amounts and other similar projections are no less imprecise. Thus, in the Commissioner's view, a methodology which preliminarily establishes the 2003-2004 cost of providing positions at "maintenance" levels by determining, as nearly as possible without benefit of audit, the actual approved cost of providing them in 2002-2003 and then allowing for reasonable, non-discretionary adjustments, is a uniform, fair and rational method for estimating future expenditures which cannot otherwise be determined with any degree of precision. The ALJ's determination in this regard, is, therefore, set aside.

SPECIAL EDUCATION

The Department takes exception to the ALJ's conclusion that petitioner's preliminary maintenance budget should include a nondiscretionary increase in special education tuition in the amount of $2,093,697. The ALJ arrives at this conclusion, the Department contends, based upon a misunderstanding of the methodology used by the Department to calculate petitioner's nondiscretionary increases for special education tuition. (Department's Exceptions at 11)

The Department explains that its methodology begins with a trend analysis of the percentage of students that districts send out of district. Based on this trend analysis, the Department determined that 17% of New Brunswick's students are sent out of district. The Department then compared enrollment of special education students in October 2002 (1,121) to the projected enrollment of special education students for October 2003 (1,196) and determined that New Brunswick would have approximately 75 new special education students in the 2003-

2004 school year. (*Id.* at 11-12) Of the 75 new students, it is estimated that 17%, or 13 students, will be sent out of district in the 2003-2004 school year. Multiplying the number of out-of-district placements, 13, by $36,306, the Department estimates that the District will need an additional $462,905 [*sic*].

The Department reasons that by basing its calculation on the number of special education students in New Brunswick in previous years, its determination is reasonable and should not be disturbed. (*Id.* at 12) By contrast, the Department asserts that New Brunswick has provided no documentation, but merely uncorroborated testimony, to substantiate its projected increase of 200 students in special education for 2003-2004. As such, the Department contends that petitioner has failed to prove a "*documented* increase in non-discretionary expenditures," as provided by *N.J.A.C.* 6A:10-3.1(d)(4). (emphasis in text) (Department's Exceptions at 13)

In reply, New Brunswick merely insists that it "offered detailed proofs on the costs of special education and Judge Reback's Findings of Fact should be sustained." (Petitioner's Reply at 2)

Upon review, the Commissioner is not persuaded that petitioner has met its burden of documenting a need for special education tuition beyond that which was determined by the Department. In this connection, the Commissioner finds that, indeed, there is nothing on this record to substantiate Mr. Jannarone's testimony that there are likely to be 200 new special education students in New Brunswick in the 2003-2004 school year, as shown in Exhibit P-9, so as to competently challenge the Department's projected new enrollment figure. Neither is the record clear with respect to the basis for the tuition increases which petitioner alleges are necessary for those students who are currently classified. This lack of clarity notwithstanding,

however, the Commissioner acknowledges that the Department concedes, in its exceptions, that petitioner's preliminary maintenance budget should include a nondiscretionary increase for special education tuition in the amount of $859,282, rather than $462,905. (Department's Exceptions at 13) The Commissioner, therefore, modifies the ALJ's finding accordingly.

CONSUMER PRICE INDEX ADJUSTMENT

The Department takes exception to the ALJ's conclusion that the preliminary maintenance budget should be adjusted to reflect an *additional* Consumer Price Index (CPI) increase in the amount of $122,554, beyond the Department's increase of $191,605. (Department's Exceptions at 14)[1] In this connection, the Department argues that:

> [The] Initial Decision states that petitioner provided "supportive documents which are either evidential or would be made available to the Department or has already been provided to the Department concerning the CPI increase." Initial Decision, p. 24. The only document submitted as evidence by petitioner in support of the CPI increase was P-13 which does not provide any demonstration that petitioner will incur a non-discretionary increase in these specific amounts. For example, the record contains no documentary evidence demonstrating that during 2003-04 petitioner will incur a non-discretionary increase in the following budget accounts: legal services; judgments against the school district; cleaning; repair and maintenance services; rental of land and buildings; insurance; energy; general administration related to capital outlay; and school administration related to capital outlay. (*Id.* at 14-15)

Thus, the Department reasons that petitioner has failed to document an increase, as required by *N.J.A.C.* 6A:10-3.1(d)(4). Additionally, the Department asserts that "on cross-examination, Mr. Jannarone conceded that he did not provide any documentation demonstrating that petitioner will incur a non-discretionary increase in these specific accounts." (*Id.* at 15) Notably, New Brunswick does not challenge the Department's recitation of the facts, but merely

[1] The Department arrived at its CPI adjustment figure of $191, 605 by multiplying certain non-salary accounts by 2.11%. (Department's Post-hearing Brief at 10)

states, that it "offered [a] detailed analysis of its calculated CPI increases. Judge Rebeck's [sic] Findings of Fact should be sustained." (Petitioner's Reply at 2)

Upon review, the Commissioner is compelled to conclude that the record herein does not confirm the validity of the claimed "omission" in CPI adjustment. Here, the ALJ found that Mr. Jannarones's testimony "demonstrates that of the CPI increases calculated by the Department, an omission of $122, 554 was made by the auditors, and those calculated omissions may be found on Exhibit P-17 for identification." (Initial Decision at 22) However, because P-17 was merely marked for identification and not placed into evidence, it is not available for the Commissioner's review. Moreover, Exhibit P-13, which was submitted as evidence, does not, alone, sufficiently document that petitioner will incur nondiscretionary increases in the specified budget accounts. Therefore, the Department's CPI adjustment is upheld.

SPECIAL TECHNICAL HIGH SCHOOL

It is undisputed that petitioner's maintenance budget did not include a non-discretionary increase in the amount of $400,000 for what is apparently a joint venture with the Robert Wood Johnson Hospital and Medical School which has resulted in the construction of a special technical high school within the District. (Initial Decision at 22) Petitioner describes this as a "contractual agreement with the Science and Technology High School testified to by Richard Jannarone as a contractual obligation that would increase $400,000 in the school year 2003-2004***." (Petitioner's Post-hearing Brief at 6) Respondent, however, asserts that the record is unclear as to whether this service is nondiscretionary or, indeed, what *type* of service is provided. (Department's Exceptions at 15-16)

The Commissioner determines that the record herein simply does not substantiate that the Department erred in excluding the $400,000 from petitioner's maintenance budget. In so

finding, the Commissioner notes that, despite petitioner's assertions that "[t]his is an ongoing contractual obligation***" (Respondent's Reply at 2), this record does not include a copy of the contract and is, in fact, devoid of *any explanation* of the services which are anticipated to be provided pursuant to the contract. Indeed, the ALJ only speculates that the District's contribution to the special high school was "perhaps in terms of rental." (Initial Decision at 22) Moreover, the Commissioner finds that the ALJ appears to have improperly shifted the burden of proof in this regard, as he determined, "there were utterly no proofs offered to contradict the District's position regarding this expenditure***." (Initial Decision at 23) Rather, it was the District's burden, as it so concedes, to prove that the Department's calculation were improper. Given the lack of petitioner's documentation pursuant to this disputed calculation, the Commissioner is simply not persuaded that it has met its burden.

TRANSPORTATION COSTS

It is undisputed that petitioner's preliminary maintenance budget does not include a nondiscretionary increase in the amount of $503,014 for transportation. Once again, however, the Department asserts that petitioner failed to submit any documentary evidence demonstrating a contractual increase for transportation. (Department's Exceptions at 16) Indeed, the Department contends that "Mr. Jannarone acknowledged that he had not yet received documentation indicating an increase in transportation costs." (*Id.* at 16) Notably, petitioner does not dispute the Department's exceptions on this issue, but merely states that "[t]ransportation cost increases must be included in the Maintenance Budget." (Petitioner's Reply at 2)

The Commissioner again determines that the record herein simply does not demonstrate that the Department erred in not including a nondiscretionary increase in the amount

of $503,014 for transportation. In so concluding, the Commissioner finds no evidence to substantiate Mr. Jannarone's testimony, however plausible it may be. In this regard, the Commissioner finds that, again, the ALJ appears to have improperly shifted the burden of proof in this regard, as he determined, "No evidence was offered by the Department *** to in any way contradict***" the testimony offered with respect to the district's transportation requirements. (Initial Decision at 23) As noted, it was the District's burden to prove that the Department's omission was improper and, given the absence of documentation on this issue, the Commissioner is not persuaded that petitioner has met its burden.

REVENUE ADJUSTMENTS

Petitioner takes exception to the ALJ's finding that an IDEA grant may be included as revenue, adding that "It is clear that regulations preclude the use of such a grant to replace or supplant State or local revenues." (Petitioner's Exceptions at 2) The Department, however, reiterates that because it included the costs of special education programs an services in the calculation of its maintenance budget, it appropriately included revenues received to fund these services. (Department's Reply at 2) The Department clarifies, however, that it is not requiring the District to use IDEA Part B revenue to fund general education programs, but rather to fund the special education programs and services included in the maintenance calculation. (*Ibid.*)

The Commissioner finds, for the reasons set forth in the Initial Decision, that the Department properly included IDEA Part B revenue in the calculation of the District's 2003-2004 total budget revenues available.

UTILITIES

The Department argues that it did not include a nondiscretionary increase for utilities,

> since the amount that petitioner spent on utilities in 2002-03 exceeded the amount budgeted by petitioner in the 2003-04 budget submitted to the Department. In essence the Department accepted the amount budgeted by petitioner for utilities for the 2003-04 school year. At hearing, however, petitioner argued that in 2003-04, it would incur an increase in utilities in the amount of $24,241 above actual expenditures on utilities in 2002-03. (Department's Exceptions at 17)

Additionally, the Department notes that, to the extent the District experiences an unforeseen increase in utility during the 2003-04 school year, it may apply for an increase in supplemental funding. *N.J.A.C.* 6A:10-3.1(g).

Moreover, the Department asserts that the Initial Decision "double counts" the increase for utilities, in that the ALJ concluded that the preliminary maintenance budget should be adjusted to reflect an additional CPI increase in the amount of $122,554, which amount already includes an increase for "Energy (Energy and Electricity)" in the amount of $24,241. (P-13) Then, the ALJ again increases the preliminary budget for a nondiscretionary increase of $24,241 for utilities at page 25 of the Initial Decision. Petitioner does not address the issue of the "double count" in its replies, but merely affirms that "[u]tility cost increases must be included in the Maintenance Budget." (Petitioner's Reply at 2)

The Commissioner finds that, given his previous conclusions hereinabove which would eliminate the problem of "double counting" raised by the Department and further noting the Department's failure to dispute the likelihood of increased utilities costs, for the reasons set forth in the Initial Decision, the District's preliminary budget should be adjusted to reflect an increase in the amount of $24,241 for utilities.

Accordingly, the Initial Decision is modified as set forth above.[2]

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[2] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the CAFR until November 2003, which will reveal the District's true audited find balance and available revenue, if any, as of June 30, 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[3] 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.

583-02

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 Order of the Supreme Court.

The ALJ determined that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court.

The Commissioner concurred with the ALJ's findings and conclusions and adopted the Initial 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.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4163-03

AGENCY DKT. NO. 183-6/03

BOARD OF EDUCATION OF

CITY OF PLEASANTVILLE

Petitioner,

v.

STATE OF NEW JERSEY,

DEPARTMENT OF EDUCATION,

Respondent.

Damon Tyner, Esq., for petitioner (Fox Rothschild, LLP, attorneys)

Jennifer Cordes, Deputy Attorney General and **Brendan Ruane**, Deputy Attorney General for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 24, 2003 Decided: September 25, 2003

BEFORE **W. TODD MILLER**, ALJ:

STATEMENT OF THE CASE

In this matter, the Board of Education of the City of Pleasantville, Atlantic County, the operator of an urban special needs *"Abbott"* school district, appeals from the Department of Education's (DOE's) initial review of the district's 2003-2004 expenditure budget. *N.J.S.A.* 18A:7F-3; *see also N.J.A.C.* 6A:10-1.1 *et seq.*

On March 24, 2003, the DOE moved before the Supreme Court for an order modifying the decision in *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V). See also Abbott v. Burke,* 172 *N.J.* 294 (2002) (*Abbott IX*). The DOE requested that the discretionary Additional *Abbott v. Burke* State Aid (supplemental aid) that it would be required to provide to *Abbott* districts in 2003-2004 be limited to an amount sufficient to support those programs, positions and services in the districts' approved budgets for 2002-2003. On April 8, 2003, the Education Law Center (ELC) cross-moved for an order setting an expedited schedule for the DOE's decisions on districts' budgets and requiring the DOE to conduct a formal evaluation of the implementation of Whole School Reform (WSR), etc. On April 29, 2003, the Supreme Court ordered the DOE and the ELC to participate in mediation before the Hon. Philip S. Carchman, J.A.D., to attempt to resolve issues raised by their motions.

Mediation resolved all issues except the 2003-2004 budget process, so the DOE's motion for an order extending by an additional year the one-year relaxation of remedies granted in *Abbott IX* remained outstanding. However, the parties agreed to an expedited schedule for budget approvals and appeals, beginning with the DOE's reviews and approvals of districts' budgets by May 30, 2003. Districts' appeals from the DOE's reviews were to be transmitted to the OAL, where administrative law judges (ALJs) were to issue initial decisions (IDs) within 50 days of the appeal. The DOE's Commissioner was to issue final decisions within 25 days of the IDs. On May 20, 2003, the Supreme Court issued an order incorporating the parties' mediation agreement and providing that the schedule would remain in effect until further order of the Court.

On May 30, 2003, the DOE issued decisions on the *Abbott* districts' budgets. In this case, by letter of that date, the DOE's Assistant Commissioner, Division of Abbott Implementation notified the district that the DOE had completed its initial review of the district's 2003-2004 expenditure budget dated February 27, 2003, that the expenditure budget was approved except as noted in the letter. On June 6, 2003, the district's verified petition of appeal was filed with the Department. *N.J.S.A.* 18A:6-9. The DOE transmitted the contested case to the OAL, where it was filed on June 9, 2003. *N.J.S.A.* 52:14B-2(b). On June 12, 2003, the Department's answer was filed in the OAL.

On June 24, 2003, the Supreme Court issued an order approving the mediated agreement and scheduling argument on the DOE's motion for an order extending the relaxation of remedies granted in *Abbott IX.* On July 1, 2003, the DOE moved for an order amending the schedule for processing the appeals to allow the Court to rule on the standard in the appeals to the OAL before hearings and issuance of initial decisions. On July 10, 2003, the Supreme Court heard oral argument on the budget process. The Supreme Court granted the DOE's motion and relaxed *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V)* remedies as applied to the 2003-2004 budget process. The Court's July 23, 2003, Order states the following:

1. The DOE's application to extend the relaxation of remedies granted in *Abbott V* is granted as follows: The DOE shall have the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke State* Aid for the *Abbott* districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order.

2. The Statewide aggregate amount of Additional *Abbott v. Burke* State Aid shall be presumptively calculated as the total amount of Additional *Abbott v. Burke* State Aid approved for the *Abbott* districts for Fiscal Year 2002-2003, subject to adjustment as required for a maintenance budget. A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.

3. For purposes of calculating Additional *Abbott v. Burke* State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-

instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students.) Insofar as any *Abbott* district has not been informed of its total amount of last year's approved Additional *Abbott v. Burke* State Aid, the DOE shall provide written notice of that amount within two weeks of the date of this Order. The DOE's application of the effective and efficient standard in its review of a district's maintenance school budget may result in a reduction to a district's presumptive amount of Additional *Abbott v. Burke* State Aid.

4. Within 30 days of the issuance of this Order, the DOE shall provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget. If the DOE deletes an expenditure from a district's 2002-2003 budget related to the district's non-instructional programs and based on the effective and efficient standard, the DOE must include in the written notice to the district the expenditure deleted along with a specific statement explaining why the program or part thereof is no longer effective and efficient.

5. *Abbott* districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.

6. The Order of the Court dated July 7, 2003, modifying the Court's scheduling Order of May 20, 2003 in order to provide the [OAL] thirty days within which to determine and issue initial decisions in the twenty-three pending budget appeals, is hereby superseded by this Order. The [OAL] shall issue initial decisions on district appeals from the DOE's preliminary maintenance budget figures for the 2003-2004 school year within 30 days of the dates of those decisions as set forth in Paragraph 4 of this Order.

> 7. To the extent that monies are deleted by the DOE in the districts' non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an *Abbott* district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

The Supreme Court also set a schedule for new DOE decisions on supplemental funding and the administrative appeal and hearing process and ordered the DOE to promulgate emergency regulations governing the process. The DOE, relying on the Fiscal Year 2004 Appropriations Act and the Supreme Court's July 23, 2003, Order, promulgated emergency regulations amending *N.J.A.C.* 6A:10, including *N.J.A.C.* 6A:10-1.2, 3.1, -4.2, and -4.7. The regulations are effective August 22, 2003, and expire June 30, 2004. Among these emergency regulations, *N.J.A.C.* 6A:10-1.2 states:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke.* Maintenance also does not include non-recurring 2002-2003 expenditures.

During the September 10, 2003[1] telephone prehearing conference, the school district advised that it had two issues for consideration. The district was given until September 12, 2003 to identify, in writing, the specific issues to be considered by the OAL. The parties were ordered to submit briefs on the issues by September 19, 2003. The specific issues identified by the district were:

[1] There were several telephone conferences with the parties prior to September 10, 2003, but due procedural history of the Abbott cases the precise issues for consideration could not articulated until September 10, 2003.

1) Whether the emergency regulation promulgated by the DOE regarding the definition of a maintenance budget is inconsistent with the Supreme Court's Order of July 23, 2003?

2) Whether the budget determination worksheet issued to petitioner by DOE was properly computed, where petitioner has unveiled several mathematical miscalculations, which improperly reduced the total budget?

On September 19, 2003, the parties file their respective legal arguments with this ALJ. Oral argument was heard on September 24, 2003 at the OAL office in Atlantic City. The parties resolved issue number 2. An executed settlement agreement, relating exclusively to issue number 2, was received on September 25, 2003. Accordingly, the record closed on September 25, 2003.

LEGAL ARGUMENTS

DISTRICT'S ISSUE # 1 "Maintenance Budget"

The school district asserts that it is not seeking to overturn the adopted regulation, but that in this matter the OAL is confronted with a choice of law as follows: whether to apply the Supreme Court's explicit definition of "maintenance budget" or the different regulatory definition adopted by the DOE? The school district contends that *N.J.A.C.* 6A:10-1.2's "maintenance budget" definition is contrary to the New Jersey Supreme Court's Order. The district argues that the OAL has jurisdiction to determine whether DOE's emergency regulation (*N.J.A.C.* 6A:10-1.2) defining "maintenance budget" or the Supreme Court "maintenance budget" definition is applicable to the 2003-2004 funding question. The district further suggests that Supreme Court mandates that the OAL determine this issue pursuant to prior *Abbott* rulings. *Abbott*, 153 *N.J.* 480, 526-527 (1998). Thus, under those decisions, it is the responsibility of the OAL, in the first instance, to assess in these disputes whether the DOE has properly implemented the Abbott educational remedies and mandates, and that the legal authority set forth in the Supreme Court's Order is binding on the OAL and should be applied herein.

During oral argument counsel for the district suggested that the "approved and provided for" language contained in the Order means programs that were approved in 2002-2003, even if not funded, must be funded this year. Any other interpretation would undermine the overriding purpose of the *Abbott* decisions. To bolster its interpretation, the district referred to the Supreme Court's Order, paragraph 2, and emphasized that maintenance budget does not include restoration of programs that were eliminated in 2002-2003 nor does it include funding for new programs. Hence, the district argues that the Supreme Court purposely did not fund new, reduced or eliminated programs. Therefore, by implication, the Supreme Court must have intended to fund "approved" programs that were not new, reduced or eliminated in 2002-2003. For example, if an approved program commenced in 2002-2003 but for some reason was temporarily suspended or altered, say by using a substitute teacher rather than a full time teacher, it should be fully funded in 2003-2004. Or if an approved program in 2002-2003 was part of the effective and efficient standard but, it did not get started until the end of the school year, under the DOE interpretation, it would not be funded in 2003-2004 since, it commenced towards the end of the year. This would in effect terminate a valid, approved program from 2002-2003 and, defeat the spirit of the Abbott decisions.

On the contrary, DOE argues that the OAL is without jurisdiction to consider the validity of an agency rule. DOE urges that any challenge to the emergency rule must be brought in the Appellate Division or the Supreme Court. R. 2:2-3(a); *See also*, *Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976). DOE urged that the OAL generally derives its jurisdiction over a controversy involving contested issues of fact and not over a language dispute between the Supreme Court and a State Agency. Even if the Supreme Court directed that the OAL resolve Abbott cases and controversies, as indicated in other Abbott matters, the meaning of "maintenance budget" was not the type of controversy contemplated, by the Court, to be heard at the OAL level. *Abbott*, 153 *N.J.* 480, 526 (1998).

DOE also urged that an agency regulation is presumptively valid and its interpretation of its own regulation is entitled to great weight. DOE promulgated the maintenance budget definition, through its rule making procedure. The emergency regulation is reasonably within specifications of the Supreme Court Order. Therefore, it is not for the OAL to determine the applicability of a language dispute in a properly promulgated regulation. For instance, the OAL

did not receive the case from DOE to decide a factual dispute. This distinction is vital to the OAL statutory jurisdiction.

If certain programs were not in full operation in 2002-2003, and thus not fully funded in the 2003-2004, this would represent an insignificant amount relative to the budget issues at hand. The concept of a maintenance budget was to provide a stable amount, equal to the 2002-2003 funding, so the same programs could be offered in 2003-2004. The process is not perfect.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Notably, if the emergency regulation were determined to be inconsistent with the Supreme Court Order, it would render the regulation meaningless and effectively invalidate it. Therefore, if the district is successful in its position before the OAL, it is a challenge to the validity of *N.J.A.C.* 6A:10-1.2. If the district were successful, an ALJ would have to find that *N.J.A.C.* 6A:10-1.2 was invalid because it was contrary to an Order of the Supreme Court. The district analogizes this to a determination regarding a choice of law rather than an attack on the validity of a regulation. I disagree. The OAL cannot or should not obtain jurisdiction over an agency regulation through the "back door". The OAL falls within in the executive branch. It is not a court and has no jurisdiction to determine the validity of a rule. *N.J.S.A.* 52:14F-1; *Wendling v. New Jersey Racing Comm'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995) (holding that the Appellate Division and not the OAL has jurisdiction for a challenge to the validity of a rule); *In re 1999-2000 Abbott Implementing Regulations, N.J.A.C. 6:19A-1.1 et seq.*, 348 *N.J. Super.* 382 (App. Div. 2002) (a previous challenge to rules implementing *Abbott* decisions brought in the Appellate Division.). Any attempt by the OAL to determine the validity of an agency regulation would be contrary to the *Administrative Procedures Act.* (*N.J.S.A.* 52:14B-1 et seq.) and R. 2:2-3(a). In short, the OAL does not have jurisdiction to, directly or indirectly, determine the validity of *N.J.A.C.* 6A:10-1.2 because there it is not permitted to by statute or court rule. I therefore **CONCLUDE** that the OAL does <u>not</u> have jurisdiction to invalidate the DOE's definition of "maintenance budget" (*N.J.A.C.* 6A:10-1.2). Likewise, in *Board of Education of the City of Asbury Park v. New Jersey Department of Education,* OAL Dkt. No. EDU 4095-03, Hon. John R. Tassini, ALJ, entered an Order relative to Maintenance Budget (September 4, 2003). In that Order, Judge Tassini stated that the school district's contention is

essentially a challenge to the validity of the above-cited regulation. Judge Tassini concluded that the district's challenge to the " 'maintenance budget' may not be heard in the OAL and that the regulation must be applied in the OAL."

Assuming for the moment that the OAL does have jurisdiction determine a choice of law as suggested by the district, I **CONCLUDE** that the definition of maintenance budget as determined in *N.J.A.C.* 6A:10-1.2 is consistent with the Supreme Court's July 23, 2003, Order. The district does not seek a decision invalidating *N.J.A.C.* 6A:10-1.2. Rather, they argue that, based on the *Abbott* decisions, the OAL must determine whether the DOE regulation is consistent with the Supreme Court's Budget Order of July 23, 2003. The Hon. Joseph F. Martone, ALJ addressed this issue in *Board of Education of the Township of Neptune v. New Jersey Department of Education,* OAL Dkt. No. EDU 4096-03. In reaching his conclusions on the meaning of "maintenance budget" Judge Martone observed that:

> In its Order of July 23, 2003, the Supreme Court states, "During 2003-2004, K-12 programs *provided* for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order," and "*Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003,* or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003." July 23, 2003 Order, at 4, 5. [Emphasis added.] The foregoing language requires that programs, positions, or services be in existence in order to be included in the maintenance budget.
>
> In its Order, the Supreme Court also stated:
>
> A maintenance budget shall mean that a district will be funded at a level such that the district can implement *current* approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. [Emphasis added.]

If the interpretation of the school district and *amicus* is accepted, the word "current" in the above passage should be viewed as referring to, describing and modifying the word "approved". Thus, under their interpretation, any programs, services, and positions that are currently approved are to be funded. However, the word "current" is more properly viewed as referring to, describing and modifying the words "programs, services, and positions". That is, the Supreme Court intended that the programs, services, and positions are to be current, that is,

currently in existence. Therefore, I **CONCLUDE** that the use of the adjective "current" rather than the adverb "currently" implies that the programs, services, and positions must be in existence in order to be funded.[3]

The language ultimately adopted by the Supreme Court to define "maintenance budget" is also reflective of the language contained in the DOE's proposal, which is attached to the Report of The Abbott Mediation (Order of April 29, 2003). The language proposed by the DOE is as follows:

> Maintenance means that a district will be funded at a level that will enable it to *continue implementing* the current approved programs, services and positions and therefore includes actual documented increases in non-discretionary expenditures.
> [Emphasis added.]

The above language as proposed by the DOE requires that the approved programs, services and positions to be maintained should be currently in existence in order that their continued implementation may be enabled through funding. I **CONCLUDE** that the language ultimately used by the Supreme Court to define "maintenance" is entirely consistent with the DOE's proposal.

Judge Martone concluded that:

> Given the foregoing language contained in the Supreme Court's Budget Order of July 23, 2003, I do not see that *N.J.A.C.* 6A:10-1.2's "maintenance budget" definition is inconsistent with the Supreme Court's Budget Order of July 23, 2003. I **CONCLUDE** that the foregoing Order provides a reasonable basis for *N.J.A.C.* 6A:10-1.2's "maintenance budget" definition. Therefore, I also **CONCLUDE** that it is unnecessary to disregard the "maintenance budget" definition contained in *N.J.A.C.* 6A:10-1.2 in deciding the present matter.

[2] It is noted that the words "current" and "approved" are both adjectives in form, and that adjectives are used to modify nouns. Adverbs such as the word "currently" are used to modify verbs, adjectives or other adverbs. Thus, under rules of grammar, the adjective "current" cannot be considered to be a modification of the word "approved" but can only be considered a modification of the terms "programs, services, and positions".

On the issue of defining "maintenance budget" for the school year 2003-2004, I fully agree with the well-reasoned analysis by Judge Martone. Therefore, I incorporate legal reasoning of Judge Martone as part of this Initial Decision. In addition to concurring with Judge Martone's reasoning, I offer the following additional observations. The interplay between the words "approved" and "provided for" in relation to the concept of "maintenance budget" must derive their meaning from all the circumstances that gives rise to the Department of Education motion. The New Jersey Attorney Generals Office initiated the present matter on behalf of the Department of Education on motion before the Supreme Court for modification of the decision in *Abbott V*. The background is that the state has been visited with a serious budget crisis[2]. DOE in its Reply Brief in *Abbott V* stated:

> This Court, acknowledging the fiscal crisis and the motivation underlying the State's proposal to contain ineffective spending in the Abbott districts for the 2002-2003 school year, granted the Department flexibility to eliminate, reduce or limit growth of certain programs, positions and services as long as the core instructional program was not negatively affected. *Abbott IX*, 172 N.J. 294, 297-298
>
> In addition, the fiscal situation in the State has not improved and, in fact, has become graver.
>
> *See*, DOE's April 21, 2003, Reply Brief filed in *Abbott v. Burke*, Sup Ct. Dkt No. 42,170 at page 21-22.

The *Abbott V* motion sought to strike a balance between urban special needs districts (Abbott districts) and state budget crisis. Mindful of the budget problems, DOE promulgated an emergency regulation, which continued to address the needs of the Abbott districts but was within its financial means. Simply stated, DOE sought to fund Abbott districts at the 2002-2003 amounts, subject to certain mandatory adjustments or increases. DOE was mindful of the Supreme Court Order that stated a "maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures." Consistent with

[2] In the Governor 2003 budget address he stated, "let me repeat that – the state of New Jersey starts out this budget year $5 billion in the red. www.state.nj.us/budget03/speech_text.html. Similarly the Commissioner of Education stated "As the Governor has stated repeatedly, this is not a budget we wanted to submit, but we are confident that this budget will enable the school districts to weather the year with some belt tightening, creative solutions, innovative programs and cooperative agreements. www.state.nj.us/njded/news/0410bud.html

the Supreme Court's Order, DOE promulgated *N.J.A.C.* 6A:10-1.2 which provides in part ' "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures.'

The issue at hand is about funding last year's programs so the Abbott districts are not deprived of those programs while the state resolves its budget crisis. The emergency regulation addresses this situation by fully funding last year's programs and allowing certain adjustments or increases, if warranted. Generally, on a global basis, the existing 2002-2003 programs should not receive less funding. Funding for those programs (funding meaning "approved and provided for") in 2002-2003 budgets represent the floor and the ceiling amount to be funded in the 2003-2004 budget. This, I believe, was the intent of DOE's original motion and it is consistent with corresponding emergency regulation Ordered by the Supreme Court. Moreover, it is consistent with the Supreme Court's definition of maintenance budget. The Supreme Court did not Order DOE to increase the 2003-2004 budget to include "the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services." A "current" program that was not funded in 2002-2003 is a new program for the purposes of a budget analysis. It is not a current program that is required to be funded. In interpreting a rule, a court may look to the policy sought to be achieved. *Matter of Gastman*, 147 *N.J. Super.* 101, 109 (App. Div. 1977). In the present matter, the policy sought to be achieved was to balance the DOE budget crisis against the needs of the Abbott districts. DOE was charged with developing a regulation for that purpose. I further **CONCLUDED** that confining the 2003-2004 budget amounts to "current programs in existence" and funded in 2002-2003 budget make sense when viewed against the backdrop of this motion.

To the extent the OAL has jurisdiction, as mandated by the Supreme Court in *Abbott*, 153 *N.J.* 480, 526-527 (1998) and that petitioner asked for a determination regarding the choice of law, I make the following conclusions. For the reasons set forth in Judge Martone's Order and independently, I **CONCLUDE** that the amount to be funded for 2003-2004 budget year is limited to only those programs that were in existence and funded in 2002-2003. Any such conclusion to the contrary would ignore the circumstances upon which DOE filed its motion. If

additional programs that were not funded in 2002-2003 were funded in the present budget, it would defeat the intent of the emergency regulation. It would not represent a maintenance budget but rather a budget increase over the prior years budget. It is the funding in the 2002-2003 budget that is the starting point for analysis. DOE sought to restrict the 2003-2004 budget to only that amount that it funded in the prior year. DOE promulgated a regulation to meet that need and that is not inconsistent with the Supreme Court Order. Moreover, the interpretation of a regulation, as offered by DOE, is entitled to great weight and is presumptively valid. *Medical Society of New Jersey v. New Jersey Department of Law and Public Safety*, 120 *N.J.* 18 (1990). Agencies are permitted significant discretion when applying criteria contained in regulations to ensure flexibility in dealing with varying circumstances. *Matter of Crown/Vista Energy Project*, 279 *N.J. Super.* 74 (App. Div. 1995).

DISTRICT'S ISSUE # 2 Budget Miscalculations

Prior to and during the hearing, the parties and their professionals agreed to Stipulation a regarding the controversy over the budget miscalculations (issue # 2). The parties have prepared a Stipulation, which is attached and fully incorporated herein. I have reviewed the record and terms of the Stipulation and I **FIND**:

1. The parties have voluntarily agreed to the Stipulation as evidenced by their signatures and as stated on the record on September 24, 2003.

2. The Stipulation disposes of all issues in controversy at this time. The Stipulation is an interim measure to bridge the current dispute regarding the budget calculations but, the budget remains subject to an annual audit. Each party specifically reserves their right to assert a claim after the audit is completed. This would include seeking additional Abbott funding by the district or seeking a refund by the DOE. This Stipulation is intended to provide the district with adequate Abbott funding prior to the conclusion of the audit but also preserve the rights of all parties to challenge or appeal the funding or the outcome of the final audit. *N.J.S.A.* 18A:23-1 *et seq.*

I **CONCLUDE** that the budget miscalculation issue # 2 is no longer a contested case before the Office of Administrative Law.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the definition of "maintenance budget" set forth in *N.J.A.C.* 6A:10-1.2 is applicable in this matter. It is further **ORDERED** that the parties comply with the settlement terms in connection with issue # 2 (budget miscalculations).

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to 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.

9-25-03
DATE

W. TODD MILLER, ALJ

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

9.25.03
DATE

E-mailed Initial Decision to the parties on:

9/25/03
DATE

/lam

Documents Relied Upon

P-1 Binder provided by the District During Oral Argument

District's September 19, 2003 Letter Memorandum

DOE's September 19, 2003 Letter Memorandum

Reply Brief of the Commissioner in Supreme Court Docket No. 42,170

District's Letter of September 12, 2003 Setting Forth the Issues

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
DOCKET NO.: EDU 04163-03S
AGENCY REF. NO.: 183-6/03

CITY OF PLEASANTVILLE BOARD OF EDUCATION,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Administrative Action

STIPULATION OF FACTS

Petitioner, having requested an administrative hearing to contest the amount of supplemental Abbott v. Burke State Aid it was awarded and the budget process under which that award was calculated, and the parties having discussed the matter, and upon presentation of new documentation to the Department of Education, the parties hereby stipulate to the following facts:

Attachment 16 ED
16a

1. $98,372.86 shall be added to the line item entitled, "Salaries - Contracted Rate," reflected in the amended budget worksheet attached to this Stipulation as Exhibit A.

2. $479,037.36 shall be added to the line item entitled, "Special Education," reflected in the amended budget worksheet attached as Exhibit A.

3. $177,197.76, plus $94,371.00, shall be added to the line item entitled, "CPI at 2.1% non-sal net of Util." reflected in the amended budget worksheet attached as Exhibit A.

4. $948,068.00 shall be deducted from the line item entitled, "FY 03-04 GF Total Budgeted Revenues Available," reflected in the amended budget worksheet attached as Exhibit A.

5. The estimated amount of supplemental aid that petitioner will be receiving totals $12,010,822.56, reflected in the amended budget worksheet attached as Exhibit A.

6. The parties agree that the estimated award of supplemental Abbott v. Burke State Aid for the Petitioner may be revised pending the audit process that will be completed on or about November 5, 2003. Accordingly, petitioner reserves any right to appeal the results of that process at the time the final supplemental Abbott v. Burke State Aid award is provided. Respondent reserves any right to contest that appeal.

7. The parties acknowledge that there is an outstanding issue regarding the definition of the "maintenance budget" standard that is being decided simultaneously by William Todd Miller, ALJ.

8. This document, in connection with the Initial Decision being issued by ALJ Miller, referred to in Paragraph 9 of this Stipulation, resolves all issues raised in petitioner's appeal, subject to any further rights to file exceptions to, or appeals from, the Initial Decision concerning the "maintenance budget" definition.

9. This Stipulation shall be construed as if it were drafted by both parties and both parties waive all statutory and common law presumptions which would serve to have the document construed in favor, or against, any party as the drafter hereof.

10. This Stipulation may be executed in counterparts.

Damon G. Tyner, Esq.
Attorney for Petitioner

Dated:

Jennifer L. Cordes
Deputy Attorney General
Attorney for Respondent

Dated: 9.25.03

Exhibit A

District: Pleasantville Maintenance Calculation - Final Revision

Budget: 2002-2003

Line #:			
9470	Approved General fund budget 02-03	$54,061,114.00	
2511	Less: EC Transfer	($574,605.00)	
			$53,486,509.00
	Add:		
13300	Early Childhood aid		$4,103,462.00
13690	DEPA Aid		$1,991,500.00
13900	Distance Learning network aid		$184,990.00
	Adjusted 02-03 State program budget		$59,766,461.00
	Adjust for actual state program spending fund 11		
7580	General Current Expense	$20,648,901.00	
8340	Capital Outlay	$2,063,531.00	
9460	Special Schools	$0.00	
9465	GF Transfer to Charter Schools	$3,751,279.00	
	Less: Actual from Bd Sec Rpt	($26,328,339.44)	
			$135,371.56
	Adjust for actual state program spending fund15 - 94%		
9466	GF Contribution to WSR	$25,941,568.82	
	Less: Actual from Bd Sec Rpt	($26,138,169.82)	
			($196,601.00)
			($61,229.44)
	Base 02-03 state program budget		$59,705,231.56
	Add/(Subtract) Difference between 02-03/03-04 Plan		
	EC Plan 03-04	$4,822,327.00	
	EC Plan 02-03	($4,103,462.00)	
			$718,865.00
	Add or deduct Non-discretionary items:		
	Salaries - Contracted Rate	$1,630,730.00	
	Health Benefits	$1,428,598.00	
	Charter School Tuition	$750,427.00	
	Special Education - Tuition	$727,161.00	
	CPI at 2.11% non-sal net of Util	$363,811.00	
	Utilities rate increases @ 8.1%	$88,549.00	
	Subtotal		$4,989,276.00
	If applical Adjust. For non-recurring items	$0.00	
	non-cash items	$0.00	
	Other - KC Provider Budget not in Plan 03-04	$183,469.00	
	Decrease in Federal aids	$0.00	
			$183,469.00
	Subtotal adjustments		$5,691,610.00
	FY 03-04 Total State budget @ Maintenance		$65,396,841.56

Budget: 2003-2004

00410	Total Gen'l fund Revenues	$60,620,492.00	
00421	ECPA carryover calc by state	$118,989.00	
00422	DEPA carryover calc by state	$90,675.00	
00425	ECPA	$3,469,509.00	
00426	DEPA	$1,292,724.00	
	Subtotal state program aid	$66,592,589.00	
00284	Less Request for AAv8A for 03-04	($12,045,173.00)	
	Base GF revenue 03-04		$53,547,416.00
	Add/(Subtract): Revenue Adjustments:		
	IDEA Increase/(Decrease)	$38,603.00	
	Extraordinary Aid Increase/(Decrease)	$0.00	
	Other: MISC unbudgeted rev	$0.00	
	Excess Fund Balance	$0.00	
	Subtotal		$38,603.00
	FY 03-04 GF Total Budgeted Revenues Available		$53,586,019.00
	Difference: Need for Supplemental aid		$12,010,822.56

OAL DKT. NO. EDU 4163-03
AGENCY DKT. NO. 183-6/03

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-2004 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Pleasantville's exceptions and the Department's reply thereto were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge (ALJ), that the OAL does not have jurisdiction to determine, directly or indirectly, the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n.*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to determine "a choice of law" as argued by the District, the Commissioner agrees

with the ALJ that the Department's definition of "maintenance budget," as detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003. Consequently, the Department's application of such regulatory definition in its review and approval of the District's 2003-2004 budget is wholly appropriate.

The Commissioner notes that with respect to the second issue in controversy in this matter, *i.e.*, budget miscalculations, the parties have entered into a Stipulation of Settlement which, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), is deemed to be the final decision at this time on this issue.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

* 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.

584-03

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court and challenging the Department's reduction, as part of its review of noninstructional expenditures for effectiveness and efficiency, of certain noninstructional supervisory positions. The District also sought to continue its appeal of certain issues arising from the budget determination made by the Department prior to the Court's order.

The ALJ found that the Department appropriately applied the duly promulgated rule implementing the Court's order for "maintenance," and further found that the Board could continue its appeal of prior budget issues. The ALJ upheld the Department's determinations with respect to restoration of programs, capital project and non-instructional salary expenditures, and other items not meeting the definition of "maintenance" or standards of effectiveness and efficiency, but also found that additional funding must be provided to support fully two positions only partly filled in 2002-03.

The Commissioner concurred with the ALJ's conclusions regarding "maintenance" and most specific issues, notwithstanding that the Commissioner did not find issues arising from the Department's prior determination pertinent to the appeal herein. However, the Commissioner rejected the conclusion that additional funding must be provided for two previously part-year positions, finding that the Department's method of calculation provided sufficient salary amounts to cover variances in year-to-year staffing needs.

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.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL Dkt. No. EDU 4157-03
Agency Ref. No. 187-6/03

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Harvey C. Johnson, Esq., P.C., for petitioner

Michael Walters, Deputy Attorney General, **Kathleen Asher**, Deputy Attorney General and **Allison Eck,** Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 24, 2003 Decided: September 26, 2003

BEFORE **ANA C. VISCOMI,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Board of Education of the City of Camden (hereinafter "school district" or "district"), the operator of an urban special needs "*Abbott*" school district,

appeals from the Department of Education's (hereinafter "DOE") initial and revised preliminary review of the district's 2003-2004 expenditure budget. *N.J.S.A* 18A:7F-3; see also *N.J.A.C.* 6A:10-1 *et seq.*

The following procedural history has been gleaned from the Supreme Court's Order of July 23, 2003. On March 24, 2003, the DOE moved before the Supreme Court for an order modifying the decision in *Abbott v. Burke*, 153, N.J. 480 (1998) (*Abbott V*). See also *Abbott v. Burke*, 172 N.J. 294 (2002) (*Abbott IX*). The DOE requested that the discretionary additional *Abbot v. Burke* state aid (supplemental aid) that it would be required to provide to Abbott districts in 2003-2004 be limited to an amount sufficient to support those programs, positions and services in the districts' approved budgets for 2002-2003. On April 8, 2003, the Education Law Center (ELC) cross-moved for an order setting an expedited schedule for the DOE's decisions on districts' budgets and requiring the DOE to conduct a formal evaluation of the implementation of Whole School Reform (WSR), etc. On April 29, 2003, the Supreme Court ordered the DOE and the ELC to participate in mediation before the Hon. Philip S. Carchman, J.A.D, to attempt to resolve issues raised by their motions.

Mediation resolved all issues except the 2003-2004 budget process, so the DOE's motion for an order extending by an additional year the one-year relaxation of remedies granted in *Abbott IX* remained outstanding. However, the parties agreed to an expedited schedule for budget approvals and appeals, beginning with the DOE's reviews and approvals of districts' budgets by May 30, 2003. Districts' appeals from the DOE's reviews were to be transmitted to the OAL, where administrative law judges (ALJs) were to issue initial decisions within 50 days of the appeal. The DOE's Commissioner was to issue final decisions within 25 days of the initial decisions. On May 30, 2003, the Supreme Court issued an Order incorporating the parties' mediation agreement and providing that the schedule would remain in effect until further order of the Court.

On May 30, the DOE issued decisions on the Abbott districts' budgets. In this case, by letter of that date, the DOE's Assistant Commissioner, Division of Abbott

Implementation notified the district that the DOE had completed its initial review of the district's 2003-2004 expenditure budget March 28, 2003 and that the expenditure budget was approved except as follows:

- Restorations – the March 28 budget submitted by the district added or restored a total of $17.3 million that was not included in the March 18 budget. Of this amount we cannot approve $12,570,164 with the balance explained by contractual salary increases that were not included in the March 18 budget;

- Capital Outlay – There is a number of items in the capital budget that can or will be financed by the School Construction Corporation and cannot be approved;

- Vacancies – The district failed to provide complete and accurate information on position status for the Department to make an accurate projection. Based on the information provided to date, we cannot approve $1,603,000 in the position account, but the final amount will be based on actual vacancies;

- Health benefits – Since the increases for the State Health Benefits Plan for the period January-June 2004 cannot be precisely projected, the district should use 12% as the projected increase with the understanding that the actual increase will be approved;

- Since charter school and special education tuition costs cannot be precisely projected, the district should base its estimate on 2002-2003 actual expenditures with the understanding that these expenditure (sic) will be adjusted based upon actual enrollment/costs;

- Excessive legal fees- $250,000;

- Excessive supervisory staff -- $725,000;

- Various fund 11 accounts – technology, school-based non-salary accounts, tuition and aid-in-lieu of transportation are not approved above the 02-03 level.

On June 6, 2003, the district's verified petition of appeal was filed with the DOE. *N.J.S.A.* 18A:6-9. The DOE transmitted the contested case to the OAL, where it was filed on June 9, 2003. *N.J.S.A.* 52:14B-2(b). On June 12, 2003, the DOE's answer was filed in the OAL. This matter was assigned to be heard before Jeff S. Masin, Acting Director and Chief ALJ.

On June 24, 2003, the Supreme Court issued an order approving the mediated agreement and scheduling argument on the DOE's motion for an order extending the relaxation of remedies granted in *Abbott IX.* On July 1, 2003, the DOE moved for an order amending the schedule for processing the appeals to allow the Court to rule on the standard in the appeals to the OAL before hearings and issuance of initial decisions. On July 10, 2003, the Supreme Court heard oral argument on the budget process. The Supreme Court granted the DOE's motion and relaxed *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V)* remedies as applied to the 2003-2004 budget process. The Court's July 23, 2003, Order provides:

> 1. The DOE's application to extend the relaxation of remedies granted in *Abbott V* is granted as follows: The DOE shall have the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke State* Aid for the *Abbott* districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order.
>
> 2. The Statewide aggregate amount of Additional *Abbott v. Burke* State Aid shall be presumptively calculated as the total amount of Additional *Abbott v. Burke* State Aid approved for the *Abbott* districts for Fiscal Year

2002-2003, subject to adjustment as required for a maintenance budget. A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.

3. For purposes of calculating Additional *Abbott v. Burke* State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students.) Insofar as any *Abbott* district has not been informed of its total amount of last year's approved Additional *Abbott v. Burke* State Aid, the DOE shall provide written notice of that amount within two weeks of the date of this Order. The DOE's application of the effective and efficient standard in its review of a district's maintenance school budget may result in a reduction to a district's presumptive amount of Additional *Abbott v. Burke* State Aid.

4. Within 30 days of the issuance of this Order, the DOE shall provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget. If the DOE deletes an expenditure from a district's 2002-

2003 budget related to the district's non-instructional programs and based on the effective and efficient standard, the DOE must include in the written notice to the district the expenditure deleted along with a specific statement explaining why the program or part thereof is no longer effective and efficient.

5. *Abbott* districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.

6. The Order of the Court dated July 7, 2003, modifying the Court's scheduling Order of May 20, 2003 in order to provide the [OAL] thirty days within which to determine and issue initial decisions in the twenty-three pending budget appeals, is hereby superseded by this Order. The [OAL] shall issue initial decisions on district appeals from the DOE's preliminary maintenance budget figures for the 2003-2004 school year within 30 days of the dates of those decisions as set forth in Paragraph 4 of this Order.

7. To the extent that monies are deleted by the DOE in the districts' non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an *Abbott* district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

The Supreme Court also set a schedule for new DOE decisions on supplemental funding and the administrative appeal and hearing process and ordered the DOE to promulgate emergency regulations governing the process. The DOE, relying on the

Fiscal Year 2004 Appropriations Act and the Supreme Court's July 23, 2003, Order, promulgated emergency regulations amending *N.J.A.C.* 6A:10, including *N.J.A.C.* 6A:10-1.2, 3.1, -4.2, and -4.7. The regulations are effective August 22, 2003, and expire June 30, 2004. Among these emergency regulations, *N.J.A.C.* 6A:10-1.2 states:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke.* Maintenance also does not include non-recurring 2002-2003 expenditures.

This matter was subsequently reassigned to this ALJ.

Pursuant to Provision 4 of the Supreme Court's Order dated July 23, 2003, the DOE was required to issue to each district "preliminary maintenance budget" figures for the 2003-2004 school year by August 22, 2003. On that date, the DOE sought leave before the Supreme Court for a three (3) day extension of time – until August 27, 2003— to issue notices to each respective district. The Supreme Court granted this extension by order of August 26, 2003.

Prior thereto, a telephone pre-hearing conference was conducted in this matter. The pre-hearing letter order limited discovery and set peremptory hearing dates for September 4, 5 and 8, 2003.

On August 27, 2003 a Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional *Abbot v. Burke State Aid Award*

was forwarded to Annette Knox, the school district's superintendent. A supplemental letter order issued by this ALJ provided, in relevant part, a reminder to district's counsel that pursuant to the special adopted amendments, *N.J.A.C.* 6A:10-4.7(a) required counsel to contact the assigned ALJ within one business day of receipt of the preliminary notice to seek a pre-hearing conference in which the issues on appeal could be identified by the district. Since that supplemental order scheduled a continued pre-hearing conference on August 29, 2003, counsel agreed to await that conference rather than schedule it on August 28, 2003.

By letter of September 3, 2003, district's counsel advised, the district:

> continues the appeal of the issues stated in its Petition dated June 5, 2003 with the following two exceptions: 1) the appeals of legal fees is deleted; and 2) the appeal regarding excessive Supervisory Staff remains, but is amended from $725,000 to $867,564 contained in the DOE letter dated August 27, 2003. ...
>
> In its order of June 24, 2003, the Supreme Court required the restoration of Whole School Reform Models to elementary schools that did not have them in the 2002-2003 school year. The Camden Board of Education has such schools. At $75,000 per school this amounts to $1,800,000. The Camden City Board of Education requests that its Petition be amended to include the funds necessary for restoration of Whole School Reform Models in schools that did not have them in the 2002-2003 school year.[1]

[1] The language of the district letter indicating that the appeal is based in part on the issues defined in the DOE May 30, 2003 letter is relevant because DAG Walters participated in all pre-hearing matters through September 10, 2003. Prior to the actual commencement of the hearing on September 14, 2003, when DAG Walters was replaced by DAG Eck and Asher, due to his appearance in another *Abbott* matter subject to a peremptory schedule, the DOE never contended the school district could no longer base its appeal, in part, on the May 30, 2003 letter. The first time the DOE sought to bar any appeal based on the issues set forth in the May 30, 2003 letter was on September 14, 2003. DOE requested a written order in that regard so that it may move forward on interlocutory appeal. However, prior to the issuance of such an order and on the same date, DAG Walters briefly appeared during the hearing and advised the DOE did not contest the district's right to pursue the issues set forth in the May 30, 2003 which set the basis for the Petition filed on June 6, 2003. This ALJ explained during the course of argument on this issue on September 14, 2003 that since the matter had not previously been objected to by DOE counsel and certainly to the extent the August 27, 2003 Notice letter did not specifically address a particular issue on appeal, it could not be deemed to supercede the May 30, 2003 letter in its entirety. It is also interesting to note that the September 3, 2003 letter by the district memorializing the issues on appeal was previously discussed with DOE counsel also

On the basis of this mutual request, the peremptory hearing date of September 4, 2003 was adjourned in order to allow the parties to engage in meaningful settlement discussions. Due to the mutual request of the parties and based on the progress of their discussions, on September 4, 2003 I adjourned the peremptory hearing date of September 5, 2003 but scheduled a conference call on the afternoon of September 5, 2003 in order to ascertain the status of the discussions and because a final peremptory hearing date was scheduled for September 8, 2003. Based on the results of that conference call, counsel were advised to contact the undersigned ALJ over the weekend so that I could make an informed decision on whether to proceed with the hearing for September 8, 2003. As a result of that call and due to further reasonable time necessitated by the district in convening an emergent board meeting and meeting with the School Construction Corp (SCC), I adjourned the final peremptory hearing date of September 8, 2003. A conference call was scheduled for September 10, 2003 in order to ascertain the status of this matter. As a result, the matter was scheduled for new peremptory hearing dates of September 16, 17 and 18, 2003 and a final pre-hearing order was entered.

During the course of the September 10, 2003 conference call, district's counsel advised petitioner was seeking a ruling with regard to the issue of the "maintenance budget definition" as set forth in the Supreme Court Order of July 23, 2003 vis-à-vis that set forth in the Special Adopted Amendments, effective August 22, 2003 at *N.J.A.C.* 10:6A:10-1.2. In the interest of efficiency and economy, the parties were advised this ALJ concurred with the ruling on this issue as set forth by John Tassini, ALAJ on September 4, 2003 in connection with the Asbury Park Abbott school district appeal. Judge Tassini's order relative to the maintenance budget issue was provided to the parties. Nonetheless, district counsel was permitted to raise that issue with regard to this matter and counsel were advised briefs were due on September 12, 2003. The final briefs were received on September 17, 2003. The Education Law Center (hereinafter "ELC") sought and was granted intervenor status, pursuant to *N.J.A.C.* 1:1-16.1 *et seq.* for purpose of an *amicus curiae* filing only. The submissions were considered during an

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indicated that the District and DOE were seeking to adjourn the first scheduled hearing date in order to attempt to resolve this matter. Presumably then, the DOE was on notice on all issues on appeal.

extended break in the context of the September 17, 2003 hearing and the parties were verbally advised on the record that in consideration of the briefs submitted, I concurred with the ruling set forth by both ALJs Tassini and Martone, respectively.[2]

This matter was heard peremptorily on September 16-18, 2003 inclusive. The parties were permitted to submit initial post hearing briefs no later than 10:00 a.m. September 22, 2003 and reply briefs no later than September 23, 2003 at 10:00 a.m. Due to a local power outage that affected the Trenton OAL offices, final submissions were received on September 24, 2003 and the record closed on that date. Pursuant to Supreme Court Order of July 23, 2003, as modified on August 26, 2003, this initial decision is due on September 26, 2003.

ISSUES PRESENTED

Based on the June 6, 2003 petition as amended by letter of September 3, 2003 and joint stipulation of the parties (J-1), the following represents the issues on appeal:

1. Restorations not approved in the amount of $12,570,164;
2. Capital outlay;
3. Vacancies in the amount of $1,603,000;
4. Health benefits (in part);

[2] Although the parties were advised that a written order memorializing this order would be provided to the parties, due to time constraints and in consideration of when the briefs were submitted, that ruling is memorialized herein. Petitioner school district contends that *N.J.A.C.* 6A:10-1.2's maintenance budget definition is contrary to the Supreme Court's Order of July 23, 2003, provision 4. Petitioner asserts that as such, an ALJ may disregard the regulation and apply the Supreme Court's Order which defined "maintenance budget" at provision 4. In its *amicus* filing, ELC contends that the Supreme Court in the "Abbott V" and "Abbot I" respective rulings vested in the OAL, the responsibility to "initially adjudicate" all disputes between the DOE and the Abbott districts. ELC asserts the Supreme Court did not specifically "limit or restrict the scope of the factual or legal issues to be determined." Thus, ELC contends an ALJ may disregard the definition as promulgated through the adoption of emergency regulations since the ALJ is charged with an "initial review" on "all issues." DOE asserts any challenge to the validity of the "maintenance budget" definition as promulgated through the Special Adopted Amendments, specifically at *N.J.A.C.* 6A:10-1.2, is not appropriately heard before the OAL. My order with regard to this motion heard during the course of the hearing was that respondent DOE is correct. R. 2:2-3(a)(2) provides that an appeal to challenge the validity of any regulation promulgated by a state administrative agency should be brought in the Superior Court, Appellate Division. Thus, the "maintenance budget" definition set forth at *N.J.A.C.* 6A:10-1.2 shall apply in this case.

5. Vocation program funds in the amount of $334,455;
6. Supervisory staff in the amount of $867,564; and
7. Various fund 11 accounts -- technology, school-based non-salary accounts and aid in lieu of transportation which were not approved above the 02-03 level.

FACTUAL DISCUSSION

The following discussion of testimony is not intended to represent a verbatim transcription of the testimony presented at the hearing but a synopsis of relevant testimony. Although respondent DOE contended much of the testimony presented by petitioner school district was not relevant and beyond the scope of the issues to be decided pursuant to the Order of the Supreme Court, all such testimony has been summarized in order to fully set forth the record before me.[3]

Respondent's witnesses included Allen Tyrone Dupree, Beth Ann Coleman and Keith S. Balla.

Dupree is employed by the DOE as the Division of Finance, Manager in charge of Finance Analysis. His responsibilities include developing research and finance analysis on school financing issues. He attained a Bachelor's degree in Political Science from Swathmore and a Master's in Public Affairs from Princeton University. He has worked with the DOE for two years. He was previously employed for a non-profit agency in Washington DC evaluating income security issues associated with such welfare programs as TANF (Temporary Aid to Needy Families). Prior to that he was a Research Assistant while a graduate student. His background in statistics is in research and quantitative analysis.

[3] Although the Findings of Fact support, in part, the DOE's contention with regard to this testimony, as relevant yet ancillary issues not part of the Supreme Court's dictate were presented, I deemed them noteworthy to set forth insofar as the some of the district's concerns with regard to its "ability" to create its budget.

With regard to projecting enrollment for the Camden school district, Dupree testified that each school district receiving state aid is required to provide Kindergarten through twelfth grade enrollment data each year in November and this is the only way that the DOE can determine how to allocate financing.

As part of the appeal process, analysis was conducted by an outside firm, Rosenfarb Winters. Each Abbott school district provided information to the audited firm contracted with the state to determine inefficiencies.

He is familiar with the calculations for Camden.

Dupree testified with regard to the projected growth calculation formula he developed. Referring to R-1, the K-12 enrollment for years 1997-2002 inclusive was considered. The enrollment for those years is:

October 2002	17,258.0
October 2001	17,530.0
October 2000	17,974.0
October 1999	18,722.5
October 1998	19,193.5
October 1997	19,773.5

To arrive at the projected enrollment for academic year 2003-2004, a figure that will be known in November, Dupree's growth rate calculation formula involved:

> Adding the totals for October 2002, 2001 and 2000 respectively (52,762.0). The totals for October 1999, 1998 and 1997 respectively are then separately added (57,689.5). 52,762 is then divided by the number 3 (17,587.3) and 57,689.5 is separately divided by the number 3 (19,229.8). 17,587.3 are then divided by 19,229.8 for a total of .9146. The cube root of this number is then calculated (.970677)

> and "one" is subtracted from this number -.029323. This number is then calculated as a percentage -2.9323%. This number represents the total decline in students over the past six years in the Camden City school district for grades K-12. The October 2002 modified district enrollment for pupils "on roll full time" is 16,551.0. That number is multiplied by –2.93% and yields a total of 484.94 which is then deducted from the October 2002 modified district enrollment and yields a total of 16,066 which represents the projected 2003-2004 enrollment for the Camden City School District. (R-1)

This growth rate formula was utilized for all Abbott school districts.

On cross-examination Dupree testified the October 2002 data reflecting a resident enrollment of 17,258 reflects resident enrollment K-12 for school age students that live in Camden but may not go to Camden schools. They are however, all under the supervision of the Camden Board of Education. (R-2)

He testified that it is a fair assumption that the declining rate of enrollment is lessening.

The growth rate calculation he utilized is an established formula. When CEIFA (Comprehensive Education Improvement and Financing Act) was passed, the Commissioner was given the authority to determine the growth rate calculation formula.

He also testified that the cube root was included as part of the equation to "smooth the growth rate" so that a "spike" in one year would not significantly impact the district in projecting future enrollment.

With regard to the distinction between "on roll" students and "enrolled students", Dupree testified that 16,066 represents the 2003-2004 projected on roll students while 16,752 represents the 2003-2004 projected enrolled students which includes students living in the district but not attending in district schools. While the DOE had access to the total "enrolled" students data, the "on roll" students' data was utilized uniformly in the growth rate calculation. But there is no reason to believe that both numbers would not run in tandem and that the projection would be substantially different.

DOE Budget Examiner Beth Ann Coleman testified next. She has worked with the Department for 8 years. She is a member on the Camden and Asbury respective school district task forces serving in the capacity of fiscal specialist/internal auditor. Prior to her employment with the DOE, she worked for 2½ years as an auditor for Thomas Havey & Co. and 2½ years as an auditor for Coopers & Lybrand. He has a Bachelor's degree in Accounting and a Masters in Public Administration from Rutgers.

She drafted the August 27, 2003 DOE correspondence to the Camden Abbott schools district which is the subject of this appeal. (R-2) Prior to drafting this letter, she performed the maintenance calculation pursuant to the Supreme Court's Order and also considered the district's surplus funds. The preliminary maintenance budget figure for 2003-2004 school year is $253,811,577. Abbott school districts are permitted to retain 2% fund balance. A fund balance represents which each district may have left over at the end of the school year. The DOE identified an additional $13,836,606 in fund balance that must be appropriated in the 2003-2004 revised budget. (R-2) The 2% ($5M) the district is permitted to retain does not have to be budgeted. Any excess surplus above the 2% must be budgeted as revenue for the next school year. Camden identified $4M fund balance that they would have to budget. Further, due to the delayed June payment of $3.9M in accounts receivable, the revenue is reduced. (R-2) The new budget fund balance is then $17,836,606.

With regard to supervisors, and specifically the salary expenditures for non-instructional supervisors, the revised Comparative Spending Guide for Abbott Districts

indicates Camden is inefficient in the area of administrative costs. Out of 30 Abbott school districts, Camden was ranked 23. The schools are ranked lowest to highest. Upon receipt of this information, known as FTE (Full Time Equivalents) from the CPA firm retained by each respective Abbott district, payroll was reviewed and non-instructional supervisors was identified as an area to be addressed with the Camden City Abbott district. Once the auditor's reports are received in November more precise figures will be known.

R-3 represents the calculations performed in order to draft the August 27, 2003 letter addressing the preliminary revised budget for 2003-2004. Coleman testified all Abbott school districts were subject to review by this formula after the Supreme Court's Order requiring the utilization of a maintenance standard. Thus, in arriving at the preliminary revised budget, the school district's budget for 2002-2003 was reviewed and provided the supporting data to create same. (R – 4) Thus, the following calculation was performed:

> The following are added: line 9470 (General fund), line 13300 (Early Childhood Program Aid), the Demonstrably Effective Program Aid and line 13900 (Total Distance Learning Network Aid). The total of $255,973,307 is the total state and local program budget.
>
> Adjustments are then made. Camden receives Title 1 aid from the federal government. This is blended into Fund 15. Federal aid for Camden is calculated at approximately 9%. Once this reduction is made, the 2002-2003 state program budget is determined to be $234,775,926.71. But Early Childhood Program Aid was increased from 2002-2003 to 2003-2004 by $1,977,219 so this was added back to the budget.

Other considerations in arriving at the preliminary revised budget included the following. Salaries of instructional staff were included at the contracted rate with the additional 4.5% rate increase that was the subject of bargaining. She had been advised in March 2003 that this was the rate increase agreed upon. Consumer Price Index (CPI) of 2.11% was added to the base on such non-salary items as textbooks, etc. Health benefits were subject to a 14.5% increase and she was advised of this by telephone conference with the State Health Benefit Plan (SHBP). Based on information provided her by the DOE Director of Finance, she increased the base of $9M for the Charter Schools to $11M. (R-4, line 9465) With regard to Special Education, a five-year trend analysis had been performed on Abbott school districts. (R-5) The purpose of this analysis was to show increases or decreases in enrollment and she wanted to make sure she factored the appropriate amount of IDEA dollars. Based on this analysis, Camden showed an increase of 19 additional children classified under IDEA. So she applied $40,000 for each respective child and netted $1.3M. (R-3) With regard to utilities, Camden had overspent their 2002-2003 budget by $115,081 and so she added that increase to the 2003-2004 budget. A decrease in Title 1 funding for the No Child Left Behind Act caused a decrease in federal funding to the district in the amount of $577,723, so in order to keep the district whole, state aid was increased in at amount. The total of adjustments made in non-discretionary items is $19,035,650 and this was added to the base reflecting a total 2003-2004 maintenance budget of $253,811,576.71.

With regard to the 2003-2004 budget and the advertised revenues (R-6), Coleman testified that line 410(total general fund) is anticipated to be $278,674,814. To this, line 425 (Early Childhood Program Aid (ECPA)) $13,699,807 is added. The amount in line 421 (Early Childhood Program Aid – Prior Year Carryover) of $76,321 is considered revenue based on the figures provided by Camden. In addition, the amount in line 422 (Demonstrably Effect Program Aid (DEPA) Prior Year Carryover) of $419,516 is considered revenue. The subtotal is $301,785,740. This is further reduced by Camden's request for additional *Abbott v. Burke* aid in the amount of $71,764,004. This reduction is made because the amount is already included in the General Fund Revenue in line 284. (R-6) The amount available then becomes $230, 021, 736.

Other adjustments made include the "extraordinary aid" to support Special Education. Camden was entitled to $59,518. In addition, the excess fund balance of $13,836,606 (R-2) must be considered as revenue. The total budgeted revenue available is then $243,917,860. The difference then is $8,776,153 representing the district's estimated need for discretionary additional *Abbott v. Burke* State Aid based on the revenues available to the district for 2003-2004 and the reductions to the maintenance budget as indicated.

With regard to the 2003-2004 maintenance calculation, maintenance of facilities was included as it had been in the 2002-2003 budget. In the 2003-2004 budget, an additional 2.11% was provided, representing the CPI. This is represented on line 7625 in the amount of $4,975,262. (R-7) In March 2003 the Camden City BOE requested the ability to spend $13M in projected surplus on maintenance ($10.5M) and ($2.5M). The DOE intervention team refused to allow Camden to amend the budget.

On cross-examination, Coleman testified that she worked directly with the Camden BOE as part of the Commissioner's Intervention Team. The DOE interceded after Camden's estimated a budget deficit of $14M in 2001-2002 school year. Wayne Thomas, a then state DOE employee was assigned to work with the Camden City school district. Spending was frozen and at the end of the year, Camden had a surplus of approximately $9M. She has worked with the Camden district for three years. To her knowledge, Camden did not have a projected deficit in 2002-2003. She met with Wayne Thomas on a bi-weekly basis in 2002-2003 and met quite often during the last six to seven months of his tenure.

She was directly involved in meetings with Camden District Superintendent Annette Knox, County Supervisor Dr. Mastrobuono and Wayne Thomas in the Spring of 2003. For example, she recalls the "Immediate Needs" itemization of the School District being discussed at the March 27, 2003 meeting. (P2a) Camden sought to utilize a projected surplus to fund various district-wide "immediate needs" in the amount of $7.66M. At the conclusion of the meeting it was determined Camden did not follow the

appropriate procedure as an Abbott school district and had to apply to the state School Construction Corporation (SCC) to order to have these items addressed. The Camden Division of Plant Services Revised March 26, 2003 request to spend $10.615M on capital projects throughout the district was also reviewed many times during the meeting. (P2c) Some of the items were approved by SCC. She was involved in the meeting with SCC. She recalled some specific items that were approved by SCC such as HVAC and gym floors in both high schools. She also recalled that Camden Plant Services Manager Robert Banscher was to continue working with DOE facilities person Mr. Gonzalez in order to fast track getting to SCC so it would expedite the decision of what SCC would fund. Knox requested that she be allowed to spend down the surplus for the items listed as immediate needs by the district. (P2a) That request was denied because many of those items could be funded by SCC had Camden followed proper procedure. Of the capital improvement projects totaling $10.6M (P2c), she never received a list from SCC indicating what projects it would fund. With regard to the Abbott school districts, if SCC does not fund a project, additional funding mechanisms are looked at; Abbotts get a second tier review.

Knox requested that the 2002-2003 approximate $10.6M projected surplus be utilized for maintenance/capital projects and the purchase of textbooks. (P2b) Coleman testified that you don't increase the level of spending at the end of the fiscal year. However, when asked if this practice is allowable, she responded she did not know. When Knox requested $2.3M in order to purchase textbooks (P2b), it was recommended that they would need to review the budget textbook line in order to determine if she could make this purchase.

With regard to the Commissioner's intervention team, County Superintendent Dr. Mastrobuono conducted the meetings and she was involved to the extent there would have been a budgetary impact on the city.

The DOE required Camden BOE to hire additional employees. (P-8) (The parties have stipulated to all the DOE directed positions listed on P-8 as part of J-1 with the

exception of two assistant superintendents.) When asked if the two assistant superintendents salaries' were funded in full for 2003-2004, Coleman responded that to the extent they were included in the 2002-2003 budget, they were included in the 2003-2004 maintenance budget. The problem, however, is that these employees were hired in January 2003.

When asked if R-3 incorporates salary increases for non-union employees, Coleman responded that it did not because she was not provided any information with regard to this. However she explained she counted everyone in the district regardless of whether a union member or not and provided for the contracted union agreement salary increase of 4.5% for each district employee.

With regard to health benefits, Coleman testified at the time she drafted the May 30, 2003 letter to the district (P-14), she did not know what rate increase to apply. However, she had this information when she drafted the August 27, 2003 letter (R-2) as SHBP communicated the information to her and so the increase was included in the revised preliminary budget for 2003-2004.

Further, with regard to the issue of the inefficiency of salary expenditures for non-instructional staff in the amount of $867,564, Coleman testified that although the salary guide for these individuals lists them by heading as "instruct/directors" (R-11), a review of the account numbers to the left of that listing proves that those employees are actually "non-instructional" staff. Coleman explained that after the May 30, 2003 letter (P-14) was forwarded to the district, Camden requested an explanation with regard to the alleged inefficiency. By referring to the columns on the left of the document, Coleman explained that "11" meant these employees were listed in the General Fund 11 account, "000" meant these employees were non-instructional staff and "221-102" meant these employees were supervisors. Camden BOE originally provided this document to the DOE so Coleman essentially provided the district information it had originated and forwarded to the DOE. After the Supreme Court order of July 2003, the DOE reviewed the issue again and that explained the change from the alleged inefficiency in this

category increasing from $725,000 to $867,564. When the May 30, 2003 letter was sent to the district, the Rosenfarb Winters report (R-8, R-9) was not available and the information included in its report provided further back-up to explain the increase in the inefficiency. In addition, she testified that when the May 30,2003 letter was forwarded, she did not have the FTE (full time equivalents) available to her. These were available prior to the issuance of the August 27, 2003 correspondence.

On cross-examination on this specific issue, Coleman was asked to refer to Rosenfarb Winters report (R-8, R-9) and specifically lines 221 and 223. Line 221-102 (Personal Salaries of Supervisors of Instruction) shows a total unfavorable variance of $983,837.19. Line 223-102 (Personal Salaries of Supervisors of Instruction) shows a total favorable variance of $747,648.84. While Coleman agreed that if these figures were netted, it would yield a negative total variance of approximately $200,000, she testified that the DOE distinguished between line 221 and 223. She also explained that Camden had no one budgeted in 2002-2003 in the "223" supervisory category and therefore, the two lines cannot be appropriately compared or netted. The $747,648 positive variance in this category, for which Camden did not have any employees budgeted, was derived from multiplying Camden's enrollment by the average spending per Abbott school district student (46.54) and thus, line 223 represents what other Abbott benchmarks budgeted in this category. She further testified that Wayne Thomas, a former state DOE employee, helped develop the 2002-2003 Camden budget. Any reclassification of employees would have to meet GAAP (Generally Accepted Accounting Principles). The assignment of a supervisor to a specific line, 221 or 223, would depend on the description of that person's function. If a district erroneously classifies someone as a supervisor, this would be considered an inefficiency.

On re-direct, Coleman testified that if a BOE wished to use available funds for small maintenance issues and the purchase of textbooks and wished to transfer funds from one fund to another in order to accomplish this, the district BOE would fill out a request form and forward it to the DOE for approval. To her knowledge, the DOE never

received such a request from Camden with regard to the purchases of textbooks Knox wished to make.

She distinguished her role on the Fiscal Intervention Team from that of Wayne Thomas. She was responsible for reviewing the Camden City budget to make sure it was complete and accurate. Thomas would have helped to prepare the budget. Further, on rebuttal, Coleman testified that the purchases of textbooks was not permitted under guidance of the DOE and pursuant to instructions received at the end of the school year in April/May 2003, none of the Abbott districts were permitted to increase spending. They were to build these proposed expenditures into the 2003-2004 budget.

With regard to the personnel listed on R-11, she testified that based on her discussion with Camden Program staff that reviewed the lists with her, to her knowledge none of the positions are instructional. The payroll information provided that none of these supervisors are instructional.

With regard to the carry over issue reflected on page 2 of R-3, specifically line 421 (ECPA carry over calc. by state) and line 422 (DEPA carry over calc. by state), the overall net effect of these adjustments is a net increase in Abbott state aid to Camden.

Respondent's final witness was Keith S. Balla, a partner with Rosenfarb Winters, a forensic accounting firm. He is the managing director of the Public Trust Group and works with municipalities and school boards. He is a CPA licensed in both New Jersey and New York. He holds a Bachelor's degree in Accounting and Finance from Rutgers University and has been employed at Rosenfarb Winters for 22 years. As managing director, he supervises managers and partners in conducting operational reviews and deficiencies as well as fraud investigations. He has worked with a variety of school districts in New Jersey including Princeton, Newark, Jersey City and Union. The projects he has worked on with these school districts has varied from evaluation of teachers' salaries to litigation regarding accounting of funds.

The DOE recently retained his firm to assist in litigation with the Abbott districts by developing standards that would flesh out operational deficiencies. The audited financial information provided by each district was reviewed in addition to enrollment and test score data. Based upon information provided, the firm developed what was considered "benchmark Abbott districts" *i.e.*, those falling in the middle range in consideration of students' scores and dollars spent. Typically, the most efficient schools are those having the highest scores and spending the least money.

The methodology applied for each review conducted was the same for each district.

He testified that Camden's inefficient spending on "object code 100 – personal services salaries total" did not exceed that of the benchmark districts. (R-8, exhibit 1, page 3 of 23.) Code 100 covers the salaries for all employees regardless of specific assigned function. (R-9) Specifically with regard to account 221-102 (which is one of the issues on appeal), it was determined that Camden had an unfavorable variance of $61.24 per pupil; Camden's 2003 budget per pupil is $254.01 compared with the standard for Abbott Districts 2003 budget of $192.77. Camden's total 2003 budget for salaries in this category is $4,080,846.51 compared with the standard for the Abbott school districts in the 2003 budget of $3,097,009.32 producing a total unfavorable variance for Camden in the amount of $983,837.19. (R-9)

On cross-examination, Balla testified the benchmark districts were considered Elizabeth, Long Branch, Gloucester and Phillipsburg. In determining benchmarks, the firm considered non-instructional spending per pupil and correlated it with educational test scores. (R-8a) No other factors, including level of impoverishment, nationalities, racial make-up, diversity, or quantity of languages spoken were considered.

On re-direct, Balla testified that the information gleaned in developing the benchmarks was then plotted on a graph. (R-8a) Those schools falling in the lower right

of the graph represent the most efficient schools. The benchmarks consistently fell in the middle quadrant.

On all three charts comprising R-8a, representing 2000-2001, 2001-2002 and 2002-2003, Camden fell almost on the same line each time as a high cost, low performance Abbott school district.

Petitioner's witnesses included: Superintendent of Camden City BOE Annette Knox, Robert Banscher and Dr. Fred Reiss.

Knox has been the superintendent for two years, seven months. When she arrived in Camden, the state intervention team was already working at the central office. Initially, its role could be categorized as advisory with respect to the budget. Four people from the state team were assigned to work in the central district BOE office. They could give advice but the district did not have to follow it. Approximately six to nine months later, their role changed in that they could approve or disapprove of budgetary issues. A change occurred in January 2001 and then a "drastic" change with the new administration.

The Commissioner's report of July 2002 was based on an extensive review by the intervention team. (P-1a) At the time this report was rendered, the intervention team's role had already changed and it had developed the budget for the district and had authority to approve or disapprove of requests. Wayne Thomas had a lead role in the team and also made decisions regarding expenditures including as it related to learning. For example, he would make decisions with regard to programs and textbooks.

This past Spring the district wanted to use funds that it knew would be surplus. She presented a plan to purchase textbooks (P-2b) and Mr. Banscher prepared the plans regarding proposed capital improvements. (P-2c, P-3a) Wayne Thomas told her they could not go forward with these plans; she was told the purchase of textbooks had to be made from the 2003-2004 budget. However, when she met with Thomas and Mastrobuono in March of 2003, there was a $12M surplus. She was also told to apply for

13a funding for the capital projects reflected in P-2a and P-2c. Thomas did not approve the adjustment of the budget to allow for the expenditure of the surplus. With regard to the expenditure of the AGS textbooks, she testified this was important because there were approximately 175 students who have been in the 9th grade for two years and the textbooks were needed for their "readability" level.

On cross-examination, she testified that the textbooks she requested during the course of the March 2003 meeting with Thomas and Mastrobuono were for the 2003-2004 school year.

With regard to the list of "Immediate Needs" she prepared in advance of the March 2, 2003 meeting, the costs listed for each respective item was derived either through a bid or a contract estimate. No supporting documentation for these amounts was attached to this document. (P-2a)

The district did apply for 13A funding for some of the projects and funding was approved for some of the projects. She did not have the supporting documentation at the hearing with regard to what had been approved.

Thomas left the district in June 2003.

On re-direct, she testified that Wayne Thomas directed that certain positions be created. (P-19) In addition, this document reflects that a series of positions were to be transferred or subject to RIF (Reduction in Force) for a net estimated savings of $1,125, 264. With regard to the position of Assistant Superintendent of Curriculum and Instruction, Thomas directed that a second position be created. As a result, both individuals were hired in January 2003. They were both on the payroll for the last six months of the 2002-2003 school year so only part of their salary would be included in the 2003-2004 maintenance budget as prepared by the DOE.

Robert Banscher, an in-house BOE architect testified next on behalf of petitioner. He worked with the schools in requesting funds to be included in the budget for maintenance of facilities and capital projects. He also worked with construction consultants.

He assisted in preparing the list of "Immediate Needs (P-2a) in preparation for the March 27, 2003 meeting. This was submitted to Superintendent Knox in preparation for the meeting with the state EDA (Economic Developmental Authority) and SCC and Dr. Mastrobuono. During the meeting, Mastrobuono suggested applying for 13A funding on projects under $500,000. The Proposed Budget Expenditures for school year 2003-2004 requesting $10.6M in funds was discussed during this meeting. (P-2c) This was revised after the meeting with a reduced request of $7.4M as some of the projects were submitted and granted 13A approval. (P-3a) Some of the 13A requests were denied because they were maintenance issues rather than capital projects. Banscher testified at length with regard to each specific school within the district and with regard to each specific project description and the budget estimate. (P-3a) No documentation supporting the budget estimate for each respective project was provided, nor was any supporting documentation made available at the hearing as to project items that were labeled "in house" or "state." Banscher testified from memory with regard to his recollection as to what he was told by the DOE representatives or Mastrobuono should be handled "in house" as part of the regular facilities maintenance budget, what should be or was granted as approved 13A funding and what should be part of the long range plan with SCC capital projects. But no supporting documentation was presented at the hearing to support Mr. Banscher's recollection. Some of the items Banscher characterized as "critical." For example, he cited to intercoms at schools that did not work properly and stressed that post-Columbine, intercoms should work properly so that announcements can be heard in all classrooms. He was advised that those matters that could be handled in-house should be taken care of through the 2003-2004 budget.

On cross-examination, he testified that the "in house" items were then deleted from the budget submission as these were to be factored in as part of the "regular

maintenance budget" which was factored in the DOE's 2003-2004 preliminary revised budget. (R-7)

Further, the SCC has approved 2003-2004 projects, 13 of which have been approved for the Camden BOE but he does not know which ones they are.

He is not sure whether Camden sought emergent appropriation funds for such issues as heating problems. He was told at the March meeting to prioritize health and safety issues. Thomas left the district after that meeting and Banscher has not been involved in any subsequent meetings.

He recalls that there exists a letter from the state indicating what SCC projects had been approved but he did not have it with him at the hearing.

Petitioner's final witness was Fred Reiss, Assistant Superintendent for Administrative Support Services. He is responsible for day-to-day operations and other ancillary functions including supervising the department that collects data and provides it to the BOE. He holds a Bachelor's degree in Physics from Rutgers, two Master's degrees including one in Computer Science from NJIT and a Ph.D. in Education Administration from Rutgers. He utilized statistics extensively in the Ph.D. program.

He prepared a logarithmic analysis of the enrollment trend of Camden schools because he was concerned when he reviewed the August 27, 2003 DOE letter that the conclusions of inefficiencies was based on erroneous enrollment information. (P-4a – P-4d, P-4f-P-4g) His major concern was how the enrollment figure was determined.

He reviewed the DOE's method of calculation as conducted and testified to by Mr. Dupree. (R-1) According to Reiss, Dupree used a linear method but in his growth rate calculation formula, all the data disappeared when the average of three years and the second set of three years left only two dots to form a line. Dupree testified that the "cube root" was taken in order to "smooth the line" and it appeared to Reiss to have been done

to the detriment of Camden. So he created his graph (P-4a et seq.) which he described as the "method of least squares." By drawing a straight line through all six points (representing 1997-2002 enrollment), a projected enrollment for 2003-2004 of 16,576.19 is established. (Dupree conceded during cross-examination that drawing a straight line through six points would represent a better projection of 2003-2004 enrollment.) Reiss also plotted out projected enrollment to reflect a three year trend through a five-year trend, respectively. The DOE in contrast, used a straight line through two points to predict a trend. So the DOE's projected 2003-2004 enrollment of 16,066 will be wrong and this impacts Camden because that was the projected enrollment figure used to project inefficiencies and determine the budget. Reiss then looked at a three-year trend by logarithmic analysis and projected 2003-2004 enrollment at 17,074.2. (P-4d) He then projected pupils on roll for October 2003 at 16,407 yet indicated the actual enrollment will be neither 16,066 (DOE projection) nor 16,407 but it will be a lot closer to the latter number. He noted that the district is responsible for other students "on roll" that the DOE did not factor in its growth rate calculation, *i.e.*, pre-school students (approximately 1,300), Adult Education (approximately 200) and out-of-district Special Education placements (approximately 300).

He also testified with regard to his concern that numerous other factors were not taken into consideration to determine inefficiencies or benchmark districts so he prepared a monthly summary for secondary schools reflecting the languages spoken at those schools. (P-16) By law, if ten students speak the same foreign language, the school is required to provide an instructor in that language. This places a burden on the district. In addition, he noted the diverse community represented at the Camden city schools (P-5) and indicated that as a result there are numerous cultural and language issues that require a great deal of in-service programs requiring more supervisors than a homogenous community. These supervisors are required in different languages as reflected in the numerous languages spoken at the Camden city school district. (P-16) There are 34 schools in Camden and several thousand students that are participating in English as a Second Language (ESL) programs. In addition, there are 12,000 middle and high school

students that qualify for free lunch based on income and family size. His experience is that the impoverished need more support.

LEGAL ANALYSIS AND FINDINGS OF FACT

In its July 23, 2003 Order, the Supreme Court limited petitioner Abbott districts respective appeals to "any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard." Pursuant to that Order, the DOE was required to promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. In addition, the Order and subsequent emergency regulations, set forth the burden of proof in any such appeal as follows: the DOE shall bear the burden of moving forward to establishing the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard. *N.J.A.C.* 6A:10-4.7.

In furtherance of the Supreme Court's Order, the DOE promulgated a regulation setting forth the methodology in application of the effective and efficient standard.

> The effectiveness and efficiency of non-instructional expenditures in the 2002-2003 budget shall be determined by: i. A comparative analysis on non-instructional expenditures to those of other school districts and/or historical spending patterns in the district; ii. An analysis of staffing needs including but not limited to comparative data of ratios of non-instructional/administrative staff to instructional staff as well as district-specific information regarding staffing needs; iii. A review of non-instructional programs to identify expenditures that are included that may be funded through other funding sources or that alternative funding is not available because the expenditure is not essential to the provision of a thorough and efficient education. Such expenditures include, but are not limited to, capital costs that could be funded pursuant to the Education Facilities Construction and Financing Act or that

> exceed the facilities efficiencies standards established pursuant to that Act; and iv. Cost savings and/or inefficiencies identified or proposed by the district or by the State Auditor or Office of Legislative Services Audit. (*N.J.A.C.* 6A:10-3.1(c)(1).

As previously indicated, the maintenance budget definition as promulgated by the Commissioner's emergency regulations shall be the basis of my initial decision.

> Maintenance budget means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's Order of June 24, 2003 in *Abbott v. Burke*. Maintenance also does not include non-recurring 2002-2003 expenditures. (*N.J.A.C.* 6A:10-1.2)

The Camden City school district is subject to the Municipal Rehabilitation and Economic Recovery Act. *N.J.S.A.* 52:27BBB-1 *et seq*. As such, the state exercises significant control over the Camden City School Board. The statute authorized the governor to directly appoint three members to the nine member school board. *N.J.S.A.* 52:27BBB-63(h) and the governor has unconditional veto over any action taken by the school board. *N.J.S.A.* 52:27BBB-64(b). As part of the control, the DOE caused an intervention team to work with Camden in an advisory capacity which later increased to the creation of budgets and decision making authority over the budget and proposed expenditures. Former DOE employee Wayne Thomas was a pivotal point person for the DOE in relation to the operation of the Camden City school district including budgetary, personnel and program issues.

As indicated previously, the following issues are the subject of this appeal in consideration of the original petition filed appealing from the May 30, 2003 letter, petitioner's September 3, 2003 amendment to the original petition as required by the emergency regulations and stipulation by the parties (J-1):

1. Restorations not approved in the amount of $12,570,164;
2. Capital outlay;
3. Vacancies in the amount of $1,603,000;
4. Health benefits (in part);
5. Vocation program funds in the amount of $334,455;
6. Supervisory staff in the amount of $867,564; and
7. Various fund 11 accounts -- technology, school-based non-salary accounts and aid in lieu of transportation which were not approved above the 02-03 level.

With regard to the first issue on appeal, restorations in the amount of $12, 570,164, petitioner's appeal is **DENIED.** The maintenance standard as ordered by the Supreme Court and defined at *N.J.A.C.* 6A:10-1.2 clearly indicates that the restoration of programs is excluded. (Petitioner did not define the nature of this restoration. What is clear is that the denial of this restoration in the amount of $12,570,164 does not pertain to the restoration of Whole School Reform programs as set forth in the Supreme Court's Order of June 24, 2003 and as stipulated to by the parties in J-1.)

With regard to the issue of capital outlay, *N.J.A.C.* 6A:10-3.1(c) iii provides that in applying the effective and efficient standard, the DOE must

> review non-instructional programs to identify expenditures that may be funded through other funding sources.... Such expenditures include, but are not limited to, capital costs that could be funded pursuant to the Education Facilities Construction and Financing Act or that exceed the facilities efficiencies standards established pursuant to the Act....

Significant testimony was presented at the hearing with regard to Camden BOE's desire in the Spring of 2003 to use a then projected $12M surplus to purchase textbooks and for capital expenditures. The ability of Camden to use those funds and the denial by the Risk Intervention Team is not an appropriate issue before me. Both Ms. Coleman and Ms. Knox indicated that Wayne Thomas and other member of the state's Risk and Fiscal Intervention Team did not approve this expenditure in the Spring of 2003. Camden was directed to pursue other means of funding for the capital projects, *e.g* applying for emergent funds for maintenance issues relating to heat, applying for 13A grants for projects estimated at less than $500,000 and applying to the School Construction Corporation for other capital projects. Maintenance funding was awarded to the school district and CPI was applied. I **FIND** the DOE has met its initial burden with regard to this issue on appeal. However, the district has not demonstrated sufficiently that any reduction is not justified under the effective and efficient standard of a maintenance budget. The district seeks to rely on lists of projects for each respective school, initially seeking approximately $10M and later $7M. No supporting documentation for the estimates was provided at the hearing. The district was advised in the Spring that other funding sources should be considered. No credible, competent evidence was presented at the hearing which would indicate the results of those efforts. It should be noted that the district did submit some information as part of post hearing submissions to document some 13A grants that were approved. This should not be construed to indicate that Mr. Banscher's testimony was not credible. He in fact was a credible and compelling witness. His testimony regarding inoperable intercoms in a post-Columbine era is a frightening reality. The district should certainly consider applying for aid in accordance with provision 7 of the July 23, 2003 Supreme Court Order. The district's appeal on the issue of capital outlay is **DENIED.**

With regard to the issue of vacancies, the parties have stipulated to certain positions being funded.(J-1). As part of the Risk and Fiscal Intervention Team and under the auspices of the Municipal Rehabilitation and Economic Recovery Act, Wayne Thomas directed certain positions be the subject of Reduction in Force (RIF) or

transferred. However, he directed the BOE to hire two Assistant Supervisors of Curriculum and Instruction. Those individuals were hired in January 2003. According to the testimony of Ms. Coleman, all positions funded in the 2002-2003 budget were maintained at the same level plus the contracted salary increase of 4.5% regardless if the employee was union or non-union (and not subject to that negotiated salary increase.) These were entirely new positions and not the filling of any vacancy. Thus a clear application of a "maintenance" standard would operate to not fully fund these specific two positions. I **FIND** that the district has demonstrated that any budgetary reduction that would operate to partially fund these two positions created at the direction of the DOE is not justified under the maintenance standard and **GRANT** petitioner's appeal with regard to the full funding of these two specific positions.

Petitioner indicated at the hearing that the issue of health benefits had been resolved in part but did not present any proofs with regard to any remaining outstanding issue. Ms. Coleman testified that when she drafted the May 30, 2003 letter to the district, she did not have access to any increase from the State Health Benefits Plan (SHBP). She also testified she obtained this information prior to the issuance of the August 27,2003 letter to the district and that the preliminary revised 2003-2004 budget incorporated this increase in health benefits. Therefore I **FIND** the DOE has met the burden with regard to this issue and **DENY** petitioner any further relief in this regard.

The issue of vocation program funds in the amount of $334,455 was based on the May 30,2003 letter to the district and petitioner indicated at the hearing that this "might" still be an issue. No specific proofs were presented however by petitioner and the appeal on this issue is therefore **DISMISSED.**

The August 27, 2003 letter to the District indicated that a review of salary expenditures for non-instructional supervisors (11-000-221-102) for fiscal year 2002-2003 found inefficient expenditures in the amount of $867,564. The determination was made based on the district's total administrative cost per pupil as reported in the March 2003 Comparative Spending Guide for the Abbott Districts. In addition, the analysis of

the forensic accounting firm, Rosenfarb Winters was considered. Ms. Coleman testified that although the document listing those supervisors indicated "salary/supv of instruct/directors" (R-11), the fact that they are listed in this account code is proof that they are "non-instructional supervisors." Based on a review of these individuals' respective functions, they were each placed in this category. Ms. Coleman was a competent and very credible witness. I **FIND** that these employees are non-instructional supervisors. I **FURTHER FIND** that as such, the negative variance indicating an inefficiency of $983,837 cannot be adjusted by the favorable variance of instructional supervisor in the 223-102 account number because these positions cannot be compared and because the favorable variance in that category represents the standard for Abbott Districts and not a true number for Camden as Camden did not have any employees serving in the job functions comprising that account code. In determining the inefficiency, cost per pupil was also considered. I **FIND** that the conclusions reached by Rosenfarb Winters were not arbitrary or capricious and each Abbott District was evaluated based on the same criteria. Although I found Dr. Reiss to have been a sincere and credible witness, the mandate from the Supreme Court does not permit me to consider any evidence of whether Camden might be a "needier" district than other Abbott districts based on any factors, including those cited by Dr. Reiss. The growth rate calculation formula in order to calculate projected enrollment for 2003-2004 utilized by the DOE is of concern. While I **FIND** that Dr. Reiss' logarithmic analysis to have been based on a better statistical formula, that finding is of no import. *N.J.S.A.* 18A:7F-5(a) provides in pertinent part:

> ...Beginning in the 1998-99 school year, unless otherwise specified within this act, aid amounts payable for the budget year shall be based on budget year pupil counts, which shall be projected by the Commissioner using data from prior years. Adjustments for the actual pupil counts of the budget year shall be to State Aid amounts payable during the school year succeeding the budget year.

The statute specifically authorizes the Commissioner to project pupil counts and does not require the Commissioner to promulgate regulations regarding the creation of a growth

rate calculation formula and as such, the statistical model utilized by the DOE was not required to be the subject of rulemaking. While I agree with Dr. Reiss that the DOE formula dilutes six years of enrollment figures to two points and then allows a "smoothing" so as to not penalize Camden for a year that showed a downward spike in enrollment, I may not disturb it.

As a result, I **FIND** the DOE has met the initial burden in this regard but the District has not demonstrated an unjustifiable budgetary reduction despite a more sound projection formula and petitioner's appeal with regard to this issue is **DENIED.**

Finally, with regard to the "various fund 11" accounts issue as presented in petitioner's initial petition based on the May 30, 2003, letter, I **FIND** that the May 30, 2003 letter specifically indicated that these accounts were not approved above the 2002-2003 level. Therefore, I **FIND** their provision in the preliminary revised 2003-2004 budget meets the maintenance standard and therefore petitioner's appeal on this issue is **DENIED.**

DECISION AND ORDER

Based on the foregoing, I hereby **GRANT** petitioner's appeal seeking full funding for the two Assistant Supervisors of Curriculum and Instruction and hereby **DENY** the remainder of petitioner's appeal as more fully set forth above as to: restorations (not including Whole School Reform pursuant to the June 23, 2003 Supreme Court Order and the parties stipulation); capital outlay, vacancies, supervisory staff and various Fund 11 accounts. I hereby **DISMISS** petitioner's appeal with regard to health benefits "in part" and vocation program funds as no proofs were advanced by petitioner on those issues.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to 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.

September 26, 2003
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

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

September 26, 2003
DATE

E-mailed Initial Decision to the parties on:

September 26, 2003
DATE

APPENDIX

Witnesses:

For Petitioner:

Annette Knox

Robert J. Banscher

Fred Reiss, PhD

For Respondent:

Allen Tyrone Dupree

Beth Ann Coleman

Keith S. Balla

Exhibits

For Petitioner:

P-1a Camden Public Schools Fiscal and Intervention Report dated July 2002 attached to Commissioner Librera's press release

P-1b December 11, 2002 status report -- Fiscal and Educational Intervention Team report

P-2a Superintendent Knox March 27, 2003 list of "Immediate Needs" for Camden schools

P-2b Knox's list of Text Books to be purchased in 2002-2003 budget

P-2c March 26, 2003 Division of Plant Services request of $10.615M to be spent from 2002-2003 budget

P-3a June 19, 2003 revision of document 2c

OAL DKT. NO. EDU 4157-03
AGENCY DKT. NO. 187-6/03

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN 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's exception to the Administrative Law Judge's (ALJ) recommendation with respect to inclusion of full salaries for certain positions filled part-year in 2002-03[1] was duly submitted in accordance with the schedule established in response to the Court's order for expedition. The Board filed neither exceptions nor a reply to the Department's submission.

Initially, the Commissioner concurs with the ALJ that the Department's methodology in reviewing the District's budget fully comports with the "maintenance" standard, as established by the Court and implemented by regulations promulgated in accordance with *P.L.* 2003, *c.* 122. The Commissioner concurs that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2,

[1] The Department also seeks, parenthetically, to clarify its position as mentioned in the Initial Decision, page 8, footnote 1. The Department's actual position is that the Board may pursue issues related to the Department's May 30, 2003 letter, but the subject of the instant appeal is the August 27, 2003 letter determining the Board's preliminary maintenance budget and additional *Abbott v. Burke* State aid. (Department's Exceptions at 1, footnote)

such determination being solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott,* 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). However, to the extent that he may appropriately do so in an administrative proceeding, the Commissioner also opines that the Department's definition of "maintenance budget," as set forth in *N.J.A.C.* 6A:10-1.2, is fully consistent with the language and intent of the Court. Thus, like the ALJ, the Commissioner finds the regulatory definition controlling herein, with no conflict between it and the underlying Court order.

The Commissioner further concurs, for the reasons fully set forth in the Initial Decision, that programs not provided in 2002-03, proposed capital outlay expenditures, health benefits, unspecified vocational programs, salary expenditures for noninstructional supervisors, and various "fund 11" accounts (technology, school-based non-salary accounts and aid in lieu of transportation) above 2002-03 levels, were properly excluded from the 2003-04 maintenance budget or reduced under regulatory standards of effectiveness and efficiency.[2]

However, with respect to increasing salary accounts to accommodate the filling of vacancies, the Commissioner cannot agree with the Initial Decision to the extent that it recommends, based on a "maintenance" analysis, additional funding to fill two specific all-year positions that were filled for only part of the year in 2002-03. Rather, the Commissioner notes that the Department preliminarily established the District's

[2] The Commissioner does not find issues arising from the Department's May 30, 2003 budget determination germane to the instant appeal, since the August 27, 2003 maintenance budget was developed through a superseding methodology, based on an explicit regulatory standard not in existence during the prior determination, and additionally took account of previously unavailable information. (See, for example, Initial Decision at 19-20.) However, to the extent that the ALJ permitted issues arising from the May 30 determination to be litigated in the present context, the Commissioner concurs with the Initial Decision's specific recommendations as set forth herein.

2003-04 cost of providing positions at maintenance level in a more global fashion, by determining, as nearly as possible without benefit of audit, the actual approved cost of providing positions in 2002-03 and then adjusting for the 4.5% salary increase of the current union contract. While it is true that dollar amounts actually paid out for staffing prior to June 30, 2003 will not perfectly predict the cost of providing comparable staffing in the next, it is *equally* true that vacancies, retirements, resignations, substitutes, part-year positions and the like occur every year, so that the Commissioner finds it entirely appropriate for a preliminary district-wide salary budget to be based on the assumption that staffing is a flexible and continuous process, with ebbs and flows that generally permit the projection of one year's overall experience onto the next. Thus, the Commissioner holds that no special consideration is warranted for two positions in particular, and he rejects the ALJ's recommendation to the contrary.[3]

Accordingly, the Initial Decision of the OAL is adopted, for the reasons expressed therein, in all respects except as to its recommendation for additional salary amounts, which is rejected as set forth above. The Petition of Appeal is dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[3] In this context, the Commissioner also notes the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[4] 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.

584-04

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" district appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court. The District also challenged the Department's reduction, as part of its review of noninstructional expenditures for ineffectiveness or inefficiency, of 53 custodial positions.

The ALJ found that the Department appropriately applied the duly promulgated rule implementing the Court's order for "maintenance." The ALJ further upheld the Department's methodology and determination with respect to custodial positions, but suggested that, because the determination was based on older data, it be considered for adjustment based on more current figures.

The Commissioner adopted the ALJ's decision in most respects, but directed the Department to increase the number of allowed custodial positions based on the District's current, verified square footage exclusive of certain leased preschool spaces, making, however, no special allowance for "satellite" locations as requested by 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.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO.EDU 5496-03

AGENCY DKT. NO. 196-6/03

STATE-OPERATED SCHOOL DISTRICT OF
THE CITY OF JERSEY CITY, HUDSON COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Charlotte Kitler, General Counsel, for petitioner

Allison Colsey-Eck, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 22, 2003 Decided: September 26, 2003

BEFORE **STEPHEN G. WEISS**, ALJ:

In this matter, the petitioner, the State-Operated School District of Jersey City (hereinafter the "Jersey City Board" or "Jersey City"), has appealed the August 27, 2003, letter determination of the respondent, New Jersey State Department of Education (hereinafter "DOE"), establishing the amount fixed by the DOE as Jersey City's "preliminary maintenance budget" for the 2003-2004 school year (Ex. J-5). The events leading up to that letter had their most recent genesis in March 2003 when the DOE moved before the New Jersey Supreme Court for an order modifying its decision in *Abbott v. Burke*, 153 *N.J.* 480 (1998) (*Abbott* V) to limit the amount of discretionary

additional *Abbott v. Burke* State Aid (supplemental aid) that it would be required to provide to *Abbott* districts in 2003-2004 in an amount sufficient to support those programs, positions and services in the district's approved budget for 2002-2003. In essence, DOE's motion sought a one year extension of the one year relaxation of remedies which the New Jersey Supreme Court granted in its ruling in "Abbott IX" (*Abbot v. Burke*, 172 *N.J.* 294 (2002)).

Subsequently, in a letter dated March 30, 2003, the DOE, applying the maintenance standard for which it was seeking approval, issued a letter to Jersey City advising the District that its expenditure budget for 2003-2004 was approved, except for certain designated areas that either did not comply with the DOE's version of "maintenance", or for which there was insufficient information for that determination to be made (Exh.J-3). In early June 2003, Jersey City appealed that determination and the case was transmitted to the Office of Administrative Law (OAL) for hearings which, in Jersey City's case, originally were conducted by the undersigned on July 2, 3 and10, 2003. Those hearings took place, of course, while the DOE's motion for Supreme Court approval of its use of the maintenance standard it had adopted for 2003-2004 was still pending before the Court.

On July 23, 2003, the Supreme Court issued an Order granting the Department's application to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke* State aid for the Abbott districts and stated that the Statewide aggregate amount of "Additional" *Abbott* State aid was to be presumptively calculated at the total amount of Additional *Abbott* State aid approved for the Abbott districts for 2002-3003, as adjusted.

The Order of July 23, 2003, further provided that the DOE also could review an Abbott district's non-instructional programs to evaluate their effectiveness and efficiency, but the agency must first promulgate an emergency regulation defining the standard for evaluation. "Non-instructional" programs were defined by the Court as, "office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students".

The DOE also was directed by the July 23, 2003 Order to notify each *Abbott* District of its preliminary maintenance budget figures and estimated supplemental funding within 30 days. The Order further noted that if DOE's application of the "effective and efficient" standard for non-instructional programs resulted in a reduction in an *Abbott* district's presumptive amount of Additional *Abbott* State aid, the DOE must include in its notification to any affected *Abbott* district the expenditure which the DOE was deleting and provide a specific statement explaining why the program or part thereof no longer was effective and/or efficient.

The Order then went on to provide for appeals by *Abbott* districts and held that DOE would have the burden of "moving forward to establish the basis for any proposed reductions to a district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations." It stated that, "If that initial burden is met, the District shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard." The Order also indicated that if monies for a district's non-instructional programs were deleted under the effective and efficient standard, it could still apply for State aid "for demonstrably needed programs or services."

The OAL was allowed thirty days from the date of the DOE's revised determinations to issue initial decisions in any pending Abbott appeals. Although these determinations initially were due on August 22, 2003, the DOE received an extension of time, until August 27, 2003, to issue its determination so that the thirty days for initial decisions by the OAL began to run on that date and will terminate on September 26, 2003, unless further extended.

On August 22, 2003, consistent with the authority granted in the FY 2003 Appropriations Act, the Commissioner promulgated emergency regulations. *See* FY 2003 Appropriations Act, *L.* 2003, c. 122. In them, DOE defined "maintenance budget" as a standard for reviewing the *Abbott* Districts' 2003-2004 applications for additional supplemental funding as follows:

> For the 2003-2004 school year, a budget funded at a level such that a district can implement 2002-2003 approved and provided programs, services and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits and special education tuition. Maintenance does not include the restoration of programs, positions or services that were provided in previous years or new programs, positions or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in Abbott v. Burke. Maintenance also does not include non-recurring 2002-2003 expenditures. *N.J.A.C.* 6A:10-1.2.

The DOE then issued a decision on August 27, 2003, establishing a preliminary maintenance budget for Jersey City in the amount of $487,961,547 (Exs. J-1; R-2). The letter advised that the DOE had found approximately $2.1 million in "inefficient" expenditures in the employment of an excessive number (53) of custodians. Jersey City continued to pursue its appeal and an additional hearing was held on September 18, 2003. Testimony was received that day on the State's behalf from Mary Byrne, a CPA employed by the Office of Management and Budget in the Department of Treasury primarily concerned with DOE, and from Benjamin D. Rarick, DOE's Director of State-Operated School Districts, who was the person primarily involved in the review of Jersey City's 2003-2004 budget and who had testified previously in July 2003 prior to the DOE's adoption of emergent regulations. The District's sole witness on September18, 2003 was Joanne Gilman, its Business Administrator who, like Rarick, previously testified in July.

As noted, the Supreme Court's July 23, 2003 Order, and the emergency regulations implemented pursuant to it, permitted DOE to reduce Jersey City's 2003-2004 budget by those amounts deemed to be ineffective or inefficient. Thus, in his testimony, Rarick addressed the sum of $2.1 million dollars for 53 fulltime equivalent ("FTE") positions for custodians which was deemed to be an "ineffective" expenditure for such services. Rarick explained that a guide which listed comparatively sized urban school districts ranked Jersey City 99th out of 101, making it the school district with the third highest costs in the maintenance, custodians and security category – a marker which he believed was significant. Rarick noted that a forensic accounting firm (Rosenfarb and Winters) hired by DOE to measure inefficiencies among the *Abbott* districts concluded

that Jersey City also spent approximately $4 million more than certain "benchmark" *Abbott* districts, which he defined as districts which are the "median spending" and "median performing" districts. As he pointed out, while the benchmarks may not the best or most efficient districts, they represent a "middle performing group" that reasonably could be identified as representing a standard every *Abbott* district could meet.

Rarick also compared three reports of "industry standards" dealing with the amount of square footage a custodian should be able to maintain in a school building. He concluded from the data that a ratio of 16,100 square feet/per custodian represented the square footage per day a custodian in Jersey City should be able to maintain. Indeed, he explained he actually modified the figure slightly to account for whole numbers rather than fractions of custodians, which resulted in a slight benefit to the District. This methodology was based, in part, on a Deloitte Touche report prepared by Newark for the New York/New Jersey Zone (Ex. P-23). Rarick also compared Jersey City's costs for custodians with other large Abbott districts. He primarily compared Jersey City to Newark, and determined Jersey City was spending more per square foot on custodians than Newark ($3.22 v. $3.14). He agreed that the total square footage he used in making his calculation was based on 1999 data and did not take into account any changes or additions since then.

Another area about which Rarick testified, mainly at the July 2003 hearings, had to do with the proposed expenditure of $300,000 for radon testing. The District estimated that since the total cost of such testing would be about $600,000 ($35 per classroom), it determined to complete one-half the testing in 2003-2004, and the balance in 2004-2005. According to Rarick, he could not give a separate approval for $300,000 even though the testing was mandated to be completed by 2005 (*N.J.S.A.* 18A:20-40) because the funds estimated to be needed were too high in terms of cost per classroom and numbers of rooms and/or areas to be tested, and the District could request an exemption to allow its own employees to be trained to perform the testing. In any case, the monies could be found in other accounts that could be reallocated to this item and, moreover, some if not all the funds could be taken from a 2.11% CPI allowance provided by DOE for 2003-2004 which, in Jersey City's case, totaled over $712,000 (Ex. R-2).

Another area about which Rarick testified in July 2003, and which remained in issue, had to do with Jersey City's having budgeted almost a $515,000 increase for "medical provider" costs consisting of contracted increases for providers of physical examinations of students and staff and for rendering medical care for injuries. Here, too, Rarick testified that it was an amount that was capable of being funded from reallocation from other accounts and, like the radon testing expenditure, was not a "substantial built-in cost driver," such as professional salaries, health benefit premiums, utilities and the like which essentially were beyond the ability of the District to control.

Finally, both in July 2003, and to a lesser extent in September 2003, Rarick opined that his approach as the primary reviewer of Jersey City's 2003-2004 budget included a belief that the District appeared to be experiencing unwarranted increases in administrative and non-instructional areas which were beyond those for instructional purposes. As he put it, this situation was the opposite of what the DOE was hoping to achieve.

Testimony on behalf of Jersey City was offered in both July 2003 and September 2003 by its Business Administrator, Ms. Gilman, Michael Littlejohn, Director of Whole School Reform and Testing (July 2003 only), and Adele Macula, Assistant Superintendent for Curriculum and Development (July 2003 only). The latter two witnesses primarily had addressed what they viewed as the devastating impact that the DOE's budget limitations have on Jersey City's ability to carry out its mandate to provide a thorough and efficient education to its students.

Gilman's testimony was specific to the budget items in issue, both in July 2003 and September 2003. As to the 53 custodial reductions proposed by the DOE, she had several points to make. First, the square footage component used by Rarick is five years old. Since 1998 here have been school additions and rental of trailers and other facilities, all of which require custodial and maintenance attention. She calculated there is about 400,000 more square feet which, even using DOE's own formula, would require 320 custodians, not the 298 proposed. Moreover, the use of 16,100 square feet per

custodian is too high – Jersey City uses 14,000 square feet as a standard. Thus, since Rarick used 16,100 derived from data which may or may not include public school buildings, she believed the District's square footage per custodian at least should be the same as Newark's (Exh. P-23).

Finally, Gilman stressed that Jersey City has special requirements impacting custodial services – very aged buildings (Ex. P-15) and many pre-school age children.

As to radon testing, Jersey City, she said, is mandated to complete it by 2005 (Exh. P21, P-22) and the $300,000 estimate ($35 per classroom) is within the DOE's own estimate of $20-$50. Therefore, it is not reasonable to expect the $300,000 to be taken from other accounts and/or the 2.11% CPI allowance.

Although Gilman did not directly address the "medical provider" issue at the September 2003 hearing, she did testify in July 2003 that the $515,000 represented increased costs over which the District had no control, and without the funds the District could not continue to provide the full panoply of health services needed.

The foregoing covers, I believe, the essential testimony offered at the hearings, exclusive of the philosophic points urged by the State in terms of the need to intelligently marshal available resources to first provide for critical school-based needs, and the counterpoints urged by Jersey City *vis-à-vis* its inability to deliver even these minimally adequate services without the full amount of funds it requested.

The threshold issue in this case is whether DOE's implementation of the emergency regulations adopted on August 22, 2003, insofar as its definition of a "maintenance budget" is concerned, was appropriate. Two administrative law judges previously have addressed the issue and both determined that any challenge to a duly adopted regulation such as *N.J.A.C.* 6A:10-1.2 must be brought in the Superior Court, Appellate Division, pursuant to *R.* 2:2-3(a)(2) and that no jurisdiction exists to do so at the OAL. *See Board of Educ. of the City of Asbury Park v. New Jersey Department of Education*, OAL Dkt. EDU 4095-03, Decision by Hon. John R. Tassini, ALJ, on Order

Relative to "Maintenance Budget" (Sept. 4, 2003); *Board of Education of the Township of Neptune v. State of New Jersey, Department of Education*, OAL Dkt. EDU 4096-03, Decision by Hon. Joseph F. Martone, ALJ, on Order Relative to "Maintenance Budget" (Sept. 10, 2003). I agree with my colleagues for, as Judge Tassini noted:

> The OAL, created by statute, is an administrative forum for hearings on contested cases transmitted to it by administrative agencies and for issuance of IDs, containing recommended findings of fact and conclusions of law, by administrative law judges. *N.J.S.A.* 52:14B-2(b),-10(c). Administrative adjudication in the OAL is governed by principles of notice, due process and fundamental fairness. *N.J.S.A.* 52:14B-9, -10; *Juzek v. Hackensack Water Co.*, 48 *N.J.* 302, 314-315 (1966); *Department of Envtl. Protection v. Stavola*, 103 *N.J.* 425, 436 n.2 (1986). In administrative adjudication in the OAL, in the interest of equity, judicial principles such as the estoppel doctrine are applicable and safeguards include the opportunity to be heard and an opportunity for cross-examination, defense and rebuttal, which a re essential for reliable fact finding. *City of Hackensack v. Winner*, 82 *N.J.* 1, 16-24 (1980). However, the OAL, established in the executive branch, is not a court and has no jurisdiction to determine the validity of a rule. *N.J.S.A.* 52:14F-1; *Wendling v. New Jersey Racing Comm'n,* 279 *N.J. Super.* 477, 495 (App. Div. 1995) (holding that the Appellate Division and not the OAL has jurisdiction for a challenge to the validity of a rule); *In re 1999-2000 Abbott Implementing Regulations, N.J.A.C.* 6:19A-1.1 *et seq.*, 348 *N.J.* Super. 382 (App. Div. 2002) (a previous challenge to rules implementing *Abbott* decisions brought in the Appellate Division). *Board of Educ. of the City of Asbury Park, supra* at pp. 8-9. [Emphasis added.]

Jersey City also argues that the implementing regulation's definition of "maintenance budget" is inconsistent with the July 23, 2003 New Jersey Supreme Court Order upon which it presumably is based, and to that extent it is within the province of an ALJ to make findings and recommendations as to the definition. I disagree. On its face, the DOE's methodology reasonably comports with the New Jersey Supreme Court's guidance and will not be second-guessed in this forum.

A second "legal" issue involves Jersey City's challenge to the DOE's determination that $2.1 million dollars in expenses for custodians should be deleted as being inefficient, resulting in the elimination of 53 full-time equivalent positions. Jersey City argues that

reductions for "ineffective" and "inefficient" non-instructional programs means only those programs, positions, services and/or expenditures that are not school based or not directly serving students in the attainment of the core curriculum content standards (*N.J.A.C.* 6A:10-2.1). Thus, since custodians are assigned to work in or at the District's schools, they fall outside the scope of the regulation.

I disagree with this notion as well. Working in or at a school building surely is not what the Court or the DOE had in mind within the language set forth above.

Regarding the methodology used by Rarick to arrive at the $2.1 million reduction, while I might disagree with some of the source data upon which he chose to rely (industry publications vaguely described), and outdated square footage (1998 v. 2003), I cannot say that his approach was unreasonable or illogical. Although I was somewhat disturbed by the subjectivity of the system whereby different reviewers could bring different ideas to the equation, thereby possibly introducing elements inconsistent with uniformity,[1] I believe that he did the best he could given the time frame and the circumstances. Perhaps in the future uniform standards can be developed to eliminate the risk different reviewers may come to different results based on the same data.

The fact that Rarick used a 16,100 square foot average for Jersey City, whereas Newark's average is 14,000 feet, and Jersey City claimed it always used that lower figure as well, is not critical. Simply put, Jersey City was spending millions of dollars more for custodians than "benchmark" *Abbott* districts and a reduction on the basis of inefficiency is perfectly proper. I would suggest, however, that if time and circumstances permit, and if updated square footage figures can be verified, that the DOE consider an adjustment in that regard.

The next issue, the expenditure of $300,000 for radon testing, may be disposed of with dispatch. On its face, since no money was spent on that item in 2002-2003, none qualify for 2003-2004 approval. The testing can fully take place in 2004-2005 in

[1] Rarick was the DOE person reviewing the Newark, Jersey City and Paterson school budgets. He conceded he did not know if other reviewers always used the same methodology he did.

compliance with statutory mandate, the District can scale back the cost (less per classroom, perhaps less classrooms since upper floors and other areas may not be implicated) and training the District's own personnel can save further funds. Finally, the CPI allowance of $712,000 also can serve as a source for partial, if not full, funding for this item.

The final issue has to do with the DOE's reduction of $515,000 for medical provider costs attendant to physical examinations, treating injuries, etc. Again, this is an area which the DOE's representative described as a "cost driver" which was not "so substantial" as to warrant approval of any increase. The DOE believes monies for these services can be found in other areas and reallocated if really needed. While I personally might disagree with that notion, it is not my province to second-guess the DOE's view, so long as it has a degree of reasonableness. Here, as the DOE points out, no affirmative proof to support the claim of contracted increases was provided, other physicians perhaps could be found whose rates are lower, the potential need is highly variable, and the CPI allowance can be used as a source of payment.

In reaching the decision I do in this case, which essentially is to reject Jersey City's appeal for restoration of funds beyond those the DOE concluded is adequate to support a maintenance budget for 2003-2004, I am not unmindful of the nature and extent of the special needs that school districts like Jersey City have. On the other hand, the thrust of the *Abbott* cases, the message they deliver, is that allocation of a possibly shrinking resource base in the area of public education funding requires a determined effort to make sure that available resources are devoted with utmost care to those needs which command primary attention – the effective delivery of educational services to the students. In that respect, Rarick made several pertinent observations during the July 2003 hearings, albeit before the new "maintenance" standard was promulgated. However, he articulated the DOE's approach to *Abbott* district budgets during the last few years in particular and which I believe to be instructive regardless of the standard to be used. They are (A) through (J) as follows:

(A) In developing the maintenance standard, we talked about a few things. We talked about, first of all, whether or not a cost is beyond a District's control, but secondly, also whether or not a cost is substantial enough that the districts cannot be reasonably be expected to reallocate from it.

There are, indeed - - I mean, it's a matter of degree here. There are certainly increases in the District's budget that are beyond their control, but somewhat nominal, maybe – take an example, 50,000 dollars here or there. That is not something that maintenance addressed.

What maintenance addressed are those factors that were believed to impact on the District substantially enough that we really couldn't expect the District to reallocate, given the size of the increase, and certainly the things that we've discussed that fall into that category are salary and benefits and insurance and, indeed, Special Ed, and some of those issues were part of maintenance.

Physical exams were not. So therefore, I don't feel that I can approve that amount at this time. (Tr. July 3, 2003, pp. 83-3 to 84-19).

(B) THE COURT: So, there are some cost drivers that are more substantial.

THE WITNESS: Indeed.

THE COURT: Okay.

THE WITNESS: And I guess - -

THE COURT: So not every - - not every built in fixed increase entitle the District to have that approved.

THE WITNESS: I believe that what it means is that there are certain cost increases that the District reasonably can't be expected to be allocated from.

You know, there - - the ones that are big enough, that are substantial enough, that are true for in conversation today, insurance, health benefits, things of this nature.

I also will say, I hasten to add, that during this process, I left myself open to consideration at any cost effort. I said, "if you bring it before me, I will consider it."

There was only - - to my knowledge, to the best of my knowledge at this point, there was only really one that I did not consider that was brought to me, and that was the argument that there were increased costs associated with the evening school program, I believe it was, that they were arguing was a cost driver, and I could not accept the argument.

I collected information on all the various areas that we talked about through the cost drivers. Physical exams did not come up, perhaps because it's such a normal cost, relatively speaking. (Tr. July 3, 2003, pp. 86-13 to 87-18.)

(C) THE COURT: Okay. So there was a - - seems to me, a lot of discretion going on here.

THE WITNESS: Discretion in terms of what's considered as part of maintenance?

THE COURT: What's considered a substantial cost driver.

THE WITNESS: Well, individually, I would argue, no, that there was not. I mean, these were not conversations I was having with myself. These were conversations that were had at the State level in terms of all right, put this on the table, insurance. How do we feel about insurance? Is it – is this something that's going to materially impact out-of-districts? We discuss it. We say, "yeah."

We're keeping – you know, keeping an informal list of those, and like I said - - you know.

THE COURT: So every district is treated the same in that regard.

THE WITNESS: Well, I can't respond. I'm going to have 27 other districts.

THE COURT: Yeah, but you just said, we'll look at, you know, what do [*Abbott*] districts need or what need. I mean, but Jersey City is not Paterson, is not Camden, is not Plainfield, is not Elizabeth, is not East Orange, and they are different.

THE WITNESS: They are indeed.

THE COURT: They have different needs, right?

THE WITNESS: They do.

THE COURT: Okay. I'm not trying to beat you up here, because I know, you know, you have to have some flexibility to deal with this situation. I'm just trying to understand your thinking of the concept.

THE WITNESS: And those are certainly the same questions that we entertain. You know, what's the best way to do this, and I guess, for purposes of my testimony today, I can't respond on behalf of 20 other budget managers.

I employ the maintenance standard as it was explained to me at those hearings. I can't testify as to what the other budget managers did, although I have some familiarity with it, but all I can say is I - - you know, have to apply the standard as I - -

THE COURT: Okay. (Tr., July 3, 2003, pp. 93-9 to 95-1).

(D) THE WITNESS: Okay. Again, it's the same standard that comes up over and over again. As a Budget Manager, I was not - - as your Honor pointed out, I didn't interpret this as something where I'm out these using a lot of discretion about what things were part of maintenance and what things were not.

I was confining myself to the standard that was set at the higher policy level, and increases of this nature were not part of that, for the same reasons I discussed.

The were not - - they were not something that was believed to be substantial enough that a District cannot reasonably be expected to reallocate from them. (Tr., July 7, 2003, pp. 95-20 to 96-7.)

(E) Q. (by Ms. Eck): All right. What is - - I guess, you identified in the letter "approximately 3 million for Administrative Excess."

What does that mean in your report? Or what were you disallowing?

A. Well, it's based on a determination, based on some research and some discussions with the District that based on some findings that were of significant concern to me as a Budget Manager and something that I'm – you know, it's my job to be concerned about, and that is a significant increase in administrative costs compared to instructional costs over the last two years.

During the time when we are trying to do, essentially, the exact opposite, which is that, you know, in ramping up funding, we are

trying to direct more dollars to the classroom and direct less to administrative costs.

My general concern, obviously, is that if we see an increase that is substantial, that it sends - - it sends a difficult message. It sends the wrong message, and it's something that we need to take to be very vigilant about.

Given all of the concerns about the budget and given that this is a public issue, we need to be able to demonstrate that the increases in money that we're awarding are going to classroom expenses. (Tr. July 3, 2003, pp. 110-8 to 111-4).

(F) THE WITNESS: And the concern there is that indeed you heard testimony yesterday about the increases in this budget, administrative to instructional, which are not significantly overlapped.

The concern here is that there was a very substantial increase in the prior year, and we see, not necessarily – we see some leveling out, but still yet another increase.

My concern is that we just obviously were in very difficult economic times this year, but we also were last year. And we went through a budgetary cycle in which we sent out guidance to [*Abbott*] districts which would be, I think, R-19 and R - - I'm sorry. They're numbered sequentially here, so it's actually R-21, and this is a copy of the guidance that went out last year.

The guidance that went out to districts was "you need to be cutting and priority – cutting central office first, and cut school level stuff second."

The concern that arises when you see these administrative increases at times like this is that well, if it's true that we had testimony that the District cut in excess of 200 positions last year at the school level, and yet we saw a substantial increase in administrative costs, that's a real concern for me, because it appears to me, that that's essentially a violation of that guidance.

Now, at the time that the budget was reviewed last year, I did raise this concern. But it's important for your Honor to understand that the review that occurred last year is different than the review that is occurring this year.

Last year, because of the agreement that was sought by apparently the Law Center and all the interested parties, we used a level spending formula. Districts got the money that was entitled to them via level spending.

It did not entail the same kinds of reviews we're doing here, which is more of a line by line review.

Now, we were obviously faced with a very difficult decision last year, and it was - - I remember having this conversation. I remember having it with the District, and I remember having it with my boss, which is that we're - - here's a District that's showing a significant administrative increase, but on the other side, they've been very compliant in a sense that, in fairness to the District, they were one of the first districts to submit their budget, and they came in under level spending.

Again, as long as a district came under level spending, you know, that budget was essentially approved, okay?

So I looked at this year's budget, and I told the District – I said, "this is a concern of mine, that we would be showing these kinds of administrative increases during these difficult times, and that these are times during which we've also had classroom reduction." And that - - that doesn't necessarily jibe with the guidance that I'm aware of . . . . (Tr., July 7, 2003, pp. 111-8 to 114-9).

(G) . . . . So I took a look at the spreadsheet and, you know, I said, all right, well, I'm very - - I'm concerned about these increases. I want to - - I want to put those administrative increases back on a course that's similar to the instructional increases. (Tr., July 3, 2003, pp. 114-22 to 115-1).

(H) THE COURT: That's [Administration] 31 percent?

THE WITNESS: Right. Right. Instruction had increased only 19%. Now, again, these are years during which the guidance to the [Abbott] districts was major cuts in central and in administration before the classroom.

As I said previously, your Honor, you've heard testimony yesterday about a loss of 200 - - of more than 200 positions in the schools last year, and yet we saw these increases in administration. So that's a concern of mine. (Tr., July 3, 2003, pp. 115-18 to 116-3).

(I) THE WITNESS: So, to summarize the point, your Honor - - I mean, this only shows that I took the extra step to look at this year. It really doesn't change the argument. Really, the argument here, your Honor, is that this is certainly no reflection on anybody in the District, and I want to make that perfectly clear. But as a professional Budget Manager, working in an [*Abbott*] district, one of

the largest [*Abbott*] districts, this is something we have to be concerned about.

We can't not raise this issue, as far as I'm concerned, because not to raise the issue implies that despite whatever rhetoric we raise about cutting from administration and not schools, that we're not willing to follow up on it, that we're not willing to do the extra work, and that ultimately, I think the success or failure of this - - this movement will depend on our ability to enforce rules like this, so there is.

THE COURT: Except it seems to me that, in effect, you're sort of punishing them for their past sins. You're not rewarding them for the leveling off that appeared. Is that fair to say?

When you're talking about a pattern going back, you're - - and it's true. I mean, there was a 30 percent plus increase, and I don't want to revisit that, and your explanation to that is well, that's the way we looked at it then, and we wouldn't do it there now. That's for sure. But that shows us something and so forth and so on. But they shaped up, didn't they?

THE WITNESS: That's true in part. And there's a part that I think that you need to factor in, which is that we now have information that we didn't have then, in the form of the CAFR for the fiscal year, and that tells you something, I think, material, and it tells you that there were amounts in those accounts that went unspent.

Now, is that unusual? No. It's not unusual. It happens in all [*Abbott*] districts, maybe not to this extent. I'm not trying to portray that there's these large sums of money in Jersey City that go unspent, but if we're going to have an administrative increase and a year in which it's made, as far as I'm concerned, plainly clear that cuts should be coming from administration and you have evidence that in a prior fiscal year, there were amounts in those accounts that went unspent, that seems to me to be a problem. (Tr., July 3, 2003, pp. 127-29 to 129-14).

(J) THE WITNESS: Okay? And these are non-salary costs above and beyond just the normal [cost] of living adjustment

THE COURT: That's where that 5 percent, that 2.11 came in before, is that it?

THE WITNESS: Exactly. So, I'm trying to distinguish – I mean, the most important thing to me is the distinguished, but this is not a dissatisfaction with the way the District does business, because I have a lot of confidence in the District.

> This is what I feel is a fulfillment of my professional responsibilities that to hold the standards that are employed and to be vigilant about administrative increases in years where we're going through very difficult times and every dollar that we get presumably needs to be directed towards those. (Tr., July 3, 2000, pp. 133-17 to 133-22).

Although, as noted, those comments by Rarick were made prior to both the Court's July 23, 2003 Order and its subsequent ruling in August 2003, as well as the DOE's adoption of the new emergency regulations, they reflect the DOE's consistent approach to what *Abbott* districts should be doing in terms of managing their budgets in such a way as to emphasize classroom needs. Thus, if too many instructional positions had to be eliminated, perhaps closer attention could and should be given to finding funds in other accounts which could be reallocated to save those jobs. Hopefully, the somewhat Draconian maintenance standard to be used for 2003-2004 is not fixed in stone, and when and if the strictures are relaxed it is expected that funds made available to *Abbott* districts will be spent in areas where they can do the most good even though the process may be fiscally if not politically painful. That, however, is Rarick's (and DOE's) message to Jersey City, a call for fiscal prudence and an emphasis on school based needs that must be honored to the greatest possible extent regardless of the funding mechanism employed and regardless of finely tuned definitions. If that is the price to be paid for effectively implementing the State Constitution's imperative, so be it.

Thus, for the reasons set forth above, I **ORDER** that the determination made by the DOE with respect to Jersey City's 2003-2004 budget, as set forth in Assistant Commissioner MacInnes' letter of August 27, 2003, be **AFFIRMED** and the appeal be **DENIED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

September 26, 2003
DATE

STEPHEN G. WEISS, ALJ

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

September 26, 2003
DATE

E-mailed Initial Decision to the parties on:

September 26, 2003
DATE
mvh

APPENDIX

Witness List:

For Petitioner

Joanne Gilman
Michael Littlejohn
Adele Macula

For Respondent

Benjamin D. Rarick
Mary Byrne

Exhibit List:

J-1	Proposed 2003-2004 Jersey City School District budget
J-2	Jersey City Public Schools' application for Additional Supplemental Aid for 2003-2004, dated March 4, 2003
J-3	Letter dated May 30, 2003 from Gordon MacInnes, Assistant Commissioner to Dr. Charles T. Epps, State District Superintendent of Schools
J-4	Department of Education answers to interrogatories, June 30, 2003
J-5	Letter dated August 27, 2003 from Gordon MacInnes, Assistant Commissioner to Dr. Charles T. Epps, State District Superintendent
P-1	Chart of Jersey City Public Schools Student Statistics
P-2	Chart of Jersey City Public Schools 2003-2004 Budget
P-3	Jersey City Public Schools Budget Comparison
P-4	Jersey City Public Schools Vacancy Report, May 1, 2003

P-5	Chart of Effect of Funding on Academic Performance and PS-30 ESPA Language Arts Proficiency (1999-2002)
P-6	Chart of PS-30 Effect of Funding on Academic Performance ESPA Mathematics, (1999-2002)
P-7	Chart of Jersey City Public Schools PS-30 ESPA Language Arts Proficiency, etc. (1999-2002)
P-8	Chart of Jersey City Public Schools P-30 ESPA Mathematics Proficiency (1999-2000)
P-9	Chart of Jersey City Public Schools ESPA Language Arts Proficiency (1999-2002)
P-10	Chart of Jersey City Public Schools ESPA Mathematics Proficiency (1999-2002)
P-11	Chart of Jersey City Public Schools GEPA Language Arts Proficiency (1999-2003)
P-12	Chart of Jersey City Public Schools GEPA Mathematics Proficiency (1999-2003)
P-13	New Jersey DOE Core Curriculum Content Standards, adopted July 2, 2002
P-14	New Jersey Assessment of Skills and Knowledge Parent, Student and Teacher Information Manual, Spring 2003
P-15	Five Year Elementary/Middle School/High School Curriculum Cycle with Approved Text Book/Curriculum Detail Charts
P-16	Chart of Proposed Text Book/Technology District Adoptions (2003-2004)
P-17	Letter dated July 2, 2003 from Senior Deputy Attorney General Michelle Lyn Miller to Acting Director and Chief ALJ Jeff S. Masin, with attachment
P-18	Chart of Jersey City Public Schools 2002-2003 Budget, Central Office Reductions
P-19	Chart re selected accounts in Administrative Cost Analysis(2001-2002 through 2003-2004)
P-20	Calculation by Ms. Gilman of Maintenance Budget
P-21	Memorandum dated January 29, 2003 from Richard Rosenberg, Assistant Commissioner to Chief School Administrators and Business Administrators

P-22	Memorandum dated September 5, 2003 from Richard Rosenberg, Assistant Commissioner to Chief School Administrators and Business Administrators
P-23	Extract from DeLoitte Study re Industry Standards for Custodians
P-24	(For Identification) Jersey City Public Schools Custodian/square foot comparison
P-25	Chart of age of Jersey City Public School buildings
R-1	Extract from Jersey City Public Schools Professional Development Plan, 2003-2004, p. 66
R-2	OMB budget calculation used for August 27, 2003 letter

OAL DKT. NO. EDU 5496-03
AGENCY DKT. NO. 196-6/03

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON 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 District's exception to the Administrative Law Judge's (ALJ) recommendation with respect to custodial positions,[1] and the Department's reply, were duly submitted in accordance with the schedule established in response to the Court's order for expedition.

Initially, the Commissioner concurs with the ALJ that the Department's methodology in reviewing the District's budget fully comports with the "maintenance" standard, as established by the Court and implemented by regulations promulgated in accordance with *P.L.* 2003, *c.* 122. The Commissioner concurs that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, such determination being solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott,* 71 *N.J.* 40, 51-52 (1976);

[1] The District reserves its objections to the Department's definition of "maintenance budget" and "school-based positions," but concedes that these "will not be resolved in the District's favor unless and until court action is taken on appeal." (District's Exceptions at 1-2)

Wendling v. N.J. Racing Com'n., 279 *N.J. Super.* 477, 485 (App. Div. 1995). However, to the extent that he may appropriately do so in an administrative proceeding, the Commissioner also opines that the Department's definition of "maintenance budget," as set forth in *N.J.A.C.* 6A:10-1.2, is fully consistent with the language and intent of the Court. Thus, like the ALJ, the Commissioner finds the regulatory definition controlling herein, with no conflict between it and the underlying Court order.

The Commissioner further concurs that the Department used an entirely lawful and reasonable approach in concluding that the District's custodial costs were excessive under standards of inefficiency and ineffectiveness. Notwithstanding that concurrence, however, the Commissioner is also persuaded that some adjustment to the Department's calculation is warranted based on the availability on record (Exhibits P-24 and P-25) of significantly updated and, apparently, undisputed square footage figures. In its exceptions, the District urges the Commissioner to make the adjustment suggested by the ALJ by applying the Department's methodology to current square footage and building configuration figures (Exhibit P-24, page 5), so as to restore 22 of the 53 custodial positions eliminated by the Department for a total budget increase of $871,706. (District's Exceptions at 3-4) This calculation, however, takes special account of custodians assigned to cover "satellite" locations ("extra sites" in P-24), a circumstance which the District believes to warrant positions over and above those generated by the District's square footage figure. Because the Commissioner does not find adequate support in the record for this contention, he finds, instead, that the appropriate resolution is to have the Department apply its formula to the District's current, verified square footage exclusive of leased preschool space receiving custodial funding through Early Childhood, taking

account of partial positions with the requisite increase in fulltime equivalent positions (FTEs) but with no additional allowance for "satellite" coverage. Based on the information provided in Exhibit P-24, this would appear, subject to the requisite deduction of the aforementioned preschool space and verification of square footage figures, to generate approximately 318 positions, or 20 more than allowed by the Department. Such adjustment, in the Commissioner's view, should amply enable the District to meet its legitimate custodial needs in accordance with appropriate Department standards of effectiveness and efficiency.[2]

Finally, the Commissioner concurs with, and the District appears to accept, the ALJ's analysis and conclusion upholding the Department's exclusion of costs for radon testing, which may be deferred until 2004-05 and scrutinized for greater savings, and for a medical provider, for which the potential need is variable and costs may be absorbed by efficiencies and the increase in the District's budget attributable to Consumer Price Index (CPI) allowances.[3]

Accordingly, for the reasons expressed herein, the Initial Decision of the Office of Administrative Law is modified with respect to its recommended upholding of the Department's full reduction in custodial positions, but adopted in all other respects. The Petition of Appeal is dismissed, except as to the Department's restoration of 20

[2] In so holding, the Commissioner is unpersuaded by the Department's Reply submission, which urges the Commissioner to uphold the full amount of the Department's reduction, reasoning that, regardless of the square footage used, it is clear that the District's "custodial cost center" reflects inefficiency. (Department's Reply Exceptions at 1-3) Indeed, the Commissioner notes that his determination herein appears consistent with the position taken by the Department in its Post-hearing Brief at 17.

[3] In this context, the Commissioner also notes the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

custodial positions, subject to preschool adjustment and verification of square footage, as set forth above.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[4] 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.

586-03

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 Order of the Supreme Court.

ALJ determined that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court.

The Commissioner concurred with the ALJ's findings and conclusions and adopted the Initial 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.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4093-03

AGENCY DKT. NO. 197-6/03

TRENTON BOARD OF EDUCATION,

MERCER COUNTY

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., (Richard E. Shapiro, L.L.C.) for Petitioner, Trenton Board of Education

Michael C. Walters, Deputy Attorney General, for Respondent, New Jersey Department of Education (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 25, 2003 Decided: September 26, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves an appeal by the Trenton Board of Education, the operator of an urban special needs "*Abbott*" school district, from the New Jersey State Department of

Education's initial review of the district's 2003-2004 expenditure budget. *N.J.S.S.* 18A:7F-3; *N.J.A.C.* 6A:10-1.1 *et seq.*

On March 24, 2003, the Department moved before the Supreme Court for an order modifying the decision in *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V). See also Abbott v. Burke,* 172 *N.J.* 294 (2002) (*Abbott IX*). The Department requested that the discretionary Additional *Abbott v. Burke* State Aid (supplemental aid) that it would otherwise be required to provide to *Abbott* districts in 2003-2004 be limited to an amount sufficient to support those programs, positions and services in the districts' approved budgets for 2002-2003.

On April 8, 2003, the Education Law Center (ELC) cross-moved for an order setting an expedited schedule for the Department's decisions on the respective districts' budgets and requiring the DOE to conduct a formal evaluation of the implementation of Whole School Reform (WSR), etc. On April 29, 2003, the Supreme Court ordered the Department and the ELC to participate in mediation before the Hon. Philip S. Carchman, J.A.D., to attempt to resolve the issues raised by their motions.

With the exception of the 2003-2004-budget process, the mediation before Judge Carchman resolved all of the issues raised. Therefore, the Department's motion for an order extending by an additional year the one-year relaxation of remedies granted in *Abbott IX* remained outstanding. The parties then agreed to an expedited schedule for budget approvals and appeals, beginning with the Department's reviews and approvals of districts' budgets by May 30, 2003. The Districts' appeals from the Department's reviews were to be transmitted to the OAL, where administrative law judges (ALJs) were to issue initial decisions (IDs) within 50 days of the appeals. The Commissioner of Education was to issue final decisions within 25 days of the IDs. On May 20, 2003, the Supreme Court issued an order incorporating the parties' mediation agreement and providing that the schedule would remain in effect until further order of the Court.

On May 30, 2003, the Department issued its decisions on the *Abbott* districts' budgets. In this particular case, a letter from Gordon MacInnes, Assistant Commissioner, Division of Abbott Implementation, notified Dr. James H. Lytle, Superintendent of the Trenton School District, that the Department had completed its initial review and, with certain exceptions specified in the

letter, approved the district's 2003-2004 expenditure budget. On June 5, 2003, the district filed its Verified Petition of Appeal with the Department. *N.J.S.A.* 18A:6-9. The Department, in turn, transmitted the contested case to the OAL, where it was filed on June 9, 2003. *N.J.S.A.* 52:14B-2(b). The Department filed its Answer directly with the OAL on June 12, 2003.

On June 24, 2003, the Supreme Court issued an order approving the mediated agreement and scheduling argument on the Department's motion for an order extending the relaxation of remedies granted in *Abbott IX.* On July 1, 2003, the Department filed an additional motion seeking an order amending the schedule for processing the appeals to allow the Court to rule on the standard to be applied in the appeals before hearings were commenced and initial decisions were issued. On July 10, 2003, the Supreme Court heard oral argument on the budget process and on July 23, 2003, issued an Order granting the Department's motion and relaxing *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V)* remedies as they applied to the 2003-2004 budget process. In so doing, the Court ordered the following:

> 1. The DOE's application to extend the relaxation of remedies granted in *Abbott V* is granted as follows: The DOE shall have the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke State* Aid for the *Abbott* districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order.
>
> 2. The Statewide aggregate amount of Additional *Abbott v. Burke* State Aid shall be presumptively calculated as the total amount of Additional *Abbott v. Burke* State Aid approved for the *Abbott* districts for Fiscal Year 2002-2003, subject to adjustment as required for a maintenance budget. A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.

3. For purposes of calculating Additional *Abbott v. Burke* State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students.) Insofar as any *Abbott* district has not been informed of its total amount of last year's approved Additional *Abbott v. Burke* State Aid, the DOE shall provide written notice of that amount within two weeks of the date of this Order. The DOE's application of the effective and efficient standard in its review of a district's maintenance school budget may result in a reduction to a district's presumptive amount of Additional *Abbott v. Burke* State Aid.

4. Within 30 days of the issuance of this Order, the DOE shall provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget. If the DOE deletes an expenditure from a district's 2002-2003 budget related to the district's non-instructional programs and based on the effective and efficient standard, the DOE must include in the written notice to the district the expenditure deleted along with a specific statement explaining why the program or part thereof is no longer effective and efficient.

5. *Abbott* districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.

6. The Order of the Court dated July 7, 2003, modifying the Court's scheduling Order of May 20, 2003 in order to provide the [OAL] thirty days within which to determine and issue initial decisions in the twenty-three pending budget appeals, is hereby superseded by this Order. The [OAL] shall issue initial decisions on district appeals from the DOE's preliminary maintenance budget figures for the 2003-2004 school year within 30 days of the dates of those decisions as set forth in Paragraph 4 of this Order.

7. To the extent that monies are deleted by the DOE in the districts' non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an *Abbott*

> district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

The Supreme Court also set a schedule for new departmental decisions on supplemental funding and the administrative appeal and hearing process and ordered the Department to promulgate emergency regulations governing the process. Relying on the Court's Order and the Fiscal Year 2004 Appropriations Act, the Department then promulgated emergency regulations amending *N.J.A.C.* 6A:10-1 *et seq.*, including *N.J.A.C.* 6A:10-1.2, -3.1, -4.2, and -4.7. Among these emergency regulations that became effective August 22, 2003, and expire June 30, 2004, is *N.J.A.C.* 6A:10-1.2, which defines a "maintenance budget" as follows:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke.* Maintenance also does not include non-recurring 2002-2003 expenditures.

The school district contends that the definition of "maintenance budget" found in *N.J.A.C.* 6A:10-1.2 is contrary to the New Jersey Supreme Court's Order; that its maintenance budget should be considered its approved 2002-2003 budget; and that it is not limited to expenditures for actually provided programs, positions, or services, plus non-discretionary expenditures. In other words, the district contends that to the extent the definition of the rule is contrary to the Supreme Court's order, it is inapplicable in the proceedings in the Office of Administrative Law, where the appeal will be heard.

The Department's position is that the regulation's definition of "maintenance budget" is consistent with the Supreme Court's order. It also argues that the district's contention is essentially a challenge to the regulation and that, consistent with *R.* 2:2-3(a)(2), such a challenge

must be brought in the Appellate Division. Since their adoption, no challenges to the regulations have been appropriately filed and the regulations have not been held invalid. Consequently, the OAL lacks jurisdiction to consider the issue and the emergency regulation is the applicable standard in this and any other *Abbott* cases presently pending in the OAL.

FINDINGS OF FACT

By letter dated September 22, 2003, Mr. Shapiro stated that he agreed with Senior Deputy Attorney General Miller that the factual issues in this matter had been resolved. Therefore, "the only remaining issue in this case is Trenton's claim that Your Honor should follow the Supreme Court's definition of maintenance budget instead of the contrary definition in the DOE regulations." He also asked that the DOE's revised letter of September 22, 2003, and the attached budget maintenance worksheet be appended to the initial decision. No objection having been raised, the request has been granted and the letter and worksheet are appended as Exhibits P-1 and P-2, respectively.

CONCLUSIONS OF LAW

In *Board of Education of the City of Asbury Park v. New Jersey Department of Education,* OAL Docket No. EDU 4095-03, the Hon. John R. Tassini, ALAJ, entered an Order Relative to Maintenance Budget (September 4, 2003). In that Order, Judge Tassini found that the school district's contention concerning the definition of "maintenance budget" found in *N.J.A.C.* 6A:10-1.2 was essentially a challenge to the validity of the emergency regulation itself. Relying on *R.* 2:2-3(a)(2), he further found that any such challenge of an administrative agency's regulation should have been and could only be brought in the Superior Court, Appellate Division.

Judge Tassini went on to explain that the OAL is an administrative forum for hearings on contested cases transmitted by administrative agencies. ALJs, in turn, are called upon to hear these cases and issue Initial Decisions containing recommended findings of fact and conclusions of law. *N.J.S.A.* 52:14B-2(b), -10(c). However, since the OAL was created by statute and placed in the executive branch, it is not technically a court and has no jurisdiction to determine the validity of a rule. *N.J.S.A.* 52:14F-1; *Wendling v. New Jersey Racing Comm'n,* 279 *N.J. Super.*

477, 485 (App. Div. 1995) (it is the Appellate Division and not the OAL that has jurisdiction to hear a challenge to the validity of a rule). *See also In re 1999-2000 Abbott Implementing Regulations, N.J.A.C. 6:19A-1.1 et seq.*, 348 *N.J. Super.* 382 (App. Div. 2002) (previous challenge to rules implementing *Abbott* decisions brought in the Appellate Division). He therefore concluded that the school district's challenge to the validity and applicability of *N.J.A.C.* 6A:10-1.2 could not be heard in the OAL and that the regulation as promulgated had to be applied in these cases.

While acknowledging that his opinion was not dispositive of the issue, Judge Tassini further opined that the Court's Order of July 23, 2003 "appears to provide a reasonable basis for *N.J.A.C.* 6A:10-1.2's 'maintenance budget' definition" and did not see "a basis for invalidating the regulation." It therefore followed that "application of the regulation appears to be consistent with the Order."

Having had an opportunity to review Judge Tassini's Order Relative to "Maintenance Budget" and the legal authorities cited therein, I am in full agreement with his analysis and do not believe it necessary, nor do I intend, to reexamine that issue. I therefore **CONCLUDE** that the legal principles enunciated by Judge Tassini in *Board of Education of the City of Asbury Park v. New Jersey Department of Education, supra,* OAL Docket No. EDU 4095-03, are applicable to this matter and adopted in this Initial Decision.

Nevertheless, the district asserts that it is not seeking to have the OAL overturn the emergency regulation. Rather, it characterizes this matter as one involving a choice of law, that is, whether to apply the Supreme Court's explicit definition of "maintenance budget" or the different regulatory definition adopted by the Department in *N.J.A.C.* 6A:10-1.2. It is the district's contention that the Supreme Court has, in its many *Abbott* decisions, been quite clear that all budget disputes related to the implementation of its *Abbott* remedies should be initially adjudicated by the OAL. Therefore, it is the responsibility of the OAL to assess whether the Department has properly implemented the *Abbott* educational remedies and mandates, and that the legal authority set forth in the Supreme Court's Order is binding on the OAL in carrying out its duty.

The district's argument would be more persuasive were it not for the fact that the regulatory definition of "maintenance budget" adopted by the DOE does not differ in any significant way from the definition of "maintenance budget" set forth in the Supreme Court's Order of July 23, 2003, and I so **FIND**. Therefore, I **CONCLUDE** that I need not determine whether to follow the dictates of the Supreme Court on the one hand, or the direction of the DOE on the other, as the district would have me do.

In its Order of July 23, 2003, the Supreme Court states, "During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order." The Court then expressly states that "Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c of the Court's Order of June 24, 2003." Read together, these provisions make it abundantly clear that programs, positions, or services must already be in existence if they are to be included in the maintenance budget.

The Supreme Court also stated:

> A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures.

If the district's interpretation of this language is correct, the word "current" must be viewed as referring to, describing and modifying the word "approved." Therefore, any programs, services, and positions that are currently approved, even if not yet in existence, are to be funded. However, as the Hon. Joseph Martone stated in his Order Relative to "Maintenance Budget" in *Board of Education of the Township of Neptune v. New Jersey Department of Education*, OAL Docket No. 4096-03, (September 10, 2003), "the word 'current' is more properly viewed as referring to, describing and modifying the words 'programs, services, and positions.'" Judge Martone therefore found that the Supreme Court intended that the programs, services, and positions are to be current, that is, currently in existence. I totally agree and therefore **CONCLUDE** as did he that the use of the adjective "current" rather than the adverb "currently"

implies that the programs, services, and positions must be in existence in order to be funded.[1]

Still, the district argues that in describing the Department's required notice to the districts, the Supreme Court stated that the notice must contain "preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget." In other words, it was the Court's intention that the preliminary maintenance budget figures would encompass funding for the "currently approved" programs, services and positions in the 2002-2003 school year.

However, that provision is but one small part of a much larger whole. The focus of that provision appears to be on the "supplemental funding" necessary to support and maintain those programs, services and positions already in place under the 2002-2003 budget. Stated another way, "supplemental funding" relates to the non-discretionary expenses such as raises or escalator clauses associated with currently existing programs, services and positions for which the district is contractually obligated. I therefore once again **CONCLUDE** that the programs must already be implemented, the services provided, and positions filled in order to be funded.

The language ultimately adopted by the Supreme Court to define "maintenance budget" is also reflective of the language contained in the Department's proposal attached to the Report of The Abbott Mediation (Order of April 29, 2003). The language proposed by the Department is as follows:

> Maintenance means that a district will be funded at a level that will enable it to *continue implementing* the current approved programs, services and positions and therefore includes actual documented increases in non-discretionary expenditures.
>
> [Emphasis added.]

[1] As Judge Martone explained, the words "current" and "approved" are both adjectives in form, and adjectives are used to modify nouns. Adverbs such as the word "currently" are used to modify verbs, adjectives or other adverbs. Thus, under the generally accepted rules of grammar, the adjective "current" cannot be considered to be a modification of the word "approved," but can only be considered a modification of the terms "programs, services, and positions".

The Department's proposed language expressly provides that if the approved programs, services and positions are to be continued, they must be currently in existence in order that their *continued* implementation may be enabled through funding. I **CONCLUDE** that the language ultimately used by the Supreme Court to define "maintenance" is entirely consistent with the DOE's proposal.

DECISION AND ORDER

Based upon the foregoing, I **CANNOT FIND** that the definition of "maintenance budget" found in *N.J.A.C.* 6A:10-1.2 is inconsistent with the definition established by the Supreme Court in its Budget Order of July 23, 2003. Having made that finding, I **CONCLUDE** that the Supreme Court's Order provided a reasonable basis for the Department's definition. I therefore further **CONCLUDE** that the Department's application of the definition of "maintenance budget" found in *N.J.A.C.* 6A:10-1.2 was appropriate.

Accordingly, it is **ORDERED** that the Department of Education's action in applying the definition of "maintenance budget" found in *N.J.A.C.* 6A:10-1.2 in its review and approval of the district's 2003-2004 expenditure budget be and is hereby **AFFIRMED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

September 26, 2003 — DATE

ISRAEL D. DUBIN, ALJ

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

9-26-03

DATE

E-mailed Initial Decision to the parties on:

9-26-03

DATE

/lam

APPENDIX

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

For Petitioner:

P-1 Letter from Gordon MacInnes to Dr. James H. Lytle dated September 22, 2003

P-2 Budget Maintenance Worksheet

For Respondent:

None

OAL DKT. NO. EDU 4093-03
AGENCY DKT. NO. 197-6/03

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-2004 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Trenton's exceptions and the Department's reply thereto were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge (ALJ), that the OAL does not have jurisdiction to determine, directly or indirectly, the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n.*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to determine "a choice of law" as argued by the District, the Commissioner agrees with the ALJ that the Department's definition of "maintenance budget," as detailed in *N.J.A.C.*

6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003. Consequently, the Department's application of such regulatory definition in its review and approval of the District's 2003-2004 budget is wholly appropriate.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

* 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.

587-03

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court. The District challenged the inefficiencies identified by the respondent; namely, supervisors of instruction, legal fees and noncertificated staff.

The ALJ determined, by interim Order dated September 4, 2003, that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2. In these proceedings, the ALJ found: (1) costs relative to legal expenses should be deleted from the District's budget, as proposed by respondent; and (2) the costs relative to noncertificated staff should not be deleted from the District's budget. The District withdrew its appeal relative to supervisors of instruction. ALJ also determined that a 3.00 percent Consumer Price Index (CPI) is applicable to the District's budget.

The Commissioner concurred with the ALJ's findings and conclusions with respect to the inefficiencies identified by respondent. However, the Commissioner determined that a CPI adjustment of 2.11 percent was properly applied and that petitioner did not demonstrate that the adjustment for preschool expansion aid was "double counted" on the Department's 2003-04 calculations.

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.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4095-03

AGENCY DKT. NO. 199-6/03

BOARD OF EDUCATION

OF THE CITY OF ASBURY PARK,

Petitioner,

v.

STATE OF NEW JERSEY,

DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Kathleen Asher, Deputy Attorney General, for respondent (Peter Harvey, Attorney General of New Jersey, attorney)

Record closed: September 25, 2003 Decided: September 26, 2003

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

The Board of Education of the City of Asbury Park (school district or district), operator of an urban special needs "Abbott district" school system, applies to the Department of Education (DOE) for aid for the 2003-2004 school year. N.J.S.A. 18A:7F-3 "Abbott district."

The New Jersey Supreme Court's July 23, 2003, Order states, "The DOE shall have the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional Abbott v. Burke State Aid for the Abbott districts." Abbott v. Burke, __ N.J. __, 2003 WL 21700375, at *1 (July 23, 2003) (emphasis added). That is, during 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in the Order and in N.J.A.C. 6A:10-1.1 to -4.7, the regulations promulgated pursuant to the Order and the Fiscal Year 2004 Appropriations Act. The "maintenance budget" is to fund a district sufficiently to implement current approved programs, services, and positions and therefore the maintenance budget includes documented increases in non-discretionary expenditures. N.J.A.C. 6A:10-1.2 "maintenance budget." "Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003." Abbott v. Burke, __ N.J. __, 2003 WL 21700375, at *2 (July 23, 2003). Abbott districts may appeal from the DOE's notices of preliminary reductions to budgets, etc., and such appeals are heard here in the Office of Administrative Law (OAL). N.J.A.C. 6A:10-4.7. In such appeals, the DOE bears the burden of moving forward "to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard" set forth in N.J.A.C. 6A:10-3.1(c), and, if that initial burden is met, the district bears the "burden of demonstrating that any budgetary reductions are not justified under that standard." N.J.A.C. 6A:10-4.7(a)(3).

The DOE issued a "Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid Award," stating that it reduced or deleted some of the school district's proposed expenditures related to (1) "Supervisors of Instruction," (2) "Legal Fees," and (3) "Non-Certificated Staff." R-1. The school district appealed, identifying issues. N.J.A.C. 6A:10-4.7. Each of the parties contends that it has met its respective burden.

PROCEDURAL HISTORY

On March 24, 2003, the DOE moved before the Supreme Court for an order modifying

the remedies ordered in Abbott v. Burke, 153 N.J. 480 (1998) (Abbott V). The DOE requested that the discretionary Additional Abbott v. Burke State Aid (supplemental aid) that it would be required to provide to Abbott districts in 2003-2004 be limited to providing support for those programs, positions and services in the districts' approved budgets for 2002-2003. On April 8, 2003, the Education Law Center (ELC) cross-moved for an order setting an expedited schedule for the DOE's decisions on districts' budgets and requiring the DOE to conduct a formal evaluation of the implementation of Whole School Reform (WSR), etc. On April 29, 2003, the Supreme Court ordered the DOE and the ELC to participate in mediation before the Hon. Philip S. Carchman, J.A.D., to attempt to resolve issues raised by their motions.

Mediation resolved all issues except the 2003-2004 budget process, so the DOE's motion for an order extending by an additional year the one-year relaxation of remedies granted in Abbott v. Burke, 172 N.J. 294 (2002) (Abbott IX), remained outstanding. However, the parties agreed to an expedited schedule for budget approvals and appeals, beginning with the DOE's reviews and approvals of districts' budgets by May 30, 2003. Districts' appeals from the DOE's reviews were to be transmitted to the OAL, where administrative law judges (ALJs) were to expeditiously issue initial decisions (IDs), and, thereafter, the DOE's Commissioner was to expeditiously issue final decisions. On May 20, 2003, the Supreme Court issued an Order incorporating the parties' mediation agreement and providing that the schedule would remain in effect under further order of the Court.

The districts submitted their budgets and the DOE issued initial reviews on them. In this case, by letter dated May 30, 2003, the DOE's Assistant Commissioner for Abbott Implementation notified the district that the DOE had completed its initial review of the district's 2003-2004 expenditure budget dated May 5, 2003, that the expenditure budget had passed all required edit checks with no errors, and that the budget was approved except as noted in the letter. On June 5, 2003, the district's verified petition of appeal was filed with the Department. N.J.S.A. 18A:6-9. The DOE transmitted the contested case to the OAL, where it was filed on June 9, 2003. N.J.S.A. 52:14B-2(b). On June 12, 2003, the Department's answer was filed in the OAL. The attorneys and I held several conferences on issues and schedules, including schedules for discovery. (Based on the Supreme Court's orders, the schedules for discovery were adjusted.)

On June 24, 2003, the Supreme Court issued an Order approving the mediated agreement and scheduling argument on the DOE's motion for an order extending the relaxation of remedies granted in Abbott IX. On July 1, 2003, the DOE moved for an order amending the schedule for processing the appeals to allow the Court to rule on the standard in the appeals to the OAL before hearings and issuance of IDs.

On July 23, 2003, the Supreme Court issued the above-quoted Order, granting the DOE authority to treat the 2003-2004 school year as a maintenance year; requiring the DOE to promulgate regulations for purposes of calculating Additional Abbott v. Burke Aid; and setting an expedited schedule for new DOE decisions on supplemental funding and governing the administrative appeal and hearing process, etc.

On August 22, 2003, the DOE promulgated the regulations governing processing of the Abbott cases relating to the 2003-2004 budgets and issued notices to the districts relative to their budgets. N.J.A.C. 6A:10-1.1 to -4.7.

On August 27, 2003, the DOE issued the "Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke Aid." R-1. By letter dated August 28, 2003, the district identified the issues that it was appealing: (1) Did the DOE properly calculate the district's maintenance budget for the 2003-2004 school year? (2) Did the DOE properly reduce or delete funding for supervisors of instruction? (3) Did the DOE properly reduce or delete funding legal services? (4) Did the DOE properly reduce or delete funding for non-certificated staff in the district? (5) Did the DOE properly determine the district's estimated need for discretionary Additional Abbott v. Burke State Aid? N.J.A.C. 6A:10-4.7.

During the case's August 28, 2003, prehearing conference, the district contended that N.J.A.C. 6A:10-1.2's "maintenance budget" definition is inconsistent with the Supreme Court's June 23, 2003, Order, so that the regulation should not be applied. In response to my question, the district advised me that it had not challenged the regulation in court pursuant to R. 2:2-3(a)(2), and it did not know of any other party that had challenged the regulation in court.

The parties submitted briefs, and on September 4, 2003, I issued an order with the following conclusions. The district's contention was essentially a challenge to the regulation. Pursuant to R. 2:2-3(a)(2), a challenge to a regulation should be filed in the Superior Court, Appellate Division. The OAL is part of the executive branch and not a court and I do not have jurisdiction to ignore and essentially invalidate a rule. N.J.S.A. 52:14F-1; see Wendling v. New Jersey Racing Comm'n, 279 N.J. Super. 477, 485 (App. Div. 1995); see also In re 1999-2000 Abbott Implementing Regulations, N.J.A.C. 6:19A-1.1 et seq., 348 N.J. Super. 382 (App. Div. 2002), where a previous challenge to rules implementing an Abbott decision was brought in the Appellate Division. Although my determination was not dispositive, it appeared to me that the June 23, 2003, Order did provide a basis for N.J.A.C. 6A:10-1.2's "maintenance budget" definition. I would apply the regulation in this case.

On September 15, 2003, the case was heard and, as detailed below, on the hearing record, the school district withdrew from its appeal the issue related to "Supervisors of Instruction" and agreed that $127,534 was eliminated from its maintenance budget. R-1. The hearing was to continue to allow the DOE to present its witness to support admission into evidence of the Rosenfarb Winters, LLC, report. R-21. However, the district withdrew its objection to admission of the report and the district submitted an exhibit in support of its contention that the consumer price index (CPI) for Northern New Jersey is applicable to the district's budget. P-9. I submitted my draft findings of fact and conclusions of law to the attorneys and invited them, as part of their written summations, to notify me of any mistake or omission in the draft, and, thereafter, I received the written summations with suggested corrections, etc. I then notified the parties of my findings of fact and requested that the DOE submit calculations consistent with my findings and conclusions. With the submission of the calculations, the record was closed and I show the calculations in the "Conclusions of Law" below. I thank the DOE staff for this submission and note that its submission does not constitute any admission or waiver.

FINDINGS OF FACT

Evaluation of Operational Efficiency and Effectiveness of Abbott School Districts

The DOE engaged Rosenfarb Winters, LLC (Rosenfarb) to assist in evaluation of the

operational efficiency and effectiveness of the Abbott school districts (Abbotts) related to non-instructional expenses and Rosenfarb prepared a report in that regard.

The Rosenfarb report noted that the July 23, 2003 Order required that DOE promulgate regulations establishing the standard for evaluating the effectiveness and efficiency of the Abbotts' non-instructional programs. Rosenfarb analyzed information and data supplied by the DOE for the 2001 to 2003 fiscal years. Rosenfarb prepared a report with a model of generally efficient spending districts as "Standards" or "Benchmarks." R-21. On the basis of the Benchmarks, Rosenfarb identified inefficient and ineffective non-instructional spending for the 2002-2003 school year budgets.

The Rosenfarb report for the Asbury Park district includes the following exhibits: (1) "Asbury Park District Inefficient Spending on Non-Instructional Expenses by Object Code in Total Dollars"; (2) "Appealing Abbott School Districts Non-Instructional Spending Inefficiencies, 2002-2003 Budgeted Average Cost per Pupil by Object Code"; (3) "Appealing Abbott School Districts Non-Instructional Spending Inefficiencies Comparison of 2003 Budget to 2003 Anticipated Actual for Non-Instructional Costs"; (4) "Appealing Abbott School Districts Non-Instructional Spending Inefficiencies Calculation of Benchmark Cost per Pupil by Object Code"; (5A) "2000-01 ESPA LA General Student Proficiency Rates by Total Annual Non-Instructional Spending Per Pupil"; (5B) "2001-02 ESPA LA General Student Proficiency Rates by Total Annual Non-Instructional Spending Per Pupil"; (5C) "2001-02 ESPA LA Total Student Proficiency Rates by Annual Non-Instructional Spending Per Pupil"; (A) a statement that the report was prepared under the direction of Keith S. Balla, CPA and PSA, Sam Rosenfarb, CPA, CFE, CVA, CBA, ABV, and others; (B) the résumé of Mr. Balla; (C) the July 23, 2003, Order; and (D) the Uniform Minimum Chart of Accounts (Handbook 2R2) for New Jersey Public Schools, effective July 1, 1993. R-21.

Mr. Balla received a bachelor of science degree in accounting from Rutgers University and is a certified public accountant (CPA). He has more than twenty years' experience in private industry and public accounting and is a partner in Rosenfarb. He has mastered auditing and investigative accounting and he has been extremely successful in utilizing those skills for state, county and numerous local public entities. R-21.

The Rosenfarb report states:

> The Benchmark Abbotts were developed based upon our analysis of two criteria, i.e., their non-instructional spending, and the results of their Elementary School Proficiency Assessment – Language Arts ("ESPA LA") fourth grade reading tests. The most efficient Abbott districts were those that incurred the lowest level on non-instructional expense while achieving the highest test results. Rather than selecting the most efficient districts as representative of "generally efficient spending," we selected those four districts that were consistently in the middle of the range for all Abbott districts – Elizabeth, Gloucester, Long Branch and the Phillipsburg school districts. Therefore, the spending efficiency of all of the Abbotts is compared to a mid-range level of spending of an Abbott district, making the Benchmark Abbotts a fair and reasonable indication of generally efficient spending.
>
> Based on the report herewith, our education, skill, expertise, training, experience and knowledge, the 2002-2003 school year budgets for each of the Abbotts include inefficient and ineffective non-instructional spending as identified in the accompanying Exhibits.
>
> The accompanying Exhibits include the results of our calculation and application of the Standards. We recognize that each Abbott district is unique, however, their individual characteristics were not taken into account in the development of the Standards. We recommend that further investigation and review be conducted to determine the causes of ineffectiveness and inefficiencies and to determine the appropriateness of additional reductions in order to limit waste, conserve assets and eliminate inefficiency and ineffectiveness.
>
> [R-21.]

The "Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke Aid"

The DOE's August 27, 2003, "Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid Award" for the Asbury Park school district states:

Pursuant to the July 23, 2003 Order of the Supreme Court of New Jersey in Abbott v. Burke, the Department has determined that your district's preliminary maintenance budget figure for the 2003-2004 school year is $65,045,366 inclusive of the district's General Fund Budget and restricted ECPA and DEPA revenue accounts. This number reflects the instructional and non-instructional programs approved and provided in the 2002-2003 school year and includes increases to the 2002-2003 budget to reflect non-discretionary costs and adjustments to the 2002-2003 budget based on actual 2002-2003 expenditures as informed by information provided by the accounting firm retained by the Treasurer to review your district's financial information. A copy of the information provided by that accounting firm is available upon request.

In addition, the Department has reviewed the expenditures in your 2002-2003 budge related to your district's non-instructional programs in light of the effective and efficient standard established by the Commissioner in emergency regulations. These regulations can be accessed at www.nj.gov/njded/code/title6a/chap10/. Listed below are the expenditures reduced or deleted and a statement explaining why the reduction or deletion was made:

[1] Supervisors of Instruction – The Department of Education reviewed expenditures for administrative salaries in the district for the fiscal year 2002-2003 and found inefficient expenditures for supervisors of instruction in an amount equal to $127,534. This finding is consistent with an independent analysis performed by a forensic accounting firm in which Abbott district "benchmarks" were established that represent a reasonable expenditure for various types of school district costs. The "benchmark" per pupil expenditure for supervisors of instruction is $193 per pupil, while the accounting firm determined that Asbury Park spent $341 per pupil, an amount that exceeded the "benchmark" amount by $149. Asbury Park's total spending for supervisors of instruction in 2002-2003 was determined to be $1,154,936. This amount exceeds total "benchmark" spending (enrollment multiplied by $149) by $502,802. After reducing spending for supervisors of instruction by $127,534, the amount for supervisors of instruction is $1,004,936, an amount that exceeds 'benchmark" spending by $352,802. This amount is still significantly higher than the average pupil spending for supervisors of instruction in "benchmark" Abbott districts.

[2] Legal Fees – The Department of Education reviewed legal fee expenditures for the district for the fiscal year 2002-2003 and found inefficient expenditures for Legal Services in an amount

equal to $350,000. This finding is partially based on actual expenditures at June 30, 2003 compared with the amount of legal fees appropriated in the district's 2003-2004 budget. This finding is also consistent with an August 2003 report by the Department of Education in which DOE auditors from the Division of School Finance and the Office of Compliance found the district's legal counsel using billing practices that failed to identify specific legal services for which they were being paid. Further, this finding is also based on an independent analysis performed by the forensic accounting firm that determined $34 per pupil to be a reasonable, "benchmark" expenditure for legal services. By reducing the district's approved expenditures for legal fees by $350,000, the Department has decreased the approved amount for legal services expenditures from $755, 986 ($223 per pupil) to $405,986 ($120 per pupil), an amount of which is still significantly higher than the average "benchmark" spending of $34 per pupil. Based on Department of Education budget data, a comparison of per pupil expenditures for Legal Services among Abbott districts indicates that Asbury Park is the highest spending district.

[3] Non-Certificated Staff – The Department of Education reviewed expenditures for on-certificated staff for the fiscal year 2002-2003 and found inefficient expenditures for the salaries for such staff in an amount equal to $1,591,000. The low student-teacher ratio in Asbury Park indicates that there is a sufficient number of teachers to perform the on-instructional classroom tasks, that are typically performed by non-certified staff in districts with large class sizes. In Asbury Park the class sizes are low and there is no basis for maintaining the high level of spending for non-certified staff who are not directly involved with instruction. Spending for non-certificated staff throughout the Asbury Park School District was approximately $5,000,000 in 2002-2003. A comparison of Abbott district expenditures for non-certificated staff indicates that Asbury Park is among the highest spending Abbott districts.

Based on the revenues available to your district for 2003-2004 and the reductions to the maintenance budget identified above, your district's estimated need for discretionary Additional Abbot v. Burke State Aid is determined to be $8,742,709. A revised 2003-2004 budget, consistent with this letter, must be provided to the Department no later than September 26, 2003. It should be noted that the preliminary maintenance budget and the estimated need for discretional Additional Abbott v. Burke State Aid will be subject to further adjustment after submission by your district of the 2002-2003 CAFR.

[R-1.]

As detailed below, the district has withdrawn its appeal relative to "Supervisors of Instruction." R-1.

The DOE's and the District's Spreadsheets and Calculations Compared

The DOE's initial budget spreadsheet calculations, dated August 27, 2003, are shown below on the left and the district's initial budget spreadsheet calculations are shown below on the right. See R-2; P-7. Note that Pre-School Expansion Aid is identified as "PSEA."

Budget: 2002-2003

Line #:		DOE's Calculations	District's Calculations
9470	Approved General fund budget 02-03	55,359,679.00	55,359,679.00
2511	Less: Transfers	(4,063,582.00)	(4,063,582.00)
	Add:		
13300	Early Childhood aid	7,723,902.00	7,723,902.00
13690	DEPA Aid	2,219,068.00	2,219,068.00
13900	Distance Learning network aid	171,071.00	171,071.00
	Adjusted 02-03 State program budget	61,410,138.00	61,410,138.00
	Less:		
Trenton to	Adjust for actual state program spending fund 11**	(753,677.74)	(753,677.74)
9466 & JD1	Adjust for actual state program spending fund 15	(221,644.00)	(221,644.00)
		(975,321.74)	(975,321.74)
	Base 02-03 state program budget	60,434,816.26	60,434,816.26
	(Add/(Subtract) Difference between 02-03/03-04 Plan		
	Less:		
	EC Plan 03-04	7,115,982.00	7,115,982.00
	EC Plan 02-03	(7,762,087.00)	(7,762,087.00)
		(646,105.00)	(646,105.00)
	Add or deduct: Non-discretionary Items:		
	Salaries – Contracted Rate	1,841,985.00	1,841,985.00
	FICA	105,000.00	105,000.00
	Health Benefits	1,250,000.00	1,250,000.00
	Charter School Tuition	786,224.00	786,224.00
	Other utilities	61,770.00	61,770.00
	Special Education	1,075,184.00	1,075,184.00
	Transportation	69,700.00	69,700.00
	CPI at 2.11%/3.00% non-sal net of Util.	66,972.00	827,283.00
	Subtotal	5,256,655.00	6,017,146.00

If applicable	Adjust. For non-recurring items	0.00		0.00	
	Non-cash items	0.00		0.00	
	Other	0.00		0.00	
	Decrease in Federal aids	0.00		0.00	
	Subtotal adjustments		4,610,550.00		5,371,041.00
	FY 03-04 Total State program Budget @ Maint.		**65,045,366.26**		**65,805,857.26**
	Less:				
	Supervisors of Instruction		(127,534.00)		0.00
	Legal Services		(350,000.00)		0.00
	Non-Certificated Staff		(1,591,000.00)		(1,591,000.00)
	Ineffective/Inefficiencies for items that are applicable in 02-03 (Rosenfarb Winters) or Budget Managers				
			(2,068,534.00)		(1,591,000.00)
	FY 03-04 Total State Program Budget @ Maint & Ineff.		**62,976,832.26**		**64,214,857.28**

Budget: 2003-2004

410	Total Gen'l fund reserves	63,343,572.00		63,343,572.00	
425	ECPA	3,160,320.00		3,160,320.00	
426	DEPA	1,644,068.00		1,644,068.00	
421	ECPA carryover	500,000.00		500,000.00	
	DLNA Aid carryover	41,195.00		41,195.00	
422	DEPA carryover	69,780.00		69,780.00	
	Subtotal state program aid	68,758,935.00		68,758,935.00	
00284	Less Request for AAvBA for 03-04	(15,024,160.00)		(15,024,160.00)	
	Base GF revenue 03-04		53,734,775.00		53,734,775.00
	Add/(Subtract): Revenue Adjustments:				
	Other: Ext. aid	29,686.00	29,686.00		
	PSEA Adjustment	469,662.00	0.00		
	Excess Fund Balance	0.00			
	Subtotal		$499,348.00		29,686.00
	FY 03-04 GF Total Budgeted Revenues Available		54,234,123.00		53,764,461.00
	Difference: Need for Supplemental aid		**8,742,709.26**		**10,450,396.26**
	ECPA Carryover differential		**0.00**		**0.00**
	Need with differential		**8,742,709.26**		**10,450,396.26**

****lines 7580, 8340, 9460 (in budget) less actual exp's from sch. A CPA reports**

Scott Henry

The district called Scott Henry as a witness.

Mr. Henry received a bachelor of science degree in accounting from Rider University. He is a CPA and certified as a school business administrator (BA). Until September 14, 2003, he worked as the district's BA and he prepared the district's 2002-2003 and 2003-2004 budgets. Since September 14, 2003, he has worked as the assistant director of the DOE's Office of Budget and Accounting.

As a CPA and BA, Mr. Henry has utilized the consumer price index (CPI) in preparing the district's budgets. See N.J.S.A. 18A:7F-3 "CPI." The United States Department of Labor, Bureau of Statistics' "Consumer Price Index for All Urban Consumers (CPI-U)" lists CPIs for selected areas, e.g., "U.S. city average," "Northeast urban," "Midwest urban," "South urban," and "West urban." P-1. Among "selected local areas," for "New York-Northern N.J.-Long Island, NY-NJ-CT-PA," the CPI percent change is 3.00% from July 2002 to July 2003. Ibid., emphasis added. The CPI-U shows no CPI for the central New Jersey area and, between northern and southern New Jersey, Asbury Park is closer to northern New Jersey and more influenced by New York than "Philadelphia-Wilmington-Atlantic City," which is among the "selected local areas." Ibid. Among the Bureau of Labor Statistics' definitions are two New Jersey areas: one area lists Monmouth County (in which Asbury Park is located) with New Jersey's northern counties and another area lists New Jersey's southern counties (and does not include Monmouth County). P-9.

Mr. Henry has utilized the CPI for northern New Jersey in preparing the district's budgets, and in preparation of the district's 2003-2004 budget, he utilized the 3.00% CPI. That is, he disagreed with the DOE's preliminary calculations (printed above) utilizing a CPI factor of only 2.11%. R-2.

The district's Reduction in Force (RIF) list shows the names, 2003-2004 salaries and benefits of non-certificated staff members whose positions the district has eliminated. By way of the RIF, the district has already eliminated $2,304,456 in non-certificated staff. The total for

teachers' aides is $1,260,373 and the total dollar amount is $2,304,456. P-5.

Mr. Henry testified that, consistent with the DOE budget instruction, he included the PSEA in other State aids income, and other State aids income is included in the Total General Fund. Consequently, the district's budget spreadsheet above, line 410, the Total General Fund Revenues, includes the PSEA adjustment. However, the DOE's budget spreadsheet mistakenly shows the PSEA adjustment of $469,662.00 as revenue in the district's 2003-2004 budget. See P-7; P-8A. That is, the DOE has counted the PSEA adjustment of $469,662.00 twice and the PSEA adjustment should be deleted from the DOE's budget spreadsheet under "**Budget: 2003-2004**."

John A. White

The DOE called John A. White as a witness.

Mr. White received a bachelor of arts degree in history from Rutgers College. He completed coursework to qualify for a certificate of eligibility as a school business administrator and completed doctoral examinations in educational theory, policy and administration at Rutgers University's Graduate School of Education. "New Jersey's System of Financing Elementary and Secondary Education," which he and others wrote, appears in Public School Finance Programs of the United States and Canada, published by the National Center of Educational Statistics, 4th Edition. He has taught school finance to doctoral candidates in Rutgers University's Graduate School of Education. He has served as secretary to the Joint Committee on the Public Schools, senior fiscal analyst in the Local Government Section of the Office of Legislative Services, and senior fiscal analyst for education in the Office of Legislative Services. Since the 1980s he has examined state trends in districts' spending. Since 1999 he has served as budget manager for Abbott districts in the DOE, responsible for the Asbury Park, Keansburg and Neptune school districts. R-18.

Mr. White reviews local districts' budgets and determines whether funding is sufficient to provide programs and services required by Abbott law with "program drives budget" as the rule.

Mr. White reviewed the district budget for inefficiency and ineffectiveness with reference to the above-described Benchmarks, e.g., for per-pupil expenditures. It was noted that the Rosenfarb report states:

> We defined those districts that clustered within the middle range of these charts as representative of "generally efficient spending" Abbott districts, ("Benchmark Abbotts"). We selected Benchmark Abbotts as those districts that were consistently in the middle-range of all Abbott districts – Elizabeth, Gloucester, Long Branch and Phillipsburg. We then developed an average cost per pupil for non-instructional expenses for the Benchmark Abbotts (see Exhibit 4).
>
> [R-21.]

Mr. White, a resident of Monmouth County, is familiar with the Asbury Park school district. Its number of supervisors exceeds that of similar districts. Its total spending divided by its number of pupils is very high.

(1) Relative to Supervisors of Instruction, the DOE created tables comparing the Asbury Park school district's spending with that of other Abbott districts. "Administrative Staff Costs in Abbott Districts, Table 1, '02 Audited Salary Expenditures: Supervisor of Instruction, Salary Amount Per Pupil in Abbott Districts for Funds 11, 13, 15 and 20 (Ranked Highest to Lowest)," lists twenty-six districts and their respective "Audited Salary Expenditures in '02: Supervisors of Instruction, Res Enrol Oct-01, Amt. Spent Per Pupil." R-26. The Asbury Park district's $317 spent per pupil is by far the highest. For example, the nearby Neptune Township district's amount spent per pupil is only $93, and Long Branch City's amount spent per pupil is only $24. Mr. White noted that Ernest Bio, Ed.D., a supervisor, has retired, and Mr. White stated that, based on other districts, the Asbury Park school district's other supervisors should easily manage his duties. Consequently, Mr. White reduced the district's budget by $127,534, the amount of the retired supervisor's salary and benefits. Hearing this explanation, on the hearing record the district stated that it withdrew the issue from its appeal and agreed that $127,534 was eliminated from its maintenance budget.

(2) Relative to Legal Fees, the DOE's "Table 1, Reporting of Hunt Legal Costs by

Category from Dec '02 thru April '03," lists categories of legal expenditures, hours billed by Hunt, Hamlin & Ridley, the district's law firm, and cost. R-13. "Table 2, Reporting of Hunt Legal Costs from Dec '02 thru April '03," lists dates, descriptions of services, hours, attorneys' names, costs, etc. R-14. The DOE also prepared "Legal Costs in Abbott Districts: '02, '03, and '04 (Sorted by highest to lowest per pupil cost for '04)." R-15. Mr. White testified that the DOE accepts that the Asbury Park school district has had legal costs in excess of the amount that it has approved and he had no evidence that the Hunt law firm had litigated inefficiently on behalf of the district. However, the Hunt firm's bills showed that district employees called upon the firm frequently. Also, the district's legal costs per pupil are grossly higher than those of any other district compared. In '02, the average district's legal cost per pupil was $30; the nearby Neptune Township district's legal cost per pupil was $29; and the Asbury Park district's legal cost per pupil was $205. In '03, the average district's legal cost per pupil was $29; the nearby Neptune Township district's legal cost per pupil was $37; and the Asbury Park district's legal cost per pupil was $146. In '04, the average district's cost per pupil is expected to be $29; the nearby Neptune Township district's legal cost per pupil is expected to be $33; and the Asbury Park district's legal cost per pupil is expected to be $143. R-15. Also, the Hunt firm submitted bills of $30,000 for each of four months, from December 2002 to April 2003, a total of $120,000, for which it itemized (identified) no particular services and relative to which it stated only "Board Office." R-13. On May 15, 2003, the district and the Hunt firm entered an "Agreement to Provide Legal Services," pursuant to which the district would pay $500,000 per year:

> **WHEREAS** the BOARD requires attorneys to provide general legal services, including litigation and labor services . . .
>
> . . . .
>
> **3. Compensation:** For all services rendered by the ATTORNEYS as General Counsel/Litigation Counsel/Employment Counsel/Labor Counsel, the ATTORNEYS shall be paid in an amount not to exceed Five Hundred Thousand Dollars ($500,000), payable in twelve monthly installments of $41,666.66 beginning July 1, 2003. Said payment no later than the last day of each month thereafter. It is expressly understood that counsel's monthly fee is based upon appearance in all litigation matters, appearance at committee meetings as requested, negotiations, arbitrations, unfair labor practice charges and any other matter involving the need for counsel. The firm shall provide

> summaries of matters handled, if same is requested by the board of education.
>
> [P-3.]

Ronald Hamlin, a partner in the Hunt firm, is a longtime friend of Raymond Palmer, president of the Asbury Park Board of Education, and the DOE's Office of Compliance Investigation (OCI) prepared a report, dated August 21, 2003, relative to the BOE's legal fees. The report stated that Asbury Park Board of Education members generally believed that "the current district administration has failed to adequately address matters that directly impact on the health and safety of the staff and students." P-4. The OCI also reported,

> . . . [The Agreement's above-quoted "**Compensation**" provision] is problematic because it initially suggests that the Board may pay less than but no more than $500,000.00. However, the second half of the sentence eliminates that possibility by mandating that the Board pay $500,000.00 in equal payments. Following this logic leads inexorably to the conclusion that the Board is responsible for the monthly payment of $41,666.66 regardless of whether the firm performed services commensurate with that amount.
>
> Discussions between the DOE and DAG have determined that the current legal contract is being executed properly. There is provision for the board requesting appropriate documentation of services. Services have been documented in the business office since the start date of the contract.
>
> [P-4.]

The district's legal fee cost of $120 per pupil grossly exceeds the Benchmark of $34. Mr. White believed that the Agreement did not sufficiently detail the services the law firm would provide. (Although, he is not an attorney and he did not know whether the law firm was itemizing its bills.) Given these circumstances, Mr. White reduced the district's legal fee for '02-'03 by $350,000 (to $405,986), which he noted is still substantially more than the legal costs of most of the districts.

(3) Relative to Non-Certificated Staff, Mr. White testified that the DOE hopes to increase the district's certified teachers and thereby decrease the student/teacher ratio. In 1999, when the

district went through the Abbott reforms, the DOE requested that it reduce its non-instructional aides, but it never did so. The DOE prepared "Table 8a Salaries & Benefits for Non-Certified Positions Not Approved in '04 Budget: Budget: Asbury Park," listing names, titles, and estimated '04 salaries and '04 benefits. R-25. Mr. White considered efficiencies of the non-certificated staff by category and not by individual employee's performance. Mr. White believes that the district's principals could perform "Dropout Prevention" duties, so he eliminated as inefficient costs for the district's 7 "Dropout Prevention" employees. R-25. Mr. White believes that the district is well staffed with secretaries and custodial staff who can perform parent-community coordination duties, so he also eliminated as inefficient costs for teacher aides/community associates and youth services advocate. Mr. White believes that the district has sufficient staff for custodial tasks, so he eliminated as inefficient costs for the district's twelve teacher aides. R-25. Special Education laws and individualized education programs (IEPs) determine what aides will be provided for classified students, so this Abbott budgetary process does not eliminate any aide required by an IEP. See 20 U.S.C.A. § 1400 et seq.; N.J.A.C. 6A:14-1.1 et seq. As a result, the DOE's spreadsheet and calculations (see above) relative to salaries, stipends, etc., for non-certificated staff deleted $1,591,000 from the district's 2003-2004 budget, which Mr. White testified is not over and above the RIF of the 2003 summer. R-2; P-7.

Mr. White agreed that the CPI most relevant to the district should be utilized to calculate the district's budget. He could not give a basis for the DOE's use of the 2.11% CPI. He did not contradict Mr. Henry's testimony that 3.00% was the appropriate CPI and he also did not contradict Mr. Henry's testimony that the DOE had double-counted PSEA and that, therefore, the PDEA should not be considered revenue in the district's 2003-2004 budget.

Antonio Lewis

The district called Antonio Lewis as a witness.

Dr. Lewis received a bachelor of science degree in health and physical education from East Stroudsburg University. He received a master's degree in education from Trenton State College (now The College of New Jersey). He received a doctorate from Rutgers University. He participated in a post master's program at Kean University. He is certified as a teacher,

supervisor, principal, school administrator, and superintendent. He has worked as a teacher, middle school principal, and, since the 1990s, as the district's superintendent.

Dr. Lewis testified that, although the district has had "problems," there has also been "movement . . . in many, many areas" improving the quality of life for students and their families. Dr. Lewis has implemented Abbott remedies for a number of years. This has involved his participation in planning programs, discussions and verification that programs are provided pursuant to Abbott regulations.

Dr. Lewis testified that, under the budget as calculated by the DOE, the district could not fund and continue to provide more than twenty programs, among which are the following: (1) The district could not provide its "Summer Enrichment" program, a summer program for regular students (not classified for Special Education) that provides ninety minutes of reading, integrated reading, mathematics and technology, breakfast and lunch, and recreation with field trips. (2) The district could not provide its "Extended Day" program for K to 12 students, which emphasizes the core curriculum with goals of improving academic achievement and test scores. Dr. Lewis explained that this program is especially important because the district is multi-cultural and many students' parents do not read or write English. (3) The district could not provide its "Enrichment and Advancement" program for high school students who failed and must make up academic courses. (4) The district could not provide its "Visual and Performing Arts" program for K to 12 students. (5) The district could not provide the "Professional Development" program for teachers, involving workshops and in-service.

Dr. Lewis testified that the failure to provide the above-described programs would result in a "major disaster" for the district.

Summary of Findings of Fact Relative to

(1) Supervisors of Instruction, (2) Legal Fees and (3) Non-Certificated Staff and CPI

(1) The school district withdrew from its appeal the issue related to Supervisors of Instruction and agreed that $127,534 was eliminated from its maintenance budget. R-1.

(2) Relative to Legal Expenses, the DOE has shown that the district's costs have been grossly more than those of comparable districts. For example, the Asbury Park district's legal cost is several times more than the Benchmark cost and several times more than the nearby Neptune Township district's cost. Also, as pointed out by the OCI report, the district's Agreement requires it to pay $41,666.66 monthly regardless of whether the law firm performs services commensurate with that amount. That is, the DOE established a basis for the proposed reduction of the district's maintenance budget based on the effective and efficient standard. Further, the district has not demonstrated, e.g., by way of detailed and identifiable services, cases, etc., that the budgetary reductions are not justified under that standard.

(3) Relative to Non-Certificated Staff, Mr. White is familiar with the district, he characterized it as well staffed, and he gave the opinion that its principals and other staff could perform duties previously performed by non-certificated staff. Therefore, the DOE established a basis for the proposed reduction of the district's maintenance budget based on the effective and efficient standard. However, Dr. Lewis is more familiar with the district. The public school system has always been essential to the foundation of our society. In recent decades, old urban centers, now designated as Abbott districts, have suffered from a range of social problems, including reduced opportunity for employment, alcohol and substance abuse, disintegrating families, substandard housing, and violence. In response, the Supreme Court has written that the law requires schools to provide social services as essential to their mission of providing a thorough and efficient education. See, e.g., Abbott v. Burke, 153 N.J. 480, 510 (1998) (Abbott V). Dr. Lewis described programs that hang in the balance here and they provide the services prescribed by the Supreme Court for districts such as Asbury Park's. Further, he testified that the reduction of funding would result in an inability to provide such programs and a "major disaster" for the district. I find Dr. Lewis more credible than Mr. White on this issue and I find that he demonstrated that the budgetary reductions are not justified.

Relative to the Bureau of Labor Statistics' CPI, between the northern New Jersey and the southern New Jersey areas, Asbury Park is closer to New York and northern New Jersey than to Philadelphia and southern New Jersey and, consistent with the testimony of Mr. Henry, who was credible, the 3.00% CPI is applicable in calculating the district's 2003-2004 budget.

Relative to the PSEA, consistent with the testimony of Mr. Henry, the district included that money in the Total General Fund. Consequently, the district's budget spreadsheet, line 410, the Total General Fund Revenues, includes the PSEA adjustment and the DOE's budget spreadsheet mistakenly shows the PSEA adjustment of $469,662.00 as revenue in the district's "**Budget: 2003-2004**." See P-7; P-8A. That is, the DOE counted the PSEA adjustment of $469,662.00 twice and the PSEA adjustment should be deleted from the DOE's budget spreadsheet.

CONCLUSIONS OF LAW

New Jersey's Constitution requires the Legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the state between the ages of five and eighteen years." N.J. Const. art. VIII, § 4, ¶ 1.

The Legislature provided for school districts, operated by boards of education, and provided statutory systems of financing districts. See, e.g., N.J.S.A. 18A:10-1. In the Abbott cases, students from poor urban districts challenged the system of school financing and New Jersey's Supreme Court concluded that the quality of education in the poor urban districts was significantly inferior to the quality of education in other school districts and ordered the Legislature to assure that poorer districts' funding would be substantially equal to that of property-rich districts in a way that the funding would not depend on the budgeting and taxing decisions of local school boards. See, e.g., Abbott v. Burke, 100 N.J. 269 (1985) (Abbott I); Abbott v. Burke, 119 N.J. 287 (1990) (Abbott II), relating to the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 to -52. The Legislature responded with further legislation, but the Abbott plaintiffs contended that disparities in financial resources continued to cause constitutional disparities. See, e.g., Abbott v. Burke, 149 N.J. 145 (1997) (Abbott IV), relating to the Comprehensive Educational Improvement and Financing Act (CEIFA), N.J.S.A. 18A:7F-1 to -36.

In Abbott V, the Supreme Court found the State's plan for funding districts facially constitutional, but unconstitutional as applied to special needs districts. The Court ordered the DOE to assure funding for and implementation of programs including those related to school

reform; preschool; full-day kindergarten; health and social services; dropout reduction; summer school, after school, and school nutrition; art, music and special education; and facilities standards and management.

As written above, the Supreme Court's July 23, 2003, Order granted the DOE's motion and relaxed Abbott V remedies as applied to the 2003-2004 budget process. The Order states:

> 1. The DOE's application to extend the relaxation of remedies granted in Abbott V is granted as follows: The DOE shall have the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional Abbott v. Burke State Aid for the Abbott districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order.
>
> 2. The Statewide aggregate amount of Additional Abbott v. Burke State Aid shall be presumptively calculated as the total amount of Additional Abbott v. Burke State Aid approved for the Abbott districts for Fiscal Year 2002-2003, subject to adjustment as required for a maintenance budget. A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.
>
> 3. For purposes of calculating Additional Abbott v. Burke State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students.) Insofar as any Abbott district has not been informed of its total amount of last year's approved Additional Abbott v. Burke State Aid, the DOE

shall provide written notice of that amount within two weeks of the date of this Order. The DOE's application of the effective and efficient standard in its review of a district's maintenance school budget may result in a reduction to a district's presumptive amount of Additional Abbott v. Burke State Aid.

4. Within 30 days of the issuance of this Order, the DOE shall provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget. If the DOE deletes an expenditure from a district's 2002-2003 budget related to the district's non-instructional programs and based on the effective and efficient standard, the DOE must include in the written notice to the district the expenditure deleted along with a specific statement explaining why the program or part thereof is no longer effective and efficient.

5. Abbott districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.

6. The Order of the Court dated July 7, 2003, modifying the Court's scheduling Order of May 20, 2003 in order to provide the [OAL] thirty days within which to determine and issue initial decisions in the twenty-three pending budget appeals, is hereby superseded by this Order. The [OAL] shall issue initial decisions on district appeals from the DOE's preliminary maintenance budget figures for the 2003-2004 school year within 30 days of the dates of those decisions as set forth in Paragraph 4 of this Order.

7. To the extent that monies are deleted by the DOE in the districts' non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an Abbott district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

> [Abbott v. Burke, __ N.J. __, 2003 WL 21700375, at *1-3 (July 23, 2003) (emphasis added).]

The DOE, citing the Fiscal Year 2004 Appropriations Act and the Supreme Court's July 23, 2003, Order, promulgated emergency regulations amending N.J.A.C. 6A:10, including N.J.A.C. 6A:10-1.2, 3.1, -4.2, and -4.7. The regulations are effective August 22, 2003, and expire June 30, 2004.

N.J.A.C. 6A:10-1.2 states:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in Abbott v. Burke. Maintenance also does not include non-recurring 2002-2003 expenditures.
>
> [Emphasis added.]

(1) Consistent with the findings of fact and the school district's withdrawal of the appeal relative to Supervisors of Instruction, no conclusion of law is required.

(2) Consistent with the findings of fact, costs relative to Legal Expenses should be deleted from the district's budget as proposed by the DOE.

(3) Consistent with the findings of fact, the costs relative to Non-Certificated Staff should not be deleted from the district's budget.

The Comprehensive Educational Improvement and Financing Act of 1996 includes among its definitions:

> "CPI" means the average annual increase, expressed as a decimal, in the consumer price index for the New York City and Philadelphia areas during the fiscal year preceding the prebudget year as reported by the United States Department of Labor.
>
> [N.J.S.A. 18A:7F-3.]

Consistent with the findings of fact, a 3.00% CPI is applicable in the district's budget.

Consistent with the findings of fact, the district included the PSEA of $469,662.00 in the Total General Fund. Consequently, the district's budget spreadsheet, line 410, the Total General Fund Revenues, includes the PSEA adjustment and the DOE's budget spreadsheet mistakenly shows the PSEA adjustment as revenue in the district's "**Budget: 2003-2004**." See P-7; P-8A. That is, the DOE has counted the PSEA adjustment of $469,662.00 twice and the PSEA adjustment should be deleted from the DOE's budget spreadsheet.

Consistent with the above findings of fact and conclusions of law, the district's 2003-2004 budget is amended as set forth below (according to the DOE's calculations submitted at ALJ's request.)

CPI at 3.00% non-sal net of Util.	$424,017.00
Subtotal	$5,613,880.00
Subtotal Adjustments	$4,967,775.00
FY-03-04 Total State Budget at Maintenance	$65,402,591.26

Less:

Supervisors of Instruction	($127,534.00)
Legal Services	($350,000.00)

Non-Certificated Staff	$0.00
Subtotal for Ineffective/Inefficiencies	($477,534.00)
FY2003-04 Total State Program Budget at Maintenance and Inefficiencies	$64,925,057.26

Revenue Adjustments:

PSEA Adjustment	$0.00
Subtotal Adjustments	$29,686.00
FY 03-04 GF Total Budget Revenues Available	$53,764,461.00
Difference: Need for Supplemental Aid	$11,160,596.26

ORDER

I **ORDER** the DOE to assure funding and provide supplemental aid for the district's budget for 2003-2004 as described above.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this 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, 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.

Sept. 26, 2003
DATE

JOHN R. TASSINI, ALJ

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

9-26-03
DATE

E-mailed Initial Decision to the parties on:

9-26-03
DATE

EXHIBITS

For petitioner:

P-1 United States Department of Labor, Bureau of Labor Statistics, Table 3, Consumer Price Index for All Urban Consumers (CPI-U): Selected Areas, all items index, September 13, 2003 EV

P-2 Asbury Park Board of Education CPI Calculations

P-3 Agreement to Provide Legal Services between Asbury Park Board of Education and Hunt, Hamlin & Ridley, May 15, 2003 EV

P-4 DOE's Office of Compliance Investigation (OCI) portion of report (review of actions of the members of the Asbury Park Board of Education fulfilling assigned governance tasks in 2002-03 school year), August 21, 2003

P-5 RIF List, Asbury Park Board of Education RIF of Non-certificated Staff, September 13, 2003

P-6 Asbury Park Board of Education, Board Secretary Report, General Fund – Fund 10, Schedule of Revenues, June 2003 EV

P-7 Spreadsheet: Comparison of DOE Budget to Asbury Park Board of Education Budget calculations

P-8 School District Budget Statement for the School Year 2003-2004, Monmouth – Asbury Park City, September 4, 2003

P-8A Revenue Section of Asbury Park Board of Education's 2003-2004 Budget

P-9 U.S. Department of Labor, Bureau of Labor Statistics, Changes in Area Definitions for Published Metropolitan Areas in the 1998 CPI Revision, November 1997 EV

For respondent:

R-1 Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid Award to Asbury Park School District, August 27, 2003 EV

R-2 DOE's Budget Worksheet, Asbury Park School District, August 27, 2003 EV

R-3 DOE's General Fund Comparative Balance Sheet, Asbury Park School District, as of June 30, 2003 and 2002

R-4 Analysis of Abbott School Districts – 2004, Asbury Park School District, Schedule A – 2003 Total Projected Spending with 2004 Budget

R-5 Analysis of Abbott School Districts –2004, Asbury Park School District, Schedule B – Audited Spending 2000-2002

R-6 Analysis of Abbott School Districts – 2004, Asbury Park School District, Schedule C – Four Year Summary of Budget Appropriations Compared to 2004 Budget

R-7 Analysis of Abbott School Districts – 2004 – Asbury Park School District, Schedule D – 2003 Total Projected Revenue Compared to 2004 Budget

R-8 Analysis of Abbott School Districts – 2004 – Asbury Park School District, Schedule E-2000/02 Revenues Budgeted with Audited Balances

R-9 Analysis of Abbott School Districts – 2004, Asbury Park School District, Schedule F – Four Year Summary of Revenues Compared to 2004 Budget

R-10 Analysis of Abbott School Districts – 2004, Asbury Park School District, Schedule I – Enrollments

R-11 Analysis of Abbott School Districts – 2004, Asbury Park School District, Schedule J

R-12 Analysis of Abbott School Districts – 2004, Asbury Park School District, Schedule G & H – Four Year Summary of Surplus – General Fund with 2004 Projection

R-13 Table 1 – Reporting of Hunt Legal Costs by Category from December 2002 through April 2003 EV

R-14 Table 2 – Reporting of Hunt Legal Costs by Category from December 2002 through April 2003 EV

R-15 Legal Costs in Abbott Districts: '02, '03, and '04 (Sorted by highest to lowest per pupil cost for '04) EV

R-16 Legal Costs Per Pupil in Abbott Districts: 2001-02 (Sorted highest to lowest cost per pupil cost for '02) EV

R-17 School District Budget Statement for the School Year 2003-2004, Monmouth - Asbury Park (detailed appropriations)

R-18 Résumé of John Anderson White, DOE Budget Manager for Abbott Districts

R-19 Non-Certificated Staff Costs in Abbott Districts, Table 7, Asbury Park Student to Staff Ratios

R-20 Asbury Park Board of Education, Board Secretary Report, General Fund – Fund 10, Interim Balance Sheet, June 2003 (upon which the DOE's August 27, 2003, notice was based

R-21 State of New Jersey, DOE, Appealing Abbott School Districts, Non-instructional Spending Inefficiencies, Rosenfarb Winters, LLC, (forensic accounting firm report), August 19, 2003 EV

R-22 Non-Certificated Staff Costs in Abbott Districts, Table 1, Audited Salary Expenditures for Aides: '02, etc., June 29, 2003

R-23 Non-Certificated Staff Costs in Abbott Districts, Table 3, '02 Audited Salary Expenditures: Secretaries, etc., June 29, 2003

R-24 Non-Certificated Staff Costs in Abbott Districts, Table 5, '02 Audited Salary Costs: All Non-Certificated Staff, etc., June 29, 2003

R-25 Table 8a, Salaries & Benefits for Non-Certificated Positions Not Approved in '04 Budget: Asbury Park, September 11, 2003 EV

R-26 Administrative Staff Costs in Abbott Districts, Table 1, '02 Audited Salary Expenditures: Supervisor of Instruction, etc., June 30, 2003

WITNESSES

For petitioner:

Scott Henry
Antonia Lewis

For respondent:

John A. White

OAL DKT. NO. EDU 4095-03
AGENCY DKT. NO. 199-6/03

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties' exceptions and replies were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner initially concurs with the Administrative Law Judge (ALJ) that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *See also*, *Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n.*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to determine the validity and applicability of the regulation at issue, the Commissioner agrees with the ALJ that the Department's definition of "maintenance budget," as

detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003.[1]

With respect to the identified inefficiencies in petitioner's noninstructional expenditures, including the supervisors of instruction,[2] legal fees and the employment of non-certificated staff, based upon the credibility assessments of the ALJ, *N.J.S.A.* 52:14B-10(c), the Commissioner accepts the ALJ's factual findings and determines that his analysis and legal conclusions are consistent with the Supreme Court's Order of July 23, 2003, as well as the Department's regulatory amendments adopted on August 22, 2003.

However, the Commissioner does not concur with the ALJ that a Consumer Price Index (CPI) adjustment of 3 percent, rather than 2.11 percent, should be applied to petitioner's 2003-04 budget because "Asbury Park is closer to New York and northern New Jersey than to Philadelphia and southern New Jersey ***" (Initial Decision at 19), where *N.J.S.A.* 18A:7F-3 specifically defines CPI as:

> the average annual increase, expressed as a decimal, in the consumer price index for the New York City and Philadelphia areas during the fiscal year preceding the prebudget year as reported by the United States Department of Labor.

Thus, in accordance with statute, the CPI calculation in the maintenance budget is an average of the CPI rate for the New York/Northern New Jersey area *and* the Philadelphia/Southern New Jersey area. Therefore, notwithstanding any testimony to the contrary, the Commissioner finds that the Department properly relied upon the 2.11 percent CPI rate calculated pursuant to statute.

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[1] Consequently, pursuant to *N.J.A.C.* 1:1-14.10(j), the Commissioner adopts the ALJ's Interim Order of September 4, 2003.

[2] It is noted that petitioner has withdrawn its appeal relative to this inefficiency.

Finally, it is not clear on this record that the Department, in fact, "double counted" the District's preschool expansion aid adjustment of $469,662, as found by the ALJ at page 17 of the Initial Decision. In this connection, the Department argues that:

> [N]o documentation was provided to show that this amount was included in any other portion of the revenue section of Asbury Park's budget nor was any calculation performed on the record to demonstrate that this was the case. There simply is no basis for this proposition on the record beyond Mr. Henry's belief that the adjustment had been duplicated, thus, overstating the district's revenue and lowering its overall "Need for Supplemental Aid." (Department's Exceptions at 6-7)

Therefore, mindful of the District's burden on this issue, and without any evidence to the contrary, the ALJ's finding in this regard is rejected.[3]

Accordingly, the Initial Decision is adopted with modification, as set forth herein.[4]

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[3] The Department also notes, by way of correction to the Initial Decision's Exhibit List that it did not enter into evidence Exhibits R-3 through and including R-12, or R-26. The decision is so modified.

[4] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the Comprehensive Annual Financial Report until November 2003, which will reveal the District's true audited fund balance and available revenue, if any, as of June 30, 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[5] Pursuant to *P.L.* 2003, *c.* 22, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

588-03

BOARD OF EDUCATION OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget" and supplemental aid, alleging that the Department's review was not in accordance with the July 23, 2003 Order of the Supreme Court.

The ALJ found that the rule duly promulgated to implement the Court's order for "maintenance" controlled in this proceeding, and that the Office of Administrative Law (OAL) lacked jurisdiction to determine its validity. However, the ALJ further found that, within the framework of that rule, the Department did not offer any factual basis for its calculations and did not dispute the documentation and testimony advanced in support of the Board's claim. The ALJ directed adjustment of supplemental aid.

The Commissioner adopted the ALJ's decision with respect to OAL jurisdiction and application of the "maintenance" rule, as well as certain adjustments in nondiscretionary costs and IDEA revenues. However, the Commissioner rejected the decision in all other respects, dismissing the Petition of Appeal except to direct modification of the Board's preliminary maintenance budget and estimated aid calculation to reflect the specified adjustments.

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.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4159-03

AGENCY DKT. NO. 200-6/03

BOARD OF EDUCATION OF
THE BOROUGH OF KEANSBURG,

Petitioner,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Deborah L. Gnatt, Deputy Attorney General, for respondent (Peter Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 22, 2003 Decided: September 26, 2003

BEFORE **ANTHONY T. BRUNO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner ("BOE") appeals the determination by respondent ("DOE") of the BOE's maintenance budget for the 2003-2004 school year, including the BOE's estimated need for discretionary additional *Abbott v. Burke State Aid* (Exhibit P-10)

On March 24, 2003, the DOE moved before the Supreme Court for an order modifying the decision in *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V). See also Abbott v. Burke,* 172 *N.J.* 294 (2002) (*Abbott IX*). The DOE requested that the discretionary Additional *Abbott v. Burke* State Aid (supplemental aid) that it would be required to provide to *Abbott* districts in 2003-2004 be limited to an amount sufficient to support those programs, positions and services in the districts' approved budgets for 2002-2003. On April 8, 2003, the Education Law Center (ELC) cross-moved for an order setting an expedited schedule for the DOE's decisions on districts' budgets and requiring the DOE to conduct a formal evaluation of the implementation of Whole School Reform (WSR), and other relief. On April 29, 2003, the Supreme Court ordered the DOE and the ELC to participate in mediation before the Hon. Philip S. Carchman, J.A.D., to attempt to resolve issues raised by their motions. Mediation resolved all issues except the 2003-2004 budget process, and the DOE's motion for an order extending by an additional year the one-year relaxation of remedies granted in *Abbott IX* which remained outstanding. However, the parties agreed to an expedited schedule for budget approvals and appeals beginning with the DOE's reviews and approvals of districts' budgets by May 30, 2003. Districts' appeals from the DOE's reviews were to be transmitted to the Office of Administrative Law (OAL), where administrative law judges (ALJs) were to issue initial decisions (IDs) within 50 days of the appeal. The Commissioner was to issue final decisions within 25 days of the IDs. On May 20, 2003, the Supreme Court issued an order incorporating the parties' mediation agreement and providing that the schedule would remain in effect until further order of the Court.

On May 30, 2003, the DOE issued decisions on the *Abbott* districts' budgets. In this case, by letter of that date, the DOE's Assistant Commissioner, Division of Abbott Implementation notified the district that the DOE had completed its initial review of the district's 2003-2004 expenditure budget dated May 5, 2003, that the expenditure budget was approved except as noted in the letter. On June 5, 2003, the district's verified petition of appeal was filed with the Department. *N.J.S.A.* 18A:6-9. The DOE transmitted the contested case to the OAL, where it was filed on June 9, 2003. *N.J.S.A.* 52:14B-2(b). On June 12, 2003, the Department's answer was filed in the OAL.

On June 24, 2003, the Supreme Court issued an order approving the mediated agreement and scheduling argument on the DOE's motion for an order extending the relaxation of remedies

granted in *Abbott IX.* On July 23, 2003, the Supreme Court granted the DOE's motion and relaxed *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V)* remedies as applied to the 2003-2004 budget process. In its Order, the Court gave the DOE the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke State* Aid for the *Abbott* districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year were to be continued, subject to conditions set forth in the Order. The Court's July 23, 2003 Order also defined the term "maintenance budget" as follows:

> A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.

With respect to appeals of the DOE's determinations, the Court's Order provided:

> *Abbott* districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.

Finally, by its Order, the Supreme Court also set a schedule for new DOE decisions on supplemental funding and the administrative appeal and hearing process. The Court fixed a schedule requiring the OAL to issue initial decisions on district appeals from the DOE's preliminary maintenance budget figures for the 2003-2004 school year within 30 days of the

dates of those decisions as set forth in Paragraph 4 of the Order. It ordered the DOE to promulgate emergency regulations governing the process.

The DOE, relying on the Fiscal Year 2004 Appropriations Act and the Supreme Court's July 23, 2003 Order, promulgated emergency regulations amending *N.J.A.C.* 6A:10, including *N.J.A.C.* 6A:10-1.2, -3.1, -4.2, and -4.7. The regulations are effective August 22, 2003, and expire June 30, 2004. Among these emergency regulations, *N.J.A.C.* 6A:10-1.2 states:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke.* Maintenance also does not include non-recurring 2002-2003 expenditures.

Prior to the hearing of this matter, ALJ Tassini entered an Order Relative to Maintenance Budget in *Board of Education of the City of Asbury Park v. New Jersey Department of Education,* OAL Dkt. No. EDU 4095-03, concluding that the school district's challenge to the validity and applicability of *N.J.A.C.* 6A:10-1.2's "maintenance budget" may not be heard by the OAL, but must be applied by the OAL in the pending matters. The parties were advised during the prehearing conference that my ruling on the validity and applicability of the DOE regulation would be the same as Judge Tassini's. Counsel for the BOE reserved the right to challenge the ruling in further proceedings in this matter.

The hearing in this matter was held on September 5, 2003 at Mercerville, New Jersey. Witnesses who testified and exhibits admitted into evidence are listed in the Appendix. Leave was granted to the parties to submit post hearing memorandum by September 22, 2003. Memorandum was received and the hearing record closed September 22, 2003.

ISSUES

Counsel for the BOE submitted the following as the issues on appeal:

1. Whether the Department properly determined the District's maintenance budget for the 2003-04 school year on the basis of programs, services and positions approved and provided.

2. Whether the Department properly calculated the maintenance budget for Keansburg.

3. Whether the Department properly calculated the non-discretionary cost adjustments for the 2003-04 school year. (Petitioner will focus on the special education and the CPI cost adjustments).

4. Whether the Department properly determined the increase in IDEA revenues for 2003-04.

5. Whether the Department properly determined the District's estimated need for discretionary Additional Abbott v. Burke State Aid.

For the reasons enunciated in Judge Tassini's Order entered in *board of Education of the City of Asbury Park v. New Jersey Department of Education,* OAL Dkt. No. EDU 4095-03, and subsequented followed by ALJ Martone in *Board of Education of the Township of Neptune v. State of New Jersey, Department of Education,* OAL Dkt. No. EDU 4096-03, I **CONCLUDE** that the Office of Administrative Law does not have the authority to review the DOE's emergency regulation set forth at *N.J.A.C.* 6A:10-1.2.

Consideration of BOE's Estimated Need For Discretionary Additional Abbott v. Burke State Aid

The testimony received into the record during the course of the hearing was directed to the 8 highlighted items of dispute between the calculations of the BOE and the DOE. (Exhibit P-1). The line items in controversy and the contending amounts are:

	BOE Calculation	DOE Calculation
Local Contribution to Special Revenue	$(1,217,210)	$(1,684,267)
Early Childhood aid [ECA]	$ 2,990,025	$ 3,582,082
DEPA Aid [Demonstrably Effected Program Aid]	$ 999,106	$ 1,009,452
EC [Early Childhood] Plan 03-04	$ 3,083,839	$ 2,723,762
EC Plan 02-03	$(2,990,025)	$(3,565,190)
Special Education	$ 426,013	$ 388,375
CPI at 2.11% non-salary other items	$ 132,612	$ 80,298
Increase in IDEA	$ 75,171	$ 89,229

The ultimate difference is the calculated need for Supplemental Aid. The BOE contends that its need is $5,798,227 and the DOE fixed the need at $4,894,321. The difference is $903,906. The BOE, in its post hearing memorandum, submits that the supplemental funding awards should be increased to $8,463,033 in accordance with the maintenance budget definition issued by the Supreme Court.

This Initial Decision is limited to the $903,906 difference.

Robert Finger, Business Administrator/Board Secretary of the Keansburg Public Schools, testified about each of the aforesaid 8 items. He prepared Exhibit P-1, using the number provided by the DOE for the "DOE Calculations" and BOE records, "approved and provided" in the BOE's Budget, for the "District Calculation." Finger corroborated the disputed items with documentation admitted into evidence.

Finger testified that the Local Contribution to Special Revenue was reduced when the BOE did not receive the promised pre-school expansion aid from the DOE. The failure of the DOE to consider the elimination of $467,057 for pre-school expansion aid, together with the reduction of $125,000 carryover accounts for the $592,057 difference at the Early Childhood Aid line item.

The $10,346 difference at the DEPA Aid line item occurred because the DOE did not correctly consider 2002-2003 school year funding of $817,736 and a DEPA carryover of $181,370.

The largest disparity in the comparable calculations occurred at the Early Childhood "EC" Plan adjustments for school years 2003-2004 and 2002-2003. The total variation is $935,242; $31,336 more than the "Difference" in the respective calculations. Finger testified that the BOE's budget for early childhood program aid for school year 2003-2004 was $3,083,839, and the correct revised amount of approved early childhood plan for school years 2002-2003 was $2,990,025. Both of the BOE's calculations include early childhood program carryover funds; the DOE's calculations do not.

The BOE referred to its Budget for school year 2003-2004 to demonstrate that the Special Education line item should be $426,013. At line 06360 of the Budget (Exhibit P-7) the difference between the 2003-2004 Appropriations ($5,042,641) and the 2002-2003 Revised Appropriations ($4,616,628) is $426,013.

The final 2 items, Special Education and Increase in IDEA, are tabulated on page 2 of Exhibit P-1. Finger deducted salaries, health benefits, special education tuition, transportation and utilities from the approved general fund budget of $31,648,524 to reach a net discretionary cost total of $6,284,943. Multiplying $6,284,943 by a 2.11% CPI, Finger arrived at a product of $132,612. The $75,171 IDEA Revenue increase was the difference between the 2003-2004 IDEA flow through and preschool and the 2002-2003 IDEA flow through and preschool amounts.

Finger also testified that the BOE's 2003-2004 salary rolls show a net loss of 9 teaching positions from 2002-2003. The DOE should provide additional money to maintain the faculty at 405. Finger also presented the results he received on August 15, 2003, of the exit conference with State retained auditors. Finger understood from the auditors that Keansburg should receive $6,436,753 in supplemental funding.

John White has been a DOE Budget Manager since 1999. Before entering this position,

White spent 27 years in private business. His present assignment is to ensure that the "Abbott" program is properly funded and properly used. White testified that the DOE used several sources to arrive at its estimated need for supplemental aid for the BOE. Among those sources were the BOE's approved general budget as of May 30, 2003, EC numbers from the Office of Early Childhood, reported revenue figures from the pre-May 30 budget, increases in Extraordinary Aid, the IDEA formula, EC expenditures as approved only, and his estimates of non-discretionary items. White presented a "spread sheet" (Exhibit R-2) which included the same numbers used by Finger in Exhibit P-1.

White testified that the BOE's approved Early Childhood Plan for 2003-2004 totaled $2,700,000. The BOE cannot spend any more than that amount without further approval. May 30, 2003 was the cut off date for reporting all numbers to DOE, and the Early Childhood Program expenditures as of May 30 were reported at $2.7 million.

ANALYSIS AND CONCLUSION

During the consideration of this matter, I am most disturbed by the attitude conveyed by the DOE. Missing completely from the DOE's position is the underlying constitutional mandate that the school children of New Jersey are entitled to a thorough and efficient education The jurisprudential foundation Abbott is that too many communities cannot afford to provide the required level of education and therefore everyone must contribute in order for the goal to be attained. The DOE purports to speak to that end through its promise that upon the statutory audit the DOE will eventually satisfy its financial obligations. What is ignored in this lip-service is the question of how the Abbott districts can fulfill their duties without the money they are entitled – or may eventually be entitled to receive. Do Abbott district students go without a thorough and efficient education until the DOE releases the money owed to those districts? Or do the districts postpone the continuation of programs until the funds are forthcoming?

I **CONCLUDE** that the Supreme Court, recognizing every student's right to a continuing thorough and efficient education, ordered the Abbott cases proceed expeditiously with final decisions issued in advance of eventual audits.

The presentation of the DOE leaves me with an emotion similar to that of the lady in the television commercial of several years ago – "Where's the beef?" In order for a trier of fact to make findings of fact, the hearing record must contain legally competent evidence of the material facts in dispute. I **FIND** that not only has the DOE not disputed the documentation and testimony entered into the hearing record on behalf of the BOE, the DOE also did not offer any factual basis for its calculation of the BOE's need for supplemental aid. The hearing record established by the DOE to this point consists of White's testimony that he, or someone at DOE, used numbers supplied by others, estimates, and preliminary budgets to devine the $4,894,321 need for supplemental aid. None of the corroborating documentation is furnished. Even if White's opinion were entitled to some elite status (and I do not accept his opinion as that of an expert), no foundation exists in the hearing record for his opinion.

I therefore give no weight to White's testimony nor to the DOE's calculation of the BOE's need for supplementary aid. I Find as a Fact that calculations prepared by Finger as contained in Exhibit P-1 to be accurate and applicable in this matter. This finding of fact is not made because the DOE did not refute the numbers, but because the corroborating documentation established the figures which Finger ably explained.

For the foregoing reasons, I **CONCLUDE** that the preliminary maintenance budget prepared by respondent for petitioner is not accurate, and that the Need for Supplemental Aid for petitioner is $5,798,227.

As stated above, because no action can be taken on issues controlled by the definition of "maintenance budget," no findings are made on petitioner's claims for additional funding for teaching positions.

ORDER

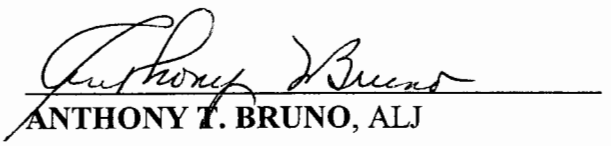
Accordingly it is **ORDERED** that petitioner's estimated need for discretionary additional *Abbott v. Burke State Aid* is determined to be $5,798,227.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to 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.

September 26, 2003
DATE



ANTHONY T. BRUNO, ALJ

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

September 26, 2003
DATE

E-mailed Initial Decision to the parties on:

September 26, 2003
DATE

/tmp

APPENDIX

WITNESSES

For petitioner:

Robert Finger, Board Secretary/Business Administrator

For respondent:

John White, DOE Budget Examiner

EXHIBITS

For petitioner:

P-1 Calculations of Budgets – SY 2002-03 and SY 2003-04

P-2 Memorandum and attachments from Richard Rosenberg (2/25/03)

P-3 Keansburg BOE Revenue Report

P-4 Correspondence from Assistant to Commissioner (2/19/03)

P-5 Correspondence and attachments from BOE Business Administrator/Board Secretary

P-6 Keansburg BOE Budget Report for Early Childhood Program

P-7 Keansburg BOE Budget Year Statement

P-8 Allocation Notices (2) (4/17/03 and 4/5/03)

P-9 Notice of Final FY 2002-2003 Additional Abbott v. Burke State Aid Award

P-10 Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid Award

P-11 Documents provided BOE upon exit conference with independent auditors (8/15/03

For respondent:

R-1 Chart of Abbott comparisons

R-2 Spread sheet to input need for supplemental aid

OAL DKT. NO. EDU. 4159-03
AGENCY DKT. NO. 200-6/03

BOARD OF EDUCATION OF THE BOROUGH OF KEANSBURG, MONMOUTH 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. Exceptions by the Department of Education (Department) and a reply by the Board of Education (Board) were duly submitted in accordance with the schedule established in response to the Court's order for expedition, and both were considered by the Commissioner in reaching his determination herein.

As a preliminary matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that hearing of this matter need not have awaited completion of the District's Comprehensive Annual Financial Report (CAFR), as argued by the Department. Within the appeal framework established by the Court, the Board was clearly entitled to make, prior to the school year in question, the factual and legal record necessary to resolve the substance of its claims, subject to final adjustment of calculations following audit.

The Commissioner also concurs with the ALJ that *N.J.A.C.* 6A:10-1.2, the regulation duly promulgated to implement the Court's July 23, 2003 order, must control in the instant proceeding, and that the OAL does not have jurisdiction to determine its validity, such determination being solely within the purview of the Appellate Division of the Supreme Court. R. 2:2-3(a); s*ee, also, Pascucci v. Vagott,* 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). However, even if the Commissioner were to accept, *arguendo*, the Board's contention that a "choice of law" may be made without passing on the validity of the rule itself, the Commissioner here opines, to the extent that he may do so in an administrative proceeding, that the Department's definition of "maintenance budget," as set forth in *N.J.A.C.* 6A:10-1.2, is entirely consistent with the language and intent of the Court, with no conflict between it and the underlying order.

The Commissioner rejects, however, the ALJ's stance that, within the framework established by *N.J.A.C.* 6A:10-1.2, this matter is appropriately resolved by wholesale acceptance of the Board's claims because the calculations underlying them were explained on record, whereas the Department's purportedly were not. To the contrary, the Commissioner finds that the record does, in fact, reveal the basis for the Department's calculations and, thus, permits more specific determinations as set forth below.

With respect to the Board's claims regarding IDEA revenues and non-discretionary cost adjustments for special education and CPI, the Commissioner finds that the Board's exhibits (P-1, page 2; P-7; and P-8) fully support its proposed revisions to the

Department's calculations, so that the ALJ's recommended adjustments in these areas are adopted as set forth at page 6 of the Initial Decision.[1]

However, with respect to the Board's claims regarding its Local Contribution to Special Revenue, Early Childhood Program Aid (ECPA), Demonstrably Effective Program Aid (DEPA) and Early Childhood Plan budgets, the Commissioner cannot agree with the ALJ's adoption of the Board's position. The ALJ finds the Board's "bottom-line" calculations to be fully supported, and, indeed, they are, in the sense that the underlying numbers on which they are based are plainly set forth in testimony and documentation on record. The parties' arguments and exhibits, however, are equally revelatory with regard to the bases for the Department's calculations, showing the disparity between the Department's figures and the Board's, for the areas in dispute, to be attributable to the use of numbers from the approved 2002-03 General Fund Budget and approved Early Childhood Plan in the Department's case, and later numbers, reflecting transfers, alterations and mid-year adjustments, in the Board's. (See Exhibit P-1, page 1; Exhibit P-2, page 3; and Exhibit R-2.) This points not, as found by the ALJ, to unsubstantiated conclusions on the part of the Department, but rather to a fundamental difference in methodology and approach between the Department and the Board.

In the matter on appeal, the Department's underlying task was to determine for preliminary purposes the 2003-04 budget that would enable the District to continue in a "maintenance" mode, that is, to implement in 2003-04 the programs, services and positions provided in 2002-03, and concomitantly to determine the estimated amount of supplemental aid necessary for it to do so. To accomplish its first goal of identifying and determining the cost of providing 2002-03 programs and services so as to

[1] It is noted that the Department does not take exception to these recommendations.

continue them in 2003-04, the Department began with the approved General Fund Budget for 2002-03, deducting the amount provided by local taxation (Contribution to Special Revenue) and adding dedicated State-aided program amounts (ECPA,[2] DEPA and Distance Learning Network), all as indicated in that budget, to create the total adjusted 2002-03 State program budget; it then made finer adjustments to reflect true spending in key accounts, looking to actual expenditures using the best documentation available in the absence of the CAFR in order to estimate the cost of maintaining programs, services and positions, with reasonable allowance for nondiscretionary cost increases. Had it been necessary to do so, additional adjustments would have been made for items such as nonrecurring expenditures and areas found ineffective or inefficient on review. To project the increase or decrease in costs for Early Childhood Education, the Department compared the 2002-03 approved plan to the 2003-04, then adjusted the base budget for the difference. The end result of this process, fully reflected in the above-noted exhibits, is the Total State Program Maintenance Budget, or the budget preliminarily deemed necessary and sufficient to support programs, services and positions at 2002-03 levels, with the difference between it and 2003-04 budgeted revenues equaling the District's estimated supplemental aid calculation.

In the Commissioner's view, the process used by the Department fully allows for reasonable, fair and consistent preliminary determinations under circumstances where precise calculations must necessarily await the results of the CAFR.[3] That

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[2] It is noted that the District's 2002-03 Early Childhood Aid (Line 13300), stated as $3,582,082, should actually be the same amount as later stated for the approved plan budget ($3,565,190). (See Exhibits P-1, R-2; Department's Exceptions at 6.)

[3] There is absolutely no evidence to support the Board's contention, and the ALJ's speculation, that if the District does not immediately receive the approximately $800,000 still in dispute, the District's children will be deprived of a thorough and efficient education while CAFR adjustment is pending.

original 2002-03 local revenue amounts and amounts supporting restricted programs, such as the ECPA and DEPA disputed herein, may prove different by the year's end does not, in itself, invalidate the Department's method, which is by its very nature based on reasonable assumptions subject to final adjustment by audit. Similarly appropriate, and reasonably based on the only available "like" components for comparison, is the Department's use of approved 2002-03 and 2003-04 Early Childhood Plans in order to determine the change in district need from one year to the next. As well stated by the Administrative Law Judge in the September 26, 2003 Initial Decision in *Board of Education of the City of Plainfield, Union County, v. New Jersey State Department of Education,* OAL Dkt. No. EDU 5502-03, Agency Dkt. No. 206-6/03: [4]

> I have considered the arguments of counsel and must agree with the position espoused by the DOE. (footnote omitted) Although I agree with the District that the consistent use of the DOE's methodology does not in itself make it correct, I do not agree that simply because it does not work to the District's advantage makes it incorrect. The methodology utilized by the Department has been applied to all "Abbott Districts" uniformly and has served to increase maintenance budgets in over half of the Districts. The District has not established that the use of this methodology is *per se* improper, illegal, inconsistent with the New Jersey Supreme Court's Order of July 23, 2003 or violative of any of its constitutional rights. The DOE is obligated only to use an approach that is reasonable and uniformly applied. Here they have done so. If the methodology is to be changed in each area in which an Abbott District is not advantaged, there will be no uniformity or equity to the provision of Abbott funds. Thus, I reject the District's argument and **CONCLUDE** that the DOE's methodology is reasonable and will not be second-guessed. (*Id.* at 8)

In holding thus, the Commissioner is also mindful that, to the extent that the results of the Department's reasonable approach may be imperfect, even after adjustment following audit, *N.J.A.C.* 6A: 10-3.1(g) provides a mechanism for the District to obtain additional supplemental funding where unanticipated expenditures or

[4] Final Commissioner decision issued on October 20, 2003.

unforeseen circumstances warrant. The Commissioner, therefore, wholly endorses the Department's methodology, subject to the correctness of its application based on the evidence presented in any particular instance, as occurred herein with respect to special education, CPI and IDEA calculations.

Accordingly, for the reasons set forth above, the Initial Decision of the OAL is adopted insofar as it concludes that the present matter was appropriately heard prior to audit, that the OAL lacks jurisdiction to determine the validity of the rule promulgated to implement the order of the Court, and that specified adjustments to nondiscretionary costs and IDEA revenue are warranted. However, it is rejected in all other respects, so that the Petition of Appeal is dismissed except insofar as the Board's preliminary maintenance budget, and its concomitant aid calculation, are to be modified to reflect the adjustments ordered herein.

IT IS SO ORDERED.[5]



COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[5] 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.

589-05

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court.

The ALJ determined, by interim Order dated September 10, 2003, that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2. In these proceedings, the ALJ found: 1) the Department correctly excluded tuition and maintenance reserves in its calculation of the District's projected fund balance; 2) the District's additional $2 million tax levy is an "available resource" to the District and the Department properly allocated and reduced the District's discretionary aid by the amount of this tax revenue; 3) the District is not entitled to the initial preschool expansion aid award of $204,210; 4) the action of the Department in adding to the District's fund balance a receivable in the amount of $594,001, representing the last payment of Additional *Abbott v. Burke* State Aid for the 2002-2003 school year is correct; and 5) the Department's method of calculating the District's projected fund balance by including encumbered funds is incorrect.

The Commissioner concurred with the ALJ's findings and conclusions with respect to the disputed issues with the exception that the Commissioner concluded that the Department correctly included the District's encumbered funds in projecting the District's fund balance consistent with the Department's accounting manual and instructions to the school districts with respect to the processing of year-end purchase orders, *N.J.A.C.* 6A:23-2.2 and *N.J.A.C.* 6A:10-1.2.

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.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4096-03

AGENCY DKT. NO. 202-6/03

BOARD OF EDUCATION OF
THE TOWNSHIP OF NEPTUNE,

Petitioner,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Ray Lamboy, Deputy Attorney General, for respondent (Peter Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 24, 2003 Decided: September 26, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By letter of its counsel dated August 28, 2003, the Board of Education of the Township of Neptune, one of 28 urban special needs *"Abbott"* school districts, notified the OAL of its intention to pursue its pending appeal from the Department of Education's (DOE's) August 27, 2003 Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of

Discretionary Additional *Abbott v. Burke* State Aid Award.

By way of background, on March 24, 2003, the DOE moved before the Supreme Court for an order modifying the decision in *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V). See also Abbott v. Burke,* 172 *N.J.* 294 (2002) (*Abbott IX*). The DOE requested that the discretionary Additional *Abbott v. Burke* State Aid (supplemental aid) that it would be required to provide to *Abbott* districts in 2003-2004 be limited to an amount sufficient to support those programs, positions and services in the districts' approved budgets for 2002-2003. On April 8, 2003, the Education Law Center (ELC) cross-moved for an order setting an expedited schedule for the DOE's decisions on districts' budgets and requiring the DOE to conduct a formal evaluation of the implementation of Whole School Reform (WSR), and other relief.

On April 29, 2003, the Supreme Court ordered the DOE and the ELC to participate in mediation before the Hon. Philip S. Carchman, J.A.D., to attempt to resolve issues raised by their motions. Mediation resolved all issues except the 2003-2004 budget process, and the DOE's motion for an order extending by an additional year the one-year relaxation of remedies granted in *Abbott IX* which remained outstanding. However, the parties agreed to an expedited schedule for budget approvals and appeals beginning with the DOE's reviews and approvals of districts' budgets by May 30, 2003. Districts' appeals from the DOE's reviews were to be transmitted to the Office of Administrative Law (OAL), where administrative law judges (ALJs) were to issue initial decisions (IDs) within 50 days of the appeal. The Commissioner was to issue final decisions within 25 days of the IDs. On May 20, 2003, the Supreme Court issued an order incorporating the parties' mediation agreement and providing that the schedule would remain in effect until further order of the Court.

On May 30, 2003, the DOE issued decisions on the *Abbott* districts' budgets. In this case, by letter of that date, the DOE's Assistant Commissioner, Division of Abbott Implementation notified the district that the DOE had completed its initial review of the district's 2003-2004 expenditure budget dated May 5, 2003, that the expenditure budget was approved except as noted in the letter. On June 5, 2003, the district's verified petition of appeal was filed with the Department. *N.J.S.A.* 18A:6-9. The DOE transmitted the contested case to the OAL, where it was filed on June 9, 2003, for hearing as a contested case. On June 20, 2003, the Department's

answer was filed in the OAL.

On June 24, 2003, the Supreme Court issued an Order approving the mediated agreement and scheduling argument on the DOE's motion for an order extending the relaxation of remedies granted in *Abbott IX.* On July 23, 2003, the Supreme Court granted the DOE's motion and relaxed *Abbott v. Burke,* 153 *N.J.* 480 (1998) *(Abbott V)* remedies as applied to the 2003-2004 budget process. In its Order, the Court gave the DOE the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke State* Aid for the *Abbott* districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year were to be continued, subject to conditions set forth in the Order. The Court's July 23, 2003 Order also defined the term "maintenance budget" as follows:

> A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.

With respect to appeals of the DOE's determinations, the Court's Order provided:

> *Abbott* districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.

Finally, by its Order, the Supreme Court set a schedule for new DOE decisions on supplemental funding and the administrative appeal and hearing process. The Court fixed a

schedule requiring the OAL to issue initial decisions on district appeals from the DOE's preliminary maintenance budget figures for the 2003-2004 school year within 30 days of the dates of those decisions as set forth in Paragraph 4 of the Order. It ordered the DOE to promulgate emergency regulations governing the process.

The DOE, relying on the Fiscal Year 2004 Appropriations Act and the Supreme Court's July 23, 2003 Order, promulgated emergency regulations amending *N.J.A.C.* 6A:10, including *N.J.A.C.* 6A:10-1.2, -3.1, -4.2, and -4.7. The regulations are effective August 22, 2003, and expire June 30, 2004. Among these emergency regulations, *N.J.A.C.* 6A:10-1.2 states:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke.* Maintenance also does not include non-recurring 2002-2003 expenditures.

On August 27, 2003, the DOE issued to Neptune its Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional *Abbott v. Burke* State Aid Award. On August 28, 2003, the Board of Education of the Township of Neptune notified the OAL of its intention to pursue its pending appeal.

A telephone prehearing conference was held on September 3, 2003, and during that conference the school district argued that the emergency regulation promulgated by the DOE defining "maintenance budget" is inconsistent with the Supreme Court's Order of July 23, 2003, and should be disregarded. I asked the parties to submit legal argument on the issue whether the OAL has the authority to disregard the provisions of a duly adopted regulation. David G. Sciarra, Esq., also submitted legal argument on this issue on behalf of *Amicus Curiae, Abbott* Plaintiffs. By an Order entered in this matter on September 10, 2003, I adopted a prior ruling by ALJ

Tassini in *Board of Education of the City of Asbury Park v. New Jersey Department of Education,* OAL Dkt. No. EDU 4095-03, that the school district's challenge to the validity and applicability of *N.J.A.C.* 6A:10-1.2's "maintenance budget" may not be heard in the OAL and the regulation must be applied in the OAL. In addition, I concluded that the language used in the DOE regulation is consistent with the definition of "maintenance budget" established by the Supreme Court.

A hearing in this matter was scheduled for September 4, 9, 10 and 15, 2003. Through the efforts of the parties, the issues were substantially narrowed in scope, and all but one hearing date was adjourned. A hearing was held on September 15, 2003. At the conclusion of the hearing, the record remained open to permit the submission of written closing arguments. When these were received, the record was closed on September 24, 2003.

FACTUAL DISCUSSION

The first witness to testify at the hearing of this matter was Dr. Michael Lake, Superintendent of Schools for petitioner. Dr. Lake testified that for the 2002-2003 school year, the Department of Education declined to fund a number of paraprofessional positions, school security and security personnel, and the cost of programs for the technology department, including an additional position. These items were previously reduced from the budget and were required to be eliminated.

Dr. Lake explained that the school district felt so strongly that these positions and programs were essential for the benefit and proper education of its students that a campaign was mounted and taxpayers were urged to approve the proposed school district budget which included these additional items (P-1). As a result, the budget was approved by a narrow margin and this additional funding was included in the school district's budget for the 2003-2004 school year. However, the DOE has taken the position that these additional funding amounts are to be included in surplus and are available to reduce State aid.

David A. Mooij, the School Business Administrator and Board Secretary, also testified concerning this funding. The Board of Education is required to develop a budget and to establish

local taxes for the 2003-2004 school year. In order to include any additional items in the school district budget it was believed necessary to raise the local tax levy, and the Board decided to go ahead with this plan. The intent was to include in the school budget funding for unfunded and non-approved programs, including services and personnel, in order to return the school district to the same level as in the 2001-2002 school district budget. A publicity campaign was undertaken in order to obtain taxpayers' support for this proposal (P-1). The voters eventually approved the school district's budget by 13 votes. He identified the Board of Education proposed budget resolution (P-2) and the certificate and report of school taxes, which established the tax levy for the 2003-2004 school year (P-3).

Mr. Mooij testified that there was no direction by the DOE as to how the additional tax levy may be used, and the school district put the two million dollars into play in this budget. However, the DOE has now reduced additional *Abbott* Aid by the two million dollars raised by the school district and intended to be utilized for these programs. Thus, the school district is not being permitted to use these funds in order to fund non-approved programs. The net effect is to reduce the burden of the DOE, contrary to the intent of the voters.

Mr. Mooij also testified concerning the issue of preschool expansion aid. By memorandum dated February 26, 2003, Richard Rosenberg of the Division of School Finance indicated that the 2003-2004 initial award of preschool expansion aid was the amount of $204,210 (P-5). However, the $204,210 amount is not in State aid (P-4). If this amount is not funded, the school district will have to make it up out of its fund balance.

Peter J. Leonard, Assistant Business Administrator and Assistant Board Secretary for the school district, and a Certified Public Accountant, also testified in this matter. He testified that he could not tie in the numbers contained in the DOE's August 23, 2003, final estimate worksheet (P-4) with many of the numbers in the school district's budget. In addition, with respect to the DOE Notice from Gordon MacInnes, Assistant Commissioner, dated August 27, 2003, specifying *Abbott* funding, he does not know where the projected surplus (fund) balance came from or how the two percent surplus was calculated.

Mr. Leonard testified that the amount not being provided by the State for *Abbott* funding

is $555,925. His estimate of the two percent required surplus is based on a total budget of $56,022,058.90 and two percent would be approximately 1.1 or 1.2 million dollars. His calculation shows the school district's surplus to be under two percent (P-7).

John White, DOE Budget Manager, testified that he has been employed by the Department of Education for four years. He testified that he was previously employed at the Office of Legislative Services for 27 years as an in-house school aid expert. He was assigned to the Neptune Township school district budget in the Fall of 2002. He was involved with the calculation of the Neptune Township school district budget for 2003-2004, including the *Abbott v. Burke* State Aid.

Mr. White identified the DOE's estimate of projected fund balances (P-6 and R-3). This was prepared using projected figures with unaudited numbers. However, the numbers used were not the same as those contained in the report of the school district's board secretary (P-7). He testified that the DOE used the 2002 audit as the starting point. He also emphasized that the amounts contained in the letter of August 27, 2003 (P-6) are not the final maintenance budget figures. In order to determine the final maintenance budget figures the DOE requires the true audited numbers, and these will not be available until November 2003 when the school district's Comprehensive Annual Financial Report (CAFR) is issued.

Mr. White testified that in calculating the surplus, all available revenues were included and surplus was calculated based on unspent funds from the prior year. The calculations in the Department's spreadsheet (P-4) only include actual expenditures based on the best available figures. He explained that these figures do not take into account unspent funds, or amounts which have been encumbered, but have not yet been expended. This is based on the best available figures, but these figures will be changed by the November 2003 final audit. He emphasized that encumbered amounts are included in calculating the total amount of surplus.

Mr. White acknowledged that the $8,843,176 amount set forth in Line 00284, is incorrect (P-4). He stated that this occurred because the school district failed to provide the revised actual budget. He also indicated that the error was on the revenue side and that this has no effect on the final aid amounts.

With respect to the local tax levy, Mr. White testified that the position of the DOE is that all spending in an *Abbott* district is *Abbott*-funded. An *Abbott* school district cannot set aside any portion of the local tax levy for unapproved programs and cannot fund unapproved programs.

On cross-examination, Mr. White testified that once the audited figures are made available, that there would probably be an additional amount of *Abbott* funding based on encumbered amounts that are found to have been actually expended. He admitted that he did not independently verify the open encumbrances set forth in the board secretary's report and did not include them in the August 27, 2003 letter. He also testified that with respect to tuition and maintenance reserves, an *Abbott* school district can come to the Department and get the actual amounts needed, so no amounts need be reserved. Finally, he testified that the school district will receive the preschool expansion aid, less an adjustment for what was actually spent.

LEGAL DISCUSSION

In its *Abbott* decisions, the Supreme Court has made it clear that all budget disputes related to the implementation of the Court's *Abbott* remedies should be first adjudicated by the OAL. Under those decisions, it is the responsibility of the OAL, in the first instance, to assess in these disputes whether the DOE has properly implemented the *Abbott* educational remedies and mandates.

An important function of the OAL is to conduct a thorough hearing and establish a complete record by allowing the parties to present all of their evidence relevant to the contested case, including evidence related to constitutional claims and defenses. The OAL's authority to hear and initially determine all factual and legal issues in *Abbott* cases has its genesis in the *Abbott I* decision, *Abbott v. Burke,* 100 *N.J.* 269 (1985), where it was stated,

> We anticipate that the OAL will conduct a thorough hearing, where the parties shall present all their evidence relevant to the constitutional claims and defenses. This will serve to consolidate all fact-findings in a single proceeding. We intend that the proceedings will promote development of a complete and informed record, which will reflect determinations of appropriate

> administrative issues as well as the resolution of factual matters material to the ultimate constitutional issues.
>
> [100 *N.J.* at 303.]

The Supreme Court's July 23, 2003 Order states that the Department bears the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. See, *N.J.A.C.* 6A:10-4.7(a)(3). In this matter, since the DOE made no reductions to Neptune's budget based on the effective and efficient standard (P-4), the burden of proof remains on Neptune. See, my discussion of this issue in *Bd. of Educ. of Tp. of Neptune v. Dep't. of Educ.*, OAL Dkt. EDU 727-03, EDU 728-03 (June 25, 2003).

Neptune' s Preliminary Maintenance Budget

On August 27, 2003, the Department issued notices of preliminary maintenance budget figures for 2003-2004 and estimates of discretionary additional *Abbott v. Burke* aid (supplemental aid) to the *Abbott* districts, including Neptune. According to DOE's Notice to Neptune, its preliminary maintenance budget figure was $61,934,548. (P-6). Department Budget Examiner John White testified that a uniform method was used to calculate the *Abbott* districts' preliminary maintenance budget figures and supplemental aid, as itemized and broken down on the Department's worksheet for Neptune. (P-4). Counsel for Neptune stipulated to the methodology used to calculate Neptune's maintenance budget figure.

Neptune's challenge to the maintenance budget figure is primarily a legal challenge in that it contends the DOE's regulatory definition of a maintenance budget is inconsistent with the Supreme Court's July 23, 2003 Order and should be disregarded. I have previously ruled in this matter that the DOE's definition of a maintenance budget is consistent with the Supreme Court's Order.

The DOE's August 27, 2003 notice to Neptune also provided the district with an estimate of discretionary aid of $5,236,824, based in part on a projected fund balance for Neptune of $2,274,763 as of June 30, 2003. (P-6). Budget Manager John White testified that the DOE calculated this balance by adding Neptune's audited unreserved fund balance at June 30, 2002

based on last year's CAFR and Neptune's ***unspent appropriations*** as of June 30, 2003 (R-3). The DOE reduced the balance by the two-percent required surplus pursuant to the Appropriations Act, and by an outstanding 2002-2003 account receivable in State supplemental aid of $594,001, leaving Neptune with an excess surplus or excess fund balance of $322,762. (P-6). Mr. White testified that the DOE did not adjust Neptune's fund balance for encumbrances because they could not be accurately determined when the balance was calculated. He explained that the DOE takes the position that Neptune's documented encumbrances and actual costs for goods and services that were received for 2002-2003 will be accurately determined, independently verified and ultimately factored into Neptune's fund balance when the Comprehensive Annual Financial Report is issued in November 2003.

Neptune Assistant Business Administrator Peter Leonard testified to his calculations of Neptune's projected fund balance as of June 30, 2003. (P-7). Mr. Leonard testified that Neptune's Final (Unaudited) Fund Balance for June 30, 2003 was only $1,024,895, leaving Neptune with no surplus over two percent and the DOE owing it the $594,001 account receivable. (P-7).

The major difference between the DOE's projected fund balance and Neptune's projected fund balance is that Neptune subtracted 2002-2003 encumbrances and reserve items from its projected fund balance, and the DOE did not.

The DOE takes the position that both the DOE's projected fund balance of $2,274,763 and Neptune's projected fund balance of $1,024,895 are based on the unaudited June 30, 2003 Board Secretary's Report. (P-6 and P-7). Both balances are based on estimated projections and estimated expenditures that did not undergo a detailed audit examination by an independent certified public accountant. The only common figure in the DOE's balance calculation (R-3) and Neptune's balance calculation (P-7) is Neptune's ***audited*** unreserved fund balance at June 30, 2002 of $1,081,826 determined in the prior year's CAFR. The DOE takes the position that this demonstrates why the CAFR is so important.

The DOE points out that, pursuant to *N.J.S.A.* 18A:4-14, the State Board of Education has prescribed a uniform system of bookkeeping consistent with generally accepted accounting

principles (GAAP) established by the Governmental Accounting Standards Board for use in all school districts. Each school district must ensure that its uniform system is fully consistent with GAAP. *N.J.A.C.* 6A:23-2.1(b). The financial reporting requirements of GAAP require the issuance of a Comprehensive Annual Financial Report by every school district. The CAFR is a school district's official annual report, prepared in part by independent auditors, due this year by November 5, 2003. The DOE accepts the costs and calculations in the CAFR because they have been independently audited and verified as accurate.

The DOE asserts that the 2003-2004 preliminary maintenance budget figure for Neptune is just that, preliminary and subject to the CAFR, which will reveal Neptune's actual audited expenditures for the 2002-2003 school year. Similarly, the DOE contends that its estimate of discretionary *Abbott v. Burke* State Aid is only an estimate and is also subject to the CAFR, which will reveal Neptune's true audited fund balance and available revenue, if any, as of June 30, 2003. The DOE takes the position that it would be fiscally irresponsible for it to award supplemental State aid based on Neptune's best-guess projections, unaudited financial statements, and undocumented encumbrances, especially in light of the fact that Neptune's CAFR will be available in less than two months. The DOE thus asks that I reject Neptune's unaudited balance calculation and that I rule that the DOE should calculate Neptune's true balance based on the 2002-2003 CAFR when it is issued.

However, in making the fund balance or surplus calculation, the DOE has disregarded the mandate of *N.J.A.C.* 6A:23-2.2(c)3 requiring that each local district board of education use the accrual basis of accounting in measuring its financial position and operating results. As I understand it, there are two basic accounting methods, the cash method and the accrual method. If the cash method of accounting is used, the business or governmental entity records revenues only when they are received as cash, and expenses only when they are actually paid out. However, this method can distort income and expenses, and does not give a true picture of the financial state of the entity. With the accrual method, the entity records income when the legal obligation to receive the income "accrues" regardless when it gets paid, and records expenses when it is legally obligated to pay them, even though they may not be paid until a later date. The accrual method recognizes economic events regardless of when cash transactions happen and gives a more accurate picture of the entity's financial position.

The purpose of the encumbrance system utilized by school districts is to comply with the accrual method of accounting by recording expenses when the school district is legally obligated to pay them, even though they may not yet be paid, that is, the cash transaction may not yet have occurred. Thus, these encumbered amounts are not merely "estimates" of the amounts the school district might be obligated to pay in the future, but are required to represent actual legal obligations of the school district. I **FIND** that these encumbered amounts are not "best-guess projections, unaudited financial statements, and undocumented encumbrances" as asserted by the DOE, but have been identified by the school district as amounts which it is legally obligated to pay.

In addition, the Annual Appropriations Act of Fiscal Year 2004, P.L. 2003 c. 122, authorizes the Commissioner to ". . . consider all of the district's available resources and any appropriate reallocations, including, but not limited to, a reallocation of the district's ***undesignated*** general fund balances in excess of two percent." My interpretation of the words "undesignated general fund balances" is that they refer to general fund balances that are not set apart for some specific purpose. That is clearly not the case with respect to encumbered funds since they have been set aside for a specific purpose. Therefore, I **FIND** that amounts that are set apart for the purpose of paying the legal obligations of the school district cannot be considered as "undesignated" fund balances. Under these circumstances, and based upon the provisions of the Appropriations Act and of *N.J.A.C.* 6A:23-2.2(c)3, I **FIND** that the DOE's method of calculating Neptune's projected fund balance of $2,274,763 by including encumbered funds therein is incorrect.

With respect to tuition and maintenance reserves, the argument can be made that the amounts set by the school district are clearly designated for particular purposes. However, there is no evidence in the record that these amounts have been the subject of encumbrances, or that they are anything more than estimates of future obligations. The DOE's position is that an *Abbott* school district can come to the DOE and obtain the actual amounts needed when they become due. Therefore, under these circumstances, I **FIND** that the DOE was correct in excluding tuition and maintenance reserves in its calculation of Neptune's projected fund balance. This finding may have differed if there had been a documentation establishing these

reserves as legal obligations of the school district.

The final and most troubling issue relating to the calculation of the projected fund balance involves the action of the DOE in adding to Neptune's projected fund balance a receivable in the amount of $594,001.00. This receivable represents the last payment of Additional *Abbott v. Burke* State Aid for the 2002-2003 school year ending June 30, 2003. The school district argues that it has lost the benefits of the final State aid payment for its needs that had not been met by State funding in the 2002-2003 school year. The school district's argument appears to have merit on its face, and it appears unfair and troubling for the DOE to take a credit for an amount it should have paid to the school district, but did not. However, the reality is that if this receivable is actually paid to the school district, this payment will simply have the effect of increasing the school district's projected fund balance. This is so because the 2002-2003 school year is completed and the school district will not be permitted to incur any new or additional expenses for that year. Therefore, I **FIND** that the action of the DOE in adding to the Neptune projected fund balance a receivable in the amount of $594,001.00 representing the last payment of Additional *Abbott v. Burke* State Aid for the 2002-2003 school year is correct.

Based on the foregoing, I **FIND** that the correct amount of Neptune's projected fund balance is $1,388,864. Since this exceeds the 2% required surplus by $30,864, I **CONCLUDE** that the additional amount available to be added to the fund balance net of the receivable of $594,001.00 in New Line 121 – in the revised budget is $30,864.00.

School district proposed use of taxpayer-approved tax revenues for non-approved purposes

During the hearing, Neptune's witnesses testified that Neptune voters approved a local $2 million tax levy to pay for non-approved positions, services and programs, but the DOE subsequently reduced Neptune's supplemental aid by a corresponding amount. The DOE points out that in the Annual Appropriations Act of Fiscal Year 2004, the Legislature required the Commissioner to "consider all of the [*Abbott*] district's available resources and any appropriate reallocations" in adjusting the district's discretionary aid. The DOE argues that local tax revenue is an available resource to Neptune, and such a reduction is mandated by law because the Legislature expressly required the Commissioner to consider all of Neptune's available resources

and make appropriate reallocations before awarding it discretionary aid.

In response, Neptune contends that the DOE's authority to consider all available resources is limited by the Appropriations Act to the time after the receipt and review of the CAFR. It also argues that the DOE is seizing "unavailable" funds because these funds have been voter-approved for specific purposes and are being utilized for these purposes. Finally, Neptune argues that the underlying premise in *Abbott v. Burke,* 153 *N.J.* 480 (1998) (*Abbott V*), is that if the DOE did not approve programs, services and positions, the school district has the ability to seek funding for those non-approved items from the local taxpayers. It contends that in the absence of clear legal authority local taxpayers should not be divested of their right to fund non-approved educational programs, services and positions.

I have not been able to find any language in *Abbott V* which supports Neptune's position that it has the ability to seek funding from local taxpayers for non-approved items. In fact, the opposite appears to be the case since the Supreme Court states:

> If a school demonstrates the need for programs beyond those recommended by the Commissioner . . . , then the Commissioner shall approve such requests and, when necessary, shall seek appropriations to ensure the funding and resources necessary for their implementation.
>
> [*Id.* 153 *N.J.* at 518.]

The DOE argues that pursuant to the Annual Appropriations Acts of Fiscal Year 2003, the Legislature required the Commissioner of Education to consider "all of the [Abbott] district's available resources and any appropriate reallocations" in determining the district's discretionary aid. It asserts that in the Annual Appropriations Act of Fiscal Year 2004, the Legislature again required the Commissioner to "consider all of the [Abbott] district's available resources and any appropriate reallocations" in adjusting the district's discretionary aid.

The exact language of the Appropriations Act, P.L. 2003 c. 122, is as follows:

> In making any adjustment to the discretionary award, the commissioner shall consider all of the district's available resources

> and any appropriate reallocations, including, but not limited to, a reallocation of the district's undesignated general fund balances in excess of two percent.

Based on the foregoing language, it is clear that an *Abbott* district must consider all of its available resources before submitting an application for discretionary aid. *N.J.A.C.* 6A:10-3.1(b). The DOE is required to review an *Abbott* district's budget to determine that all available resources and reallocations have been incorporated therein. P.L. 2003 c. 122; *N.J.A.C.* 6A:10-3.1(c). I **FIND** that Neptune cannot set aside tax revenue for non-approved programs while requesting that the State provide supplemental aid for approved programs as if the tax revenue was not an available resource to it. I agree with the DOE that such a scheme would effectively result in a windfall for Neptune. An *Abbott* district that seeks the benefit of supplemental State aid must also bear the burden of considering all of its available resources before receiving that aid, pursuant to statute and regulation.

Accordingly, I **FIND** that Neptune's additional $2 million tax levy is an "available resource" to Neptune and that the DOE properly reallocated and reduced Neptune's discretionary aid by the amount of this tax revenue.

Preschool Expansion Aid

In his post-hearing submission, attorney for petitioner states that petitioner will not pursue the preschool expansion aid issue at the present time. I am uncertain, based on this statement, whether petitioner is withdrawing the claim it pursued at the hearing or has simply chosen not to pursue argument on the issue. Since the issue of preschool expansion aid was dealt with at the hearing, I feel constrained to address the issue in this initial decision.

By a memorandum dated February 26, 2003 (P-5), Richard Rosenberg of the DOE's Division of School Finance, advised Neptune that its approved early childhood plan for 2003-2004 was $6,057,095, and its initial award for preschool expansion aid was $204,210. During the hearing, Neptune's Business Administrator David Mooij testified that this preschool expansion aid was not included anywhere in the DOE's calculations. However, Budget Examiner John White testified that the correct amount is included on the worksheet (P-4) under the item

heading "EC [early childhood] Plan 03-04 $5,967,430". Mr. White also testified that the early childhood plan ultimately determines the amount of preschool expansion aid. (P-4).

The DOE asserts that the Appropriations Act for Fiscal Year 2003 provides that *Abbott* preschool expansion aid "shall be based on documented expansion of the preschool program" and that the Act authorizes the Commissioner to require *Abbott* districts to provide supporting documentation to verify that the actual expansion in the preschool program had occurred in 2002-2003. It further asserts that the Act additionally authorizes the Commissioner to make appropriate adjustments to this aid based on actual need. It contends that the Appropriations Act for Fiscal Year 2004 continues this statutory scheme, and that preschool expansion aid is funded based on actual expansion, actual costs and actual need.

The specific language of the 2003-2004 Appropriations Act, P.L. 2003 c. 122, is as follows:

> The amount appropriated hereinabove as Abbott Preschool Expansion Aid is for the purpose of funding the increase in the approved budgeted costs from 2001-2002 to 2003-2004 for the projected expansion of preschool programs in "Abbott districts." Payments of Abbott Preschool Expansion Aid shall be based on documented expansion of the preschool program. Upon the Commissioner of Education's request, "Abbott districts" will be required to provide such supporting documentation as deemed necessary to verify that the actual expansion in the preschool program has occurred in the 2003-2004 fiscal year. Such documentation may include expenditure, enrollment and attendance data that may be subject to an audit. Appropriate adjustments to a district's Abbott Preschool Expansion Aid amount may be made by the commissioner based on actual need.

I agree with the DOE that Neptune's initial 2003-2004 preschool expansion aid award of $204,210 in February 2003 was initial only, based on an approved 2003-2004 early childhood plan of $6,057,095 and an expectation of a certain level of enrollment and corresponding costs. It is also clear that such award is subject to change based on any change to the early childhood plan. (P-5). Neptune's approved early childhood plan for 2003-2004 was subsequently amended and reduced after the date of the Rosenburg memorandum, February 26, 2003.

As the Rosenberg memorandum shows, the initial preschool expansion aid award of

$204,210 was calculated by subtracting the 2001-2002 approved, early childhood plan of $5,852,885 (the baseline plan) from the 2003-2004 approved early childhood plan of $6,057,095. (P-5). Any subsequent reduction to the 2003-2004 approved plan would necessarily result in a corresponding reduction to preschool expansion aid. In fact, Neptune's preschool expansion aid was amended and reduced after the Rosenberg memorandum was issued in February 2003. As pointed out by attorney for respondent, in *Bd. of Educ. of Tp. of Neptune v. New Jersey Dep't. of Educ.*, OAL Dkt. EDU 2202-03 (July 2, 2003) it is stated:

> It has been stipulated and agreed by and between the parties that the Department has approved Neptune's Early Childhood Plan for the 2003-2004 school year in the amount of $5,967,430.

This stipulated amount is reflected on the Department's worksheet. (P-4) Based upon the foregoing discussion, I **FIND** that the initial award of $204,210 is based on a previously approved early childhood plan funded at a higher level than the subsequent approved plan. I **FIND** that Neptune is not entitled to the initial preschool expansion aid award of $204,210, because that award was based on an early childhood plan that was subsequently amended and reduced, as stipulated by Neptune.

DECISION AND ORDER

For the reasons stated above, it is hereby **ORDERED** that the DOE's method of calculating Neptune's projected fund balance by including encumbered funds therein is incorrect and is hereby **REVERSED**. It is further **ORDERED** that the DOE was correct in excluding tuition and maintenance reserves in its calculation of Neptune's projected fund balance and in adding thereto a receivable in the amount of $594,001.00 representing the last payment of Additional *Abbott v. Burke* State Aid for the 2002-2003 school year, and these actions are hereby **AFFIRMED**. It is further **ORDERED**, based on the foregoing, that the correct amount of Neptune's projected fund balance is $1,388,864 and that since this exceeds the 2% required surplus by $30,864.00, the additional amount of $30,864.00 is available and is to be added to the fund balance net of the receivable of $594,001.00 in New Line 121 in the revised budget.

It is further **ORDERED** that the $2 million tax levy approved by the voters of Neptune

is an "available resource" to Neptune, and the action of the DOE reallocating and reducing Neptune's discretionary aid by the amount of this tax revenue is correct and is hereby **AFFIRMED**.

It is further **ORDERED** that Neptune is not entitled to the initial preschool expansion aid award of $204,210, because that award was based on an early childhood plan that was subsequently amended and reduced, as previously stipulated by Neptune, and the action of the DOE in this regard is hereby **AFFIRMED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

September 26, 2003
DATE

JOSEPH F. MARTONE, ALJ

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

9-26-03
DATE

E-mailed Initial Decision to the parties on:

9-26-03

mph

APPENDIX

WITNESSES:

For petitioner:

Dr. Michael Lake

David A. Mooij

Peter J. Leonard

For respondent:

John White

EXHIBITS:

For petitioner:

P-1 Neptune Township Board of Education 2003-2004 Budget Proposal

P-2 Board of Education Budge Resolution, dated March 28, 2003

P-3 Board of Education Tax Levy for 2003-2004 School Year

P-4 Department of Education Budget Worksheet of August 23, 2003

P-5 Richard Rosenberg memo, dated February 26, 2003

P-6 Department of Education Notice of Preliminary Maintenance Budget, etc., dated August 27, 2003

P-7 June 30, 2003 Board of Education Secretary Report

For respondent:

R-3 Department of Education Calculation of Excess Surplus

OAL DKT. NO. EDU 4096-03
AGENCY DKT. NO. 202-6/03

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department of Education's (Department) decision on its supplemental funding request for the 2003-2004 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions and replies thereto were filed by both the Board of Education of the Neptune School District (District) and the Department in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Initially, upon careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge's (ALJ) September 10, 2003 Order Relative to "Maintenance Budget,"[1] that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); s*ee, also,*

[1] The District did not file a request to the Commissioner for interlocutory review of this Order, but its exceptions to the Initial Decision urge the Commissioner to "reject the ALJ's determination of the 'maintenance budget' issue." (District's Exceptions at 5)

Pascucci v. Vagott, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Moreover, even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to determine "a choice of law" as argued by the District, the Commissioner finds that the Department's definition of "maintenance budget," as detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003. Consequently, the Department's application of such regulatory definition in its review and approval of the District's 2003-2004 budget is wholly appropriate.[2]

Upon a thorough and independent review, the Commissioner concurs with the ALJ's determinations that: 1) the Department correctly excluded tuition and maintenance reserves in its calculation of the District's projected fund balance; 2) the District's additional $2 million tax levy is an "available resource" to the District and the Department properly allocated and reduced the District's discretionary aid by the amount of this tax revenue; 3) the District is not entitled to the initial preschool expansion aid award of $204,210[3]; and 4) the action of the Department in adding to the District's fund balance a receivable in the amount of $594,001, representing the last payment of Additional *Abbott v. Burke* State Aid for the 2002-2003 school year is correct. With respect to these issues, therefore, the Commissioner accepts the ALJ's factual findings and determines that his analysis and legal conclusions are consistent

[2] Consequently, pursuant to *N.J.A.C.* 1:1-14.10(j), the Commissioner adopts the ALJ's interim Order of September 10, 2003.

[3] The ALJ points out that the District indicated in its post-hearing brief that it will not pursue its preschool expansion aid claim at the present time. (Initial Decision at 15) However, stating that he is uncertain whether the District's intention is to withdraw its claim or whether it has chosen not to present arguments on this issue, the ALJ made findings on this issue and concluded that the District was not entitled to the $204,210 preschool expansion aid "because that award was based on an early childhood plan that was subsequently amended and reduced, as stipulated by Neptune." (*Id.* at 17) The sole mention of this claim in the District's exceptions to the Initial Decision appears in the District's conclusion:

> (3) require the DOE to provide the District with the pre-school expansion aid***. (District's Exceptions at 13)

with the Supreme Court's Order of July 23, 2003, as well as the Department's regulatory amendments adopted on August 22, 2003.

However, the Commissioner does not concur with the ALJ's finding that the Department erred in calculating the District's projected general fund balance by including encumbered funds in the amount of $2,274,763 because "amounts that are set apart for the purpose of paying the legal obligations of the school district cannot be considered as 'undesignated' fund balances." (Initial Decision at 12) The Commissioner believes that the ALJ's analysis reflects a fundamental misunderstanding of the differentiation between the terms "encumbrances" and "accounts payable," and how these terms are used in conjunction with an accrual or modified accrual basis of accounting. As correctly explained by the Department in its exceptions:

> An encumbrance is an accounting tool that permits a school district to set aside funds for purchase orders that were issued during the 2002-2003 school year for goods or services that were *not* received as of June 30, 2003. In the Department's manual, *Financial Accounting for New Jersey Public School Districts* (web site omitted), school districts were directed to account for unpaid purchase orders in which goods or services were received by June 30th as accounts payable liabilities, and account for purchase orders to be honored in the subsequent fiscal year by reserving them as encumbrances on their June 30th general fund balance sheets. *** If a school district complied with the manual, then the encumbrances on its June 30th balance sheet reflect liabilities for goods and services that were not received by June 30th. Encumbrances should not be deducted from a district's fund balance as of June 30, 2003, because the underlying goods and services were not actually received in the 2002-2003 school year. *See N.J.A.C.* 6A:10-1.2 (a maintenance budget is funded at a level so a district can implement 2002-2003 approved and "provided" programs, services, and positions, with adjustments for "actual" 2002-2003 expenditures).
>
> The Department's inclusion of encumbered funds in Neptune's fund balance calculation does not conflict with the accrual method

of accounting. Pursuant to *N.J.A.C.* 6A:23-2.2, school districts are required to use an accrual or modified accrual basis of accounting.

Accrual is a method of accounting

> that records the financial effects on a district board of education of transactions...that have cash consequences for the district in the periods in which those transactions...occur, rather than only in the periods in which cash is received or paid by the district. [*N.J.A.C.* 6A:23-1.2.]

An accrual reflects the fact that an obligation has been incurred or a revenue has been earned. Under the modified accrual method, an obligation is incurred when a school district has received a good or service and thus is obligated to pay for it, regardless of when the payment is made. For example, if the district received textbooks on June 2, 2003, but did not receive the invoice nor make the payment for the textbooks, the district has still incurred the legal obligation to make payment. Encumbrances are not "accrued" because the underlying obligations have not occurred yet. Those obligations will occur when the goods or services are provided. (Department's Exceptions at 3-5)

The Commissioner finds that the above explanation is consistent with the record in the matter entitled *Board of Education of the City of Burlington v. New Jersey State Department of Education*, Commissioner Decision No. 581-03, decided October 20, 2003. Therein, Keith Costello, Budget Manager/Examiner for the Department of Education, Office of Abbott Implementation, testified that, by memo dated September 16, 2003 to all school districts, Assistant Commissioner Richard Rosenberg addressed the procedures to be followed for open purchase orders and encumbrances on the school district's books as of June 30. The September 16, 2003 memo states, in pertinent part:

> Open purchase orders at June 30, 200X should be classified into the following two categories for review and reclassification:

1. Category one represents purchase orders for which the goods have been received or the services have been rendered at June 30th that have not been paid. These purchase orders must be expensed in the current audit period, the related encumbrances reversed, and a liability (accounts payable) established. If the invoice has not been received the amount must be estimated. In accordance with GAAP, an expenditure is recorded when goods are received or services are rendered.

2. Category two represents purchase orders which will be honored in the subsequent year. These purchase orders will be rolled over into the next fiscal year and will be shown in the June 30th general fund balance sheet as a reserve for encumbrances. Per NCGA Statement 1, paragraph 91 "encumbrances outstanding at year-end represent the estimated amount of the expenditures ultimately to result *if unperformed contracts in process at year-end are completed. Encumbrances outstanding at year-end do not constitute expenditures or liabilities."* (emphasis in text) (Exhibit R-1, in evidence) (*Board of Education of the City of Burlington v. New Jersey State Department of Education*, slip opinion at 17)

Accordingly, category one purchase orders and the related encumbrances are to be considered 2002-2003 fiscal year expenditures in applying *N.J.A.C.* 6A:10-1.2, but category two purchase orders are considered expenditures in the 2003-2004 fiscal year and, thus, are not to be included in development of a "maintenance budget" for the 2003-2004 school year pursuant to *N.J.A.C.* 6A:10-1.2.

The District insists that the Commissioner should accept the ALJ's conclusions with respect to encumbrances because: 1) "the ALJ had the opportunity to evaluate all of the testimony and documentary information before him at the hearing in reaching his conclusion that the DOE erred in increasing the District's fund balance by improperly excluding valid encumbrances" (District's Reply Exceptions at 3); 2) "the ALJ heard the District's testimony on how the list of encumbrances was developed and what the encumbrances represented" (*Ibid.*); and 3) the Department bases its exceptions to the ALJ's conclusions "on a document that was *not*

introduced into evidence and on factual assertions that are not part of the record." (emphasis in text) (*Id.* at 2) Notwithstanding these assertions by the District, the Commissioner finds that the resolution of whether it was appropriate for the Department to include encumbered funds in the fund balance calculation does not turn on credibility determinations or documents "not introduced into evidence," but, instead, on whether the encumbered goods and/or services were received by June 30, 2003. Assuming the District properly complied with the procedures set forth in the Department's accounting manual and Assistant Commissioner Richard Rosenberg's letter of September 16, 2003, as set forth above, encumbrances for goods and services received by June 30, 2003 were to be reversed and a liability (accounts payable) established. The District's encumbrances outstanding at year-end, therefore, represent the estimated amount of the expenditures ultimately to result if unperformed contracts in process at year-end are completed, and, thus, encumbrances outstanding at year-end do not constitute expenditures or liabilities. Although there is no dispute that expenditures for goods and/or services received by June 30, 2003 should be deducted from the District's fund balance, based on the proofs brought to this record, the Commissioner is unable to determine which, if any, of the District's encumbrances have become accounts payable by virtue of the receipt of the encumbered goods or services on or before June 30, 2003 so as to be considered 2002-2003 expenditures.

The Commissioner, therefore, concludes that it was entirely appropriate and consistent with the Department's accounting manual, *Financial Accounting for New Jersey Public School Districts*, the instructions with respect to the processing of year-end purchase orders provided to school districts in Assistant Commissioner Richard Rosenberg's letter of September 16, 2003, *N.J.A.C.* 6A:23-2.2 and *N.J.A.C.* 6A:10-1.2 to include the encumbered funds in the fund balance calculation. Any adjustments to be made will be based on updated

information with respect to the June 30, 2003 encumbrances and accounts payable for the 2002-2003 school budget year in the course of the Comprehensive Annual Financial Report (CAFR) review scheduled to begin in November 2003.

Finally, in its exceptions, the Department seeks what it terms a "correction of a factual error" regarding the District's request for State supplemental aid, stating:

> [D]uring the hearing, Neptune Business Administrator David Mooij pointed out that line item 00284 on the Department's worksheet (Ex. P-4) incorrectly indicates that the district requested $8,843,176 in Additional *Abbott v. Burke* State Aid. In fact, Neptune requested $7,651,967 in additional aid, a difference of $1,191,209. (Ex. P-2) In order to properly account for this factual error, Neptune's estimated discretionary aid must be reduced by an additional $1,191,209, to $4,045,615. (Department's Exceptions at 2)

In response, the District vigorously objects to this "correction," averring that this "alleged" error was fully discussed at hearing and that "the DOE budget manager testified 'that the error was on the revenue side and that this has no effect on the final aid amounts.'" (District's Reply at 2) The District further claims that this is a disingenuous attempt by the Department to further reduce the District's discretionary aid.

In reviewing the Initial Decision, with respect to the Department's budget manager's testimony, the ALJ states that:

> Mr. White acknowledged that the $8,843,176 amount set forth in Line 00284, is incorrect (P-4). He stated that this occurred because the school district failed to provide the revised actual budget. He also indicated that the error was on the revenue side and that this has no effect on the final aid amounts. (Initial Decision at 7)

Given the lack of specificity or any analysis of the effect of this "alleged" error in the Initial Decision, the absence of a transcript of the proceedings, and the silence of the record on this issue, the Commissioner cannot, based on the record before him, resolve this dispute.

Ordinarily, this matter would be remanded for an evidentiary hearing to fully develop the record so that a determination could be made, but, in light of the Supreme Court Order to expedite proceedings in this matter, the Commissioner concludes that the most effective approach to resolve this matter is to direct that the effect on discretionary aid, if any, of the "alleged" error be reviewed as a part of the November CAFR. In the event that a dispute remains after the CAFR, either party may subsequently seek relief by filing a Petition of Appeal to the Commissioner.

Accordingly, the Initial Decision is adopted with modification, as set forth herein.[4]

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[4] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the Comprehensive Annual Financial Report (CAFR) until November 2003, which will reveal the District's true audited fund balance and available revenue, if any, as of June 30, 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[5] 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.

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court. The District challenged the inefficiencies identified by the respondent in noninstructional expenditures, including a grant writer's position, the business cost center and purchased professional services for special education. The District also challenged the Department's determination of certain maintenance calculations.

The ALJ found that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2. The ALJ also concluded that the Department properly determined inefficiencies with the grant writer's position and the business cost center, noting that the latter reduction must take into account any superceding constraints of contractual and tenure rights. Finally, the ALJ found that respondent's maintenance calculations which incorporate Consumer Price Index (CPI) adjustments of 2.11 % and an anticipated cost increase of 7 % for utilities should be upheld.

The Commissioner concurred with the ALJ's findings and conclusions and adopted the Initial 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.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5499-03
AGENCY DKT. NO. 203-6/03

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent.

Deryls Maria Gutierrez, Esq., appearing for Petitioner

Allison Colsey Eck, Deputy Attorney General, appearing for Respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 24, 2003 Decided: September 26, 2003

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner, Board of Education of the City of Passaic or District, an "Abbott" special needs school district, is appealing Respondent's Department of Education (DOE or Department) review of the District's 2003-2004 expenditure budget bearing the

date of May 5, 2003. *N.J.S.A.* 18A:7F-3 "*Abbott District;*" see also *N.J.A.C.* 6A:10-1.1 *et seq.* Subsequent to filing of the initial appeal, there were several orders of the Supreme Court, as set forth more fully below: ultimately the issues on appeal were those arising out of the amended DOE budget letters issued on August 27, 2003. (J-1)

Although Petitioner set forth ten specific items to be resolved through litigation, as a result of the settlement conference held on August 29 and subsequent negotiation, all but three of the items were settled or withdrawn. (Appendix I). The issues to be determined herein are, first, to determine which definition of the term "maintenance budget" should be applied; however, the threshold question of whether the Office of Administrative Law has jurisdiction to make such a determination must first be resolved. The second issue which must be addressed is whether DOE has made a *prima facie* case of three specifically identified inefficiencies in the non-instructional programs including the business center, the grant writer position and purchased professional services for special education. Finally, if DOE has made a *prima facie* showing identifying the inefficiencies, Petitioner must demonstrate any budgetary reductions are not justified under the effective and efficient standard. (July 23 Order at 5.]

PROCEDURAL HISTORY

On March 24, 2003, the Commissioner of Education (Commissioner) moved before the Supreme Court for relief from some of the mandates of *Abbott v. Burke*, 153 *N.J.* 480 (1999) (*Abbott V*). Specifically, the Commissioner requested that discretionary Additional *Abbott v. Burke* State Aid (supplemental aid) be limited in 2003-2004 to providing support for those programs, positions and services in the Abbott districts' approved budgets for 2002-2003.

On April 8, 2003, the Education Law Center responded to that motion and made a cross motion for relief, requesting an expedited schedule for the review and approval of Abbott district budgets and the appeals arising therefrom. On April 29, 2003, the

Court ordered the parties into mediation before the Honorable Philip S. Carchman, J.A.D.

During the mediation, the parties resolved all of the issues except that of the 2003-2004 budget process. The parties, however, did agree to an expedited schedule for budget approvals and appeals which commenced with the DOE review and approval of district budgets by May 30, 2003. In that expedited schedule, the OAL would render an Initial Decision within 50 days of the appeal, and the Commissioner would render final decisions within 25 days of the Initial Decision. On May 20, 2003, the Court entered an order incorporating that agreement. The Order provided that the schedule would "remain in effect until the further Order of the Court."

On May 30, 2003, the DOE rendered decisions on all of the Abbott budgets using the maintenance standard that it had requested that the Court approve. Twenty-three districts (including Passaic) filed appeals from the decisions and those appeals were transmitted to the OAL. All 23 appeals challenged the standard employed by DOE in approving the budgets for 2003-2004.

On June 24, 2003, the Supreme Court issued an Order in *Abbott v. Burke* incorporating the terms of the mediation agreement and scheduling oral argument for July 10, 2003 on the remaining issue of the 2003-2004 budget process.

On July 23, 2003, the Supreme Court issued an Order (July 23 Order) in favor of the Commissioner, granting the application for relaxation of the *Abbott V* remedies as applied to the 2003-2004 budget process:

> The DOE shall have the authority to treat the 2003-2004 school year as a maintenance year for purposes of calculating Additional Abbott v. Burke State Aid for the Abbott districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order.

[July 23 Order at 4].

The Court went on to establish a schedule for the provision of new DOE decisions on supplemental funding and the administrative hearing process to follow on "the DOE's application of the effective and efficient standard." *Id.* at 7. The Court also directed the promulgation of emergency regulations on the standard. *Id.* at 5-6.

On August 22, 2003, consistent with the authority granted in the FY2003 Appropriations Act, the Commissioner promulgated emergency regulations as directed by the July 23 Order.[1] The DOE defined "maintenance budget" as the standard for reviewing the Abbott Districts' 2003-2004 applications for additional supplemental funding as follows:

> for the 2003-2004 school year, a budget funded at a level such that a district can implement 2002-2003 approved and provided programs, services and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits and special education tuition. Maintenance does not include the restoration of programs, positions or services that were provided in previous years or new programs, positions or services unless necessary to meet paragraph 2c of the Supreme Court's Order of June 24,2003 *Abbott v. Burke*. Maintenance also does not include non-recurring 2002-2003 expenditures.
>
> [*N.J.A.C.* 6A:10-1.2].

[1] The FY2003 Appropriations Act, L. 2003, c. 122, provides in pertinent part:

> The Commissioner of Education shall not authorize the disbursement of funds to any "Abbott district" until the Commissioner is satisfied that all educational expenditures in the district will be spent effectively and efficiently in order to enable those students to achieve the core curriculum content standards. The Commissioner shall be authorized to take any necessary action to fulfill this responsibility, including but not limited to, the adoption of regulations related to the receipt and/or expenditure of State aid by the "Abbott districts" and the programs, services and positions supported thereby. Notwithstanding and provision of P.L. 1968, C. 410 (C.52:14B-1 *et seq.*), any such regulations adopted by the Commissioner shall be deemed adopted immediately upon filing with the OAL.

On August 27, 2003, the DOE issued decisions establishing a preliminary maintenance budget figure and the amount of additional supplemental funding needed to support that budget for each of the 23 "appealing" Abbott districts, including Passaic. Pursuant to the regulatory definition of a maintenance budget in *N.J.A.C.* 6A:10-1.2, the DOE used the 2002-2003 school year as a baseline to determine Passaic's preliminary maintenance budget figure for 2003-2004.

The preliminary maintenance budget figure reflects instructional and non-instructional programs that were approved and provided for in the 2002-2003 school year, including increases for non-discretionary costs, as well as adjustments based on Passaic's actual 2002-2003 expenditures.[2]

During a telephone prehearing conference in one of the other "Abbott" cases, Petitioner asserted DOE's regulatory definition of a maintenance budget was inconsistent with the Supreme Court's July 23, 2003 Order.

Subsequently, Passaic notified me that it joined in that contention. I requested and received legal argument from both sides on the issue

LEGAL ANALYSIS AND CONCLUSION

I. *Definition of Maintenance Budget*

This matter was scheduled for hearing to commence on August 29, 2003 and to continue on September 8, 12 and 15, 2003. Because DOE issued new budget review letters late in the day on August 27, 2003, these parties requested the August 29 hearing date be converted to a settlement conference. I granted this request and, during a status conference call on Thursday, September 4, 2003, the parties indicated that three inefficiencies, out of ten set forth in the August 27, 2003 letter, remained in

[2] "Actual 2002-2003 expenditure" is defined by regulation as a cash or accrued expense in the 2002-2003 school year for goods and/or services received in the 2002-2003 school year. *N.J.A.C.* 6A:10-1.2.

contention. (See Appendix I). The representatives requested a determination of whether the definition of maintenance budget promulgated in the emergency regulations is inconsistent with the Supreme Court's Order of July 23, 2003 and, therefore, should be disregarded.

I have reviewed the submissions of both parties as well as the orders issued in *Board of Education of the City of Asbury Park v. New Jersey Department of Education,* OAL DKT NO. EDU 4095-03, Order Relative to maintenance Budget," September 4, 2003 and *Board of Education of the Township of Neptune v. New Jersey Department of Education,* OAL Dkt. No. EDU 4096-03, "Order Relative to "Maintenance Budget," September 10, 2003. I agree with the conclusions of my colleagues who have determined in the first instance that since Petitioner's contention is essentially a challenge in the validity of the regulation, OAL lacks jurisdiction to determine issue and, in the second instance, concluding the definition of "maintenance budget" in the regulation does not differ in any significant way from the definition in the Supreme Court's definition.[3]

I **CONCLUDE** that the legal principles enunciated in *Asbury Park* and in *Neptune* are fully applicable to this matter and incorporate them herein as if set forth in full. Both are attached as Appendix II and III. Based upon those legal principles, I **CONCLUDE** the appropriate definition of "maintenance budget" is that which is set forth at *N.J.A.C.* 6A:10-1.2.

II. *Effectiveness and efficiency of non-instructional expenditures*

The emergency regulation governing application for additional supplemental funding for the 2003-2004 school year requires Respondent to review the non-instructional

[3] See *Board of Education of the Township of Neptune v. New Jersey Department of Education,* OAL Dkt. No. EDU 4096-03, Order Relative to "Maintenance Budget," September 10, 2003 (recognizing Petitioner's assertion that he issue is not a facial challenge to the regulation, but presents a choice of law questions, *i.e.,* whether to apply the Supreme Court's definition of "Maintenance Budget: or the different regulatory definition adopted by DOE; concluding that the language in each definition is consistent with the language in the other). (Attached hereto as Appendix I & II respectively).

expenditures in the 2002-2003 budget, on which the 2003-2004 school year is based, to ensure that they are effective and efficient. The regulation then sets forth the mechanisms by which the determination of effectiveness and efficiency of non-instructional expenditures shall be measured. These mechanisms include a comparative analysis of non-instructional expenditures to those of other school districts and/or historical data in the district, an analysis of staffing needs, and a review of non-instructional programs which may be funded through other sources or, in the alternative, that funding is not available because the expenditure is not essential to the provision of a thorough and efficient education. For those inefficiencies which are sustained by the Commissioner, a reduction in Petitioner's budget shall be made. *N.J.A.C.* 6A:10-3.1.

In this case, when Respondent's letter dated August 27, 2003 was issued, Petitioner identified ten "inefficiencies" which the District intended to appeal. The first scheduled date of hearing, September 29, was converted to a settlement conference[4] and, by the day of hearing, the ten issues had been reduced to three.[5] There were, however, six last minute "maintenance issues" raised for the very first time at a late afternoon conference with the attorneys on the Friday before the hearing.

The first inefficiency identified by Respondent is the grant writer's position. While the DOE representative was explicit and strenuous in his support of maintaining this position, he testified that, after completing the analysis of this position, currently funded at 67% from the General Revenue fund and 33% from Special Revenue fund, he came to the conclusion the position could be funded through sources other than through Petitioner's budget and made a $30,000 reduction in the District's budget for this position. He made this determination by comparing Passaic with other districts as well as examining alternative funding sources. For example, some grants permit a district to charge for indirect costs which could be used to capture a portion of the grant

[4] The cooperation between the District and DOE representatives in attempting a resolution in this matter has been exemplary. The parties spent many hours here at OAL negotiating their differences. I commend them for the time and effort they expended.

[5] Attached as Appendix I is Petitioner's letter indicating the ten issues and which had been withdrawn and which remained to be heard on the date of hearing.

writer's salary. Moreover, he recommended that the District investigate the viability of using so called "carry-over" grant funds to fund a portion of the grant writer's salary. The witness further testified that he, as the Coordinator of the Northern Region and Budget Manager for Passaic, has seen "carry-over" grant money revert to the grantor because Passaic failed to monitor the grants to prevent this from happening. This testimony was unrebutted.

The language of the regulation requires Respondent to identify expenditures which may be funded through other funding sources. Based on DOE'S analysis, I **FIND** Respondent has identified this expenditure as an inefficiency. I further **FIND,** based on the witness' testimony of the comparison to other districts as well as his analysis of alternative funding sources, Respondent has made a *prima facie* case for the reduction of the budget item relating to the grant writer's position.

Petitioner's witness, the grant writer, replied that the amount of grant money which the writer has brought in over the period of her tenure more than justifies her salary. In addition, the District asserts that many Abbott districts have grant writing positions whose entire salary is paid by the District. While the record is clear that the position is essential to the District, such conclusory statements are not sufficient to support elimination of recommended reduction. The grant writer herself testified that if more of her salary was attributed to "carry over" funds, she would have to allocate a greater percentage of her time to grant management, which has to do with implementing the programs for which the grant is provided, rather than grant development, which is concerned with the researching of ideas and the writing of grant proposals. Given the unrebutted testimony regarding the reversion of carry over funds to the grantors, I **FIND** there is clearly a need for better grant management in the District.

With respect to the suggestion that a portion of the grant writer's salary be funded through indirect costs, the grant writer testified that this could not be done because Passaic did not have an indirect cost rate, which is required in order to apply

for salary funding through indirect costs, which are certain administrative costs involved in the programs for which the funds are granted.

Moreover, according to the Business Administrator, indirect costs are only applicable to Title I grants. There was, however, no explanation of what Title I grants are and how much of the total grant funding is attributable to Title I nor was there an explanation of why Passaic has not applied for the rate. Finally, Petitioner has not demonstrated other funding sources are not available.

Based on the totality of the testimony, I **FIND** that Petitioner did not sustain the shifted burden of demonstrating that this budgetary reduction is not justified under the effective and efficient standard. I **CONCLUDE**, therefore, that DOE properly determined that there is an inefficiency in this position and that the reduction in the budget of $30,000 was proper and is affirmed.

Turning now to the issue of the efficiency and effectiveness of the Business Cost Center, DOE determined that $150,000 in the business cost center should be reduced as inefficient. DOE's representative, the Budget Manager for the District who is also the Coordinator of the Northern Region, evaluated this cost center by reviewing the number of business office personnel in other Abbott districts. (R-1). Although this Cost Center includes business office personnel as well as other administrative personnel, Respondent's focus was on the business office. In its relevant submissions to DOE, Passaic represented that it had 31 positions in this cost center.

Respondent's witness testified that in coming to this determination, he took the following factors into consideration:

a) the large number of non-degree (uncertified) individuals earning extremely high salaries, in excess of $50,000, in comparison to other districts;
b) the Business Administrator is the highest paid in the State of New Jersey; and

c) the Assistant Business Administrator is paid a "significant" salary.

Respondent's representative noted other *Abbott* school districts operate without an Assistant Business Administrator; in addition, Passaic is presently operating without two FTE's.[6] A proposed budget manager has not been hired and one vacancy exists in the position of assistant payroll coordinator.

Based on the testimony that the Business Administrator is the highest paid in the State and the Assistant Business Administrator receives a significant salary, as well as the fact that the two vacancies exist and there has been no testimony that keeping these positions vacant has had a deleterious effect on the operation of the business office, I **FIND,** to the extent of the salaries and benefits related to the two vacancies, Petitioner has failed to rebut Respondent's *prima facie* showing of inefficiency in the business office. The record is devoid of any testimony or documentation of specific need for an Assistant School Business Administrator.

In addition to keeping the two positions vacant, Respondent testified since the salaries of the Business Administrator and his assistant, as well as those of other high level administrative personnel not covered by a collective bargaining agreement are among the highest in the State, he suggested that an efficiency in the business office might be accomplished by a salary freeze. The record is clear that the witness was aware that at least one of the employees in this category is tenured, and, therefore, enjoys the protection of the tenure statute.[7]

Because Respondent identified the salaries of these administrators as a possible source of inefficiency, Petitioner must demonstrate reductions based on these salaries are not justified, which Petitioner has failed to do. Although these are individuals not covered by collective bargaining agreements, there are issues of contractual rights, and, perhaps, protection of the tenure law. There is nothing in the record to

[6] Full Time Employee
[7] *N.J.S.A.* 18A:6-10

demonstrate which of these administrators may be protected by the tenure statute or may have contractual rights which would be affected by a wage freeze. I **FIND**, therefore, to the extent that these top administrators are protected by contractual rights and/or the tenure statute, the payment of a salary increase is non-discretionary; I further **FIND**, however, Petitioner has failed to demonstrate any budgetary reduction in the business office account is not justified. Accordingly, I **CONCLUDE** the determination an inefficiency exists in the business office was appropriate; I further **CONCLUDE** an appropriate deduction from Petitioner's budget in accord with the superceding constraints of contractual rights and the tenure statute is appropriate.

The third inefficiency identified by Respondent is in the area of purchased professional services in Special Education. The record is clear Passaic has historically had difficulty in budgeting in this area and there is significant variation in the spending per special education student in Passaic in comparison with that of other Abbott Districts. In comparison to the other districts, Passaic's per pupil amount is considerably higher than the average and significantly higher than the next closest school district by more than $700 per pupil, according to DOE's testimony. Moreover, the average cost for purchased professional services in Passaic is $1484, the highest of all the Abbott districts, in which the average is $210. These numbers were not disputed.

Accordingly, one of the economies suggested by Respondent was for the District to consider employing "in house" providers of related or purchased services rather than paying consultant a "per hour" fee for services. The testimony of Petitioner's two witnesses on this point, however, was consistent and persuasively credible. Both testified that the District has been unable to hire staff consultants, such as speech therapists; therefore, there is a need to purchase the services on a "per hour basis". The requirements are driven by the IEP[8] in each individual student's case and they fluctuate throughout the year. In addition, although Respondent asserted purchasing

[8] Individual Education Plan

the required services on a "per hour basis" *could* result in higher costs, this testimony was couched in general, non-specific terms.

Based on the testimony of Petitioner's witnesses regarding the difficulty they have encountered in employing such consultants "in house" well as Respondent's recognition increased spending in new IEP's depends on the composition of the district and the requirements of each district's special education population, I **FIND** Petitioner has successfully rebutted the *prima facie* case on this issue. I **CONCLUDE,** therefore, that a reduction in Petitioner's budget based on this inefficiency is inappropriate.

III. *Determination of Certain Maintenance Calculations*

Literally on the eve of hearing, the District raised the issue of whether six maintenance calculations had been properly determined. The parties reached an agreement with respect to four of those calculations. (See Appendix IV). Only the propriety of the calculations of the CPI and the utilities adjustments remain to be determined.

The Supreme Court's July 23, 2003 Order and the Department's regulations require the Department to provide increases for non-discretionary costs in the 2003-2004 maintenance budget; neither the Court nor the Department require adjustments for discretionary costs. Although not required to provide an adjustment for discretionary increases, the Department decided to provide an across the board cost of living increase to all of the non-salary cost centers not otherwise specifically provided for in the list of non-discretionary increases. The Department also provided an increase for utility costs, which could be considered both discretionary and non-discretionary. Utilities are non-discretionary since electricity and heat need to be provided, but utility costs are also discretionary since the school district can seek to control the usage and costs through other providers and engaging in conservation measures.

Petitioner challenges both of these calculations.

A. Consumer Price Index – 2.11% Non-Salaried Increase

Respondent's witness testified the CPI[9] adjustment was a catch-all adjustment which was intended to provide the districts with a little extra funding to cover unforeseen increases in their budget. The CPI calculation in the maintenance budget is an average of the CPI rate for the New York/Northern New Jersey area and the Philadelphia/Southern New Jersey, in accordance with the statutory provision set forth in *N.J.S.A.* 18A:7F-3 which states:

> CPI means the average annual increase, expressed as a decimal, in the CPI for the New York City and Philadelphia areas during the fiscal year preceding the prebudget year as reported by the United States Department of Labor.

Although the Northern New Jersey CPI may be higher, the Department relied upon the CPI rate calculated pursuant to statute for all of the state aid figures in the state, and used the CPI figure provided by the Department of Finance when it calculated the CPI adjustment to the maintenance calculation. Although I agree with Petitioner's assertion that this calculation does not take into consideration the rising cost of non-salaried items that a school district must necessarily purchase in order to provide a thorough and efficient education to its pupils, especially when that district is located in an area with a higher CPI, I **FIND** that there is a reasonable basis for Respondent's calculation; furthermore, the methodology, *i.e.,* the averaging of New York and Philadelphia areas, is required by statute. I am, therefore, constrained to **CONCLUDE** Respondent's determination concerning the rate of 2.11% must be upheld since it was calculated pursuant to Department procedures for all school districts and in accordance with statutory requirements.

In addition to the rate of the CPI adjustment, Passaic also challenges the total number of accounts to be included in the calculation of the CPI adjustment. Respondent's witness testified he looked at the total expenditure in the 2002-2003 year

[9] Consumer Price Index

for the non-salary accounts. He then deducted the amounts included in separate cost driver adjustments, specifically, salaries, health benefits, charter school tuition, special education, transportation for special education, social security FICA and utilities, as well as the amount for compensated absences, which was an area of inefficiency that the parties are attempting to eliminate. After he made these deductions from the sum of non-salary accounts, the witness testified he arrived at a figure of approximately ten million dollars. He then multiplied that amount by the 2.11% average to determine that the district should receive a CPI adjustment in the amount of $215,877.

Passaic did not provide any evidence to challenge the Department's total expenditures sum nor did they challenge the number of the accounts that were deducted. Mr. Lee, Petitioner's representative, and Mr. Turek, Respondent's representative, could not explain the difference between the Department's and Passaic's numbers for the sum on non-salary accounts. Each witness testified to the method he employed; however, Passaic did not provide any evidence which demonstrates that the Department's determination is unreasonable, arbitrary or capricious. Accordingly, I **FIND** DOE's calculation to be reasonable; I further **FIND** the Department's calculation of the total number of non-salary accounts, exclusive of the items otherwise provided for, and the $215,877 provided as the CPI adjustment are reasonable. I **CONCLUDE** these determinations should be upheld.

B. Utilities

Respondent recognized districts could be faced with significant utility increases. Accordingly, the Department decided to include a cost driver for utilities to provide funding for anticipated cost increases. Respondent's witness testified that he reviewed the rates of increase for a number of utility providers and determined that a seven percent increase appeared to be an average increase based upon the information he had available.

Passaic claims that its rates for utilities will increase by close to 30% for the 2003-2004 school year. Petitioner's witness testified that he called four other utility companies, all of whom declined to bid, because PSE&G rates were competitive; Petitioner's witness also testified to a conversation he had with a PSE&G representative, who, according to the witness, told him the increase in rates in the coming year would be approximately 30%. This testimony is unsupported hearsay; thus, I accord it no weight.

Moreover, Passaic's reliance on the PSE&G bulletin (P-15) is misplaced. In the first instance, that bulletin also is clearly hearsay which was uncorroborated and unsubstantiated during the hearing. Secondly, the bulletin, which is ambiguous, at best, does not state that energy bills will increase by 30%. The narrative on the two pages describes the elimination of the 14% rate freeze and the increased costs of providing service to customers, and nothing in the language states that rates will increase 30%. The only reference to anticipated increases is set forth in a side box of information on the second page which states that "PSE&G's *residential* customer bills will increase an average 15.1 percent beginning this month." (Emphasis added).

DOE's representative testified if the cost of utilities increases throughout the year, the District has the right to apply to DOE for additional funding. Although Petitioner contends this method of delaying the District's entitlement to an increase can be interpreted as nothing more than an attempt to prolong the budget appeal process, it is because of the nature of the particular circumstances surrounding energy issues, such as the recent expiration of the rate freeze and the announced increase, as well as the changing patterns of usage in the districts, that such a budget process is required. If Passaic incurs an unexpected cost increase in utilities mid-year, it can apply for additional supplemental *Abbott v. Burke* State Aid. *N.J.A.C.* 6A:10-3.1(g). I **FIND** the determination of Respondent regarding the calculation of utility increase, which is an increase granted in the discretion of DOE, *i.e.,* it is outside the parameters of the *Abbott* order, to be reasonable. I **CONCLUDE**, therefore, that Respondent's calculation should be upheld.

ORDER

Consonant with the preceding findings of fact and conclusions, I hereby **ORDER:**

Respondent's determination with respect to the grant writer position be and hereby is **AFFIRMED**;

Respondent's determination with respect to the business office be and hereby is **MODIFIED** in accordance with the conclusions set forth herein;

Respondent's determination with respect to purchased professional services for special education be and hereby is **REVERSED**; and

Respondent's determination with respect to calculation of the CPI utility adjustments be and hereby are **AFFIRMED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

September 26, 2003
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

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

September 26, 2003
DATE

E-mailed Initial Decision to the parties on:

September 26, 2003
DATE

jb

APPENDIX V

Witnesses

James Turek

Henry Lee

Ellen Ziff

Frank D'Ambra

Angela Gomez

Exhibits

Joint:

J-1 DOE Letter, August 27, 2003

J-2 DOE Maintenance Items, August 23, 2003

Petitioner:

P-1 Excerpt from Annual District Budget Statement Supporting Documentation (pg. F 2)

P-2 Grants Development to Date (2 pgs)

P-3 Director of Grant Management List

P-4 Districts with Grants Offices Funded Through District Funding

P-5 Final Report - Passaic Public School System Management Study, June 13, 1997

P-6 Fiscal Function, September 11, 2003

P-7 Business Office Staffing Summary

P-8 Total Administrative Cost – Indicator 8

P-9 Salaries & Benefits for Administration – Indicator 9

P-10 Contractual Salaries & FICA

P-11 Health Benefits Calculation

P-12 US Dept. of Labor CPI

P-13 CPI Adjustment by District

P-14 Statement of Energy Costs

P-15 PSE&G New Rates effective August 1, 2003

P-16 Calculation of Electric Energy Costs for LPLS Users

P-17 Calculation of Electric Energy Costs for GLP Users

P-18 Positions Transferred from General Funds Early Childhood Education

Respondent:

R-1 Business Office FTE Analysis

R-2 Rosenfarb Waters Report (pg. 16 only)

R-3 Special Education Related Costs

R-4 Student/Administrator Ration – Indicator 18

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties' exceptions and replies were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner initially concurs with the Administrative Law Judge (ALJ) that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to consider petitioner's argument regarding the validity and applicability of the regulation at issue, the Commissioner agrees with the ALJ that the Department's definition of

"maintenance budget," as detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003.

Further, with respect to the identified inefficiencies in petitioner's non-instructional expenditures, including the grant writer position, the business cost center and purchased professional services for special education, based on the record before him and the credibility assessments of the ALJ, *N.J.S.A.* 52:14B-10(c), the Commissioner accepts the ALJ's factual findings and determines that her analysis and legal conclusions are consistent with the Supreme Court's Order of July 23, 2003, as well as the Department's regulatory amendments adopted on August 22, 2003.[1] The Commissioner additionally concurs with the ALJ that respondent's maintenance calculations incorporating Consumer Price Index (CPI) adjustments of 2.11 % and an anticipated cost increase of 7 % for utilities should be upheld.

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

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[1] The Commissioner notes that the individuals involved in this business cost center are *not* covered by a collective bargaining agreement. (Initial Decision at 10) To the extent there is a contractual obligation to pay these individual administrators' salaries, the Commissioner clarifies that the Department is not necessarily obligated to provide funding for the increase where it has been determined to be inefficient, as it has herein. (*Ibid.*)

[2] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the Comprehensive Annual Financial Report (CAFR) until November 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[3] Pursuant to *P.L.* 2003, *c.* 22, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

591-03

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" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court.

The ALJ found that the duly promulgated rule implementing the Court's order for "maintenance" controlled in this proceeding, and that the Office of Administrative Law lacked jurisdiction to determine its validity.

The Commissioner concurred with the ALJ's findings and conclusions, adopted the Initial Decision for the reasons expressed therein and dismissed the District's 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.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5493-03

AGENCY DKT. NO. 205-6/03

BOARD OF EDUCATION OF
THE CITY OF ELIZABETH,

Petitioner,

v.

NEW JERSEY DEPARTMENT
OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., appearing for petitioner

Kathleen Asher, Deputy Attorney General, appearing for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 22, 2003 Decided: September 26, 2003

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

STATE OF THE CASE
AND PROCEDURAL HISTORY

Petitioner Board of Education of the City of Elizabeth (district), the operator of an urban special needs *Abbott* school district, appealed from the Department of

Education's (DOE) initial review of the district's 2003-2004 expenditure budget. *N.J.S.A.* 18A:7F-3.

On March 24, 2003, the DOE moved before the New Jersey Supreme Court for an order modifying the decision in *Abbott v. Burke*, 153 *N.J.* 480 (1998) (*Abbott V*) to limit the budgetary expenditures for the 2003-2004 years to those approved for 2002-2003. A subsequent Court-ordered mediation resolved most issues between the parties but the issue of the maintenance budget remained. On May 30, 2003, the DOE issued decisions on the *Abbott* districts' budgets.

In this case the DOE Assistant Commissioner, Division of Abbott Implementation, by letter dated May 30, 2003, notified the district that the DOE had completed its initial review of the district's 2003-2004 expenditure budget. On June 3, 2003, the district filed a verified petition of appeal with the department challenging parts of the budget. The DOE transmitted the matter on June 9, 2003 for a hearing as a contested case to the Office of Administrative Law. On June 12, 2003, the DOE filed its answer.

On July 10, 2003, the New Jersey Supreme Court heard oral argument on the budget process. The Supreme Court's July 23, 2003 Order (the Order) gave DOE the authority to treat the 2003-2004 fiscal school year as a maintenance year for calculating additional Abbott aid. The Order set a deadline for DOE to provide notice to each district of the preliminary maintenance budget figures and set a schedule for new DOE decisions on supplemental funding and for the administrative appeal and hearing process. The Court also ordered DOE to promulgate emergency regulations for evaluating the efficiency of non-instructural programs.

The DOE promulgated emergency regulations, effective August 22, 2003, including amending *N.J.S.A.* 6A:10 to include a definition of the term "maintenance budget". *N.J.A.C.*6A:10-1.2 states in pertinent part: "'Maintenance budget' means, for the 2003-2004 school year, a budget funded at a level such that a district can

implement 2002-2003 approved and provided programs, services and positions . . . . Maintenance does not include the restoration of programs, positions or services that were provided in previous years . . . ."

On August 27, 2003, the DOE sent to the district superintendent preliminary maintenance budget figures, setting the school district's budget at $288,116,672, inclusive of the district's general fund budget and restricted revenue accounts. The DOE's review determined that the district's need for discretionary Additional Abbott v. Burke State Aid was $7,413,285. The DOE noted that the preliminary maintenance budget and the estimated supplemental aid was subject to further adjustments after submission by the district of the 2002-2003 CAFR.

In early September 2003, the district and the DOE engaged in informal discussion over the course of several days. As a result counsel for the district notified the undersigned by letter dated September 16, 2003, that the district "does not contest any of the specific maintenance budget calculations of the department in its August 27, 2003 letter." The district further advised that there was no need for a factual hearing. As the only remaining issue was the definition of "maintenance budget," the undersigned directed the parties to file briefs on the subject on or before September 22, 2003. On September 19, 2003, DOE filed its brief. On September 22, 2003, the district filed its brief and the record closed. In its brief the district stated that it was negotiating with the DOE for stipulations but none have been received.

LEGAL ANALYSIS AND CONCLUSION

The issue here is the applicable definition of the term "maintenance budget" in these administrative proceedings. The school district argued that the Order clearly and unambiguously provided that a maintenance budget is the amount approved for 2002-2003 school fiscal year, whether or not the funds were actually spent for the approved purposes. In ordering that DOE treat the 2002-2003 school fiscal year as a maintenance year, the Court stated, "During 2003-2004, K-12 programs provided for in

the 2002-2003 school year will be continued, subject to the conditions set forth in this Order." Order, para 1. Next the Court explicitly defined maintenance budget as a budget in which "a district would be funded at a level such that the district can implement current approved programs, services and positions and therefore includes documented increases in non-discretionary expenditures." Order, para. 2. The district argued that, contrary to the DOE's emergency regulation definition, the Supreme Court's use of the terms "provided for" and "current approved" plainly denote that the maintenance budget means the approved, not the actual, expenditures.

Additionally, the district argued that the Supreme Court ordered the DOE to promulgate an emergency regulation concerning the standard for evaluating non-instructional programs, but neither required or authorized the DOE to promulgate a regulation relating to the definition of maintenance budget. Hence, *N.J.A.C.* 6A:10-1.2, the DOE's emergency regulation defining maintenance budget as "a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services and positions . . ." is not keeping with the Court's own Order. The district further argued that the term "provided for" has a completely different meaning than "provided": "provided for" being synonymous with "approved" and "provided" being "actually supplied." The district also argued that the definition in DOE's emergency regulation was contrary to the definition DOE had offered previously to the Supreme Court. "Maintenance means that a district will be funded at the level that will enable it to continue implementing the current approved programs, services and positions . . . ." (Report of the Abbott mediation (Order of April 28, 2003) attachment 4).

The DOE argued that the *N.J.S.A.* 6A:10-1.2 maintenance budget definition is consistent with the Supreme Court Order. Further, DOE submitted that the school district's objection to the definition is essentially a facial challenge to the regulation. As such, the challenge must be brought in the Appellate Division under *R.* 2:2-3(a)(2), as the OAL has no jurisdiction to determine the validity of rules. It is undisputed that no challenge to the regulation has been filed in the Appellate Division. Consequently, the current regulation is the applicable standard in all cases pending at the OAL.

The school district disagreed with the need to challenge the validity of the rule in the Appellate Division. Rather the district argued that *Abbott V* directed that all disputes concerning the *Abbott* issues must be heard at the OAL, then go to the Commissioner, with the final agency determination appealable to the Appellate Division. *Abbott V* at 526-27. Moreover, the ALJ is merely faced with a choice of law and must choose the wording of the Supreme Court over the regulation.

An administrative regulation carries a presumption of validity so that any party attacking it bears the burden of proving it is arbitrary, capricious and unreasonable or otherwise unlawful. *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 *N.J.* 544, 561-62 (1978). If an administrative regulation is within the fair contemplation of the enabling statute and is neither arbitrary nor capricious, a court will not invalidate the regulation. *Marsh v. Dept. of Environmental Protection*, 152 *N.J.* 147, 149 (1997). In creating the OAL, the Legislature provided an administrative forum for hearings on contested case of administrative agencies and for issuance of initial decisions by an administrative law judges containing recommended findings of fact and conclusions of law. *N.J.S.A.* 52:14B-2(b)-10(c). The OAL is part of the executive branch and has no jurisdiction to determine the validity of a rule. *N.J.S.A.* 52:14F-1; *Wendling v. New Jersey Racing Comm'n,* 279 *N.J. Super.* 477, 475 (App. Div. 1995). In fact, a previous challenge to the rules implementing *Abbott* funding was brought in the Appellate Division. *In re 1999-2000 Abbott Implementing Regulations*, *N.J.A.C.* 6:19A-1.1 *et seq.,* 348 *N.J. Super.* 382 (App. Div. 2002).

The crux of the school district's contention is that the regulation adds an impermissible limitation to the maintenance budget definition in the Order, which on its face is arbitrary and unreasonable. *R.* 2:2-3(a)(2) provides that an appeal challenging the validity of any state administrative agency regulation must be brought in the Superior Court Appellate Division. See also *Pascucci v. Vagott,* 71 *N.J.* 40 (1976). It is undisputed that no such appeal has been brought. Therefore, I **CONCLUDE** that the district's challenge to the validity and applicability to the *N.J.A.C.* 6A:10-1.2 definition of

"maintenance budget" is a facial challenge to the regulation, which cannot be heard at the OAL. Unless determined otherwise by the Appellate Division, the disputed definition is part of a valid regulation that must be applied at the OAL. The district's argument that this is a choice of law case and that the OAL may choose to follow the Order rather than the valid regulation gives the OAL more power than the legislature and the Supreme Court has. Plainly the *Abbott* districts would not have previously challenged the 1999-2000 regulation in the Appellate Division if the OAL were the correct forum to make the facial attack. Hence, I **CONCLUDE** that the regulation's maintenance budget definition must be applied here.

ORDER

Consistent with the above, it is hereby **ORDERED** that the *N.J.A.C.* 6A:10-1.2 definition of maintenance budget is applicable here.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to 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.

Sept 26, 2003
DATE

MARGARET M. HAYDEN, ALJ

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

Sept. 26, 2003
DATE

E-mailed Initial Decision to the parties on:

Sept. 26, 2003
DATE

jb

OAL DKT. NO. EDU 5493-03
AGENCY DKT. NO. 205-6/03

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 local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-2004 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The District's exceptions and the Department's reply thereto were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record and the District's exceptions, the Commissioner concurs with the Administrative Law Judge (ALJ), that the District's challenge to the definition of "maintenance budget" in *N.J.A.C.* 6A:10-1.2 is a facial challenge to the regulation and that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v.* Vagott, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n.*, 279 *N.J. Super.* 477, 485

(App. Div. 1995). Moreover, even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to determine "a choice of law" as argued by the District, the Commissioner finds that the Department's definition of "maintenance budget," as detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003. Consequently, the Department's application of such regulatory definition in its review and approval of the District's 2003-2004 budget is wholly appropriate.[1]

Accordingly, the Initial Decision is adopted for the reasons expressed therein. The District's petition is, therefore, dismissed.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[1] In that counsel for petitioner notified Judge Hayden by letter of September 16, 2003 that the District "does not contest any of the specific maintenance budget calculations of the Department of Education in the August 27, 2003 letter," the validity of the definition of the "maintenance budget" set forth in *N.J.A.C.* 6A:10-1.2 is the only remaining issue in this matter.

[2] 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.

592-03

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court.

The ALJ found that the duly promulgated rule implementing the Court's order for "maintenance" controlled in this proceeding, and that the Office of Administrative Law lacked jurisdiction to determine its validity. The ALJ also concluded that: 1) the Department correctly adjusted the maintenance calculation for Funds 11 and 15 and the excess fund balance, and that any adjustments for new information will be audited and adjusted with the 2002-03 CAFR and 2) the Department's methodology for calculating the maintenance budget for the Early Childhood Plan is reasonable. The ALJ further ordered that, as set forth in Joint Exhibit No. 1, the parties will review the PSEA revenue adjustment to determine if this amount was counted twice, the Department will calculate the District's CPI adjustment based on the June 30, 2003 Board Secretaries Report at 2.1% and the maintenance budget worksheet will be revised accordingly, and that, in all other respects, the Department's determination was affirmed with respect to Plainfield's 2003-04 budget, as set forth in the determination letter of August 27, 2003.

The Commissioner concurred with the ALJ's findings and conclusions and adopted the Initial Decision for the reasons expressed therein.

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.

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5502-03
AGENCY DKT. NO. 206-6/03

BOARD OF EDUCATION OF THE
CITY OF PLAINFIELD, UNION COUNTY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent.

Richard E. Shapiro, Esq., for petitioner

Diana Rosenheim, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 25, 2003 Decided: September 26, 2003

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

Statement of the Case

The Board of Education of the City of Plainfield, operator of an urban special needs "Abbott District" school system appeals from the Department of Education's (DOE's) May 30, 2003 review of the District's 2003-2004 expenditure budget. More particularly, the District appeals from DOE's preliminary maintenance budget figure for

the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support the 2003-2004 approved budget, as set forth in DOE's letter of August 27, 2003 by Assistant Commissioner Gordon MacInnes (J-2 and J-3).

After numerous conferences with counsel, this matter was scheduled for hearing on September 24, 2003 at the Office of Administrative Law. Witnesses who testified and exhibits considered in deciding this case are listed in the attached appendix.

Issues

Prior to the hearing, it became clear that there were essentially three issues in dispute. First, the District contends that *N.J.A.C.* 6A:10-1.2's "maintenance budget" definition conflicts with the Supreme Court's July 23, 2003 Order and should not govern this case. Second, the District argues that the DOE's calculation for funds 11, 15 and, therefore, the excess surplus fund balance does not appropriately take into account the District's actual expenditures and encumbrances as of June 30, 2003. Third, the District asserts that the DOE's "maintenance budget" worksheet improperly compared the difference between the budgeted early childhood plan for 2003-2004 and the budgeted early childhood plan for 2002-2003 rather than the actual (revised) plan of the District for 2002-2003, which was based on the District's actual enrollment in 2002-2003.

Stipulated Facts

At the hearing it became clear that the facts were essentially undisputed. The parties signed a stipulation of facts (J-1), incorporated by reference, which sets forth the relevant facts essential to a determination, as well as those issues, which have been resolved by the parties.

Testimony

In addition to the stipulated facts, the DOE relied on the testimony of Keith Costello, budget manager for the DOE, responsible for aiding the District in formulating a "maintenance budget," consistent with DOE guidelines. His testimony related solely to whether the DOE properly compared the budgeted early childhood plan for 2002-2003 to the budgeted early childhood plan for 2003-2004. Although he agreed that this comparison resulted in a decrease in the amount of money received by Plainfield for 2003-2004, he indicated that since the actual amount for 2003-2004 could not be known, the budgeted amounts for the two years were compared. This was the approach utilized in each "Abbott District." He contended that most "maintenance numbers" are based on 2002-2003 budgeted amounts.

On cross-examination, Costello agreed that the District received aid based on the actual enrollments for 2002-2003. In fact, the District received approximately $2 million less than its budgeted amount. He agreed that a budgeted plan is based on the projection of the number of children and the actual plan based on actual enrollments, which was less in this case. He further agreed that the DOE looked at the actual numbers in determining the budget for funds 11 and 15 and knew the District's actual numbers for early childhood for 2002-2003. [1]

Discussion

First to be addressed is the District's contention that *N.J.A.C.* 6A:10-1.2's "maintenance budget" definition conflicts with the Supreme Court's July 23, 2003 Order and should not govern this matter. In reaching a determination on this issue, I am persuaded by the decision of Administrative Law Judge John R. Tassini, dated September 4, 2003 in which Judge Tassini considered an "Abbott district's" challenge to

[1] Although Costello claimed that he received conflicting information as to the actual amount of money received by the District in early childhood for 2002-2003, the District agreed to stipulate to the DOE's actual numbers for 2002-2003.

the validity and applicability of *N.J.A.C.* 6A:10-1.2's "maintenance budget" definition. *See, Board of Educ. of the City of Asbury Park v. New Jersey Department of Education*, OAL Dkt. No. EDU 4095-03, Decision by Hon. John R. Tassini, ALJ on Order Relative to "Maintenance Budget" (Sept. 4, 2003). Judge Tassini determined that any challenge to a duly adopted regulation, such as *N.J.A.C.* 6A:10-1.2 must be brought in the Superior Court, Appellate Division, pursuant to *R.* 2:2-3(a)(2) and no jurisdiction exists at OAL to address that issues. He thus concluded that the regulation must be applied in the OAL.

I am further persuaded by the order of Administrative Law Judge Joseph F. Martone dated September 10, 2003, in which he agreed with Judge Tassini's determination. *See, Board of Educ. of the Township of Neptune v. State of New Jersey, Department of Education*, OAL Dkt. No. EDU 4096-03, Decision by Hon. Joseph F. Martone, ALJ on Order Relative to "Maintenance Budget" (September 10, 2003). Of import, Judge Martone also found that the language contained in the Supreme Court's Budget Order of July 23, 2003 was consistent with *N.J.A.C.* 6A:10-1.2's "maintenance budget" definition. He concluded that the Supreme Court's Order provided a reasonable basis for *N.J.A.C.* 6A:10-1.2's "maintenance budget" definition and refused to disregard the "maintenance budget" definition contained in that regulation in deciding a matter involving a particular Abbott school district.

Since I am in agreement with the conclusions reached by Judges Tassini and Martone, regarding the proper definition of "maintenance budget," I incorporate them here. Inasmuch as I agree with my colleagues, I see no reason to reiterate the arguments of counsel or further discuss their conclusions. I, therefore, **CONCLUDE** that the definition of "maintenance budget" as set forth in *N.J.A.C.* 6A:10-1.2 is applicable to this matter.

The next issue to be addressed is the District's contention that the DOE must consider the actual figures in the June 30, 2003 Board Secretary's Report rather than the figures supplied by the District by August 26, 2003. The District does not dispute that the Board Secretary's Report was supplied to the DOE on or about September 18,

2003, but argues that in any event the DOE must use that updated information rather than wait for the Comprehensive Annual Financial Review (CAFR) to make the necessary adjustments. The District contends that if the June 30, 2003 Board Secretary's Report had been available to the DOE prior to August 27, 2003, the DOE would have utilized the figures contained in that report. The District asserts that resolution of this issue should not be based on an assessment of "fault" because the District turned in the report late, but rather on what the District's 2003-2004 maintenance budget properly should be so that the children impacted by the budget are not harmed. The District argues that the DOE has the legal obligation "through the administrative process to accept supplemental documentation" and to cure any deficiencies in the District's budget resulting from the DOE's consideration of outdated and inaccurate information. Thus, the adjustments should be made based on what it has now given to the DOE and should not await the CAFR for the 2002-2003 school year, required to be submitted to the DOE by the District mid-November 2003. The District asserts that the Supreme Court's Order of July 23, 2003 requires that the District's budget issues be resolved now, not after receipt of the CAFR, which properly allows the District to plan for the school year. Moreover, there is no indication as to when the DOE will make any adjustments based on the CAFR, nor is it clear that the District would receive actual cash funding if there is an upward adjustment in favor of the District rather than an account receivable in the 2004-2005 school year. The District further points out that the DOE improperly reduced the excess fund balance over 2% on the basis of predictions in advance of the CAFR.

DOE argues that pursuant to *N.J.A.C.* 6A:24-9.6(c), the District bears the burden of proof in this case and must comply with the requirements of the DOE's duly adopted regulations in order to establish any entitlement to additional aid. The DOE argues that it used the numbers for funds 11 and 15 that were provided to it from the District by August 26, 2003. These were the most up-to-date numbers that the District had provided to the DOE prior to the issuance of the August 27, 2003 budget letter. It contends that further adjustments for actual spending and final 2002-2003 amounts should await receipt of the CAFR. More particularly, the DOE argues that pursuant to *N.J.S.A.* 18A:17-10 the Board Secretary is required to file the Board Secretary's Report

with the Commissioner on or before August 1 of each year. Pursuant to *N.J.S.A.* 18A:23-1, the school district is to have an annual audit completed not later than four months after the end of the school fiscal year. *N.J.A.C.* 6A:23-1.2 defines the CAFR to be the official annual report of a governmental unit that includes all funds and accounts groups summarizing the activities and operations performed by all units. According to the DOE, if the District's new information is, after audit, included in the CAFR, then the adjustment will be made to the District's aid award pursuant to the Appropriations Act (New Jersey Fiscal FY 04 Appropriations Act, P.L. 2003 c. 122).

I have considered the arguments of counsel and must agree with DOE's contentions. It is clear that pursuant to *N.J.S.A.* 18A:17-10 the Board Secretary is required to file the Board Secretary's Report with the Commissioner on or before August 1 of each year. In this case, the District simply did not do so. Moreover, the Supreme Court's July 23, 2003 Order set forth particular time frames for the DOE to provide notice to each district of its preliminary maintenance budget figures for the 2003-2004 school year, consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that would be needed to support the currently approved budget. In actuality, these scheduling orders gave the DOE until August 27, 2003 to issue its budget decision letter to the District.

It must be pointed out here that not only did the District fail to get the Board Secretary Report to the DOE as required on August 1, 2003 but it did not get its updated figures to the DOE prior to the DOE's August 27, 2003 letter. In fact, the Board Secretary Report was not given to the DOE until September 18, 2003.

In light of this, I **CONCLUDE** that the District failed to comply with the requisite statutory requirements, as well as the scheduling requirements, essentially established by the New Jersey Supreme Court. As such, it is not only reasonable but appropriate that the District's *Abbott v. Burke* State Aid Award be adjusted based on the annual audit filed pursuant to *N.J.S.A.* 18A:23-1, if the District's new information is, after the requisite audit, included in the CAFR. I, therefore, **CONCLUDE** that the DOE correctly adjusted the maintenance calculation for Funds 11, 15 and the excess fund balance

and that any further adjustments for new information will be audited and adjusted with the 2002-2003 CAFR.

A third legal issue concerns the District's contention that in the case of early childhood, the DOE improperly used the approved 2002-2003 EC plan rather than the actual revised 2002-2003 plan after the elimination of preschool expansion aid. The District points out that since the elimination of preschool expansion aid required a reduction in the scope of the approved plan for the 2002-2003 school year, the District's revised approved EC plan had to be adjusted downward to account for the revised scope of the plan. Thus, the accurate calculation of the differences between 2002-2003 and 2003-2004 should take into account the revised, approved plan because that is all the District was able to provide in 2002-2003. The District argues that simply because the DOE consistently used this methodology, does not make it correct. The District contends that since the budgeted 2003-2004 EC plan is, until otherwise revised, the actual EC plan for 2003-2004, DOE's comparison of the 2003-2004 EC plan with the 2002-2003 EC plan should have similarly accounted for the actual revised 2002-2003 EC plan.

The DOE argues that it properly adjusted the maintenance calculation for the difference in the EC plan by comparing EC Plan Year Budget to EC Plan Year Budget. The DOE argues that it did this consistently throughout all the districts resulting in more favorable outcomes for the districts than unfavorable outcomes. The DOE contends that the negative result here should not invalidate the consistent and reasonable approach that the DOE took in dealing with this adjustment. It further asserts that even if the DOE had compared the EC Plan Budget for 2002-2003 to 2002-2003 EC Plan actual expenditures, the District would have incurred the same decrease and thus no adjustment is necessary based on the available numbers.

I have considered the arguments of counsel and must agree with the position espoused by the DOE.[2] Although I agree with the District that the consistent use of the DOE's methodology does not in itself make it correct, I do not agree that simply because it does not work to the District's advantage makes it incorrect. The methodology utilized by the DOE has been applied to all "Abbott Districts" uniformly and has served to increase maintenance budgets in over half of the Districts. The District has not established that the use of this methodology is *per se* improper, illegal, inconsistent with the New Jersey Supreme Court's Order of July 23, 2003 or violative of any of its constitutional rights. The DOE is obligated only to utilize an approach that is reasonable and uniformly applied. Here they have done so. If the methodology is to be changed in each area in which an Abbott District is not advantaged, there will be no uniformity or equity to the provision of Abbott funds. Thus, I reject the District's argument and **CONCLUDE** that the DOE's methodology is reasonable and will not be second-guessed.

Order

I **ORDER** that as set forth in J-1 (#1) the parties will review the PSEA revenue adjustment to determine if this amount was counted twice. Further, pursuant to J-1 (#2), The DOE will calculate the District's CPI adjustment based on the District's June 30, 2003 Board Securities Report at 2.1%. The maintenance budget worksheet will be revised accordingly. I further **ORDER**, for the reasons set forth above, that in all other respects, the determination by the DOE with respect to Plainfield's 2003-2004 budget, as set forth in Assistant Commissioner MacInnes' letter of August 27, 2003, be affirmed and that the appeal be **DENIED.**

[2] Although the DOE argues that the calculation on the maintenance budget worksheet, J-3, would be unchanged no matter how the actual plan decrease was handled, I make no finding on that assertion, inasmuch as no testimony has been adduced in regard to that calculation nor is the undersigned clear that this would be the result.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to 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.

September 26, 2003
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

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

September 26, 2003
DATE

E-mailed Initial Decision to the parties on:

September 26, 2003
DATE

al

APPENDIX

List of Witnesses

For Respondent:

Keith Costello

List of Exhibits

J-1 Stipulation of Facts, dated September 24, 2003 (three pages)

J-2 Letter to Dr. Linnea Weiland, Acting Superintendent, from Gordon MacInnes, Assistant Commissioner, dated August 27, 2003 (two pages)

J-3 Maintenance Budget Worksheet for Plainfield, dated August 19, 2003 (two pages)

J-1 1 rev'd 9/0

Stipulated Facts

1. If the total general fund revenue of $106,916,490. includes the PSEA revenue adjustment of 389,157. then the PSEA revenue adjustment will be zero.

2. The CPI adjustment will be calculated based on the District's June 30, 2003 Bd. Sec. report. at 2.1.%.

3. The ~~the~~ District agrees with the utilization rate increase determined by the Dept on the maintenance budget worksheet

4. The Department's calculation for funds 11 + 15 on the maintenance budget worksheet is based on information provided to the Dept by the District on August 26, 2003. This information was based on preliminary June 30, 03 figures provided by the District

Excess Surplus Fund Balance - To be adjus
accordingly, based on the ab
adjusted figures.

5. The Department's maintenance budget wor
compared the difference between the budg
Early childhood Plan for 2003-04 a
the budgeted Early childhood Plan for 2002-03
to determine the amount to be added
subtracted from the ~~or~~ base 2002
program budget. This resulted in a
deduction of $1,585,682.00 to the
District in ~~the~~ determining the amount f
2003-2004 maintenance budget.

The Department did not utilize the
actual (revised) plan of the District
2002-2003. This was based on the
enrollment in 2002-2003. If these
numbers were utilized the difference bet
the 2002-

the Dept's approach resulted in an increase in its maintenance budget for 2003-2004.

Dated: 9/24/03

Counsel for Plainfield School District

9-24-03

Dianna Rosenbaum, DAG

OAL DKT. NO. EDU 5502-03
AGENCY DKT. NO. 206-6/03

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department of Education's (Department) decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board of Education of the Plainfield School District's (District) exceptions and the Department's reply thereto were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Initially, the Commissioner concurs with the Administrative Law Judge (ALJ), that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v.* Vagott, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). However, to the extent that he may appropriately do so in an administrative proceeding, the

Commissioner opines that the regulation at issue is fully consistent with the language and intent of the Court. Thus, like the ALJ, the Commissioner finds the regulatory definition controlling herein, with no conflict between it and the underlying Court order. Accordingly, the Department's application of such regulatory definition in its review and approval of the District's 2003-04 budget is appropriate.

Upon careful and independent review of the record, and based upon the credibility assessments of the ALJ, *N.J.S.A.* 52:14B-10(c), the Commissioner accepts the ALJ's factual findings and determines that her analysis and legal conclusions are consistent with the Supreme Court's Order of July 23, 2003, as well as the Department's regulatory amendments adopted on August 22, 2003.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

* 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.

593-03

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" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 order of the Supreme Court. The District challenged the inefficiencies identified by the respondent.

The ALJ determined that the OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2. The ALJ also concluded that the Department properly determined inefficiencies in the following areas: contracted salaries, health benefits, special education tuition, 8 new high school teachers, non-recurring expenses, miscellaneous unbudgeted revenue, courtesy busing, 3 full-time supervisory positions, one full-time central office position, one full-time assistant principal, one full-time central office technology position, and 5 of the 7 identified full-time custodial and security staff. The ALJ restored the following: 2 in-class support teachers, 3 preschool-handicapped teachers, part-time instructional aides, one full-time athletic trainer, legal fees, 2 custodial/security services positions, armory rental costs, supplies and materials and a part-time substitute caller.

The Commissioner concurred with the ALJ's findings and conclusions and adopted the Initial 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.

October 20, 2003



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5501-03
AGENCY DKT. NO. 207-6/03

BOARD OF EDUCATION OF OF PHILLIPSBURG SCHOOL DISTRICT,
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: September 22, 2003 Decided: September 26, 2003

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by the Phillipsburg Board of Education ("Phillipsburg" or "Board") from its amount of Additional Abbott v. Burke State Aid ("supplemental aid") for the 2003-2004 fiscal year ("FY '04"). In accordance with the recent ruling by the New Jersey Supreme Court issued on July 23, 2003, the amount of supplemental aid granted for 2003-2004 is to be determined under a "maintenance budget" standard.

Adoption of this standard allows a school district to continue implementing the approved programs, services and positions from the 2002-2003 fiscal year ("FY '03"), subject to an adjustment for "non-discretionary expenditures," such as increases in contracted salaries, health benefits and special education tuition. Additionally, the Supreme Court directed the New Jersey Department of Education ("DOE") to "promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the district's non-instructional program." In compliance with this directive, the DOE adopted emergency regulations on August 22, 2003 clarifying the meaning of "maintenance budget" and establishing standards for determining whether administrative and central office expenditures are "ineffective and inefficient." Applying its newly adopted standard, the Department has identified various administrative costs said to be "ineffective or inefficient" and has reduced Phillipsburg's FY '04 supplemental aid by such amounts.

Phillipsburg argues that the definition of "maintenance budget" set forth in the Department's new regulations contravenes the New Jersey Supreme Court's ruling and deprives it of maintenance funds to which it is entitled. Moreover, Phillipsburg contends that the budgetary reductions are improper under the effective and efficient standard. Additionally, Phillipsburg contends that the DOE failed to apply its regulations uniformly and consistently among the thirty Abbott districts.

Under the Supreme Court order, "the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulation. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard."

Procedural History

By letter dated May 30, 2003, the Department notified the Board of the results of its initial review of Phillipsburg's budget submission. On June 5, 2003, the Board filed a verified petition of appeal with the Commissioner of Education ("Commissioner").

Thereafter, the Department filed an answer on June 13, 2003. Meanwhile, on June 9, 2003, the Commissioner had already forwarded the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

Initially, the OAL held hearings on July 7, and 8, 2003. After the New Jersey Supreme Court issued its most recent ruling, the OAL held additional hearings on September 9, 10, 12 and 22, 2003. Witnesses and exhibits are listed in the appendix.

Findings of Fact

General Background Information

Most of the general background facts are undisputed. Located in Warren County, New Jersey across the Delaware River from Pennsylvania, the Town of Phillipsburg has a population of 15,000 to 16,000. Phillipsburg School District, one of thirty so-called "Abbott" Districts, has a total enrollment of roughly 3,500 students.[1] It is a K-to-12 district serving the children of town residents. Phillipsburg operates four elementary school buildings (two for grades 1 and 2 and two for grades 3, 4 and 5), a middle school building (grades 6, 7 and 8) and a high school building (grades 9, 10, 11, and 12). Kindergarten classes are conducted at an armory and at one of the elementary schools. Phillipsburg also leases facilities for use of its preschool program.

Phillipsburg is the receiving district for high school students from the neighboring municipalities of Alpha, Bloomsbury, Greenwich, Lopatcong and Pohatcong. None of these comparatively wealthier sending districts qualify as "Abbott" Districts. In contrast, Phillipsburg has "a lot of needy children," many of whom come from single parent households. Over half of the children at the elementary and middle school level receive subsidized meals under the federal free or reduced lunch program. Economic

[1] "Abbott district" means one of the 28 urban districts in district factor groups A and B specifically identified in the appendix to *Abbott v. Burke*, 119 *N.J.*287, 394 (1990) ("*Abbott* II") or any other district classified as a special needs district by legislation. *N.J.S.A.* 18A:7F-3. Phillipsburg falls within district factor group B. http://www.state.nj.us/njded/finance/sf/dfgdesc.shtml

conditions in the community have deteriorated following the closing of the Ingersol Rand plant and other nearby factories. A majority of its students are Caucasian. African-American students comprise nine to ten percent of the enrollment and Hispanic students one to two percent.

Pursuant to the direction of the New Jersey Supreme Court in *Abbot v. Burke*, 153 *N.J.* 480 (1998) ("Abbott V"), every Abbott school must adopt one of several whole-school reform models designed to raise educational standards for disadvantaged children. Unique among Abbott Districts, Phillipsburg received state approval to select an alternate model whose use in the District predated whole school reform. At the elementary level, Phillipsburg employs the "standard bearer model" developed by Phil Schlechtey of the Center for Leadership and School Reform in Louisville, Kentucky. Essentially, this model requires educators to align curriculum, instructional activities and assessment so that children are tested on what they are taught. At the high-school level, Phillipsburg applies the "Coalition of Essential Schools model," derived from the research of Ted Sizer of Brown University, which focuses on the work product of the child as the measure of success.

What originally drew the Department's attention to Phillipsburg is that its budget for FY '04 is 14% higher than base year '03, far outstripping the annual rise in the cost of living. At a time when the Department sought to hold educational spending level in Abbott districts, Phillipsburg's request for state aid rose from $4.2 million in 2002-2003 to $11.3 in 2003-2004, an increase of 275%.

When reviewing Phillipsburg's budget requests, James Turek, DOE's budget manager assigned to review the Phillipsburg budget, concentrated on economic "inefficiencies" and did not conduct his own evaluation of programmatic "effectiveness."[2] Turek is a certified public accountant with special expertise in school finance and has eleven years of experience examining school budgets. Having been assigned to work with Phillipsburg for several years, Turek is thoroughly familiar with local conditions. He

[2] Eleanor Jaick, a Department official with expertise in program development, performed a programmatic review of the District, but she did not testify at the hearing.

defines "efficiency" in terms of "achieving positive results and spending low amounts of money." Thus, he looks for ways to save money without compromising academic achievement in a school district. Generally, Turek commenced his review by comparing budgeted amounts in FY '04 with FY '03, looking for increases. Then he referred to DOE's comparative spending guide for 2003, which ranks all Abbott districts in terms of spending for a particular function or service. Overall, Turek found that Phillipsburg was consistently among the top spenders in nearly every category.

Next, Turek utilized a report prepared for DOE by the independent forensic accounting firm of RosenfarbWinters as an additional measure of excessive spending. RosenfarbWinters took audited financial expenditures for FYs '01 and '02, adjusted for inflation, and converted the data to cost per pupil for various categories contained in the uniform chart of accounts.[3] As a proxy of academic success, RosenfarbWinters used test scores on a statewide reading test administered in fourth grade. Plotting non-instructional expenses against reading scores, RosenfarbWinters selected four districts falling within the middle range of all Abbott districts as "benchmarks. Lastly, Turek applied his own professional judgment and experience in identifying which cost centers were overly expensive. For the most part, Turek did not single out individual employees as performing poorly, but rather compared total costs for delivery of particular packages of goods or services.

Disputed Cost Items

For convenience, each disputed cost item will be discussed under an appropriate heading. Items No. 1(A) through 1(F) involve "non-discretionary" cost increases necessary to maintain programs and services existing in 2002-2003. Item 2 deals with non-recurring expenses. Item No. 3 relates to determination of miscellaneous unbudgeted revenue. Items No. 4 to 15 pertain to non-instructional expenses that the Department has identified as "inefficient or ineffective," and, therefore, ineligible for state funding.

[3] RosenfarbWinters derived its data from the Comprehensive Audited Financial Reports ("CAFRs") that school districts are required to file annually. Actual expenditures for FY '03 are not yet available since the CAFRs are not due until November 5, 2003.

Calculation of Non-Discretionary Expenses

Abbott districts are entitled under the latest New Jersey Supreme Court order to "documented increases in non-discretionary expenditures" including, *e.g.*, increases in contracted salaries, health benefits and special education tuition. A common theme running throughout discussion of this issue is the difference in methodology used by the parties to calculate this amount. DOE started with projected total spending in FY '03 taken from a report prepared by accounting firm of KPMG.[4] After adjusting for the effect of staff turnover, Turek applied a factor designed to represent a reasonable increase in non-discretionary expenses, such as the consumer price index or movement on a negotiated salary guide. Phillipsburg started with the number of employees on the district roster as of June 30, 2003 (or the number of students enrolled in the district as of September 2003) and multiplied that amount by contracted increases. Basically, DOE bases its calculation on *spending* in FY '03, whereas Phillipsburg bases its calculation on contracted increases *per employee or student*. Both methods have their relative strengths and weaknesses. DOE's reliance on actual spending does not fully mirror that some employees may start or leave midyear, although the DOE contends that such minor variances should not materially affect the total amount that Phillipsburg spent in the 2002-2003 school year. Phillipsburg's reliance on the number of persons on its payroll at the end of a particular school year fails to consider that these same persons may not be employed during the next school year.

[4] Because final audited financial data for FY '03 will not be available until November 5, 2003, DOE retained KPMG to project Phillipsburg's spending in FY '03 based on "agreed-on procedures." DOE has stipulated that it is willing to adjust the numbers up or down when the final audited figures are filed.

1(A) Increases in Contracted Salaries

Negotiations for teacher salary increases were ongoing during FY '03 and were not concluded until shortly before the closing of the record in this case. Therefore, the salary increases are not really "non-discretionary," in the sense that, until recently, they were still within Phillipsburg's ability to control. Aware of the High Court's directive for continuation of a maintenance standard, Phillipsburg nevertheless saw fit to award its teachers a generous salary increase well above the statewide average.[5] Since Phillipsburg was not raising its local tax share, the Board had little incentive to hold the line. On September 13, 2003, Phillipsburg entered into a memorandum of agreement granting teachers a 7% increase for FY '04.[6] In exchange, Phillipsburg obtained the teachers' consent to lengthen the school day by 60 minutes at the elementary and middle schools and by 10 minutes at the high school. Significantly, Phillipsburg made no attempt to justify its high salary increase by claiming that its teaching staff historically earned less than teachers in comparable school districts.

Following the DOE's methodology, Turek increased the total spending in FY '03 by the amount necessary for step increases on existing salary guides and arrived at a total salary increase of $774,931.[7] While the DOE acknowledged a willingness to approve a reasonable salary increase for teachers once contract negotiations were complete, it is unprepared to fund such a large salary jump in an austerity year. On the other hand, Poch applied the 7% increase to the salaries of teachers on the payroll and came to a total salary increase of $1,776,990, or about $1 million more than DOE's estimate.

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[5] A news release from the New Jersey School Boards Association, dated September 4, 2003, reports that the average salary increase for teachers' contracts covering the 2003-2004 school year is 4.63%

[6] In addition, the Board made other substantial concessions, including deleting the deductible on the district's prescription drug plan, increasing coaches' salaries and agreeing to submit future disputes to binding arbitration.

[7] Turek's approach also took into consideration a 4% contractual increase for other school-based personnel and 4.25% contractual increase for custodians and maintenance workers. Their contracts did not expire in FY '03, so the amounts were already fixed.

I **FIND** that the Department's methodology provides a reasonable gauge of the total increase that Phillipsburg will spend for salaries in FY '04. No system is perfect and each necessarily depends on a snapshot of available data at a particular point in time. Regardless of the merits of Phillipburg's preferred methodology, the DOE has chosen a rational approach that must be upheld. Phillipsburg acted imprudently by expanding the workload in a maintenance year and demanding state subsidy of a large salary increase to pay for what is clearly a new service. Understandably, the DOE is reluctant to intervene in the collective bargaining process or to establish an inflexible cap on salary increases. Surely, teachers are entitled to receive a reasonable cost-of-living adjustment. Absent special circumstances, however, the Commissioner should not approve funding for a salary increase greatly in excess of the average increase resulting from competitive market forces.

1(B) Increased Cost of Health Benefits

Disagreement on the health benefit issue again turns on the parties' differing methodologies for calculating increased costs. Both sides accepted the FY '04 rate increases for Phillipsburg's major medical, dental and prescription drug programs, amounting to roughly 11%, 9% and 17% respectively. Once more, Turek multiplied the composite rate times actual *spending* in FY '03 and determined a total cost increase of $596,672. Poch used the same rates, but took the *number of employees* on its payroll on June 20, 2003, and projected a total cost increase of $740,126.

I **FIND** that that DOE applied an appropriate methodology, based on actual spending in FY '03, and granted Phillipsburg a reasonable increase for higher health benefit costs in FY '04.

1(C) Increase in Special Education Tuition

Phillipsburg incurs tuition costs for placement of students with severe disabilities in various types of out-of-district settings, including other public school districts, state

facilities, day training centers and private schools.[8] Expected percentage increases in tuition rates are largely known, stemming from fees charged by the schools in question. However, the need for outside placement changes from year to year, depending on a set of complex factors, including the severity of the handicapping condition, the kinds of classes and related services available in-district, the progress made by individual children, graduation of those eligible for service, and families moving into and out of the district.

In light of the potential for wide fluctuations, the DOE did not merely take last year's actual spending to calculate the anticipated increase the current fiscal year. Instead, Turek reviewed the number of individual educational programs from 1998-1999 through 2002-2003 and created a five-year historical trend for each Abbott school district. The underlying source for such data is the annual Application for State School Aid ("ASSA"), containing audited enrollment figures as of October 15th of each year[9].

On the five year historical trend, Phillipsburg had a projected decrease in special education tuition of -.267%. By comparison, East Orange had a projected increase of 11.79% and City of Newark of 8.87%. Rather than subject Phillipsburg to a loss of special education tuition, Turek extrapolated a likely out-of-district enrollment of 51 children and granted a special education tuition increase of $205,000. Should actual enrollment happen to turn out differently, Turek is willing to adjust the aid figure once actual enrollment and audited spending amounts are known.[10]

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[8] Under federal and state law, public school districts in New Jersey are obligated to provide eligible handicapped children with a free and appropriate public education, which sometimes requires placement in a more restrictive environment than the local public school. *Lascari v. Board of Educ. of Ramapo-Indian Hills Reg. Sch. Dist.*, 116 *N.J.* 30 (1989).

[9] *See N.J.S.A.* 18A:7F-33.

[10] Assistant Education Commissioner Gordon MacInnes' letter of August 27, 2003 promises "that the preliminary maintenance budget and estimated need for discretionary Additional Abbott v. Burke State aid will be subject to further adjustment after submission by your district of the 2002-2003 CAFR."

Since official enrollment figures for the current year will not be compiled until October 15, 2003, Phillipsburg does not yet have reliable enrollment date for FY '03.[11] Using less accurate information available as of September 2003, however, Poch calculated that Phillipsburg's special education tuition increase for the current year should be $399,226 or $194,226 more than DOE's allowance. Apart from its questionable accuracy, Phillipsburg's reliance on opening-day enrollment figures conflicts with DOE's established procedures for predicting Abbott district's future needs. Although this year the state's determination of the preliminary maintenance budget happened to be delayed, ordinarily the DOE would expect to release its preliminary aid figures in ample time for Abbott districts to plan for the upcoming school year. Of necessity, the preliminary figures would have to be based on reasonable projection techniques, since actual numbers would not be available until after the start of classes.

Equally important, Phillipsburg failed to present a satisfactory explanation for any sudden and unexpected increase in tuition costs. Adequate inquiry into such changed circumstances would best be accomplished by a thorough programmatic review conducted by the Division of Special Education rather than a financial audit by persons less acquainted with special education considerations. Completion of such programmatic review will take additional time and cannot be accomplished within the short timeframe for determination of the district's immediate budgetary needs.

I **FIND** that DOE used the best available data to foresee likely tuition increases in the school year about to begin. When audited figures become known in November, Phillipsburg will have an opportunity to reconcile any differences. If Phillipsburg remains dissatisfied with the amount of tuition costs reimbursed by state aid, it can always file a mid-year emergency application for additional resources.[12]

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[11] In its report, RosenfarbWinters did not use Average Daily Enrollment ("ADE"), as opposed to ASSA numbers, because "budgeted ADE numbers may be inaccurate." (at 20).

[12] An Abbott district may file a separate application for supplemental funding during a school year if it has a " need for additional resources to implement Department-approved program, services and other services due to unanticipated expenditures or unforeseen circumstances." *N.J.A.C.* 6A:10-3.1(g).

1(D) 2 "In-Class Support" Teachers Costing $94,049

Responsive to the strong statutory preference for educating handicapped children together with their non-handicapped peers in the mainstream, Phillipsburg has several third and fourth grade classes with a mixed enrollment of classified and non-classified students.[13] Such "in-class support" settings require two teachers, an elementary-school teacher who teaches the regular curriculum to everyone and a teacher of the handicapped who provides extra support to handicapped students. Last year, Phillipsburg provided in-class support services to five classes at Andover Morris Elementary School with a total enrollment of 47 students. Enrollment has increased to 56 this year. Accordingly, Phillipsburg is extending in-class support services to two additional classrooms in FY '03 and has requested two additional special-education teachers to provide these services. John Consentino, Phillipsburg's director of special services, testified that Phillipsburg would be unable to furnish the services mandated by the children's individual educational programs without the two new teachers.

At first blush, this cost center would appear to be governed by the same principles as the preceding one, in which Phillipsburg had relied on unaudited enrollment data from September 2003. Turek, however, adopted a much more conciliatory approach and appeared to agree with Consentino that the increase was probably necessary. Turek's only hesitation in approving this expense was that he had not been provided with sufficient information that existing classes had reached maximum capacity.

Consentino explained that the Division of Special Education will rarely grant a waiver to increase class size. Lacking expertise in the field of special education, Turek mistakenly thought that one teacher with dual certification might be able to perform the services of both teachers. That proposal, however, would defeat the purpose of adding a second teacher to provide additional support and assistance to children in need of more individualized attention.

I **FIND** that Phillipsburg must employ two additional special education teachers to comply with federal mainstreaming requirements and provide learning-disabled students with the assistance necessary to succeed in a regular classroom environment.

1(E) 3 Preschool-Handicapped Teachers Totaling $160,749

While this item was analyzed as a "non-discretionary increase," it is not a new or more costly service in the district. During 2002-2003, Phillipsburg already provided in-class support services to handicapped children enrolled in mainstream preschool classes. Phillipsburg actually had four special-education teachers providing in-school support to handicapped preschool-aged children last year, but one of the teachers has been transferred to a third-grade class for 2003-2004. Therefore, Phillipsburg is seeking Abbott funding to maintain three teaching positions that had already existed in the base budget year.

Phillipsburg's inclusive preschool classes have a maximum class size of 15 children, no more than 6 of whom can be handicapped.[14] Staffing consists of three adults: a preschool teacher; a special-education teacher; and an aide. Prior to FY '04, the Division of Early Childhood Education funded all three positions out of Early Childhood Program Aid. Beginning in 2003-2004, the Division of Early Childhood Education will no longer pay for the special education teacher, which position must now be funded out of the general account. Turek's objection to this expense relates not so much to the efficacy of the program as to the change in funding source. Nevertheless, he expressed lingering doubts regarding whether such intensity of service is really desirable or necessary.

I **FIND** that this program was included in last year's spending and, regardless of funding source, is more fittingly part of the maintenance budget than a new expense. In-class support is a school-based instructional service that directly benefits the

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[13] 20 *U.S.C.A.* §1412(5)(B). *Oberti v. Board of Educ. of Clementon Sch. Dist.,* 995 *F.* 2d 1204 (3rd Cir. 1993).

[14] Mainstream preschool programs must have "a certified teacher and an assistant for each class" and "a maximum class size of 15 students." *N.J.A.C.* 6A:10-2.1.

youngest and most vulnerable members of our society. Phillipsburg is entitled to receive Abbott funding in order to continue this valuable program.

1(F) 8 New High School Teachers Totaling $334,026

Not only did these positions not exist in FY '03, but also the September 2003 high-school enrollment was unknown at the time that the DOE determined Phillipsburg's preliminary maintenance budget. Comparing official high school enrollment on October 15, 2002 with unofficial figures on September 8, 2003, Phillipsburg calculated an increase of 164 students. Without explaining the intervening steps, Phillipsburg equated this increased secondary enrollment to a need for two social studies teachers, an English teacher, a home economics teacher, a French teacher, a special education teacher, a health and physical education teacher and a mathematics teacher.

As discussed in the general background section, Phillipsburg is the receiving high-school district for several surrounding communities, many of which are relatively prosperous and do not qualify as Abbott districts. Since public records show that the growth rate for enrollment at Phillipsburg's elementary and middle schools is less than 1%, it is reasonable to infer that the bulk of the increased enrollment at the high school comes from the sending districts. Turek was dismayed at the prospect that Abbott funds might be "diverted" to pay the fair share of sending districts that can afford to pay their own way. Phillipsburg received $7.9 million from the sending districts for FY '04, an increase of $600,000 to $700,000 over the prior year.

In advocating the need for additional high school teachers, Phillipsburg witness George Chando referred to a "prescribed" classroom size of 24 students at the high school level, but did not cite any authority for this limit. Turek clarified that 24 students per high-school class was intended by DOE as a target goal and that DOE has no immediate plans to sanction any Abbott district for failing to reach that goal.[16] Class sizes in non-Abbott high schools in New Jersey range from a low of 15 to a high of 35.

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[16] *N.J.A.C.*6A:24-4.1(j) requires that, by September 2002, Abbott districts have a plan in place to continue to reduce class size by 1:24 for grades 9 through 12.

I **FIND** that the increase in high school enrollment is largely attributable to population trends in the sending districts and that Phillipsburg has the option of increasing its tuition fees to defray any increased costs. In the worst-case scenario, a modest increase in high-school class size will not substantially impede the ability of Phillipsburg students to master the core curriculum content.

2. Non-Recurring Expenses Totaling $142,825

One-time costs incurred in the base year must be deducted from the maintenance budget because they will not recur in the current year. Phillipsburg stipulates that the acquisition costs for the site of its proposed new high-school building is a non-recurring cost because the School Construction Corporation ("SCC") has purchased the property and assumed financial responsibility. Henceforth, Phillipsburg will no longer be required to make principal and interest payments on the lease-purchase agreement. However, Poch testified that, on September 15, 2003, Phillipsburg had to make a last payment to the bank of $120,000 in principal and $11,667 in interest. Another interest payment of $11,158 is due by March 15, 2004.

Phillipsburg concedes that the SCC will ultimately refund its full principal and interest payments. Before that can happen, however, the Board must successfully bring a "defeasance" action in court. Phillipsburg encountered delay in instituting the defeasance proceeding because its bond counsel has been ill or otherwise unavailable for the past four months. In essence, Phillipsburg is asking the DOE to "front" the money, which Phillipsburg knows will soon be reimbursed to it.

Turek countered that DOE has been encouraging Phillipsburg to commence a defeasance action "since March or April 2003," but that Phillipsburg has ignored its entreaties. DOE is unwilling to fund amounts now payable by the SCC.

I **FIND** that the continuing obligation for Phillipsburg to pay these costs in FY '04 is due to its own inaction and failure to protect its rights. DOE should not use Abbott

funding to pay for a cost that was avoidable and for which Phillipsburg will be receiving full reimbursement.

3. Miscellaneous Unbudgeted Revenue Totaling $350,000

Miscellaneous revenue includes income from various sources, such as interest earnings, athletic gate receipts, and income from rental of district-owned facilities. While Phillipsburg budgeted miscellaneous revenues of $175,000 for FY '04, DOE wants to double that amount to $350,000.

Poch introduced a worksheet showing that Phillipsburg had received total miscellaneous revenue of more than $300,000 each year since FY '00. In FY '02 alone, miscellaneous revenue totaled $529,257. Despite that rosy record, Poch anticipates that this number will drop to $175,000 next year because one of the major sources of miscellaneous revenue last year will not be repeated in 2003-2004. Furthermore, Poch noted that interest rates have fallen dramatically. Taken in conjunction with Phillipsburg's declining free balance, Poch predicted that future interest earnings would be less than past performance.

Data from the KPMG report confirms that Phillipsburg had miscellaneous revenues well in excess of $300,00 each year for the past four years. Moreover, the KPMG report discloses that Phillipsburg engaged in a pattern of underestimating its miscellaneous receipts by half in the years for which audited data is available. Turek disagreed with Poch that interest earnings will continue to erode, since the effect of lower interest rates has already been felt in FY '03. Additionally, Phillipsburg has some ability to increase future returns by raising the cost of tickets to athletic events and by charging more for rental of its facilities.

I **FIND** that DOE's calculation, based on historical performance and the district's demonstrated tendency to understate its revenues by half, is an acceptable approach to projecting miscellaneous revenue in FY '04.

4. Courtesy Busing Totaling $50,000

State statutes and regulations require public school districts to furnish transportation for elementary-school students residing more than two miles from their school of attendance and for high-school students residing more than two and-a-half miles from their school of attendance.[17] Above the amount necessary to comply with the law, Phillipsburg seeks additional money to provide transportation for students alleged to reside along hazardous routes. Although the Department approved about half of this request, it deducted $50,000 from Phillipsburg's appropriation.

School business administrator William Poch described several heavily traveled thoroughfares running through the District, such as Route 22 and Belvidere Road, and other streets that are "narrow" or "do not have sidewalks." Crossing guards supplied by the town are stationed at some of the more dangerous intersections during hours when children walk to and from school.[18] Despite his personal views on safety conditions, Poch acknowledged that the Board had never adopted a formal policy designating certain routes as hazardous.[19] Moreover, Phillipsburg did not produce any government reports showing a high number of accidents at any particular location or present any testimony by law enforcement officials trained in traffic safety. In response to questioning, Poch admitted that the Board has never explored other available options, such as asking the town to pay for courtesy busing, requesting additional crossing

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[17] *N.J.S.A.* 18A:39-1; *N.J.A.C.* 6A:27-1.2.

[18] Traffic safety hazards are the responsibility of municipal or county government and not the school district. *Melick v. Lopatcong Twp. Bd. of Educ.*, OAL DKT. NO. EDU 2280-85 (Oct. 28, 1985), *adopted* Comm'r (Dec. 4, 1985). The Commissioner has ruled that a school board lacks the "authority to enforce traffic laws, to provide sidewalks, traffic lights, crossing guards, police patrols, overpasses, etc. to meet the requirements of safe travel for school children." *Schrenk v. Ridgewood Bd. of Educ.*, 1961 *S.L.D.* 185, 187.

[19] *N.J.S.A.* 18A:39-1.1 expressly requires that school districts providing courtesy busing must adopt a policy listing hazardous routes requiring courtesy busing of students and setting forth "the criteria used in designating the hazardous routes."

guards, or charging subscription fees to parents who can afford to pay.[20] As Turek pointed out, nearly half of the families in the district are not financially disadvantaged and could contribute toward courtesy busing if they want the extra service.

I FIND that $50,000 for remote busing could be eliminated from Phillipsburg's budget without negative impact on the quality of education in the district. Phillipsburg has voluntarily chosen to provide free transportation to children who live within reasonable walking distance of school. Proofs are inadequate to establish that these routes pose an unacceptable threat to children's safety. Furthermore, the Board has not exhausted other methods of shifting these costs to families who directly benefit from the service or to town authorities who are responsible for local safety conditions.

5. Part-Time Instructional Aides Totaling $60,000

Phillipsburg has employed instructional aides or "tutors" to assist classroom teachers at the primary-grade level since long before the advent of whole school reform. Last year, Phillipsburg employed twelve full-time equivalent ("FTE") aides in its elementary classrooms, including three FTE's that the Department proposes not to fund. Typically, an aide works only part-time, so that six or more people fill three full-time positions Most of these aides are assigned to grades 1 and 2 and only a few to grades 3 and 4. Pat Cawley, Phillipsburg's director of elementary education, explained that aides work intensively with at-risk students entitled to remedial educational services.[21] Much of the aides' time is devoted to reinforcing the lessons in an instructional setting. The District uses a "balanced literacy program," in which students are exposed to a variety of instructional approaches, including phonics, guided reading and written exercises. Groups of three or four children gather at workstations to practice their reading, writing and mathematics skills. Since a classroom teacher

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[20] The Town of Phillipsburg or the Board itself may provide busing to non-remote children and pass all or some of the cost along to parents or guardians, provided that it does not impose such charges on households who qualify for the free and reduced lunch program. *N.J.S.*A. 18A:39-1.2, -1-3; *See also*, *N.J.A.C.* 6A:27-1.3.

[21] Initially, Phillipsburg's classroom aides had been partially supported by Title I funds, but eventually the local district assumed the full costs.

cannot be everywhere at once, the teacher relies on the instructional aide to circulate among these smaller groups.

Use of paraprofessionals to assist teachers is a time-honored practice in the field of education.[22] Aides do not possess teaching certificates and can only work under the direction of a certified professional.[23] Cawley, who personally evaluated classroom aides in his previous position of elementary school principal, noted that elementary school aides had become "part of the fabric" of the District's homegrown model for whole school reform. Teachers and aides "co-plan together" and "meet at various times to coordinate their efforts."

Indeed, the Department's representative recognizes that classroom aides in Phillipsburg perform "a wide gambit" of activities, including assisting students with their studies and helping control misbehaving students. Turek targeted this area for a cut not for any perceived lack of educational usefulness, but largely because state code only requires classroom aides in kindergarten and preschool. Conceding that Phillipsburg has not proposed any increase in the number of elementary school aides from the prior year, Turek nevertheless suggested that the money "could be put to a better use." Not having academic credentials, however, Turek was unable to contradict Cawley's assertion that classroom aides make a valuable contribution to the success of Phillipsburg's academic program. Cawley noted that fourth graders' test scores on state-mandated achievement tests have improved, which he attributes to greater academic preparation in the lower grades.

I **FIND** that Phillipsburg has made effective use of school-based aides to assist small groups of at-risk students in developing basic academic skills. Unrefuted proofs

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[22] As the name implies, an aide's main function is to aid professionals by relieving them of easy or repetitive tasks that do not require extensive training or expertise. *Roach v. Sch. Dist. of South Orange-Maplewood,* 96 *N.J.A.R.*2d (EDU) 370, 1995 *W.L.* 869230 (N.J. Admin.)

[23] *N.J.A.C.* 6:11-4.6 authorizes the County Superintendent of Schools to approve the appointment of school or classroom aides who assist in the supervision of pupil activities "under the direction of a principal, teacher, or other designated certified professional personnel."

show that primary grade students have benefited from the extra attention and that their basic skills have measurably improved. Over the years, these aides have been integrated into the design of Phillipsburg's whole school reform and it would be difficult to eliminate them now without adversely affecting the comprehensive model. None of the evidence indicates that the aides are wasteful or nonproductive in achieving academic gains.

6. 1 Full-Time Athletic Trainer Costing $40,000

Turek targeted this cost center for reduction of one athletic trainer because he "had the suspicion that Phillipsburg was spending at the upper range of the scale." Unlike some larger school districts that employ only one athletic trainer, Phillipsburg budgeted for two trainers, one male and one female, so that female students would be serviced by a female trainer. If the district eliminated the female trainer, who has less seniority, the remaining male trainer would treat at least 150 female students. Indicator 13 of the 2003 comparative spending guide confirmed that Phillipsburg ranks as third highest in spending among the Abbott districts for *all* extracurricular activities, including sports as well as other pursuits. Statistics gathered internally by the DOE suggest that Phillipsburg had budgeted $76 per pupil for athletic costs in FY '04, compared to an average of $22 per pupil for twenty-seven other Abbott districts. On cross-examination, however, Turek conceded that the statistical analysis "appeared to have some flaws in it" and that the Department "could probably get better data."[24] In the absence of a female trainer, Turek suggested that a school nurse, the school physician, or female coaches might assume her duties. Turek consulted with coaches "outside the district," but did not speak to Phillipsburg's athletic trainers to find out exactly what they do.

Athletic trainers in Phillipsburg perform personal services requiring physical contact with students, such as wrapping ankles. William Poch, the school business administrator, explained that Phillipsburg wanted to retain a female athletic trainer to treat sports injuries incurred by female athletes. Parents in the district have expressed

[24] Several school districts are portrayed in the DOE's data as having spent nothing for their entire athletic program in FY '03, which appears highly unlikely.

concern about having male staff touching the bodies of adolescent girls. Approximately three hundred-fifty to four hundred girls presently participate in interscholastic athletic programs in Phillipsburg, a marked increase over female participation in past years. During the last five years, Phillipsburg has added a girls' lacrosse team and girls' soccer team to its sports program. Often the boys' team will play at one site at the same time that the girls' team is playing at a different site, making it impossible for the same person to cover both events.

I **FIND** that Turek relied on an admittedly unreliable statistical analysis and that he failed to give adequate consideration to local sensibilities. Phillipsburg's hiring of same-sex trainers was a reasonable accommodation to parental concerns for the welfare of their children. Because scheduling conflicts prevent the male athletic trainer from regularly attending girls' sporting events, someone else would have to cover these events anyway. DOE has not shown that it would be more cost-effective to hire a more qualified nurse or doctor to perform services that could be handled by an athletic trainer or that female coaches are properly trained to serve as a substitute.

7. Legal Fees Totaling $100,000

Phillipsburg spent $241,259 for legal services in FY '03. DOE proposed to reduce state aid relating to legal expenses by $100,000 for FY '04. Adjusting the difference of $141,259 by an inflation factor of 2.11%, DOE approved legal fees of $144,240. In conducting his review, Turek did not prepare a detailed analysis of what was driving legal costs in the district. Instead, he compared Phillipsburg's legal expenses to the RosenfarbWinter's benchmark standard of $115,791. Nevertheless, Turek criticized certain legal expenditures as being extravagant or unnecessary. Specifically, Turek faulted Phillipsburg for increasing legal fees by entering into a one-year contract with its teachers, thereby necessitating that the contract be renegotiated in the upcoming year. Similarly, he questioned whether it was necessary for Phillipsburg to retain outside counsel to pursue its Abbott appeal and sue to switch to a different interscholastic athletic league.

Phillipsburg countered with evidence that its legal expenses were reasonable and justified by the needs of the district. Some of Phillipsburg's legal expenses were appropriately incurred in connection with disciplinary action taken to suspend disruptive students and in the defense of a slip-and-fall case. Originally, the Board had entered into a one-year labor contract due to the uncertainty surrounding state funding, but Phillipsburg has recently concluded negotiations resulting in a new three-year contract. Phillipsburg hired outside counsel to handle the Abbott appeal because its regular board counsel lacked special expertise in this field. Changing to a different athletic league is designed to reduce significantly the travel time of students participating in interscholastic sports.

I **FIND** that the amount incurred by Phillipsburg for legal expenses last year was reasonable and should not be reduced by $100,000 below the maintenance budget. Legal costs are one of the most difficult types of expenses to compare meaningfully, since the amount varies greatly with type of litigation and, to the extent that a district is forced to defend itself, may be beyond its ability to control. Fees for labor counsel and for legal advice about switching athletic leagues are related to legitimate district business and cannot be regarded as extravagant or unnecessary. Certainly the Board should be able to obtain adequate legal representation in order to challenge the amount of state aid allocated to it under the Abbott formula. Nothing suggests that the hourly rates charged or the amount of time spent by the attorneys were excessive.

8. 3 Full-Time Supervisory Positions Totaling $200,000

Compared to other Abbott districts, Phillipsburg devotes a larger portion of its limited revenues to administration and supervision of teachers. On the 2003 comparative spending guide, Indicators 18 and 19, which reflect administrative deployment, illustrate that Phillipsburg ranks 28 out of 30 Abbott districts, with a student-administrator ratio of 79.1 to 1 and a faculty-administrator ratio of 8.9 to 1. Garfield City, a comparable school district in size and population, manages to perform the same function with a more efficient student-administrator ratio of 168.5 to 1 and an administrator–faculty ratio of 14.9 to 1. RosenfarbWinters' study of Phillipsburg's

budget confirms abnormally high spending in this cost center. Scrutinizing total salary expense for non-instructional services (which lumps together school administrators and supervisors with other non-instructional services), RosenfarbWinters quantified Phillipsburg's inefficient spending in this general category to be in excess of $1.45 million.

Testimony of Phillipburg's own witnesses lends support to the finding that the district has too many supervisors. Until recently, Phillipsburg functioned without a supervisor of curriculum and instruction, let alone two such positions. Pat Cawley, director of elementary education, recalled that these two new positions were added in 2001 because Phillipsburg's curricula were not aligned to the state's core curriculum content standards and the task was too large for one person alone. One of the new supervisors updated the curricula for science, social studies and world language, while the other updated the curricula for language arts, reading and math. Significantly, Phillipsburg concedes that the task is now complete, so it would appear that one or both positions are no longer necessary. With their main job done, the two supervisors are largely reduced to responding to future core curriculum changes, introducing new teaching materials to teachers, attending meetings and assisting other administrators. Written descriptions of the tasks assigned to these two supervisors disclose numerous overlapping duties and responsibilities.

Unlike many other Abbott districts, Phillipsburg's supervisors do "little or no teaching" and "have no regular classes." Phillipsburg employs nine supervisors, who serve as department heads. Their time is exclusively spent on administrative tasks, such as developing new courses, making in-service presentations, supervising other teachers, and conducting performance evaluations. The closest any of these supervisors get to the classroom is when they occasionally demonstrate a model lesson to inexperienced or ineffectual teachers. In addition to the nine subject-matter supervisors, Phillipsburg also has building principals and various assistant principals (four at the high school and one at the middle school) who serve the duplicative function of evaluating teacher performance. Review of Phillipsburg's organizational hierarchy reveals that the administrative structure is highly redundant. For example, in

special education, this relatively small district maintains three separate layers of supervision: a director of special services; a supervisor of special education; and a supervisor of child study teams.

Without presuming to tell Phillipsburg which particular supervisory positions are dispensable, Turek expressed his view that Phillipsburg could eliminate three intermediate-level supervisors at a salary savings of $200,000. State law requires school districts to employ a chief school administrator and building principal (and most, if not all, districts have an assistant superintendent), but, once you get below cabinet level, other supervisory duties "are ripe for reallocation." It is important to emphasize that Turek did not attempt to assess the job performance of individual supervisors. Far from accusing Phillipsburg's supervisors of incompetence, Turek believed that their talents were underutilized and that a fewer number of administrators could accomplish more work. According to Turek, Phillipsburg's high administrative costs "created a drag on this cost center in comparison to other Abbott districts."

I **FIND** that Phillipsburg is top heavy in administration and could realize a savings of $200,000 in this cost center without any adverse impact on learning. Contrary to the format in other districts, supervisors in Phillipsburg do not carry a teaching load and have no direct interaction with students. Phillipsburg consistently rates near the bottom of the list on all objective measures of administrative efficiency, including ratio of administrators to faculty or students and total administrative costs.

9. 1 Full-Time Central Office Position Totaling $50,000

Again, Turek proposed that one central office position could be safely abolished due to Phillipsburg's excessive administrative ratios on Indicators 18 and 19 and the RosenfarbWinters study of inefficient non-instructional costs.[25] About three and-a-half years ago, Superintendent Pethick undertook an administrative reshuffling, which

[25] RosenfarbWinters commented that, while Abbott districts have greater needs than the wealthiest districts, "special needs do not drive all costs." In some areas, one would expect same or similar cost structures. For example, central office costs "should not vary significantly between school districts." (cf. p. 17).

changed several job titles but did not cause a net loss in the total number of administrators.[26] As part of the reorganization, an existing administrator was promoted to the title of director of elementary education and the high school principal was transferred to the title of director of secondary education. While Phillipsburg sought to justify the reorganization in terms of greater efficiency, Business Administrator Poch was unable to produce any cost-benefit analysis and admitted that the salary cost was pretty much "a wash." Aside from meaningless generalities, the district offered no explanation as to why its administrative expenses exceed other Abbott districts or why the duties of one of the three directors could not be redistributed among the five other central office administrators.

I **FIND** that the central office staff could be streamlined by abolishing one director's position, at a savings of $100,000, without harming the delivery of a thorough and efficient education. Simply put, Phillipsburg has too many administrators for a district of its size.

10. 1 Full-Time Assistant Principal Totaling $84,000

Phillipsburg employs four assistant principals at the high school. In comparison, Garfield City, with comparable enrollment, has only two assistant principal at the high school. As noted, Phillipsburg ranks low on Indicators 18 and 19 for administrative efficiency and was designated a high spender in the RosenfarbWinters study. Turek believes that Phillipsburg originally shared his perception because in April 2003 the Board selected one of the four vice-principal slots for elimination.

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[26] Before the reorganization, Phillipsburg had a superintendent, two assistant superintendents, a business administrator/ school board secretary, a director of reading and a special projects coordinator. After the reorganization, Phillipsburg had a superintendent, one assistant superintendent, a business administrator/school board secretary, a director of elementary education, a director of secondary education and a director of whole school reform.

George Chando, the district's director of secondary education, described the duties of a vice principal as including staff evaluation, student discipline, attendance matters, parent contact and supervision of student activities. While Chando said that services at the high school would be "strained" by the loss of one assistant principal, he never claimed that the remaining supervisors would be unable to assume the additional responsibilities.

I **FIND** that the administrative structure of four vice-principals at the high school is inefficient and that one of the positions could be eliminated without significant impact on student academic achievement.

11. 1 Full-Time Central Office Technology Position Totaling $50,000

Although the DOE agrees that Phillipsburg is entitled to a director of technology to oversee the district's computer system, it questions whether he also needs an assistant to help him perform his duties. Here too, Phillipsburg spends considerably more than other Abbott districts to deliver similar services. Indicator 7 shows that Phillipsburg budgeted $2,219 per pupil for support-service salaries and benefits for FY '03, compared to the Abbott state median of $1,322, and ranks 25th highest in per-pupil expense for this cost center. Likewise, Indicator 8 shows that Phillipsburg budgeted $1,480 per pupil for total administrative costs, compared to the median of $1,309, and ranks 24th highest in per-pupil expense. Attempting to explain such poor showing, Turek noted that some of the smaller districts with declining enrollment, like Phillipsburg, would like to provide the same breadth of support services as larger districts, although their smaller size cannot justify the higher per-pupil expenditure.

Larry McKenna, Phillipsburg's director of technology, testified that he is in charge of three computer technicians, who monitor and repair computer hardware. Last year, McKenna also supervised an unspecified number of technology coordinators, who worked directly with teachers "to integrate current technologies into their curriculum."

Management of Phillipsburg's student database, including attendance records and scheduling, has been outsourced to a private company in Pennsylvania.

Nonetheless, McKenna claims that he must have an assistant, possessing data processing and web-design skills, to fulfill his own managerial responsibilities. Pressed to elaborate on his assistant's duties, McKenna mentioned that his assistant makes educational materials available on the district's website, publishes data for Title I monitoring, and performs the "time-consuming" process of transferring student information at the end of the year. It turns out, however, that the task of transferring student information occurs over the summer, so that McKenna (who is a twelve-month employee), or someone under his direction, should be able to accomplish the chore without interfering with other duties during the regular school year.

I **FIND** that Phillipsburg is inefficient in the area of support services and does not require an extra person, at a cost of $50,000, to assist the director in managing its computer services. No evidence establishes that Phillipsburg has been unable to repair or maintain its computer system. Inadequate consideration has been given to using secretaries or clerical staff to assist with whatever data collection and analysis is not done by the outside company. Phillipsburg has failed to prove that the lack of a director's assistant will significantly impair the ability of its student body to master the core curriculum content.

12. 7 Full-Time Custodial & Security Staff Totaling $270,000

While this cost center also incorporates maintenance workers and security guards, Turek focused on inefficiencies in custodial staffing. Indicator 11, which captures costs for operation and maintenance of physical plant, shows that Phillipsburg has a per-pupil cost of $864, well above the Abbott state median of $688, and ranks 23 among the 30 districts. Several New Jersey school districts, notably Keansburg Boro and the Paterson City, have realized considerable economies by opening their cleaning operations to competitive bidding. Consequently, Turek recommended that Phillipsburg could achieve substantial savings either by reducing its janitorial staff or by privatizing

its custodial operations. In lieu of privatization, Turek suggested that Phillipsburg might reduce costs by minimizing overtime and cutting back on absenteeism. Assuming an average annual salary of $38,500, Turek estimated that Phillipsburg could save about $270,000 by eliminating seven custodians.[27] Phillipsburg itself abolished two custodial positions at the end of the 2003-03 academic year, which DOE regards as tacit recognition that its custodial department was overstaffed.

National figures from a cost study cited by DOE indicate that the median amount of square footage maintained per full-time custodial worker is 24,167.[28] Although the study has definite limitations, it offers a reasonable approximation of an acceptable workload for one custodian.[29] Applied to the total area of 420,960 square feet in Phillipsburg's physical plant, the study suggests that Phillipsburg only needs 18 full-time custodians to clean its buildings.

Phillipsburg seeks to retain its full complement of 35 custodial positions existing as of June 2003 and to add an additional custodial position. At the commencement of the 2003-2004 academic year, Phillipsburg had five vacant custodial positions and would have to remove another two custodians to attain DOE's goal of reducing seven positions. William Poch, school business administrator, maintained that DOE overstates the savings obtainable through the reduction of seven custodians, because seniority rules require that the district lay off lowest-paid workers first. He calculates actual savings from a reduction of seven custodial positions to be $215,131.

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[27] It is not exactly clear how Turek arrived at this number, but apparently it represents the savings that he hoped Phillipsburg could achieve if they privatized custodial services.

[28] *32nd Annual Maintenance and Operations Cost Study*, published in AMERICAN SCHOOL & UNIVERSITY MAGAZINE 32 (April 2003).

[29] The article cautions that, "When using these figures as a benchmark, keep in mind that all costs are greatly affected by a number of factors, including the age and overall condition of buildings, climate, the labor market in your area, as well as other aspects over which school administrations have limited control." (at 32-34).

Evidence shows that Phillipsburg's school buildings are relatively old, with the oldest dating back to 1927 and others built during the 1930's. Presumably, older buildings would require more maintenance and upkeep than newer structures. Conspicuously absent from the testimony, however, is any showing that the facilities in Phillipsburg are especially dilapidated or in need of repair. Instead, Tom Scerbo, Phillipsburg's director of facilities, testified that the thirty or so trailers serving as temporary classroom space are "a nightmare to clean" because of difficulty in moving furniture in such confined quarters. Scerbo anticipated that the proposed reduction of custodians would mean that his staff would no longer be able to continue wiping desktops, emptying wastebaskets and cleaning bathrooms on a daily basis. He predicted that less frequent cleaning might lead to a greater incidence of illness among students and teachers.

With respect to privatization, Poch stated that it would be extremely difficult to accomplish in FY '04 because the district's current contract with its custodial staff will not expire until June 2004.[30] Checking with colleagues in other New Jersey school districts, Poch learned of serious tradeoffs resulting from privatization, such as less dedication to the job, higher rates of absenteeism and loss of control over work product.[31] Hunterdon Central Regional High School District, which returned to a district-operated custodial staff after experimenting with privatization, reported that their experience had been "very negative."[32]

I **FIND** that the truth lies somewhere between the two extremes advocated by the litigants. Phillipsburg has not adequately explained why its custodial services are so labor intensive. DOE, on the other hand, has not presented a persuasive case for

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[30] *But see Impey v. Board of Education*, 142 *N.J.* 388 (1995), holding that a school board may legally terminate employment of tenured teachers and subcontract their former duties to an outside agency.

[31] For a frank discussion of the drawbacks of privatization, see "*Privatization of Custodial Services – Lessons Learned*" on the website of the Paterson Public School District. http://inet.paterson.k12.nj.us/~maintenance/ARTICLE2.html

replacing the district's entire custodial staff. Any decision by the local board to privatize custodial services should be reached only after careful consideration of all alternatives and not in the heated context of Abbott litigation. A suitable middle ground is for Phillipsburg not to fill the five custodial positions that existed throughout most of FY '03 but are presently vacant. Elimination of five custodians at the district's lowest average salary of $30,700 should produce a savings in the neighborhood of $153,500.

13 . Rental Costs for Armory Totaling $49,855

Phillipsburg houses three of its kindergarten classes in a portion of an armory, which it leases from the Department of Military & Veteran's Affairs. Phillipsburg's School-Based Youth Services ("SBYS") occupy the rest of the building, and its costs are subsidized by federal grants. The present arrangement is only temporary. Plans are afoot for Phillipsburg to vacate the armory and consolidate its far-flung kindergarten operations at a single location by September 2005. In the meantime, Pat Cawley, Phillipsburg's director of elementary education, has examined the available alternatives and concluded that it is "not feasible" to find sufficient classroom space for the 57 kindergarten students elsewhere in the district.

Turek contemplated that Phillipsburg could save rent of $49,855 if it broke up existing kindergarten classes and rearranged elementary class configurations to free up additional classroom space in other elementary schools. This idea is an offshoot of Turek's proposal to increase kindergarten class size up to the state maximum of 21 students.[33]

I **FIND** that it would be unrealistic to attempt to redistribute three large kindergarten classes to other school facilities, especially since the temporary housing

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[32] Besides the direct disadvantages to the district, there are accompanying social costs, including loss of local jobs in an economically depressed area and potential undermining of good will towards the school system.

[33] N.J.A.C. 6A:24-3.2 requires full-day kindergarten for all five-year-old children in Abbott districts, staffed by one teacher and one aide, and prescribes that maximum class size "shall not exceed 21 children." It does not, however, prohibit a smaller class size.

arrangements are expected to last only two years. Transferring young children, now that the children are just getting accustomed to their new routine, would be highly disruptive and likely to have adverse educational and social effects.

14. Supplies and Materials Totaling $175,000

Entries in this cost center are for "amounts paid for material items of an expendable nature that are consumed, worn out, or deteriorated by use." DOE did not cut any school-based supplies used by teachers or children, such as paper, pencils, erasers and books, so that the proposed reductions are addressed to non-instructional consumables used by district personnel such as board members, central-office administrators, custodians, substance-abuse counselors and computer technicians. Due to the lack of a relevant indicator on the comparative spending guide, Turek made his determination solely on the basis of the RosenfarbWinters study, which flagged inefficient spending of $215,753 in the total supplies and materials account.

Turek refined his analysis into an alleged inefficiency of $75,000 for maintenance supplies and materials and $100,000 for administrative office supplies and materials. Reportedly, this more precise breakdown came from some unidentified "documentation" that never made its way into RosenfarbWinters' final report. Prior to the hearing, DOE failed to make a copy of this document available to Phillipsburg. During the hearing, Turek could neither produce the document nor recall its contents in detail. He admitted making "a quick evaluation" of these other accounts.

Phillipsburg had originally budgeted $229,300 for maintenance supplies and materials in FY '03, but expended only $151,412 because of a self-imposed "freeze" on expenses instituted mid-year. Average expenditure for this line item over the last four years has been $180,438. Director of Facilities Tom Scerbo testified that he had deferred much-needed repairs to the FY'04 budget, including the purchase of new motors for the heating system and an ejector pump for Green Street School. A cut of an additional $75,000 from the amount spent last year would virtually cut his supplies budget in half and devastate his capacity to maintain the safety of the school buildings.

Because of a lack of storage space, Phillipsburg keeps a very low inventory of replacement parts. In response to an inquiry, William Poch assured the DOE that Phillipsburg participates in a cooperative purchasing arrangement with over one hundred school districts and obtains quotes for every expense that exceeds the statutory threshold.

Referring to unaudited figures, Poch testified that last year Phillipsburg budgeted $257,500 for administrative-office supplies but spent only $150,517. Over the most recent four-year period, the average cost has been $161,915. A large part of this category is for copy paper purchased in bulk for sending newsletters to parents and for the drug-and-alcohol program and whole school reform. Paper alone costs $24,000 to $30,000 per year.[34] Another big-ticket item is computer supplies, including replacement parts, which last year came to $58,658.

I **FIND** that DOE has not adequately demonstrated that Phillipsburg has inefficient expenditures in the two named accounts. Unable to specify the information on which he relied, Turek cited composite data from the RosenfarbWinters study that does not provide adequate detail. Phillipsburg's voluntary budget freeze in this cost center in FY '03 resulted in considerably less spending for supplies and materials in these categories than its average annual expenses during the preceding four years. Forced to accept an additional $175,000 cut on top of its self-imposed budgetary discipline, Phillipsburg would not have sufficient supplies and materials to carry out its essential responsibilities.

15. Part-Time Substitute Caller Totaling $13,000

Relying on RosenfarbWinters study of total administrative salaries, Turek postulated that Phillipsburg could dispense with employment of a substitute caller and shift her duties to existing personnel without incurring additional expense. RosenfarbWinters highlighted inefficiencies totaling $1.4 million in the non-instructional

[34] Some of the paper supplies were apparently distributed to schools "without charging back" and probably should have been reported in the school-based budget accounts.

salaries account, but did not single out the substitute caller in particular. While Turek did not explore the feasibility or cost of other alternatives, he speculated that "maybe" someone else could handle the task in exchange for "comp time" or a lesser stipend.

Every school district must make some arrangement to obtain substitutes for absent teachers and staff members. Summarized in a written job description, Phillipsburg's substitute caller "works early mornings (M-F) and early evenings (Sun-Th) to arrange coverage for employees who are using sick, vacation, family illness or personal days." Currently, the retired person who occupies this part-time position earns salary of $13,000 per year and does not receive paid vacation time or health insurance benefits. Even though she is only paid for a thirty-hour workweek, she is usually available on call throughout the school day.

Jackie Attinello, assistant superintendent in charge of operations, calculated that it would cost an average of $26,945 per year to assign a secretary to perform the same service. Secretaries working an identical thirty-hour workweek would be entitled under their contract to overtime at time-and-a half. Requiring secretaries to come early and stay late in order to perform this routine clerical task would interfere with performance of their secretarial duties. In an informal survey, Phillipsburg ascertained that nine other Abbott districts also employ a substitute caller, four others use secretaries and one uses an outside service. Burlington City, with roughly half the student enrollment of Phillipsburg, pays its substitute caller $7,000 per year.

I **FIND** that DOE has not shown that Phillipsburg's employment of a substitute caller is inefficient or that someone else is willing to do the work more cheaply. To the contrary, payment of a secretary at overtime rates is likely to be more costly and take away time from important secretarial duties.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the DOE's emergency regulations are fully consistent with the New Jersey Supreme Court's

order to establish standards for evaluating the effectiveness and efficiency of non-instructional programs.

Long before its recent reminder, the Court recognized the obligation of DOE to devise firm administrative controls to ensure that the increased funding made available to Abbott districts "was spent effectively and efficiently." *Abbott V*, 153 *N.J.* at 492. Delegation of rulemaking authority to an administrative agency is designed to permit the appropriate governmental body with the staff, resources and expertise to understand and solve highly specialized problems. Steven L Lefelt, 37 *N.J. Prac. Series*, "Administrative Law & Practice," §2.12 (West 2003). The Legislature has vested the Commissioner of Education with broad supervisory powers over the public school system, including express power to withhold State aid from any school district which fails "to obey the law or the rules or directions of the state board or the commissioner." *N.J.S.A.* 18A:55-2. *Jenkins v. Twp. of Morris Sch. Dist.*, 58 *N.J.* 483, 507 (1971).

Preliminarily, Phillipsburg argues that the Commissioner deviated from binding judicial interpretation by adopting a "maintenance budget" standard that excludes programs or services "approved" but not actually "provided" in the base year. *N.J.A.C.* 6A:10-1.2. Orders entered by the Office of Administrative Law have uniformly rejected Phillipsburg's legal argument, either on the substantive ground that the Commissioner's regulation is consistent with the Supreme Court's ruling, Judge Martone's view in *Board of Educ. of Neptune. v. N.J. Dep't of Educ.*, OAL Dkt. No. EDU 4096-03 (Sept. 11, 2003), or on the procedural ground of lack of jurisdiction, Judge Tassini's view in *Board of Educ. of Asbury Park v. N.J. Dep't of Educ.*, OAL Dkt. No. EDU 4095-03 (Sept. 4, 2003). The rationale of those cases is equally applicable here.

In passing, it is worth noting that the subtleties of the situation may require analysis of the particular facts in order to resolve what Phillipsburg conceptualizes as a legal question. When an Abbott district accepts state aid for an approved service, but fails to provide it and diverts the money to other purposes, one can easily see why that amount should be deducted from the maintenance budget in the following year. Results may be different, however, where a district makes a good faith effort to provide

a particular service, but cannot find a qualified person willing and able to do the job. These niceties need not concern us, however, since Phillipsburg made no showing that it was prevented from delivering approved goods or services in FY '03 due to circumstances beyond its control.

Emphasis in the Supreme Court's recent ruling is on controlling wasteful spending in administrative overhead and non-instructional programs, without hampering a district's capacity to provide quality school-based services directly to students. Abbott funding was never intended to create additional layers of bureaucracy, but rather to expand educational opportunities and promote greater learning. Emergency regulations adopted by DOE foster the academic goal of enabling students to achieve core curriculum content standards and read at appropriate grade level. In keeping with the spirit of this approach, this decision gives close scrutiny to central office and supervisory expenses not directly related to classroom teaching.

Lastly, Phillipsburg raises the perplexing issue that DOE has been inconsistent in applying the same regulatory standard to different Abbott districts. As one of many examples, DOE slashed petitioner's custodial and maintenance expenses because Phillipsburg ranked 23rd from the top of the relevant indicator, but did not take similar action against Newark, which ranked 30th on the same scale. Turek was not responsible for conducting the review of Newark's budget and was unable to say what local circumstances may have led his colleague to make a different judgment call. Equal protection does not require mathematic exactitude, so long as distinctions are reasonably related to a legitimate state objective. *Security Heritage, Inc. v. City of Cape May,* 361 *N.J. Super.* 281, 300 (App. Div. 2003). If Phillipsburg is inefficient in providing custodial and maintenance services, the condition cannot be ignored merely because another district happened to get away with it.

Order

It is **ORDERED** that the DOE restore $94,049 for in-class support teachers, $160,749 for preschool handicapped teachers, $60,000 for instructional aides, $40,000

for an athletic trainer, $100,000 for legal fees, $116,500 for custodial and maintenance serves, $49,855 for armory rental costs, $175,000 for supplies and materials and $13,000 for a substitute caller.

It is further **ORDERED** that, in all other respects, DOE's determination of Phillipsburg's maintenance budget for 2003-2004 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 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.

9/26/03
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

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

September 26, 2003
DATE

E-mailed Initial Decision to the parties on:

DATE

al

APPENDIX
List of Witnesses

(b) Gordon Pethick, superintendent of schools, Phillipsburg public school district

(c) William Poch, school business administrator/board secretary, Phillipsburg public school district

(d) James Turek, coordinating budget manager for northern region, New Jersey Department of Education

(e) Pat Cawley, director of elementary education, Phillipsburg public school district

(f) Jackie Attinello, assistant superintendent, Phillipsburg public school district

(g) George Chando, director of secondary education, Phillipsburg public school district

(h) Larry McKenna, director of technology, Phillipsburg school district

(i) Tom Scerbo, director of facilities, Phillipsburg school district

9. John Consentino, director of special services, Phillipsburg public school district

List of Exhibits

No.	Description
J-1	Copy of letter to Dr. H. Gordon Pethick from Gordon Maclinnes, dated August 27, 2003
P-1	Copy of letter to Dr. H. Gordon Pethick from Gordon MacInnes, dated May 30, 1999

P-2 Copy of budget expenditure report for the legal account No. 00230331, for the period July 1, 2001 to June 30, 2003

P-3 Copy of actual kindergarten enrollment in the Phillipsburg public school district as of September 3, 2003

P-4 Copy of job description for substitute caller, adopted July 2002

P-5 Copy of Abbott district substitute caller information, undated

P-6 Copy of substitute caller information, undated

P-7 Copy of job description for supervisor of elementary curriculum, undated

P-8 (a) Copy of job tasks of Ro Manmiller for 2002-03, dated May 20, 2003

(b) Copy of job tasks of Jason Bing, dated May 20, 2003

P-9 Copy of job description of director of elementary education, dated January 2001

P-10 Copy of Phillipsburg data regarding maintenance, custodian and security, undated

P-11 Copy of list of custodians for 2003-2004, undated

P-12 Copy of article entitled "Privatization of Custodial Services-Lessons Learned," on the Paterson public school district website, dated September 11, 2003

P-13 Copy of letter to Thomas P. Dunn Jr., from Gordon MacInnes, dated August 27, 2003

P-14 Copy of letter to Dr. Charles T. Epps from Gordon MacInnes, dated August 27, 2003

P-15 Copy of letter to Marion Bolden from Gordon MacInnes, dated 27, 2003

P-16 Copy of letter to Dr. James H. Lytle from Gordon MacInnes, dated August 27, 2003

P-17 Copy of corrected letter to Antonio Lewis from Gordon MacInnes, dated August 27, 2003

P-18 Copy of letter to Dr. Laval Wilson from Gordon MacInnes, dated August 27, 2003

P-19 Copy of letter to Dr. Edward F. Gola from Gordon MacInnes, dated August 27, 2003

P-20 Copy of letter to Constance Frazier from Gordon MacInnes, Dated August 27, 2003

P-21 Copy of letter to Barbara A. Trzezkowski from Gordon MacInnes, dated August 27, 2003

P-22 Copy of job description for position of custodian, adopted July 2002

P-23 Copy of job description of fields-grounds maintenance, adopted July 2002

P-24 Copy of document entitled "Supplies and Material for Maintenance," for 1999-2000 to 20003-2004

P-25 Copy of total salary increases for 2002-2003 and 2003-2004

P-26 Copy of document entitled "Supplies and Materials On-Instructional Administrative Office," for 1999-2000 to 2003-2004

P-26 (a) Copy of memorandum of agreement between the Phillipsburg board of education and the Phillipsburg Education Association, undated

P-28 Copy of increase in health benefits for 2003-2004 (actual rates), dated June 2003

P-29 Copy of special education tuition costs for 2002-2003 and 2003-2004

P-30 Copy of document entitled "CPI at 2.11% non-salary other items for net base 2002-2003 budget

P-31 Copy of document entitled Outlay Transportation-School Budget, dated July 21, 2003

P-32 Copy of document entitled "Social Security FICA," for 2002-2003

P-33 Copy of document entitled "Non-Recurring Items Lease-Purchase and Supervisor's Early Retirement," for 2002-2003 and 2003-2004

P-34 Copy of document entitled "Non-Recurring Item – E.C.P. Positions Ended 6/30/03," for 2002-2003 and 2003-2004

P-35 (a) Copy of allocation notice for IDEA funds for FY 2003

(b) Copy of allocation notice of IDEA funds for FY 2004

P-36 Copy of document entitled "Teaching Staff 2003-2004 School Year Due to Enrollment Increase," undated

P-37 Copy of document relating to special education teachers at Andover-Morris School, undated

P-38 Copy of document entitled "Preschool In-Class Support Staff," undated

P-39 Copy of list of preschool special education teachers for in-class support, dated September 22, 2003

P-40 Copy of document entitled "Revenue Adjustment Miscellaneous Revenue" comparing 1999-2000 to 2003-2004

P-41 Copy of CAFR audited revenues for the fiscal year ending June 30, 2000, June 30, 2001 and June 30, 2002

R-1 Copy of memorandum to Jim Turek from William W. Poch, dated June 6, 2003

R-2 Copy of memorandum to Jim Turek from William W. Poch, dated July 1, 2003

R-3 Excerpt from the Board's 2003-2004 budget submission (pages Jc 1, Jc 2, Jc 3, Jc4, Jc7 and Jc 8)

R-4 Excerpt from Board's 2003-2004 budget submission (page F33)

R-5 Copy of I and J spending profile, prepared by the New Jersey Department of Education

R-6 Copy of Abbott district spending profile prepared by the New Jersey Department of Education

R-7 Copy of athletic costs in Abbott districts for 2002, 2003 and 2004 prepared by the New Jersey Department of Education

R-8 Copy of food service enterprise fund comparative statement of revenues, expenses and changes in retained earnings for the fiscal year ending July 30, 2002 and July 30, 2001

R-9 Copy of New Jersey Department of Education Comparative Spending Guide for 2003-2004, dated March 2003

R-10 Report by RosenfarbWinters, LLC entitled "Appealing Abbott School District's Non-instructional Spending Inefficiencies," dated August 19, 2003

R-11 Copy of letter to Dr. Edwin Duroy from Gordon MacInnes, dated August 27, 2003

R-12 Copy of article entitled "Absence of Resources" from the website of American School & University, dated April 2003

R-13 Copy of DOE's maintenance work sheet for fiscal year 2003-2004, dated August 27, 2003

R-14 Copy of KPMG accounting report including Schedules A to J, undated

OAL-1 Copy of news release from the website of the New Jersey School Board's Association, dated September 4, 2003

OAL DKT. NO. EDU 5501-03
AGENCY DKT. NO. 207-6/03

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 local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties' exceptions and replies were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner initially concurs with the Administrative Law Judge (ALJ) that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also*, *Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to consider petitioner's argument regarding the validity and applicability of the regulation at issue, the Commissioner agrees with the ALJ that the Department's definition of

"maintenance budget," as detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003.

Further, based on the record before him and the credibility assessments of the ALJ, *N.J.S.A.* 52:14B-10(c), the Commissioner accepts the ALJ's factual findings and determines that his analysis and legal conclusions are consistent with the Supreme Court's Order, as well as the Department's regulations.[1] [2] In so concurring, the Commissioner finds that, except as specifically noted in the text of the Initial Decision, the Department's determination of Phillipsburg's maintenance budget is upheld.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.[3]

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: N/A

[1] In so concluding, the Commissioner finds that, to the extent positions were restored herein, all such positions, together with their concomitant health benefits, if any, are subject to the findings and conclusions at pages 7 and 8 of the Initial Decision regarding the application of the Department's methodology to determine increases in salaries and health benefits.

[2] The Commissioner clarifies that in concurring with the ALJ's conclusion that five of the vacant custodial positions remain unfilled, it is his intent that these positions be *eliminated.*

[3] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the Comprehensive Annual Financial Report (CAFR) until November 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[4] Pursuant to *P.L.* 2003, *c.* 22, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

594-03

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning Abbott District challenged what should properly be included in its budget as "non-discretionary" items and the Department of Education's determination of excess fund balance as of June 30, 2003.

The ALJ notes there are two issues: (1) whether the District has demonstrated that certain items are nondiscretionary and should, therefore, be added to the base 2002-03 budget and (2) whether the District has demonstrated that the 2% undesignated fund balance and excess surplus were improperly calculated by the Department. The ALJ found that No Child Left Behind (NCLB) Supplementary Services, the NCLB ESL Paraprofessional Position, the two ESL Positions and the two Balanced Literacy Positions should be considered "non-discretionary," but that radon testing, the Tienet testing and the position of Director of Security should not. Additionally, the ALJ found that the District had carried its burden of demonstrating that the 2% undesignated fund balance and excess surplus were improperly calculated by the Department.

The Commissioner modified the Initial Decision. On the latter issue, the Commissioner adopts the conclusion of the ALJ, subject to the Comprehensive Annual Financial Report (CAFR) in November 2003. However, the Commissioner set aside the ALJ's conclusion that items (a), (b), (c), (d), (e) and (h), in part, are properly considered "non-discretionary," within the intendment of the Supreme Court's Order.

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

October 28, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4162-03

BOARD OF EDUCATION OF
THE TOWNSHIP OF PEMBERTON,
Petitioner,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,
Respondent.

Richard E. Shapiro, Esq., for petitioner

Kathleen Asher, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey)

Record Closed: October 2, 2003 Decided: October 3, 2003

BEFORE **ROBERT S. MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner ("BOE" or "the District") appeals the determination by respondent ("DOE" or "the Department") of the BOE's maintenance budget for the 2003-2004 school year, including the Department's estimated need for discretionary additional *Abbott v. Burke* State aid (Exhibit R-1).

A detailed procedural history of this year's *Abbott* cases is set forth in the September 20, 2003 initial decision of Administrative Law Judge John R. Tassini in the case of *Board of Education of the City of Asbury Park v. State of New Jersey, Department of Education,* (OAL Dkt. # EDU 4095-03) and need not be repeated here.

The hearing in this matter was scheduled to begin on September 23, 2003 but had to be adjourned and rescheduled because petitioner's counsel was still in trial on another *Abbott* case in which he had been retained.

A further complication arose on September 19, 2003 when the Department advised the District that it had discovered a mathematical error in its calculations of the District's maintenance budget, resulting in a reduction of supplemental aid from $10,076,681 to $2,453,449. This dramatic reduction led the District to raise a host of new and unanticipated issues. A new hearing date was set for September 30, 2003, and the hearing began late that afternoon. Prior thereto, after extensive discussions and negotiations, most of the issues were resolved. The hearing concluded on October 1, 2003.[1] Counsel submitted letter memoranda on October 2, 2003, on which date the record closed.

The following stipulations were made by counsel at the outset of the hearing:

1. The District stipulates to all DOE figures on the DOE's maintenance budget worksheet through the EC Plan figures for 2002-03 and 2003-04. The District reserves its right to challenge the DOE's definition of "maintenance budget."

2. The District stipulates to the figures in the DOE maintenance budget worksheet for salaries, health benefits, charter school tuition, and CPI as 2.1%

[1] Altogether five witnesses testified for petitioner and one witness for the Department. All of them were candid, credible, and helpful. However, I was most impressed with the District's witnesses, whom I found to be very knowledgeable and well-prepared.

3. The DOE stipulates to an increase of $640,200 plus the increase of $76,210 or a total increase of $716,410 in special education tuition.

4. The DOE stipulates to the amount of $241,800 for Haines WSR implementation.

5. The DOE stipulates to an increase of $464,654 for curricular materials/books.

6. The DOE stipulates to an increase of $240,000 for basic skills math teachers.

7. The DOE stipulates to an increase of $360,000 for world language teachers.

8. The DOE stipulates to an increase of $130,00 for two police officers.

9. The District stipulates to the withdrawal of the Information Technology Salary.

10. The DOE stipulates to an increase of $151,966 in utilities.

11. The District stipulates to the DOE's figure of $25,830 in decrease in federal aid.

12. The District stipulates to the revenue figures for 2003-04 with the exception of IDEA revenue and excess surplus.

13. The DOE stipulates to the District's food service deficit calculation, subject to receipt of the CAFR.

14. The District withdraws the appeal on the issue of the reserve for encumbrances, based on the understanding that no later than October 21, 2003, the parties will meet and determine the encumbrances allocable to the 2002-2003 school year budget.

15. The DOE stipulates that on Exhibit R-2A (the revised maintenance budget worksheet) the difference between the District's EC Plan 03-04 and EC Plan 02-03 should be $631,000 rather than $669,000.

16. The DOE has agreed to a contracted transportation runs increase in the amount of $35,290.00.

17. The District and the DOE have agreed that on page 2 of Exhibit R-2A, the IDEA revenue increase should be $173,741 instead of $62,371.00.

The parties have agreed that two major issues remain. They are as follows:

1. Whether the District has demonstrated that the following items are non-discretionary items that should be added to the base 2002-2003 State Program budget:

(a) NCLB Supplementary Services
(b) NCLB Supplementary Services (2 additional schools)
(c) NCLB ESL Requirements
(d) Other ESL Requirements
(e) Balanced Literacy Requirements
(f) Radon Testing
(g) Tienet Testing
(h) Approved positions for FY 2002-2003

2. Whether the District demonstrated that the 2% undesignated fund balance and excess surplus were improperly calculated by the Department.

For the reasons to be expressed hereafter, I am of the opinion that - - with the exception of items 1.(f) and (g) and one position in (h), to be discussed below - - these questions should be answered in the affirmative.

1.

Iliana Okum, the District's Assistant Director of Elementary Instructional Services, testified at length about the educational requirements imposed by both federal and state law. She explained that the federal "No Child Left Behind Law" ("NCLB"), which became effective on January 2, 2002, requires that certain school districts (of which Pemberton is one), provide extra instructional services to eligible students[2] immediately after the regular school day has ended. These extra services are primarily in "Language Arts" (reading, writing, speaking and listening) and in mathematics, *i.e.,* the fundamentals or basic skills required of an educated person.

Out of the 11 schools in Pemberton Township, five have been designated "Category I" schools (schools in need of improvement). Two of the five have only recently been identified. According to a formula devised by the Department, approximately $1000 per student must be "set aside" by the District for the provision of such extra instruction, *i.e.*, cannot be used for any other educational services, as had been the case in the 2002-2003 school year. Thus, a substantial number of other educational services (which *had* been funded in 2002-2003) will not be provided in 2003-2004 unless the District receives additional monies. The additional monies being sought total $401,638, including monies for the two recently added "Category I" schools.

According to Ms. Okum, there are requirements under both the NCLB law and under state regulations, to help Limited English-Proficient ("LEP") students. There are additional mandates to assist the "lowest performers" of the student population to pass the ESPA and GEPA tests given to all students every year. Yet, in the 2002-2003 school year, *none* of the 47

[2] There are approximately 350 students in five schools who are so eligible.

LEP students in the school system passed the ESPA and GEPA tests, and preliminary indications are that there will be an increase in the number of LEP students in the 2003-2004 school year.

Further, according to Ms. Okum, the District has not yet been able to fully comply with the Department's mandate (found in *N.J.A.C.* 6A:15-1.4) to establish a bi-lingual education program, although it does have one ESL (English as a second language) teacher serving the Denbo School and another ESL teacher serving three other schools. The teacher serving the Denbo School does not speak Spanish, even though Spanish-speaking students are the most numerous of the District's LEP students.

In order to comply with the aforesaid requirements and mandates, the District needs *at least* one ESL paraprofessional to assist a regular ESL teacher ($12,000), two new ESL teachers ($80,000), and two reading specialists (to serve the middle school and the high school) ($80,000).[3]

One of the subjects on which Patricia Austin (the District's Business Administrator) testified was a $10,000 item for radon testing. Referring to Exhibits R-8 and R-9, she noted that in accordance with *N.J.S.A.* 18A:20-40 all public schools must be tested for radon by September 2005 and that DOE "strongly recommends that schools . . . begin planning and budgeting for radon testing now [January 29, 2003]." She declared that the $10,000 item was calculated based on the District's having to place radon test kits (at $20 per kit) in 500 school rooms, and that the $20 figure was a minimum dollar amount.

Another of petitioner's witnesses was Charles A. Highsmith, Jr. (Director of Instructional Services). He stated that the "Tienet" item ($83,775) was the cost for obtaining and using a new test to "disaggregate" statistics and data so as to show the educational performance of students by designated sub-groups (primarily racial, ethnic, sex, and socioeconomic), required by the NCLB Act. The test used in 2002-2003, the "Stanford 9" test, did not effectively do this. Tienet was chosen after an investigation by a committee of administrators and teachers indicated that it was the best of several alternative programs and could do the job.

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[3] At present, there are *no* reading specialist serving the middle school and the high school.

The Department did not offer any testimony or evidence disputing the District's claim that it needed the funding to meet state and federal mandates. Its only witness, Andrew Bishop, is not a program manager and stated that he had little knowledge of programmatic requirements under federal or state law. Indeed, he did not believe that he was responsible for providing funding to meet legal mandates, but only to approve funding for *Abbott* remedies.

A determination of which of the foregoing items is allowable depends on the definition of the phrase "maintenance budget." In applicable part, *N.J.A.C.* 6A:10-1.2 states that:

> 'Maintenance budget' means . . . a budget funded at a level such that the District can implement 2002-2003 approved and provided programs, services and positions and includes documented increases in *non-discretionary* expenditures and adjustments for actual 2002-2003 expenditures . . . . Maintenance does not include . . . new programs, positions or services . . . . (emphasis supplied)

As indicated, the operative phrase is "non-discretionary." The question is whether the phrase should be given a broad and expansive interpretation or a narrow and restricted one. In essence, the District argues for the former and DOE for the latter. I agree with the District.

The District has no discretion in deciding whether to comply or not with the NCLB Act and with state laws and regulations. It is *required* to do so, and, in my opinion it has clearly demonstrated that it needs the additional teachers and other instructional persons in order to do so.

Furthermore, the long history of *Abbott v. Burke* litigation manifests an unwavering intention by the Supreme Court to require the State and the Department to be generous in meeting the educational needs of all of the children of the State in order to comply with the Constitutional mandate of a "thorough and efficient education." It seems unlikely that the Court would now give the phrase "non-discretionary" the crabbed and narrow interpretation urged by the Department.

For these reasons, I believe that all of the items under numbers 1. (a) – (h) should be considered "non-discretionary" except for: radon testing (not actually *required* to be done until

September 2005; Tienet testing (insufficient evidence that present testing programs and methods are unable to do the job); and the position of Director of Security found in item 1. (h) (this position was not filled either in whole or in part during the 2002-2003 school year, but remained vacant).

2.

Testifying on behalf of the District on the issue of the 2% undesignated fund balance and excess surplus were Rodney R. Haines, C.P.A., [an independent auditor retained by the District to perform the Annual Comprehensive Financial Review ("CAFR")]; James J. Flanagan, C.P.A. (Assistant Business Administrator); and Patricia Austin (Business Administrator). Testifying for the Department was Andrew Bishop, C.P.A.

In Exhibit R-1, the budget decision letter dated August 27, 2003, DOE claims that the District had a sufficient excess fund balance, as of June 30, 2003, to eliminate the *Abbott v. Burke* State aid receivable for the 2002-2003 school year. Otherwise, the District would have been entitled to the amount of that receivable ($1,179,648) in July 2003 to apply to the 2002-2003 budget. DOE further contends that, even after that deduction, the District had sufficient excess balance to allocate to the 2003-2004 school year budget and, in addition, had sufficient funds to reach 2% in the undesignated general fund balance, the allowable amount under the FY 2004 Appropriations Act and applicable regulations. The District disputes these determinations.

Mr. Bishop testified that in his calculations he had used a $1.2 million number he obtained from the June 30, 2002 CAFR, but he did not produce the CAFR to support his statement. He admitted - - and it was confirmed by the testimony of Patricia Austin and Rodney Haines - - that this is the first time that the Department has *projected* a surplus balance and fund balance in advance of DOE's receipt and review of the CAFR. He could not explain why the Department made this change.

Ms. Austin testified that the District had *no* surplus in the 2001-2002 school year and that the only $1.2 million dollar item in the District's 2003-2004 budget relating to reserves was in the capital outlay account, which is a dedicated reserve allowable under DOE regulations. In

other words, Ms. Austin claimed the Department mistakenly assumed a $1.2 million dollar surplus from 2001-2002 that did not actually exist.

The second component of the Projected Surplus Balance was information obtained from the Board Secretary's Report. Mr. Bishop candidly admitted that this was based on a "snapshot" taken on June 30, 2003, and that Mr. Haines' figures on the excess surplus calculations are more current. Also, he conceded that the Department's projected surplus as of June 30, 2003 did not take into account the information derived from the accrual method of accounting, which is required under DOE regulations (*see N.J.A.C.* 6A:23-2.2(c)(3)), but rather focused on circumstances as of that date. Under the accrual method, the District must *record* expenses when legally obligated to pay them, even though they may not actually be paid until a much later date.

The result of DOE's surplus calculations is to: (1) deprive the District of the *Abbott v. Burke* receivable for 2002-2003 in the amount of $1,179,648; (2) require the District to add $539,957 in the 2003-2004 budget since DOE found alleged excess surplus for 2002-2003; and (3) deprive the District of funding needed in 2003-2004 to fill any shortfall below 2% in the excess surplus.

In contrast to the Department's methodology, Mr. Haines testified that he calculated the excess surplus using the official DOE calculation sheet and the procedures he would ordinarily follow in an audit. He also utilized information from the District based on accrual accounting rather than merely taking a "snapshot" as of June 30, 2003. The result of Mr. Haines' excess surplus calculation was that the District had a surplus of $1,029,540, well below the 2% allowable amount of $1,553,127.

In short, it appears that: (1) the basis of the Department's calculation of Projected Surplus Balance is unsupported by the record and conflicts with the accrual method of accounting; (2) the District's more current determination of the surplus balance follows applicable regulations and prescribed methodology for the annual audit; (3) until this year, DOE had waited for the audited numbers in the CAFR to make adjustments to the excess fund balance; and (4) DOE's method of calculating the 2% surplus results in depriving the District of an *Abbott v. Burke* receivable for 2002-2003 in the amount of $1,179,606, as well as the $523,588 it needs to reach the allowable 2% undesignated general fund balance. I believe, moreover, that the Department

has also mistakenly required the District to allocate $539,957 of alleged surplus fund balance in excess of 2% to the 2003-2004 budget when the evidence established that the District's actual surplus is considerably below the 2% allowable amount.

The sum total of these errors is to deprive the District of an Additional *Abbott v. Burke* State Aid receivable of $1,179,606 that the District was entitled to have in order to meet obligations in the 2002-2003 school year and to reduce the District's Additional *Abbott v. Burke* State Aid award in 2003-2004 by $1,063,544 (the sum of $539,956 and $523,588).

CONCLUSION AND ORDER

For the reasons stated above, I **CONCLUDE** that: (1) petitioner has been able to carry its burden of proving that Items number 1(a), (b), (c), (d), (e), and (h) (except for the Director of Security position) are non-discretionary and should be added to the base 2003-2004 State Program budget; and (2) the District has carried its burden of proving that the 2% undesignated fund balance and excess surplus were improperly calculated by the Department and should be readjusted as indicated heretofore. The Department should revise the District's Maintenance Budget, including the estimated need for discretionary Additional *Abbott v. Burke* State aid, accordingly. 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 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.

October 3, 2003
DATE

ROBERT S. MILLER, ALJ

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

October 3, 2003
DATE

E-mailed Initial Decision to the parties on:

October 3, 2003
DATE

/tmp

APPENDIX

WITNESSES

For petitioner:

Iliana Okum

Charles A. Highsmith, Jr.

Rodney R. Haines

James J. Flanagan

Patricia Austin

For respondent:

Andrew Bishop

EXHIBITS

For petitioner:

P-1 Excerpt from No Child Left Behind ("NCLB") Application, dated August 28, 2003, listing proposed uses of federal funding in the 2003-04 school year. This document will demonstrate the dedicated purposes of NCLB funding in the 2003-04 school year.

P-2 No Child Left Behind Allocations for Pemberton Township in FY 2003 (from DOE website).

P-3 Preliminary FY 2004 NCLB Allocations for Pemberton Township from DOE.

P-5 September 8, 2003, memorandum to Chief School Administrator and School Principal regarding Preliminary School Status under NCLB and attachment identifying Alexander Denbo E.S.

P-6 September 10, 2003, memorandum to Chief School Administrator and School Principal regarding Preliminary School Status under NCLB and attachment identifying Pemberton High School.

P-13 Letter from Rodney R. Haines, Certified Public Accountant, to Patricia Austin, dated September 15, 2003, regarding undesignated fund balance and excess surplus fund calculation for 2002-03.

P-14 Letter from Rodney R. Haines, Certified Public Accountant, to Patricia Austin, dated September 15, 2003, regarding undesignated fund balance and excess surplus calculation for 2002-03.

P-15 Memorandum dated August 25, 2003, from Risk Assessment Services regarding pricing of Radon testing and removal.

P-16 Quote from Radata, Inc. re: Radon School Test Kit Pricing.

P-19 2002-03 Positions Created after September 1, 2002, that will be employed for the entire 2003-04 school year.

P-21 Excess Surplus Calculation showing that there is no excess surplus available over 2% for the 2003-04 school year.

P-22 2002-2003 – New Positions created worksheets of James Flanagan.

For respondent:

R-1 August 27, 2003 Decision letter from Gordon McInnes, Assistant Commissioner, Division of Abbott Implementation to Mark Cowell, Superintendent, Pemberton School District. This document sets forth the preliminary maintenance budget numbers which are the subject of this litigation.

R-2 Budget Worksheet, Pemberton School District. This document sets forth the corresponding calculations which support the findings set forth in the August 27, 2003 decision letter (R-1).

R-2A Revised Budget Worksheet for the Pemberton School District, completed in late September, 2003 and prior to hearing.

R-3 KPMG Audit Results – This is the result of an audit performed by the accounting firm KPMG, upon which the Department relied in coming to the calculations set forth in R-1 and R-2 above. This document is made up of a narrative portion as well as several schedules set forth as follows:

Schedule A – 2003 Total Projected Spending with 2004 Budget – Pemberton.

Schedule B – Audited Spending 2000-2002 – Pemberton.

Schedule C – Five Year Summary of Budget Appropriations Compared to 2004 Budget – Pemberton.

Schedule D – 2003 Total Projected Revenue – Pemberton.

Schedule E – 2003 Total Projected Revenues – With Comparisons to 200, 2001, and 2002 school years.

R-4 Board Secretary's Report dated June 30, 2003.

R-5 Pemberton's 2003-04 Budget.

R-6 Pemberton's 2002-03 Budget.

R-7 Resume of Andrew Bishop, Budget Manager for the Department of Education.

R-8 Memorandum from Richard Rosenberg, Assistant Commissioner, Division of Finance to Chief School Administrators and Business Administrators, dated January 29, 2003, regarding "Radon Testing in School.

R-9 Memorandum from Richard Rosenberg, Assistant Commissioner, Division of Finance to Chief School Administrator and Business Administrators, dated September 5, 2003, regarding "indoor Radon Testing in Public Schools."

R-10 Excerpt from NCLB guidelines.

Joint:

J-1 Stipulations (Letter dated September 29, 2003 from Shapiro to Miller)

J-2 Letter dated September 15, 2003 from Haines to Austin

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties' exceptions and replies were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner initially concurs with the Administrative Law Judge (ALJ) that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to consider petitioner's argument regarding the validity and applicability of

the regulation at issue, the Commissioner agrees with the ALJ that the Department's definition of "maintenance budget," as detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003.

Next, the Commissioner recognizes that the Supreme Court's Order provides that the Department "shall bear the [initial] burden of moving forward to establish the basis for any proposed reductions to the [Abbott] district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations."****Abbott v. Burke*, M-976 September Term 2002, at 7. However, the Department did not reduce the District's maintenance budget based on ineffectiveness or inefficiency. (Pemberton's Exceptions at 3) Therefore, the Commissioner notes that the District bears the burden of proving that the Department's calculations were unreasonable or otherwise improper. *N.J.A.C.* 6A:24-9.6(c).

There are essentially two issues before the Commissioner: whether the District has demonstrated that certain items are nondiscretionary and should, therefore, be added to the base 2002-03 budget and whether the District has demonstrated that the 2% undesignated fund balance and excess surplus were improperly calculated by the Department. On the latter issue, the Commissioner adopts the conclusion of the ALJ at page 10, subject to adjustment after receipt of the Comprehensive Annual Financial Report (CAFR) in November 2003.

The Commissioner does not, however, concur with the ALJ that the items proposed by the District, enumerated as (a), (b), (c), (d), (e) and (h)[1] in the Initial Decision at page 4, are properly considered "non-discretionary," within the intendment of the Supreme Court's Order.[2]

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[1] That is, positions other than the Director of Security.

[2] The Commissioner concurs with the ALJ's conclusion that item (f) Radon testing and item (g) Tienet testing, cannot be considered nondiscretionary maintenance budget items.

In this connection, the Commissioner notes that the pertinent regulations provide the following definition of maintenance budget:

> [F]or the 2003-2004 school year, a budget funded at a level such that a district can implement 2002-3003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions or services that were provided in previous years or new programs, positions or services unless necessary to meet Paragraph 2c of the Supreme Court's order of June 24, 2003 in Abbott v. Burke. Maintenance also does not include non-recurring 2002-2003 expenditures. *N.J.A.C.* 6A:10-1.2.

Here, the District asserts that the No Child Left Behind (NCLB) Supplementary Services for the Busansky Elementary School, the Stackhouse Elementary School and the Fort Middle School ($251,638), the NCLB Supplementary Services for the Denbo Elementary School and the Pemberton High School ($150,000) and the NCLB ESL Paraprofessional Position ($12,001) should be considered nondiscretionary. The District reasons that, as a result of a mandatory set-aside of funds for supplemental services in these schools, it "does not have that funding to provide in 2003-04 the positions, programs and services in the basic skills area that were provided to students in these schools during the 2002-03 school year." (Pemberton's Post-hearing Brief, October 2, 2003, at 3)[3] Quite simply, the District asserts that, "[r]egardless of the source of the legal mandate, the District has an obligation to meet federal and state legal requirements, and that obligation renders such expenditures non-discretionary in the 2003-04 school year." (*Id.* at 4)

[3] Notably, however, the District does not provide detail with respect to those programs and services which, it alleges, were approved and provided for 2002-03 and will be sacrificed to the NCLB program and position requirements for the 2003-04 school year.

The Commissioner finds, however, that the District has failed to meet its burden of demonstrating that these items are "non-discretionary" within the intendment of the Supreme Court's Order and the implementing regulations, *supra,* where the NCLB Supplementary Services and NCLB ESL Paraprofessional Position were neither approved nor provided in 2002-03, and where the District failed to present evidence that it considered other resources or reallocations in order to meet these new requirements. In so finding, the Commissioner notes that *N.J.A.C.* 6A:10-3.1(g) provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

Similarly, the Commissioner finds that the two ESL positions ($80,000) and the two Balanced Literacy Positions ($80,000) are unquestionably positions which were neither approved nor provided in the 2002-03 school year. As such, these positions cannot be considered within the definition of "maintenance budget" and are beyond the scope of the Supreme Court's Order and the implementing regulations.

Finally, the Commissioner acknowledges that the District seeks $312,353 in salary prorations that were filled for less than the full 2002-03 school year. However, the Department takes the position, and the Commissioner so upholds, that under the maintenance definition, positions are properly funded in accordance with the amounts actually spent on those salaries in the 2002-03 school year, along with the nondiscretionary salary increases, that is, "[t]he district will receive funding for any teacher or substitute that was employed last year based on the amount that the district paid to those individuals plus the agreed contracted salary rate increase agreed upon." (Department's Exceptions at 7-8)

In so finding, the Commissioner notes that the Department's overall charge in this matter was to determine the level of 2003-04 funding that would enable the District to continue

in a "maintenance" mode, that is, to implement in 2003-04 the programs, services and positions provided in 2002-03. While it is true that dollar amounts actually paid out for staffing prior to June 30, 2003 will not perfectly predict the cost of providing comparable staffing in the next, it is *equally* true that originally budgeted amounts and other similar projections are no less imprecise. Thus, in the Commissioner's view, a methodology which preliminarily establishes the 2003-04 cost of providing positions at "maintenance" levels by determining, as nearly as possible without benefit of audit, the actual approved cost of providing them in 2002-03 and then allowing for reasonable, nondiscretionary adjustments, is a uniform, fair and rational method for estimating future expenditures which cannot otherwise be determined with any degree of precision. In this connection, the Commissioner is not persuaded that this method does not take into account vacancies, retirements, substitutes and positions filled for only part of the year, since variances of these types occur every year and a preliminary district-wide salary budget is appropriately based on the assumption that staffing is a flexible and continuous process, with ebbs and flows that, absent specific evidence to the contrary, generally permit the projection of one year's experience onto the next.[4] To the extent that results may be imperfect, even after adjustment following audit, as noted above, *N.J.A.C.* 6A: 10-3.1(g) provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

[4] Moreover, as the Department noted and the District does not dispute:

> [T]he District failed to meet its obligation under *N.J.A.C.* 6A:10-3.1(b)2 and 3, [which] required a district prior to submitting its application for additional supplemental funding, to consider its salary appropriations for vacant positions and salary breakage for replacement of retiring staff during the upcoming budget year. Mr. James Flanagan, Assistant Business Administrator for Pemberton testified that he had not completed a salary breakage analysis for the district for the 02-03 school year. (Department's Exceptions at 8)

Accordingly, the Initial Decision is modified as set forth herein.[5]

IT IS SO ORDERED.[6]



COMMISSIONER OF EDUCATION

Date of Decision: 10/28/03

Date of Mailing: N/A

[5] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the CAFR until November 2003, which will reveal the District's true audited fund balance and available revenue, if any, as of June 30, 2003.

[6] Pursuant to *P.L.* 2003, *c.* 22, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.

595-03

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the definition of "maintenance budget" set forth in *N.J.A.C.* 6A:10-1.2 conflicts with the July 23, 2003 Order of the Supreme Court and, therefore, should not govern the case; that the Department's calculation for charter school tuition did not take into account the correct and actual documented increases in tuition; and that the Department's calculation for utilities rate increases fails to include the utilities costs for two buildings that were not fully utilized in the 2002-03 school year.

The ALJ found: 1) the rule duly promulgated to implement the Court's Order for "maintenance" controlled in this proceeding, and that the Office of Administrative Law lacked jurisdiction to determine its validity; 2) that the Department properly adjusted the maintenance calculation for charter school tuition; and 3) that the proofs offered by the District in support of its projected utility rate cost increase were deficient and devoid of any competent evidence that would offer credence to the District's position in this regard. The ALJ upheld the Department's calculations, concluding that the Department properly determined the District's increase in utilities costs in accordance with established Supreme Court criteria and appropriate Department regulations, with such calculations being subject to adjustment upon receipt of supportive information from the District in the course of the Comprehensive Annual Financial Report (CAFR) process.

The Commissioner concurred with the ALJ's findings and conclusions and adopted the Initial 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.

October 28, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 05492-03

AGENCY DKT. NO. 191-6/03

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, appearing for petitioner

Francine W. Kaplan, Deputy Attorney General, appearing for respondent (Peter C. Harvey, Attorney General of the State of New Jersey, attorney)

Record Closed: September 30, 2003 Decided: October 3, 2003

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the City of East Orange ("petitioner" or "District"), the operator of an urban special needs "*Abbott*" school district, appeals from the determination of the New Jersey State Department of Education ("DOE" or

"Department") establishing the District's "preliminary maintenance budget" for the 2003-2004 school year. *N.J.S.A.* 18A:7F-3.

On March 24, 2003, the DOE moved before the New Jersey Supreme Court for an Order modifying the decision in *Abbott v. Burke*, 153 *N.J.* 480 (1998) (*Abbott V*). Specifically, the DOE requested that discretionary supplemental aid be limited in the years 2003-2004 to providing support for programs, positions and services approved for 2002-2003. On April 8, 2003, the Education Law Center responded and cross-moved for an Order setting an expedited schedule for the DOE's decisions on district budget approvals and appeals. Following Court-ordered mediation, the parties agreed to an expedited schedule, pursuant to which respondent was to issue its determinations by May 30, 2003. The agreement further provided for a review process with hearings before the Office of Administrative Law (OAL). On May 20, 2003, the Court entered an Order incorporating the agreement.

On May 30, 2003, the DOE rendered decisions on the *Abbott* districts' budgets. In this matter, by letter of that date, the District was notified that DOE had completed its initial review of the 2003-2004 budget, and that the budget had passed all required edit checks with no errors, and further, that the budget had been approved except as delineated in the letter. On June 6, 2003, the District's Verified Petition of Appeal was filed with the Department and the matter was, in turn, transmitted to the OAL on June 9, 2003. On June 16, 2003, the Department's Answer was filed with the OAL.

Petitioner's appeal raised the issue of the proper standard for approving district budgets for the 2003-2004 school year. On June 24, 2003, the Supreme Court issued an Order scheduling oral argument for July 10, 2003, concerning the standard to be used. On July 23, 2003, the Supreme Court issued an Order approving a maintenance standard as set forth therein, for the 2003-2004 budget process. The Court also directed the DOE to promulgate emergency regulations, and established a schedule for further proceedings.

On August 22, 2003, the DOE promulgated emergency regulations, a key provision of which is a definition of "maintenance budget" as the standard for reviewing the applications of "Abbott Districts" for supplemental aid for the 2003-2004 school year.

On August 27, 2003, the DOE sent to the district superintendent, preliminary maintenance budget figures for the 2003-2004 school year, setting the District's budget at $166,433,502 inclusive of the District's general fund budget and restricted revenue accounts. The DOE's review determined that the District's need for discretionary Additional Abbott v. Burke State Aid was determined to be $2,606,739. The letter also noted that the preliminary maintenance budget and the estimated supplemental aid was subject to further adjustment after submission by the District of the 2002-2003 CAFR.

The hearing was originally scheduled to be conducted on September 4, 2003; however, on September 3, 2003, counsel for the District advised that his principal witness had been out of state for a week due to her father's serious illness, had only returned the day before, and had not had an opportunity to review the DOE documentation or discuss discrepancies between the District and DOE's budget numbers. The matter was thereafter scheduled to be heard on September 22, 2003, however, due to the multiple representations of the school districts by petitioner's counsel, it became impossible to begin the hearing until September 25, 2003, one day before the original filing deadline of September 26, 2003, pursuant to the Supreme Court's Order. The hearing was commenced on September 25, 2003. At the conclusion of the hearing, the parties requested the opportunity to file post-hearing briefs by September 29, 2003, which date was extended to September 30, 2003, following the Court's extension of the filing deadline to October 3, 2003. Briefs were received on September 30, 2003, and on that date the record closed.

ISSUES

Prior to the hearing, it was agreed that there were three issues in dispute. First, the District contends that the definition of "maintenance budget" set forth in N.J.A.C. 6A:10-1.2 conflicts with the Supreme Court's July 23, 2003 Order, and therefore should not govern the case. Second, the District argues that the DOE's calculation for charter school tuition did not take into account the correct and actual documented increases in tuition. Third, the District argues that the DOE's calculation for utilities rate increases fails to include the utilities costs for two buildings that were not fully utilized in the 2002-03 school year.

FACTS

Based on the relevant evidence I **FIND** the following as **FACT**:

1. On March 24, 2003, DOE moved before the New Jersey State Supreme Court for an order to modify the decision in *Abbott v. Burke,* 153 *N.J.* 480 (1998)(*Abbott V*). Essentially, DOE sought to limit the supplemental aid to an amount sufficient to support programs, positions and services in the Districts' approved budgets for 2002-2003.

2. On July 23, 2003, the Court granted DOE's motion to relax the *Abbott V* remedies as applied to the 2003-2004 budget process. The Order states in part:

> (1) The DOE's application to extend the relaxation of remedies granted in *Abbott V* is granted as follows: The DOE shall have the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke State Aid* for the *Abbott* districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order.

(2) The Statewide aggregate amount of Additional *Abbott v. Burke* State Aid shall be presumptively calculated as the total amount of Additional *Abbott v. Burke* State Aid approved for the *Abbott* districts for Fiscal Year 2002-2003, subject to adjustment as required for a maintenance budget. A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c. of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.

(3) For purposes of calculating Additional Abbot v. Burke State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students.) Insofar as any *Abbott* district has not been informed of its total amount of last year's approved Additional *Abbott v. Burke* State Aid, the DOE shall provide written notice of that amount within two weeks of the date of this Order. The DOE's application of the effective and efficient standard in its review of a district's maintenance school budget may result in a reduction to a district's presumptive amount of Additional *Abbott v. Burke* State Aid.

(4) Within 30 days of the issuance of this Order, the DOE shall provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget. If the DOE

> deletes an expenditure from a district's 2002-2003 budget related to the district's non-instructional programs and based on the effective and efficient standard, the DOE must include in the written notice to the district the expenditure deleted along with a specific statement explaining why the program or part thereof is no longer effective and efficient.
>
> (5) Abbott districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.
>
> ***
>
> (6) To the extent that monies are deleted by the DOE in the districts' non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an *Abbott* district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

3. On August 22, 2003, DOE promulgated emergency regulations, which defined "maintenance budget" as the standard for evaluating the districts' programs. The regulation states:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health

> benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke.* Maintenance also does not include non-recurring 2002-2003 expenditures.
>
> [*N.J.A.C.* 6A:10-1.2]

4. On August 27, 2003, DOE issued a Notice of Preliminary Maintenance Budget for 2003-2004 for the District in the amount of $166,433,502. Further, DOE determined the District's estimated need for discretionary Additional *Abbott v. Burke Aid* is $2,606,739. The notice also states:

> It should be noted that the preliminary maintenance budget and the estimated need for discretionary Additional Abbott v. Burke State aid will be subject to further adjustment after submission by your district of the 2002-2003 CAFR.

LEGAL ANALYSIS AND CONCLUSION

The District contends that the definition of "maintenance budget" contained within *N.J.A.C.* 6A:10-1.2 conflicts with the Supreme Court's July 23, 2003 Order. This issue has been previously addressed by two Administrative Law Judges. In the matter of *Board of Educ. of the City of Asbury Park v. New Jersey Department of Education,* OAL Dkt. EDU 4095-03, decision by Hon. John R. Tassini, ALJ, on Order Relative To "Maintenance Budget" (September 4, 2003), Judge Tassini considered an *Abbott* district's challenge to the validity and applicability of the definition of "maintenance budget" set forth in *N.J.A.C.* 6A:10-1.2. Judge Tassini determined that a challenge to a duly adopted regulation, such as *N.J.A.C.* 6A:10-1.2, must be brought in the Superior Court, Appellate Division, pursuant to R. 2:2-3(a)(2), and that no jurisdiction exists at the OAL. He concluded, therefore, that the regulation must be applied at the OAL. Moreover, on September 10, 2003, in the matter of *Board of Educ. of the Township of Neptune v. State of New Jersey, Department of Education,* OAL Dkt. EDU 4096-03,

decision by Hon. Joseph F. Martone, ALJ, on Order Relative To "Maintenance Budget" (September 10, 2003), Judge Martone agreed with Judge Tassini's determination, and found that the definition of "maintenance budget" within *N.J.A.C.* 6A:10-1.2 was consistent with the Supreme Court's Order of July 23, 2003. As he concluded that the Supreme Court's Order provided a reasonable basis for the definition of "maintenance budget" in the regulation, he declined to disregard that definition in deciding an Abbott school district case. I concur with the analyses of both Judge Martone and Judge Tassini and the conclusions they reached regarding the definition of "maintenance budget" are incorporated here. I therefore **CONCLUDE** that the definition of "maintenance budget" as set forth in *N.J.A.C.* 6A:10-1.2 is applicable to this matter.

The District also contends that the DOE did not consider the correct and actual documented increases in two categories of non-discretionary expenditures, charter school tuition and utilities. None of the other specific maintenance budget calculations of the DOE were contested by the District and, after making two agreed-upon changes, the parties stipulated to most of the remaining numbers set forth in those calculations (J-2). With respect to the corrections, on page one of J-2, the parties agreed to an increase of $119,734 in "Salaries-Contracted Rate", and on the top of page two of J-2, the parties agreed to the elimination as a revenue line item of "$333,947.00" on J-2, under the heading "Budget: 2003-2004".[1].

Testifying for the district was Joyce DeVincenzi, Assistant Business Administrator. She has been employed for five years in that capacity and previously was employed with the Boonton Board of Education as Superintendent, and prior to that with the same district as Business Administrator. She is certified as a Business Administrator and an Assistant Superintendent for Finance. Her duties include collecting data and preparing the budget for final submission to the DOE.

[1] The District stipulated to the numbers in the maintenance budget calculations but reserved its right to challenge whether the regulation comports with the Supreme Court's July 23, 2003 Order.

With respect to the calculations for charter school tuition, DeVincenzi first explained that the District disagrees with the decrease in charter school tuition of $76,952 which represents the difference between the 2002-03 budgeted amount ($4,197,650) and the 2003-04 budgeted amount ($4,120,698). The decrease is disputed by the District because the budgeted amount for 2002-03 was not actually received by the District. The actual cost to the District for the year 2002-03 for charter school tuition, through June 30, 2003, was $4,102,207. Ms. DeVincenzi, referencing p. 6 of P-1, indicated that pursuant to the per mandate of February 2003, the District budget for 2003-2004 should have included $4,262,508 for charter school tuition. This was a reduction of $79,328 from the District's approved estimated appropriation for charter school tuition for October 15, 2002. DeVincenzi testified that usually she would not receive another estimated appropriation for charter school tuition costs until October 15 of each year and was not aware that a figure as of June 1, 2003 was issued until she arrived at the hearing in this matter. DeVincenzi testified that she submitted her Board Secretary's June 30, 2003 report to the DOE in August of this year and that report contains the District's calculations of what they actually will expend on charter school tuition for 2003-04. DeVicenzi alleges that the "actual expenditure" for charter school tuition for 2003-04 will be $4,102,207.[2] DeVincenzi urges the utilization of the calculation of actual expenditures of $4,102,207 for 2002-03 and the February 25, 2003 estimate of charter school tuition of $4,262,508 to compute the 2003-04 appropriations amount which would result in an increase of $160,301 in tuition costs for 2003-04. The District argued none of the current numbers from the DOE should be used because they are all "budgeted" numbers and not "actual expenditures." However, DeVincenzi used the February 25, 2003 "budgeted" number to arrive at the $160,301 number. DeVincenzi acknowledged that each year the District provides enrollment figures to the DOE which recalculates charter school tuition and adjusts the estimated appropriations for the District's charter school tuition costs during

[2] The DOE issued an estimated notice for Charter School tuition costs on June 1, 2003 that it utilized to arrive at the figures in its August 27, 2003 preliminary maintenance budget determination in the amount of $4,120,698, which is $18,491 higher than the figure given by DeVincenzi.

the year. *See N.J.A.C.* 6A:11-7.2(k). DeVincenzi also indicated that it was her understanding that the per pupil tuition has decreased since 2002-03 and that was the reason for the reduction in the initial budgeted amount for 2003-04 over last year's figure. The District's primary concern, however, is that if there is an upward adjustment of enrollment, the District would not receive actual cash funding from the state; rather, it would receive an account receivable entry, which it would not be able to utilize to meet current expenses.

With regard to the utilities calculations, DeVincenzi testified that the District is operating two additional buildings for classroom instruction, which have not previously been fully utilized. One facility is referred to as the Glenwood Avenue site, a building previously used by the Archdiocese of Newark. The second facility is referred to as the old East Orange High School building, located at 34 North Walnut Street, East Orange. DeVincenzi described the Glenwood Avenue site as being used to house an "alternative program", to provide a different setting for "certain students who are unable to function in a day-to-day classroom". She testified that she determined the square footage of the building and then compared it with the C.J. Scott building, another building in the District's inventory which is approximately the same square footage as the Glenwood site. She calculated what was spent on utilities at the Scott building and used that amount to set the utility costs for the Glenwood site, arriving at a figure of $98,330.14[3]. DeVincenzi indicated that these figures were obtained from the PSE&G bills for the Scott building. On cross-examination DiVincenzi was unable to offer testimony as to the age of either building, type(s) of heating system, age of the equipment, or any deficiencies in the equipment and indicated that she compared square footage only.

With regard to the old high school building, DeVincenzi testified that, for the past year, it has been largely unoccupied, with two people working in the kitchen occasionally, and no students in the facility for any portion of the year. Lights were kept on "as needed" for security purposes, and the building was heated to prevent pipes

[3] This figure consists of three line items as reflected on P-2 in the amounts of $82,738.92, $8,821.20 and $6,770.02, for a total of $98,330.14.

from freezing. The District now has transferred 1,000 students to that site with the attendant staffing, and runs a full educational program for the 9th grade at that location. The District arrived at its proposed utility figure for the building by doubling the total utility costs of $238,254.58 for the building in 2002-03.

Accordingly, the increases for utilities sought by the District for the 2003-04 school year, including the $529,812.50 calculated by the DOE to constitute utilities rate increases for existing buildings, is $866,397.22. DeVincenzi indicated that doubling the utilities expended at the old high school building last year for its new level of occupancy was her "best guess" of what utilities would be in 2003-04 for that building. She testified that the old high school building was last used in 2001-02 as a school; however, she was unable to provide any evidence of the cost of utilities for that year. She had no information relative to the temperature maintained in the building during the year when it was minimally used, did not know what type of heating system was in place, and had no information as to the amount of lighting utilized other than noticing "what lights were on as [she] drove by."

Testifying for the Department was Michael Arizechi, who has been employed by the DOE as Budget Manager for five years. Mr. Arizechi is a CPA, with an MBA and a BA degree in accounting. His responsibilities include reviewing the initial budgets of the school districts in February of each year and doing an analysis of the numbers. He reviewed the District's 2002-03 budget and its 2003-04 budget.

With respect to the reduction of $76,952 in the charter school tuition line item, Mr. Arizechi testified he arrived at this figure based upon the annual aid calculation as of June 30 for the year 2002-03. He utilized the chart (P-4), prepared by Yut'se Thomas, Director of the Office of School Funding within the DOE, entitled Aid Calculated for June 1, 2003 for the 2003-04 School Year, in his preparation of the DOE worksheet (J-2). The budgeted amount for charter school tuition for 2002-03 was $4,197,650 and the budgeted amount for the 2003-04 was estimated to be $4,128,698, resulting in a difference of $76,952. The decrease was reflected in the line item for

charter school tuition on the worksheet. The number appears as a negative number because the mandate is $76,952 less. Arizechi agreed that he had not used the actual expenditure for 2002-03 in his calculation; rather he utilized the budgeted numbers for 2002-03 and 2003-04 in arriving at his calculation. He testified that the 2003-04 figure of $4,120,698 must be budgeted by the District, and thereafter is subject to adjustment depending on enrollment. He agreed that in other areas the actual expenditures were reviewed in determining the increases for 2003-04.

Regarding the utilities issue Arizechi agreed that he had not taken into account the utilization of the Glenwood School and the old East Orange High School buildings in arriving at his figure for utility cost increases of $529,812.50. Rather, he looked at the history and the actual numbers and the auditors report to see what the expenditures had been. He compared the auditors report with the District numbers and used 50% of the difference (the increase) as his basis for arriving at a figure of $529,812.50 for non-discretionary increased utility costs for 2003-04.

With respect to charter school tuition, increases or decreases are considered non-discretionary and accordingly must be added to or subtracted from the maintenance budget calculation. Preliminary charter school tuition figures are provided to the districts by the DOE. The districts report their student enrollment figures to the DOE for District charter schools three times a year, in October, February and June of each year. Adjustments in charter school tuition calculations are made pursuant to *N.J.A.C.* 6A:11-7.2(k)(4) which provides in salient part as follows:

Enrollment counts, payment process and aid adjustments.

. . .

(k) The following delineates the payment process and payment adjustments made to a charter school by the district of residence and non-resident district(s) during any given school year.

. . .

(4) During the school year, a charter school shall conduct an enrollment count on October 15, February 15 and the last day of the school year. A charter school shall submit each count through a summary school register for the purposes of determining average daily enrollment.

i. The data shall be submitted to the Commissioner three days after the dates of each of the three required enrollment counts and all aid to a charter school shall be adjusted accordingly from estimated enrollments counts to average daily enrollments and then adjusted forward to the next four months.

. . .

In calculating the changes in the charter school tuition, the DOE reviewed the budgeted tuition for 2002-03 and the budgeted tuition for the 2003-04, resulting in a decrease of $76,852, which is reflected as a deduction from the preliminary maintenance budget. The District argues that they did not actually receive this sum of money as it was merely a budgeted figure, and therefore should not be "charged with" having received it. The District acknowledges that the budgeted amounts are adjusted throughout the course of the school year as enrollment figures are revised and updated. It urges that, because the budgeted amount for 2003-04 is $18,481 more than the actual costs for charter tuition in 2002-03, this constitutes a documented actual increase in charter school tuition expenditures for 2003-04. This clearly is not the case. Charter school tuition aid is revised throughout the course of the school year pursuant to *N.J.A.C.* 6A:11-7.2 as the enrollment figures change. The District's concern is that enrollment may rise, and there is no assurance that the District will receive actual cash funding to help meet other financial obligations rather than an account receivable adjustment. Concern over an accounting entry cannot serve as the basis for an upward adjustment in the 2003-04 figure in favor of the District. Based upon the foregoing, I therefore **CONCLUDE** that the DOE properly adjusted the maintenance calculation for charter school tuition.

As to the utilities issue, any increase or decrease in utilities is a non-discretionary item under the Department's maintenance budget calculation. The Department calculated utilities rate increases in the amount of $529,812.50, and agreed that it had not included in its calculation the utilities costs for two buildings which had not been previously fully utilized for classroom instruction. With respect to the Glenwood Avenue site, the utilities costs for a building with similar square footage were utilized by the District in arriving at its request for the Glenwood site[4]. No other comparisons were made to take into consideration any of the other factors influencing utilities costs, including the age of either building, the type of heating system (whether oil or gas), number or type of windows, efficiency ratings in the heating systems of either building, or the utilities costs incurred by the Archdiocese of Newark which had previously utilized the building. The Court's Order requires funding for documented increases in non-discretionary expenditures. Clearly, the utility costs for the Glenwood Avenue site which the District urges be included are not documented, and contrary to the District's assertion, there is no "persuasive evidence" of $98,330.14 in utilities costs attributable to the Glenwood Avenue site.

With regard to the old East Orange High School building, the District utilized the building only for limited purposes in 2002-03 to operate some catering functions out of the kitchen. The building will now be used to house 1,000 ninth grade students and staff for the current school year and will be in full operation from September through June 2004. The District is seeking an addition $238,254.58 as the increase in utilities costs for this building for 2003-04, which figure was arrived at by doubling the utilities costs for last year. This figure is also an arbitrary figure and does not constitute competent evidence of an increase in utilities costs attributable to the East Orange High School property for 2003-04.

The District bears the burden of proving that the DOE's calculation of its maintenance budget failed to follow the maintenance budget review required under *N.J.A.C.* 6A:10-1.2. I **FIND** the proofs to be deficient and devoid of any competent

[4] No evidence was offered as to the square footage of either building.

evidence that would offer credence to the District's position with regard to utilities cost increases. The District has not established entitlement to the additional $336.584.72 sought, by a preponderance of the credible evidence, and I so **FIND.** I **FIND** that the DOE properly determined the District's documented increase in utilities costs in accordance with established Supreme Court criteria and appropriate DOE regulations. Further adjustments based upon actual spending should await the Comprehensive Annual Financial Report ("CAFR"). Pursuant to *N.J.S.A.* 18A:23-1, the District is to have an annual audit completed not later than four months after the end of the school fiscal year. *N.J.A.C.* 6A:23-1.2 defines the CAFR to be the official annual report of a governmental unit that includes all funds and accounts groups summarizing the activities and operations performed by all units. According to the DOE, if the District's new information is, after audit, included in the CAFR, then the adjustment will be made to the District's aid award pursuant to the Appropriations Act (New Jersey Fiscal 2003-04 Appropriations Act, P.L. 2003c. 122).

Moreover, *N.J.S.A.* 6A:10-6.1 provides a mechanism for the District to apply for additional supplemental funding. These options provide the District with a realistic approach under the circumstances, inasmuch as the severe time constraints in this matter[5] do not permit the record to be reopened in order for competent proofs to be received.

In a climate of extremely limited resources available for allocation, a concerted effort is mandated to guarantee that those resources are properly apportioned in a fiscally responsible manner. That apportionment cannot be based upon a "best-guess."

In light of this, I **CONCLUDE** that it is not only reasonable but appropriate that the District's *Abbott v. Burke* State Aid Award be adjusted based on the annual audit filed pursuant to *N.J.S.A.* 18A:23-1, if the District's supplemental information relative to

[5] Post-hearing briefs were received on the afternoon of September 30, 2003, and on that date the record closed.

documented utilities costs for the two buildings is, after the requisite audit, included in the CAFR. I, therefore, **CONCLUDE** that the DOE correctly adjusted the maintenance calculation for utilities, and that any further adjustments for supplemental information should be audited and adjusted with the 2002-03 CAFR.

ORDER

Based upon the foregoing it is hereby **ORDERED**:

1. That the definition of "maintenance budget" set forth in N.J.A.C. 6A:10-1.2 is applicable in this matter.

2. That the maintenance budget reflect the DOE's calculation relative to charter school tuition of ($76,952).

3. That the maintenance budget reflect the DOE's calculation for increased utilities of $529,812.50 with the actual utilities costs attributable to the two additional buildings to be added into the final calculation.

I further **ORDER** for the reasons set forth above that in all other respects, the determination by the DOE with respect to the District's 2003-04 budget as set forth in Assistance Commissioner MacInnes' letter of August 27, 2003 be **AFFIRMED** and that the appeal be **DENIED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

October 3, 2003
DATE

LESLIE Z. CELENTANO, ALJ

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

October 3, 2003
DATE

E-mailed Initial Decision to the parties on:

October 3, 2003
DATE
da

APPENDIX

Witnesses

For Petitioner:

Joyce DeVincenzi

For Respondent:

Michael Arizechi

Exhibits

Joint:

J-1 Letter dated August 27, 2003, from Gordon MacInnes to Dr. Laval Wilson, Superintendent East Orange School District, 2 pages

J-2 Worksheet entitled "District East Orange, Maintnew, August 27, 2002" 2 pages

For Respondent:

R-1 The Report of Lerch, Vinci & Higgins, L.L. P., Certified Public Accountants, 38 pages

For Petitioner:

P-1 Worksheet entitled "2002-2003 Charter School", and attachments, 12 pages

P-2 Worksheet entitled "East Orange School District Utilities," 1 page

P-3 Worksheet entitled, "East Orange School District, Public Service Analysis, total Monthly Gas & Electric 2002-2003", 2 pages

P-4 Report of the Department of Education, Charter School Division, entitled, "Aid Calculated for June 1, 2003 for the 2003-04 school year", 1 page

OAL DKT. NO. EDU 05492-03
AGENCY DKT. NO. 191-6/03

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. East Orange's exceptions were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner adopts the Administrative Law Judge's (ALJ) decision as he determines her factual findings, analysis and legal conclusions are consistent with the Supreme Court's Order of July 23, 2003, as well as the Department's regulatory amendments adopted on August 22, 2003.

Initially, it is noted that petitioner's exceptions object to the ALJ's failure to address an issue, raised in its post-hearing brief, with respect to the legal propriety of the Department's fund balance calculation. (Petitioner's Exceptions at 1, 2) In this regard, the District states that the Department's August 27, 2003 budget letter projected the District's excess fund balance, made reductions to what it had determined was a balance in excess of the required

two percent, and denied the District's *Abbott v. Burke* receivable for 2002-03 based on its projected calculations. It charges that the Department's "projection of excess fund balance prior to the receipt of the [Comprehensive Annual Financial Review] CAFR violates the language and intent of the FY 04 Appropriations Act." (*Id.* at 8, 9)

The Commissioner finds the District's charge in this regard without merit. It is observed that the Supreme Court's Order directed the Department to provide Abbott districts with their preliminary maintenance budget figures for the 2003-04 school year by August 27, 2003. In fulfillment of that directive, the Department, pursuant to *N.J.A.C.* 6A:10-3.1(c), reviewed the most recent budget calculations provided by the District to determine if all available resources and reallocations and other factors had been incorporated in the budget and that the budget submitted comported with the maintenance standard. Based on this review, the Department made the requisite projections in its August 27, 2003 *preliminary* maintenance budget letter. It must be emphasized that the preliminary maintenance budget figure for the District here is just that, *preliminary*, subject to the CAFR, which will establish the District's actual audited expenses for the 2002-03 school year. Likewise, the estimate of the District's discretionary *Abbott v. Burke* aid is also subject to the District's true audited fund balance and available revenue, if any, as of June 30, 2003.

Next, the Commissioner concurs with the ALJ, that *N.J.A.C.* 6A:10-1.2, the regulation duly promulgated to implement the Court's July 23, 2003 Order, must control in the instant proceeding, and that the OAL does not have jurisdiction to determine, directly or indirectly, its validity, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995).

However, even if the Commissioner were to accept, *arguendo*, the District's contention that a "choice of law" may be made without passing on the validity of the rule itself, the Commissioner here agrees with the ALJ that the Department's definition of "maintenance budget," as set forth in *N.J.A.C.* 6A:10-1.2, is entirely consistent with the language and intent of the Court, with no conflict between it and the underlying order.

In his consideration of the District's remaining arguments herein, the Commissioner finds that a review of the respective parties' burdens of proof is particularly instructive. In this regard, the Commissioner recognizes that the Supreme Court's Order provides that the Department "shall bear the [initial] burden of moving forward to establish the basis for any proposed reductions to the [Abbott] district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations."***_Abbott v. Burke_, M-976 September Term 2002, at 7. However, as indicated in the Department's preliminary maintenance decision letter dated August 27, 2003 (Exhibit J-1), the District's maintenance budget was not reduced based on ineffectiveness or inefficiency. Therefore, pursuant to *N.J.A.C.* 6A:24-9.6(c), the District bears the burden of proving that the Department's calculations were unreasonable or otherwise improper.

This said, the Commissioner agrees with the ALJ that the Department's calculation of charter school tuition must be sustained, as he finds that the District has not met its burden of establishing that the Department's use of an *approved* plan-to-plan review to determine the tuition calculation figure was unreasonable or otherwise improper. In the Commissioner's view, the process used by the Department, based on the only available "like" components for comparison, *i.e.*, approved 2002-03 and 2003-04 charter school tuition, in order to determine the change in the district need from one year to the next, fully allows for

reasonable, fair and consistent preliminary determinations under circumstances where precise calculations must necessarily await the results of the CAFR. As well articulated by the ALJ in her Initial Decision in *Board of Education of the City of Plainfield, Union County, v. New Jersey State Department of Education*, OAL Dkt. No. EDU 5502-03, Agency Dkt. No. 206-6/03, decided September 26, 2003:

> I have considered the arguments of counsel and must agree with the position espoused by the DOE. (footnote omitted) Although I agree with the District that the consistent use of the DOE's methodology does not in itself make it correct, I do not agree that simply because it does not work to the District's advantage makes it incorrect. The methodology utilized by the DOE has been applied to all "Abbott Districts" uniformly and has served to increase maintenance budgets in over half of the Districts. The District has not established that the use of this methodology is *per se* improper, illegal, inconsistent with the New Jersey Supreme Court's Order of July 23, 2003 or violative of any of its constitutional rights. The DOE is obligated only to utilize an approach that is reasonable and uniformly applied. Here they have done so. If the methodology is to be changed in each area in which an Abbott District is not advantaged, there will be no uniformity or equity to the provision of Abbott funds. Thus, I reject the District's argument and CONCLUDE that the DOE's methodology is reasonable and will not be second-guessed. (*Id.* at 8)

The Commissioner, however, underscores that, to the extent the results of the Department's reasonable approach may be imperfect, even after adjustment following audit, *N.J.A.C.* 6A:10-3.1(g) provides a mechanism for the District to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

Turning to the projected utilities increase calculation, the Commissioner, similarly, finds that the District has failed to satisfy its burden. The Commissioner is in full agreement with the ALJ that "the proofs [brought to the record are] deficient and devoid of any competent evidence that would offer credence to the District's position with regard to utilities cost increases." (Initial

Decision at 14, 15) The District's exceptions maintain that the ALJ, while recognizing that the Department had not included its two new buildings in the utility increase calculation for 2003-04 (Initial Decision at 14), erred in failing to award the District *any* funding increase based on a lack of documented evidence. (Petitioner's Exceptions at 16) Rather, it proffers, "the ALJ should have directed the DOE to develop appropriate documentation in conjunction with the District to determine what increase should be attributable to these two buildings." (*Id.* at 17)

Upon consideration, the Commissioner finds the District's arguments in this regard specious. The Initial Decision reflects that the Department's witness, Michael Arizechi, testified

> that he had not taken into account the utilization of the Glenwood School and the old East Orange High School buildings in arriving at his figure for utility cost increases of $529,812.50. Rather, he looked at the history and the actual numbers and the auditor['s] report to see what the expenditures had been. He compared the auditor['s] report with the District numbers and used 50% of the difference (the increase) as his basis for arriving at a figure of $529,812.50 for non-discretionary increased utility costs for 2003-04. (Initial Decision at 12)

Given the total unsupportability of the District's calculations in this regard, it cannot reasonably be argued that the Department's calculation for increased utility costs, subject to further refining after receipt of some logical, supportable additional information from the District during the course of the CAFR process, was unreasonable.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed

therein and the instant Petition of Appeal is hereby dismissed.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 10/28/03

Date of Mailing: N/A

[1] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the CAFR until November 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[2] 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.

596-03
596-03

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget" and supplemental aid, alleging that the Department's review and calculations were not in accordance with the July 23, 2003 order of the Supreme Court. The District also challenged the Department's reduction, as part of its review of noninstructional expenditures for ineffectiveness or inefficiency, of proposed costs for School Leadership Teams (SLTs), overtime, the Office of Design and Construction, the Office of Development Planning, resource teachers/coordinators, department chairpersons, food service deficits, consultants and drivers for the State District Superintendent.

The ALJ found that the rule duly promulgated to implement the Court's order for "maintenance" controlled in this proceeding, and that the Office of Administrative Law (OAL) lacked jurisdiction to determine its validity. The ALJ further found that, within the framework of that rule, the Department had made several appropriate determinations, but that the District was entitled to increases for certain previously undocumented encumbrances, salary adjustments and vacancies, workers' compensation reserves, special education tuition costs, CPI adjustments and utilities. The ALJ further found that, on the Department's findings of ineffectiveness and inefficiency, the District was entitled to restoration of all reductions except those for the Superintendent's drivers.

The Commissioner adopted the ALJ's decision with respect to OAL jurisdiction and several of its specific determinations, but rejected its acceptance of the District's claims for increases in allowable encumbrances, salary adjustments and vacancies, workers' compensation reserves, special education tuition costs, CPI adjustments and utilities. With respect to inefficiencies, the Commissioner rejected most of the ALJ's recommendations and restored only those funds supporting Resource Teachers/Coordinator positions. Additionally, the Commissioner directed the Department to conduct an analysis of the District's workers' compensation needs and to make thereafter any necessary adjustments to the District's budget and supplemental aid.

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.

October 28, 2003

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5497-03

AGENCY DKT. NO. 193-6/03

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Perry L. Lattiboudere, General Counsel, for petitioner

Michael Walters, Deputy Attorney General, for respondent, (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 25, 2003 Decided: October 3, 2003

BEFORE **EDITH KLINGER**, ALJ:

On June 5, 2003, the petitioner, State-Operated School District of Newark (District), filed a Verified Petition of Appeal before the Commissioner of Education appealing the May 30, 2003 determination of Assistant Commissioner Gordon

MacInnes relating to the District's 2003-04 K-12 budget and Additional Abbott v. Burke State Aid application for the 2003-04 school year. On June 9, 2003, the Commissioner 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. The respondent, Department of Education (Department), filed its answer with the OAL on June 12, 2003.

On July 23, 2003, the Supreme Court of New Jersey (Court) issued its Order in *Abbott* v. *Burke* authorizing the Department to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional Abbott v. Burke State Aid for the Abbott districts, including the Newark District. *Abbott v. Burke*, __ *N.J.* __, 2003 WL 21700375 (July 23, 2003) The Court defined a maintenance budget to mean:

> that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions or services.

The Court directed the Department to promulgate an emergency regulation for "purposes of calculating Additional Abbott v. Burke State Aid and in furtherance of its pre-existing duty to implement administrative controls." The emergency regulation was to establish:

> the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students.)

In accord with the Order of the Court, on August 22, 2003, the Department promulgated emergency amendments to *N.J.A.C.* 6A:10, originally promulgated on July 1, 2003. Specifically, the Department amended *N.J.A.C.* 6A:10-1.2, 3.1, 4.2 and 4.7.

In the matter entitled *Board of Education of the City of Asbury Park v. State of New Jersey Department of Education*, OAL Dkt. No. EDU 4095-03, presently pending before Administrative Law Judge John R. Tassini, Asbury Park, another Abbott district, challenged the definition of "maintenance budget" in *N.J.A.C.* 6A:10-1.2 as inconsistent with the Court's Order. Asbury Park argued that its maintenance budget should be considered its approved 2002-2003 budget and not limited to programs, positions, services and/or expenditures actually provided, plus non-discretionary expenditures. In his order, dated September 4, 2003, Judge Tassini ruled that the regulation could not be challenged in this forum because the OAL is without jurisdiction to hear this issue.

The same motion was brought by the District before the undersigned who adopted the ruling made by Judge Tassini and declined to hear this issue in the present appeal for the same reasons.

In its Order of July 23, 2003, the Court also directed the Department to:

> provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget. If the DOE deletes an expenditure from a district's 2002-2003 budget related to the district's non-instructional programs and based on the effective and efficient standard, the DOE must include in the written notice to the district the expenditure deleted along with a specific statement explaining why the program or part thereof is no longer effective and efficient.

The Order further provides:

> To the extent that monies are deleted by the DOE in the district's non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an Abbott district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

On August 27, 2003, the Department issued its Notice of Preliminary Maintenance Budget Figure for 2003-2004 and Estimate of Discretionary Additional Abbott v. Burke State Aid (Notice) to the District as directed by the Court. The issues to be addressed in the present proceeding are as set forth in this Notice. (J-1) The

analysis contained therein was performed by an independent accounting firm retained by the Treasurer to review the District's financial information in cooperation with representatives of the Treasury and the Department.

CALCULATION OF THE BASE 2002-2003 STATE AND LOCAL PROGRAM BUDGET

Mary Byrne, a licensed CPA, has been employed by the Department of the Treasury, Office of Management and Budget, for four years. She is responsible for oversight of the State budget for the Department of Education and reviews the Department's yearly requests for funding as part of the State budget. She also provides advice and recommendations and monitors the Department's budget throughout the year.

In her testimony, Byrne referred to worksheets showing adjustments made to the budget and the Budget Analysis and Independent Accountant's Report on Applying Agreed-Upon Procedures (R-2) (Report).

These documents show that the independent accountants first considered the District's Approved General fund budget for 2002-2003 which was $642,662,024. It then subtracted $17,090,489 as the local contribution to Special Revenue. It added $53,661,167 in Early Childhood (EC) aid, $20,103,295 in DEPA Aid and $1,975,257 in Distance Learning aid to reach an Adjusted 2002-2003 State program budget of $701,311,254. This amount does not include funds paid to the District from federal sources so that they are subtracted from the budget items for purposes of computing Abbott aid.

The original Budget 2003 Spending, Local Contribution – Transfer, was $17,090,489; the projected spending for this item was $9,312,771. The difference between these two amounts, $7,777,718, was transferred to the Special Revenue Fund (SRF). The reduction was due to decreased enrollment in the program.

The independent accountants next considered the original Budget 2002-2003 Spending for Funds 11, 12 and 13, salaries and benefits, ($328,606,179) and determined that the unaudited 2002-2003 spending for these funds was $318,133,342. This showed that the District underspent its budgeted amount by $2,695,119 and this amount was deducted from the 2002-2003 base budget.

Byrne explained that all unaudited amounts are subject to finalization at the time the school districts are audited yearly and Comprehensive Audited Financial Reports (CAFR) are prepared in early November. All calculations based upon unaudited data will be revised at that time using audited figures and Abbott aid adjusted up or down as necessary.

In a similar manner, the accountants determined that the District had underspent its 2002-2003 budgeted amount for Fund 15, the segment of the District budget used to account for the individual school based budgets, by $2,337,739. Since seven percent of this fund is attributable to federal resources and 93% to State and local funding, the Adjusted 2003-2003 budget was reduced by $2,165,403, or 93% of the underspending.

These two adjustments resulted in a Base 2002-2003 state and local program budget (Base Budget) of $696,450,732.

ADJUSTMENTS TO THE BASE BUDGET

Early Childhood Plan

The EC Plan for 2003-2004 ($66,454,818) exceeded the EC plan for 2002-2003 ($52,104,130) by $14,350,688 and this amount was added to the budget.

Encumbrances

In the Notice, the Department excluded $25,510,005 in 2002-2003 encumbrances that appeared to be 2003-2004 expenditures and $5,860,928 in prior

year encumbrances that are considered cancelled pursuant to Department accounting/audit guidance. The Notice invited the District to provide documentation to the Department in the event that it disputed the assessment of encumbrances. Due to time constraints, this documentation was presented at hearing.

Byrne explained that an encumbrance is a commitment of funds for an order placed for goods and services. In accord with the regulations, maintenance is based upon actual spending. Since encumbrances are not actually spent, they were accounted for as surplus and not included in the approved budget which is restricted to maintenance.

When the goods or services are received, their costs then become an account payable, which are maintenance, and as such are included in the approved budget. If goods and services were received but not billed, they remain encumbrances. According to the Report of the Secretary of the Board of Education, Newark Public Schools (R-3) (Secretary's Report), the total current encumbrances for 2002-2003 in Funds 10 and 15 was $25,510,004; the total encumbrances for these two funds for the prior year was $5,860,482. The total for the two years together was $31,370,392.

Byrne testified that, in the Department's accounting procedures, any encumbrances for goods and services not received within six months after the end of the fiscal year, June 30, are deemed cancelled. The only exceptions are for encumbrances attributed to long term projects, such as capital improvements, or undertaken pursuant to a contract. These exceptions do not apply to the encumbrances discussed here.

As a result, the Department deemed all encumbrances from the 2001-2002 school year to be cancelled. According to the accountants, they relied upon for information contained in columns in the Secretary's Report entitled "accounts payable" and "cash expenditures." The items in the Secretary's Report listed as "encumbrances" for the 2002-2003 fiscal year were all open items and not included as additional

spending in the Report or accounted for in the 2003-2004 Approved Budget since they were deemed to be 2003-2004 expenditures.

Byrne explained that only expenditures were included in the maintenance budget and it was assumed that all open encumbrances would become expenditures in the 2003-2004 school year. The District was given the opportunity, as outlined in the August 27, 2003 letter, to present documentation that would support the expenditures of any of the $25,510,005 in encumbrances by supplying a listing of purchase orders that were invoiced for services or items received by June 30, 2003. Byrne noted that the District would then be given credit toward the maintenance calculation for 2003-2004.

The District presented testimony by Ronald Lee, School Business Administrator, that it is entitled to additional expenditures of $9,735,823.31 for invoiced encumbrances through June 30, 2003. It supported its claim by supplying a listing of purchase orders and the amount of invoices and accruals. Lee confirmed that these amounts represent goods and/or services that were received and invoiced in accordance with the standard outlined by Byrne. His testimony and the supporting documentation were never rebutted by the Department. Therefore, it is the District's position that the $9,735,823.31 should be added to the maintenance calculation in accordance with Supreme Court Order and regulations for the maintenance budget.

The Department argues that it will make appropriate adjustments after it reviews the District's Comprehensive Annual Financial Review ("CAFR") for the 2002-03 school year. This is required to be submitted to the DOE by early November 2003. The Department's present position is contrary to its position in its letter of August 27, 2003, in which it agreed to make these adjustments as soon as the appropriate documentation was submitted to the Department. Due to the constraints of time, that documentation was provided at the hearing and the Department should live up to its commitment to adjust the budget accordingly.

The District is concerned because historically adjustments are not made by the State when they receive CAFR information which should cause additional revenue to be paid to a district. Its experience has been that no additional revenues were provided and the District was forced to reallocate the scarce dollars within its budget.

Lee testified about a specific example in 2002-2003 relating to additional Charter school costs. When the actual costs exceeded the amount budgeted by the District, he requested additional funding from the State in the amount of $3.6 million dollars. The DOE responded by only providing $1.9 million and noted that the District would have to look within their budget to reallocate funds for the difference. As such, the District maintains that the $9,735,823.31 should be added to the maintenance calculation in accordance with Supreme Court Order and regulations for the maintenance budget.

Based upon the testimony of Lee and the supporting documentation, I **FIND** that $9,735.823 should be removed from encumbrances and treated as expenditures for the 2003-2004 school year. I, therefore, **FIND** that $9,735.823 should be added to the Base Budget.

Projected Surplus

The Department determined that the projected surplus balance for the 2002-2003 budget would be $17,526,672. This amount includes, among other items, the audited surplus balance of June 30, 2002 ($9,073,437), the total unspent appropriations from the General Fund and Fund 15 ($4,860,522), and the cancelled encumbrance of $5,860,928. It also includes a projected revenue surplus of $639,761 in the General Fund. ($631,524,067 - $ 630,884,306) (R-2, Schedule D, revised in Schedule F) It does not include a Budgeted Fund balance of ($4,000,000) or an increase in reserve for encumbrances ($2,366,185) for 2002-2003. The analysis incorrectly included cancelled encumbrances for the 2001-2001 year of $3,458,209. If this is removed, the projected excess surplus is reduced to $14,068,463. The District must maintain a surplus balance of 2%, or $12,988,365, so the projected excess surplus balance is $1,079,698. ($14,068,063 - $12,988,365)

The District did not address this issue and I **FIND** that this calculation stands as reported by the Department.

Other Adjustments

In Schedule D, R-2, the accountants erroneously deleted $18,382,753 from the actual 2002-2003 revenues because this amount had accrued but was not yet paid. This was corrected in Schedule F, R-2, according to generally accepted accounting principles (GAAP) for government, which say that this can be done if there is a statute permitting it, as there is in this case. Schedule D is accurate in all other respects.

The District has a remaining receivable of $9,751,008 in 2002-2003 Abbott aid. This will become a receivable of $13,209,217 because of the cancelled $3,458,209 encumbrance. This change is an adjustment to a receivable and does not affect the Additional Abbott aid for 2003-2004.

Non-Discretionary Items - Salaries

Ben Rarick is employed by the Department as the Director of the Office of State-Operated School Districts. He has held this position for the last three years. In this capacity, he also serves as the budget manager for three districts, Jersey City, Paterson and Newark.

Rarick initially testified as to the treatment of non-discretionary items in the budget. Non-discretionary costs are those, such as contractual increases in wages, that will increase beyond the control of the District.

He first reviewed the salary analysis worksheet (R-8) (Funds 11, 12, and 13). He compiled the information contained in the salary accounts, using the Report as his source, and concluded that non-discretionary salaries for the 2003-2004 budget year would be $18,886,540.37. This is derived from the salary expenditures for 2002-2003

plus the estimated union contractual raises of 4.884%. Any funds not spent on salaries were excluded. $18,886,540.37 was added to the Base Budget.

Funds in the amount of $31,718,771, consisting of $77,092,000 for substitutes, $21,347,833 for overtime, stipends and per diems, and $3,278,938 for summer school salaries were not included in the calculation of non-discretionary contractual salary increases but the salaries themselves were accounted for elsewhere in the budget. Raises for non-affiliated staff of approximately $300,000 were deemed to be discretionary and excluded. This treatment was uniform across all of the Abbott districts. Rarick never considered whether the employees receiving these salaries were covered by union contract increases or salary increases pursuant to employment contracts.

The District agrees with the Department's calculation that the salaries expended in 2002-2003 amounted to approximately $424,035,384. However, it argues that Rarick improperly failed to take into account contractual increases in salaries for substitutes, overtime, stipends, per-diem and summer schools. These are areas that are historically and ordinarily subject to contractual increases. Therefore, Rarick erroneously deducted $7,092,000 for substitute costs, $21,347,833 relating to overtime, stipend and per-diem costs plus an additional $3,327,938 in summer school costs when calculating the non-discretionary increases and reduced the expended salary for 2002-03 to $392,316,613.

Rarick then applied a projected salary rate increase of 4.884%, the amount he considered the average salary increase for the Newark Teacher's Union ("NTU") contract. He applied this amount to all the contracts without supporting information as to the actual rate and the rate of settlements within the State and Essex County. His analysis yielded a total projected increase of $19,160,743.38 from which he arbitrarily deducted $274,203 in salary increases he contended should not be provided to the District's unaffiliated (non-union) employees.

Rarick conceded that he failed to consult any District handbooks with respect to the contractual salary increases for non-union employees. He also made the

unwarranted assumption that the substitutes, overtime, stipends, per-diem and summer schools categories would not be entitled to contractual increases without checking the contract or inquiring about the status of negotiations with the District's unions.

Using contractual documents and current county averages for salary increases, the District, through Ronald Lee, the District Business Administrator, presented evidence that a more accurate and up-to-date calculation would amount to an increase of $32,585,087.15. Lee derived his numbers from the Summary Budget report for Funds 11, 12, 13 and 15 as reported in the District's current financial records.

With respect to substitutes, overtime, stipends, per-diem and summer school increases, Lee noted that those categories historically increased every year and he supplied copies of the actual contracts to prove his assertion.

The contract provided that teacher substitutes were paid a rate of $95.00 for the contract ending June 30, 2000. In the contract from July 1, 2000 to June 30, 2003, that rate increased to $100.00, or a 5.26% increase. For the same contract term, the per-diem rate for Aides, the smallest group in the bargaining unit, was $10.40 raised to $10.60 or a 1.92% increase. The substitute per-diem rate for clerks was $62.00 and increased to $70.00, for the respective year, or a 12.9% increase.

With respect to overtime, Mr. Lee explained that increases in overtime rates follow directly from the increase in the employee annual salary rates. The District showed that, if the salary rate increased by 5%, the overtime cost would also increase by 5%, so therefore a non-discretionary increase for overtime should be included in the calculations.

Items such as supplemental and extra pay are subject to contractual increases. Contract excerpts show that the stipend costs in the NTU contract increase from year to year, not just from one contract to the next. The percentage increases range from 4.58% to high of 4.96%.

Summer school rates are expected to increase again as they have under previous contracts. As support for this analysis, the District provided the summer school rates for the contract ending June 30, 2003 governing the salaries for teachers, school clerks, coordinators, psychologists and aides. This shows that, in July 1, 2001, the summer school rate for teachers was $29.00 but on July 1, 2002 the rate increased to $31.00 or a 6.9% increase. The District argues that, since the rates will continue to increase, the maintenance budget should reflect a non-discretionary increase in these categories.

After taking all of the above contractual increases into account, the District's financial records reflect that the total amount expended on salaries for 2002-2003 was $424,181,743, to which a contracted salary increase of 5% was applied to all categories. The District's rate was reached by analyzing the salary increase rate for 2003-2004 statewide (4.95%) but the Essex County rate increases (6%) were slightly higher than that. For example, Irvington has a salary increase for 2003-2004 in the amount of 6%.

Lee asserts that the 5% rate increase applied by the Department was too conservative an estimate. Lee realized that 5% was slightly above the state average but he believed it to be less the average for the county because of the contract reached Irvington. He testified that, when the 5% increase is applied to the $424,181,743.00 actually expended for salaries in 2002-2003, the non-discretionary increase for salaries $21,209,087.00.

Based upon the evidence, I **FIND** that the contractual increases in the salaries for substitutes, overtime, stipends, per-diem and summer school categories are non-discretionary and should have been accounted for in calculating the necessary budget increase. I **FIND** that the same thing applies to the contractual raises for non-affiliated employees. There is no evidence supporting the Department's assertion that these increases are discretionary. As a result, I **FIND,** based upon the historical expenses of the District, that the non-discretionary salary increases should be calculated using a total salary amount of $424,181,743.

With respect to the projected rate of increase, I **FIND** from the District's testimony that not all of the District's projected salary increases are at a rate comparable to that in Irvington and, therefore, there is no reason to disturb the Department's projection of a 4.884% increase, the State average.

Accordingly, I **FIND** that the projected non-discretionary salary increases for the 2003-2004 school year are $20,717,036 and this amount should be added to the Base Budget.

Unfilled Vacancies:

Rarick excluded salaries for teachers who left during the 2002-2003 school year and were not replaced. He stated that this was required under the "maintenance" standard so that the District would not be funded in 2003-2004 to fill teaching positions vacated during or after the prior school year.

Both the District's Deputy Superintendent, Anzella Nelms and Lee, testified to the devastating effect this decision would have on instructional programs. Lee demonstrated the manner in which instructional vacancies have a direct effect on the ability to provide educational programs at current levels. Nelms added that eliminating vacancies would deprive the District of the ability to hire certified teachers, resulting in the loss of classrooms and an increase in enrollments in the elementary and secondary levels in excess of statutory maximums.

The District explained that it is not always possible to replace a teacher who leaves after the start of the school year, particularly in certain subject matter areas such as math, music, and physical education. The best time for hiring is the period from the end of school, when recent teacher graduates are available, through the end of the summer vacation. Under the Department's interpretation of "maintenance," this would leave the District without a teacher during the following year through no fault of the District.

Lee requested the addition of $11,373,000.00 to the calculation of the maintenance budget, the amount needed to fund instructional vacancies. The instructional vacancies include instructional and classroom based personnel such as paraprofessionals. The total for the instructional vacancies was 164 FTE (Full Time Equivalents) and 73 FTE for paraprofessionals, for a total in the classroom for instructional purposes of $11,376,000.00. The District is only seeking to fill instructional vacancies and is not seeking funding for the approximately 200 other non-instructional FTEs consistent with its understanding of the maintenance budget mandates.

The definition of "maintenance" in *N.J.A.C.* 6A:10-1.2 allows funding for positions approved and provided during the 2002-2003 school year. It does not include the restoration of positions that were provided in previous years. The "maintenance" standard addresses the maintenance of "positions," not the maintenance of the District's actual expenditures in filling them. I **CONCLUDE** that any teaching or paraprofessional position that was filled by a permanent employee at the start of the 2002-2003 school year was "provided" within the meaning of *N.J.A.C.* 6A:10-1.2, irrespective of whether it subsequently became vacant during the year and that employee could not be replaced. Therefore, I **FIND** that the District should be provided with funding for any instructional vacancy that arose during the course of the 2002-2003 school year, providing that there was a permanent employee in the position at the start of the year and the position could not subsequently be filled notwithstanding the efforts of the District to locate a permanent replacement.

The District has estimated this amount to be $11,376,000 to replace 164 FTE (Full Time Equivalents) for teachers and 73 FTE for paraprofessionals, and I **FIND** this amount should be added to the Base Budget subject to the conditions above.

Non-Discretionary Items - Benefits

Non-discretionary health benefits were calculated by taking the actual spending on benefits in 2002-2003 and applying a growth factor of 4.884%, the same as the

projected rate of increase in salaries. In addition, the Department consulted with the State Health Benefits Program (SHBP) to determine if it would increase its rates. This increase had to be adjusted because the SHBP's fiscal year is the calendar year while the District's fiscal year is July 1 to June 30. As a result, the SHBP rate increase affects the non-discretionary benefits costs differently from January 1 to June 30, 2003 (20%) and then from July 1 to December 31, 2003 (10.8%). The Department calculated that the effective rate of increase over the 2002-2003 fiscal year was 14.5%. This rate is not an average but accounts for the compounding of increases over the twelve month school year.

The Department calculated the maintenance supplement for benefits to be $8,138,460. Rarick testified that the State included social security contributions of $12,408,220, the amount the District had expended in 2002-2003, and added a $4.884% increase to account for contractual salary increases. This resulted in an increase of $660,017.

Rarick then applied the 14.5% increase in health benefit costs to the Fund 11 amounts for an increase of $1,502,556 and to the Fund 15 amounts for an increase of $6,029,088.00. His total non-discretionary increase for benefits was $8,138,460.81.

Rarick failed to consider increases in other benefit categories, such as workers compensation, unemployment and retirement contributions. There was no explanation for these omissions. Worker's compensation will be discussed separately below.

I **FIND** that there should be no adjustment for State unemployment insurance contributions (SUI) at this time because of the projected rate of salary increases. The amount of SUI contribution per employee per year is capped and the rate of increase is determined by the State. The District has shown no relationship between the rate of an SUI contribution increase and the contractual rate of salary increase.

The District argues that pension contributions should increase at the projected rate of salary increases. However, there is insufficient information in the record to make an adjustment so that I **FIND** no adjustment can be made at this time.

Lee calculated the non-discretionary increase in benefits to be $14,894,159.10. This was based on actual rates published and supplied by the SHPB and the dental, prescription, and podiatry benefit providers multiplied by the actual number of employees enrolled in each plan. Lee's calculations included the amounts in the original budget, transferred amounts in the revised budget and any amount paid for 2002-2003. The base number for the amount paid for 2002-2003 did not differ from the Department's amount, $26,875,972.07, for Fund 11. The differences in the parties' results arises from the different rates applied in the District's calculations.

With respect to FICA or social security, Lee testified the District added a 5% increase to the 2002-2003 expenditures based upon its projected salary increases for 2003-2004. Since the Department's projected increase has been accepted, this increase will be calculated using the projected 4.884% increase. Likewise, the increase in contributions for pensions and unemployment will be calculated at the same rate.

In reaching his conclusions regarding health benefits, Lee used the actual rates that are delineated by the SHBP for coverages on the dental, prescription, and podiatry supplemental fringe benefits for a total of $66,842,044.00 (the largest amount being from health benefits of $48,361,268.00). That amount was then reduced by the amounts budgeted in Early Childhood, Title I and Title II, bringing the total supplement required to $62,965,542.10 minus $51,947,885.00, the amount expended in 2002-2003 for health benefits.

The support for the rates applied to the District's benefits calculation stem from a State Benefits and Pension division letter, dated September 2002, stating that the increase in NJ Plus was 28.4% in the Traditional plan and 21% in the HMO. In addition, an August 28, 2003 letter from the same agency provides the rate increases for 2003-2004. The District then applied the increased rates to the number of

employees enrolled in the individual plans under the health benefits plan in calculating the actual cost. It claims its need in the health benefits maintenance cost category is $14,894,159.10.

Based upon the gaps in the record and the time constraints preventing implementation of the record, I **FIND** that the Department's $8,138,460.81 estimate of the non-discretionary benefit increases should be applied at this time. Adjustments can be made at a later time when the District's actual needs can be determined with some degree of accuracy.

Non-Discretionary Items - Worker's Compensation

The District is self-insured for worker's compensation. As of September 3, 2003, Allied Risk Services (Allied Risk), the District's fiscal agent for its worker's compensation program, required an additional deposit of $3,500,000 in its reserve to meet the program's obligations from September 9, 2003 to June 30, 2004. This projected increase was based upon Allied Risk's analysis of the program's history of claims.

In another portion of the District's maintenance budget, the Department made a reduction of $2,000,000 in insurance costs as a non-recurring expense. The District had included the increased contributions to worker's compensation as insurance expense so the Department's reduction effectively eliminated the District's possibility of receiving supplemental funding to address this additional expense.

The District has the obligation to adequately fund its worker's compensation plan. The source of the dollar amount of funding needed based upon the history of claims is the fiscal agent, Allied Risk. The District documented its history of past contributions and its fiscal agent's notice to increase the fund to meet projected needs.

The Department's position is that there should be no increase in funding because the amount to be kept in the reserve for claims is speculative. It suggests that

the reserve be maintained at its prior level and, if additional funding is necessary because the fund has unforeseen expenditures, the District can apply to the Department for additional Abbott aid.

There are several problems with this suggestion. To begin with, the required expenditures are not unforeseen but are based upon an unrebutted actuarial analysis by Allied Risk. Further, if the worker's compensation plan is inadequately funded so that the District has a problem paying claims and has to apply to the Department for emergency relief, affected workers may not be comforted by the fact that an Abbott supplement will be provided in due course.

The Department has produced no actuarial evidence to refute the District's claims history causing the need for additional funding. I, therefore, **FIND** that this increase is no more speculative than the projected need to increase the size of any insurance reserve and is entitled to the same respect.

The District requires $3.5 million in additional funds over the $1,450,000.00 previously contributed by the District to its workers' compensation fund. Unless the Department subsequently analyzes the need for the large increase appropriately, I **FIND** that the additional contribution of $3,500,000 is a non-discretionary increase and should be added to the Base Budget.

Non-Discretionary Items – Charter School Tuition and Pupil Transportation

The Department stipulated that the costs of Charter School Tuition ($4,427,159), and the contracted increase in transportation costs ($3,085,209) were non-discretionary and $7,512,368 was added to the Base 2002-2003 budget for both items.

Non-Discretionary Items – Special Education Tuition in Private Schools for the Disabled

This was the only item in the request for supplemental aid in the area of special education tuition that was reduced by the Department. The total amount budgeted for

all special education tuition in 2002-2003 was $41,307,680. The amount budgeted for 2003-2004 is $50,979,758. The District requested an increase of $9,259,855 for all tuition which was substantially reduced by the Department because of the manner in which the tuition in private schools for the disabled was calculated.

In 2002-2003, the District requested a budget of $24,904,661 for special education tuition in private schools for the disabled. It actually spent $20,318,603. Its projected need is $26,837,590 for 2003-2004 because of an increase of twenty-nine children and increases in tuitions. The initial increase requested by the District for the 2003-2004 school year is $7,685,703, less the projected IDEA funds for this purpose anticipated from federal sources, or $6,518,987.

Rarick determined that projected increases in tuition supported by the record are only about $1,900,000 so the Department replaced the requested increase of $6,518,987 with $1,900,000. This reduced the total increase in Abbott aid for all special education tuitions to $4,673,697 from $9,259,855. When this was adjusted to account for projected IDEA funds of $1,159,116 from federal sources, an increase of $3,514,681 was added to the Base Budget as a non-discretionary item.

Rarick had information that, during the fiscal year 2002-2003, approximately $5,752,000 was transferred out of this account and used for non-special-education purposes so it was not used to calculate the increase in aid. Records from the District business office showed that only $135,705 was actually transferred. In addition, the IDEA grant for 2003-2004 for this purpose was reduced to $500,000.

Rarick stated that the numbers used to calculate the spending for special education were obtained from the District Director of Special Education. Rarick requested that Steven Hoffmann, a Department coordinating auditor, learn how the District paid for its special education program when the budgeted amount was less than actual expenditures. Hoffmann learned that the program's creditors were paid and there were no significant purchase orders outstanding or cancelled. He did not verify any transfers out of the special education account since he was just told to identify

amounts transferred in. Neither Hoffmann nor Rarick confirmed any information with the District business office.

The District requested additional increases for other non-discretionary special education tuitions that were not provided by the State. There was an additional $30,384.11 in increases for tuition to other regular local education agencies within the State and a difference of $1,162,530 for tuition to the regular County Vocational School District. These were excluded by the Department as increases in regular, not special education, tuition. The District provided no evidence to the contrary and the requested increases for these items will not be included.

Based upon the above, I **FIND** that the non-discretionary tuition increases for the private schools for the disabled should be revised in accord with the evidence. This results in the need of $1,900,000 for tuition increases for private schools for the disabled in 2003-2004 rather than the $6,518,986.69 requested by the District. When this substitution is made in the total requests for special education tuitions, the amount of increase becomes $4,640,868. This, however, should be reduced by the anticipated decreased IDEA grant of $500,000 for the fiscal year. I **FIND** the additional need for non-discretionary special education tuition increases to be $4,140,865 rather than the $3,514,681 calculated by the Department.

Only the special education tuition was treated as a non-discretionary item. All other special education spending was adjusted upward using the consumer price index for the tri-state area. (See below.)

Non-Discretionary Items – Rent/Lease Obligations and County Vocational School Tuition

The increase in rent/lease obligations of $222,483 was accepted as a non-discretionary item and added to the base budget. The increase of $932,228 for County Vocational School Tuition was also accepted and added.

Non-Discretionary Items – Consumer Price Index Adjustment

The Department compiled all non-salary accounts (R-12) except utility costs and adjusted them upward by 2.11%, the consumer price index (CPI) for the tri-state region. This added an additional $932,228 to the Base Budget.

N.J.S.A. 18A:7F-3 defines the appropriate CPI as follows:

> "CPI" means the average annual increase, expressed as a decimal, in the consumer price index for the New York City and Philadelphia areas during the fiscal year preceding the prebudget year as reported by the United States Department of Labor.

The Department used the average of the increases in the CPI's for the New York and Philadelphia areas to arrive at an average of 2.11%. No explanation of this percentage increase was provided. The District used the 3% CPI for New York, Northern New Jersey, Long Island, NY-NJ-CT-PA, for July 2002 to July 2003 based upon the U.S Department of Labor, Bureau of Labor Statistics, News, Table 3. Since this does not include the Philadelphia area, as required by the statutory definition, the increase of 1.5% for the Philadelphia, Wilmington, Atlantic City, PA-NJ-DE-MD area for August 2002 to August 2003 was taken from the same source and averaged with the 3.1% CPI for New York, Northern New Jersey, Long Island, NY-NJ-CT-PA, for the same month. This results in a CPI of 2.3% instead of the 2.11% utilized by the Department. These values are as close to the CPIs for the fiscal year preceding the prebudget year as is possible without further information.

Since there is no dispute as to the base number used by the Department for this calculation, I **FIND** that the CPI adjustment should be $44,181,440 times 2.3%, or $1,016,173.

Non-Recurring Items – Legal Expenses

Rarick next discussed the treatment of non-recurring items in the budget. He explained that, in some years, the District incurs unusually high expenses for certain

items and these expenses return to within normal limits in subsequent years. The abnormal increases need not be accounted for in subsequent budgets.

In 2002-2003, the District budgeted $800,000 for legal expenses but $1,523,311 was actually spent. $723,311 was subtracted from the Base Budget as a non-recurring expense. The District did not revise its 2002-2003 budget to reflect the additional expenditures and Rarick did not ask the District if more funds were needed.

The District states that the request of $1,500,000 is necessary based upon outstanding and pending litigation but no documentation or testimony was provided to specifically support this increase. I **FIND** that the District did not carry its burden to support this increased budget amount for the 2003-2004 fiscal year.

Non-Recurring Items – Insurance Expenses

In 2002-2003, $1,470,009 was budgeted for insurance but $4,530,404 was actually spent because of extraordinary costs. The Base Budget was reduced by $2,379,227 to $2,151,175, the increase requested by the District. Rarick did not make any adjustment for worker's compensation increases. (See above.)

I **FIND** that the increase in worker's compensation has been accounted for elsewhere and the Department correctly deducted $2,379,227 from the Base Budget for insurance expenses.

Non-Recurring Items – Utilities

The District originally requested Abbott aid for utilities in the amount of $10,180,000 which is less than it requested the year before. The request was accepted and $828,352 removed from the Base Budget for non-recurring utility expense. Rarick did not look at the amount actually spent and took no rate increases into consideration. He said he was not aware of any.

The District has demonstrated that it has ongoing utilities costs and is subject to significantly increased rates for service. I **FIND** that its projection of the necessary funding is supported by the record and is a non-discretionary expense. The District can not operate without adequate funding for electricity and fuel.

I, therefore, **FIND** that the District should receive additional funding for utilities at its projected level. As a result, I **FIND** that an additional $1,055,681 should be added to the Base Budget for utilities instead of a decrease of $828,352.

Non-Recurring Items – Belmont Runyon School

The District is in the process of constructing the Belmont Runyon School. The funding for this project comes from multiple sources: the New Jersey Department of Transportation, bond proceeds and approximately $2.8 million from the Department to cover "soft costs and furniture." Some of the specifications for constructing Belmont Runyon exceed the State standards and the Department will not fund them. This treatment is no different from that afforded to all schools in the State. At this time, the Department claims that it has already provided more than it had agreed to provide.

Because of the sources of its funding, Belmont Runyon is not part of the District's Long-Range Facilities Plan, pursuant to the Educational Facilities Construction and Financing Act, *N.J.S.A.* 18A:7G-1 to -44 (Act). Rarick argues that the Act allows Districts to amend their Long Range Facilities Plan to include the remaining costs for finishing Belmont Runyon and the District should do this instead of relying upon its budget.

The problem with this suggestion is that the District is planning to complete the school during the 2003-2004 school year and an application for funding under the Act may delay completion still further. The testimony shows that the District is presently starving for safe and efficient school buildings. (See below.) The end result of the suggested procedure would be to simply transfer funding to complete the project from one State department to the another to the detriment of the District.

As of May 21, 2001, the $2.8 million in costs for "furniture, equipment, exterior costs and other amenities and minor finishing work" on Belmont Runyon were to be deferred to the 2002-2003 General Fund budget. Rarick determined this to be a non-recurring amount for purposes of the 2003-2004 budget.

It was recently found that there are still open encumbrances on Belmont Runyon because it is a construction project. The District actually spent $1,589,609 on this school during 2002-2003, but $2,977,365, not including encumbrances, was initially removed from the Base Budget as a non-recurring cost before Rarick recalculated the amount. He made the correction during his testimony at hearing to add $1,387,756 back into the Base Budget and the final number may be further adjusted after the November 2003 CAFR audit.

Superintendent Bolden testified that the District had an agreement with former Commissioner Hespe of the Department that the District would be allowed to use up to $2,700,000 in general revenue to complete Belmont Runyon in exchange for the District's agreement to utilize $12,000,000 in bond funds raised for Belmont Runyon to close a budget deficit in the 2001 school year.

Since the District has already used $1,589,609 of its general revenue for Belmont Runyon pursuant to its agreement with the Department, it should still be able to utilize the remaining $1,387,756. I **FIND** that Rarick allowed for this by replacing $1,387,756 back into the budget and removing only $1,589,609 as a non-recurring expense.

Non-Recurring Items – Replacement of Title 1 Funds

The final non-recurring item was an increase of $322,759 to replace Title 1 funds that will not be received by the District in 2003-2004. This amount was added to the Base Budget only because the Department made a commitment to replace missing

Title 1 funds. Rarick was not aware that there were changes in the law and made no adjustment to compensate for them.

The District claims that it will lose $4,657,730 in funding from the federal No Child Left Behind, Pub. L. 107-110, 115 Stat. 1425, 20 *U.S.C.A.* §7231, (NCLB) program for the 2003-2004 fiscal year. It contends that this funding should be replaced by the Department under the same agreement as replacement of Title 1 losses. The Department responds that there is no provision for this in the regulations and its agreement with the District covers only Title 1.

It further argues that the "District's maintenance budget already includes all expenditures related to special education in 2002-2003, and assumes that in 2003-2004 it will not incur any of the same costs incurred in 2003-03. Newark has provided no documentation to support this assumption." This argument is included here to preserve it. It is not clear what specific costs are meant since NCLB has implications for special education but is by no means solely special education legislation.

In the past, the District has been able to divert funding from the Title 1 program in the WSR portion of its budget. Now, because of the reduction in Title 1 funds, and the requirements of NCLB for 2003-2004, more dollars from Title 1 have to be used for Title 1 programs. This will leave the District with a projected shortfall of $4,657,730 for mandated services under NCLB.

The Department only agreed to replace Title 1 funds and Title 1 is only one aspect of NCLB. The District failed to demonstrate what requirements under the NCLB cannot be met and would create such a large need for supplemental funding in 2003-2004. I **FIND** that it has not met its burden of showing that any NCLB funds should be replaced beyond the Title 1 funds the Department has already agreed to As there is no provision in the Abbott regulations for replacing all lost federal funding, I **FIND** that the Department correctly added only the missing $322,759 to the budget.

Inefficiencies - SLTs

Rarick next began to address inefficiencies for items budgeted in 2002-2003. The first of these concerns the five School Leadership Teams (SLTs) in the District. There are seventy-seven schools in the District and these are divided among the five SLTs for purposes of administration. Each SLT is responsible for about fifteen schools. Jersey City, the second largest district in the State, has a similar system and the reduction in the number of teams would bring the District in line with Jersey City.

This was deemed an inefficiency because of a Projected Five Year Cost Saving Actions agreement between the District and a prior Commissioner of Education to reduce the number of teams from five to four by the 2002-2003 school year. The remaining SLTs were to be restructured to meet K-12 feeder patterns. If this were done, it allegedly would have resulted in a savings of $2,000,000 in the 2002-2003 school year. Rarick would not consider a staff reduction affecting all SLTs to meet the terms of the agreement, even if it met the cost savings objective.

The SLT staff is not funded from the SLT account. Its staff's salaries are paid from different accounts and the roster of their employees was derived from their location, not the source of their pay.

Rarick also relied upon the report of Rosenfarb Winters, LLC (Rosenfarb), a forensic accounting firm retained by the Department to prepare a report to establish standards by which to quantify inefficiencies in the districts as they relate to non-instructional programs. Rosenfarb was provided with the CAFR reports for all Abbott districts for the 2000-2001 and 2001-2002 school years and with available budget expenditures for the 2002-2003 school year.

Rosenfarb then utilized the Abbott districts' performances on the corresponding Elementary School Proficiency Assessment - Language Arts (ESPA LA) tests for the fourth grade to develop a ratio between the test scores and the per pupil non-

instructional costs for each district. When these were plotted on a chart, certain districts fell within the middle range for each of these fiscal years and they were classified as "generally efficient spending" Abbott districts. Rosenfarb then selected the four districts (Elizabeth, Gloucester, Long Branch and Phillipsburg) that consistently fell within this range and denoted them "Benchmark Abbotts." They then developed an average cost per pupil for non-instructional expenses for the Benchmark Abbotts and used this as the standard of comparison for the other Abbott districts. Rosenfarb designated the quantification of inefficiency in dollars as an "unfavorable variance" from the Benchmark Abbotts.

This was strictly a quantitative analysis. No attempt was made to inquire into the underlying reasons for the differences in spending. There were no allowances made for regional differences, numbers of school buildings, conditions of school buildings or student populations. Keith Balla, a partner in Rosenfarb, testified that unique needs were not considered because there would have been no way to quantify areas of inefficiency if they had been taken into account. Rosenfarb attributed $52,394,669 in inefficient spending to all salaries.

Rarick looked at those salaries attributed to the fifth SLT and determined that, although there had been a decrease in personnel in the SLTs, the projected $2,000,000 had not been saved. He further compared the District with Jersey City and Paterson and, finally, he looked at the Rosenfarb report which confirmed his determination of inefficiency. As a result of these considerations, he reduced the Base Budget by $1,208,080.

As the Department pointed out, *N.J.A.C.* 6A:10-3.1(c)(2) also requires that the Department consider historical spending patterns and district-specific information as to staffing needs, neither of which were considered in the Rosenfarb report.

I **FIND** the District to be unique in the State in many ways and its problems are long-standing and pervasive. The facts supporting this finding, which appear throughout this Initial Decision, are the size of its enrollment, the age and condition of

its buildings, the obstacles it faces in maintaining and replacing its deteriorated buildings and its long history of neglect. *See, Contini v. Board of Education of Newark,* 286 *N.J. Super.* 106, (App. Div. 1995), *cert. den.*, 145 *N.J.* 372 (1996). In light of the uniqueness of the District's problems, this Initial Decision will rely heavily upon District-specific information in determining whether an inefficiency exists. If the item or organizational structure is found to be serving a necessary function, it will not be deemed an inefficiency in the absence of a more effective and immediate alternative.

Marion Bolden became the State Superintendent for the District in 1999. One of her goals was to make the District efficient financially as well as educationally. Between June 19, 2000 and October 27, 2000, she attended weekly meetings with auditors and District and Department personnel to identify areas that were inefficient and to develop strategies to improve them. These meetings were continued for almost two years and resulted in the development of the Projected Five Year Cost Saving Actions agreement in September 2001 during the time the Whole School Reform (WSR) plan was being implemented. The items that were the subject of the agreement represented areas of concern that could not be handled immediately. It was determined that there were redundancies of services that would be phased out as part of the agreement.

Bolden attempted to follow the plan by reorganizing the SLT system to group high schools together with their feeder elementary and middle schools. This did not work because of programmatic concerns with the secondary schools. The District has implemented a schools-to-careers initiative that requires uniform application and the new feeder grouping interfered with the District's ability to carry out this and other programs specific to secondary schools in a uniform manner. The schools were then regrouped to the prior SLT system and the programs now function more efficiently as a result.

Before entering into any further into the discussion of the administrative structure of the District, the following must be taken into consideration: Newark has 76 schools,

whereas Paterson has 49 schools and Jersey City has 39. Newark has approximately 43,000 students and Jersey City approximately 36,000 students.

Dr. Raymond Lindgren, Executive Assistant to the Superintendent, prepared a chart that showed Paterson was grouped into four administrative units with an average of 12.25 schools per unit. Newark's five SLTs have an average of 15.2 schools per unit. Jersey City was divided into two administrative units with an average of 19.5 schools per unit. This puts Newark about midway between Paterson and Jersey City in the number of schools per administrative unit.

Rarick testified that he compared Newark with Jersey City because the two are the first and second largest districts. He considered the fact that the District has two special assistants in each SLT while Jersey City only has one in each of its two clusters. Lindgren testified that one of the special assistants is non-instructional and is paid significantly less than the special assistant for instruction. Lindgren also pointed out that Jersey City has one special assistant and one administrative analyst per cluster. The function of the administrative analyst is similar to that of the District's non-instructional special assistant.

Nelms testified that, prior to the state takeover of the District, the schools were grouped into four clusters for purposes of administration. She was the head of one of these clusters and supervised twenty-six schools so that she had insufficient time to spend on the needs of the individual schools that were her responsibility. When the District was reorganized into five units, now designated as SLTs, she was able to perform her duties much more effectively.

Bolden testified that, when she assumed the position of superintendent in July 1999, there were sixty-eight employees in the SLTs with a budget of approximately $18,000,000. She has reduced the roster of employees to its current level of forty with a budget of $6,000,000. Of the seventy-four employees shown in the present roster of the five SLTs, thirty-four are paid through other departments in the District and are not part of the SLT budget. Rarick included these employees as evidence of inefficiency

but did not show that the thirty-four employees, or any category of them, serve no useful function. To the contrary, he arbitrarily eliminated the salaries of all employees of one SLT irrespective of the function performed or the source of their salaries.

Based upon the testimony, I **FIND** that the District has realized more than the savings projected by the plan even though it was not accomplished through implementation of the plan. I **FIND** that the District attempted to implement the structural reorganization contemplated by the plan but it found it to be less efficient than the five SLTs and it restored the more effective system. I **FIND** the Department's preference for implementing a five-year-old agreement, which creates a system that did not work as well as the one in place, to be arbitrary. Furthermore, its position does not take into consideration that creation of a massive reorganization of the District by suddenly withholding funds could easily lead to chaos. This matter should be resolved by negotiation, not through an attack on the District's funding.

I **FIND** the comparison of the District to Jersey City to be unpersuasive since it is based solely on numbers and ratios and ignores the requirement of the regulations that the spending history of the District and its specific staffing needs also be taken into consideration.

For all of the above reasons, I **FIND** that the fifth SLT is not an inefficiency and, therefore, $1,208,080 should be restored to the budget.

Rarick basically ignored the result of the Rosenfarb report in this instance and in those that follow. It will not be taken into consideration by this forum since it does not appear to be a useful measure of inefficiency in any of the areas it explored.

Inefficiencies - Overtime

Rarick reduced the Base Budget by $700,000 for excess overtime payments to blue collar workers. He characterized this as an inefficiency because the District was expected to reduce overtime spending by this amount. He did not explain the source of

his expectation. Rarick was concerned about the amount of overtime paid in general, $5,700,000, and, specifically, the amount paid to certain individuals. There were two employees, a night electrician and a foreman of electrical workers, earning over $50,000 each in overtime during the 2000-2001 school year. He was also concerned about the unfavorable comparison between overtime spending in Newark and in Jersey City. Paterson is the smallest of the three districts he is involved with and it outsources its custodial services so that Rarick did not stress this comparison with Newark.

He conceded that there were certain problems during the 2002-2003 school year, such as the number of snowstorms, that led to increased use of overtime. He further conceded that there is provision in the union contracts for custodians and maintenance workers that require to District to pay for a minimum of four hours of overtime if a worker is called out to an emergency after school hours. In spite of these District-specific factors, he still based his decision on a comparison with other Abbott districts.

Steve Morlino, the Executive Director of Facilities Management for the District, testified that Newark has seventy-six schools but there are eighty-two school buildings. The average age of a District school building is eighty-five years. Newark is the only district with twenty-six buildings over 100 years old.

He testified that a significant amount of the overtime expense is weather-related. When the temperature drops below thirty degrees, the District's custodians are bound by contract to check the buildings' heating systems. When the temperature drops below twenty degrees, he requires the custodians to operate the school boilers on a 24-hour basis to avoid emergencies such as damaged boiler systems and freezing and bursting pipes. He stated that this was necessary to avoid losing the use of classrooms in already overcrowded classes.

Five of the buildings have boilers that are beyond repair. They have temporary boilers located in trailers outside the schools. These require considerable overtime attention to avoid freezing and to protect them from vandalism. Constant fuel deliveries

are required because of the small capacity of the boilers. They create additional expense because they emit "cold oil smoke" which dirties the surrounding homes. The District cleans this up as a matter of public relations.

The age and condition of the school buildings exacerbate the overtime expenditures. Skilled trade workers are called out at all hours of the day and night to make emergency repairs or remedy vandalism so that the building can be used for school purposes.

The State performs renovation projects through an agency which will be identified here as the SCC. (This will be explained fully below.) Although the District does not do the work, the State workers do not clean up after the job is over so that District employees incur overtime carrying out this function.

When summer school is in session, custodial workers clean the buildings daily. When summer school is over, custodial and skilled trade workers are called upon to conduct a massive clean up and repair of schools for the regular school year.

Morlino performed a cost/benefit analysis and determined that adding additional staff would not reduce the need for overtime.

Rarick did not explain the basis for his expectations, but, given the problems, it is surprising that the District has been able to reduce the cost of overtime as much as it has. According to Morlino, it will attempt to negotiate the four-hour overtime minimum from the workers' contracts to save even further on this expense. In the meantime, I **FIND** that the cost of overtime is necessary given the historical expense and the staffing needs of the District. I, therefore, **FIND** that $700,000 should be restored to the Base Budget.

Inefficiencies – Office of Design and Construction

The District's Office of Design and Construction was also considered an inefficiency. Rarick determined that the functions of this office duplicated those of the District's office devoted to maintenance and plant services and also duplicated services provided by the New Jersey School Construction Corporation (SCC), a subsidiary of the New Jersey Economic Development Authority formed pursuant to the Educational Facilities Construction and Financing Act, *N.J.S.A.* 18A:7G-1 to –44 (Act), to administer school construction and renovation. For this reason, he deleted $2,154,000 from the Base Budget as inefficient use of funds.

Abbott districts are required to use the SCC to construct their school facilities projects. Districts, such as Newark, that have approved long-range facilities plans may undertake pre-development activities consistent with the approved plans under the auspices of the SCC. *N.J.A.C.* 19:34-1.1. Further, the SCC promulgated rules to implement section 13(a) of the Act which permits the SCC to "authorize a school district to undertake the acquisition, construction and all other appropriate actions necessary to complete" a school facilities project whose eligible costs are less than or equal to $500,000 and to enter into a grant agreement with the District for the payment of the State share. *N.J.S.A.* 18A:7G-13(a).

Rarick never spoke to anyone in the SCC to confirm his analysis of the responsibilities of the District. It was based only upon his perception and the spending by the District. Newark ranks the highest in the state in spending per pupil, $2215. The second highest is Trenton which spends $1856 per child. This means that Newark exceeds the second highest district by twenty percent, a significant margin.

The Rosenfarb report found an unfavorable variance in salaries for the Office of Design and Construction (ODC) of $9,040,609.70. Rarick looked more closely at the underlying considerations, that is, the District employees in the Office of Facilities which includes the ODC. There are four subdivisions of the Office of Facilities: project control;

building maintenance, performing SLT services in the schools; facility support; and ODC. He found no counterpart of ODC in any other Abbott district. He also considered that the staff of this Office had increased over time. Furthermore, there was a highly-paid consultant, Frost Associates, engaged by the District to assist with construction and renovation plans submitted under the Act.

Rarick conceded that the ODC had responsibility for projects less than $500,000 and emergency needs but stated that other districts had the same responsibilities and handled them without this type of office.

Rarick considered that there are 27 full-time equivalent (FTE) employees in the office, and calculated their total salaries and estimated total benefits to be $297,000. He estimated these benefits using an average per FTE employee of $11,000 per year times the twenty-seven employees. He then removed the result, $2,154,000, from the budget as an inefficiency.

William Parrish has been the District's Director of the ODC since July 2002. He testified that this office consists of a director, a chief engineer, a supervising engineer, eight project managers, a construction management specialist, an assistant building services management specialist, six assistant construction management specialists, a principal purchasing assistant and support staff.

The licensed professionals in the Office of Design and Development provide the technical expertise to develop all major capital projects of the district. They identify projects; draft specifications, including technical standards; and identify, select, and oversee outside professionals and contractors.

His staff also coordinates with agencies and the community with regard to land acquisition and predevelopment activities. The ODC is also involved in the day-to-day maintenance and oversight of the District's 80 buildings that are on average 85 years old, as well as the long-range improvements and recommendations for environmentally sound and energy efficient practices. The ODC also processes and oversees numerous

federal, state and local grants, including SCC 13 and 13A grants for projects under $500,000 and pre-development work (traffic studies, geo-technical work, site feasibility).

Parrish disagreed with Rarick's testimony that the SCC maintains all school buildings at this time, as well as the premise that the ODC is an overlapping function with the SCC, which handles construction of new schools as opposed to continued need for capital projects at existing schools. Parrish outlined a number of functions of the ODC completely unrelated to the SCC, the applicable subsidiary of the EDA.

He testified that many of the duties of the ODC impact upon safety of students, staff and visitors, and implicate serious District liability concerns, such as: (1) removal of underground storage tanks; (2) sidewalk and curb repairs; (3) playground resurfacing; (4) athletic field repairs; and (5) exterior and site lighting upgrades. Other duties of the ODC are directly related to, and desperately needed for, maintaining the District's curriculum, such as: (1) library renovations; (2) classroom conversions (*e.g.*, a $60,000 undertaking of transforming classrooms into a culinary arts program); (3) building and maintenance of vocational schools; (4) science labs; and (5) temporary classroom units. Indeed, some services are mandated by NCLB, such as creating media labs and writing centers in classrooms.

The ODC also addresses all emergency structural repairs at any of the District's 80 school buildings, a critical function not handled by the SCC. In fact, an emergency situation had just occurred the day before when a roof collapsed at a school, and his staff was called upon to stabilize the situation. He added that, without a staff, he would not have been able to respond adequately and the District would have incurred great expense.

Parrish testified that no other District had approximately 50 capital improvement projects at this time valued at over $20 million. The Belmont Runyon school alone is an approximately $30 million project. As an example, Parrish indicated that the SCC evaluated Jersey City's "health and safety" funding at $40 million and assessed Newark's at $130 million, largely in part due to the significantly greater amount of

buildings, and the condition of those buildings. Therefore, contrary to Rarick's statements, a comparison to other Abbott districts can not properly be made.

Parrish disputed Rarick's assertion that the ODC staff was growing at a time that it should be reduced. He said that the District's Long Range Facilities Management Plan involves more than $1.6 billion in projects, and, at each stage of building, a higher level of District coordination is needed to interface with the SCC. This requires representatives of the ODC to ensure efficiencies for subsequent construction of buildings based on prior experience. Among other things, it eliminates the need for contracted professionals to educate themselves at the expense of the District or State each time a new project is undertaken.

Parrish made a cost/benefit analysis of retaining the staff in the ODC. Given the current $20 million in capital improvement projects, an industry standard of 15 to 20 percent in construction "soft" costs and management fees and private industry salaries, elimination of the ODC would cost the District approximately double the cost of maintaining the ODC.

Finally, Parrish testified that neither Rarick nor Hoffman, who, despite being stationed in the District's Internal Audit room outside of the ODC office, ever spoke to him regarding the functions or efficiency of the ODC.

George Gottuso is employed by the SCC as the senior project officer in charge of the District's public school construction programs. As part of its Long Range Facilities Plan, the District will construct forty new schools and renovate thirty others at an estimated cost of $1.6 billion dollars. The work will extend indefinitely into the future.

Gottuso testified that, once the Department approves a project, he works closely with the ODC. He attends meetings with District staff and educators to set up the design and construction of new and renovated schools at which the ODC educates prospective architects as to what is needed before a design is submitted. He works with Parrish and other District facilities staff when the design drawings are considered

and approved. The design phase of each project can go on for up to eighteen months depending on the size and complexity of the project. The District must approve and sign off on the construction drawings so that they meet its standards. The SCC monitors the whole process and keeps it moving forward. In small districts, the SCC works with a district on a few schools. In Newark, it works with the District on 40 schools.

At the present time, the Department has approved twenty-eight projects submitted by the District and there are additional ones being prepared for submission.

Gottuso confirmed that the SCC approves the District for grants for projects costing less than $500,000; however, once the grant is approved, the District does everything else. The SCC only receives invoices and pays the contractors for the project. It does not have the capacity to deal with all of these projects and has delegated the responsibilities to the districts as permitted by law. As a result, the work is performed by the ODC.

Gottuso said that the office of SCC devoted to the District consists of himself and two project managers. Given the number of projects in the District and his lack of staff, he relies heavily upon District resources to carry out the work of his office. The SCC has no plan to provide him with additional staff.

Based upon the evidence, I **FIND** the ODC performs necessary services that do not duplicate the services provided by the SCC and the District would incur greater costs by eliminating it. The Department never considered the staff requirements of the District before eliminating funding for the ODC. I, therefore, **FIND** that this office is not an inefficiency and the Department should restore $2,154,000 to the Base Budget.

Inefficiencies – Office of Development Planning

Rarick also considered the Office of Development Planning (ODP) to be inefficient and questioned the need for it. He stated that, at least as far back as August

2001, he has been trying to get an organizational chart of this office and the job descriptions of its employees. These employees are a director, a teacher of industrial arts reclassified as a resource teacher/coordinator, a legislative information officer and a secretary. He was concerned that the resource teacher/coordinator, who helps to plan facilities needs in the schools, was performing a job for which he was not hired. Rarick was also concerned that the legislative information officer performed duties already being performed by the District's Office of Public Information. He could not find a comparable office in any of the other Abbott districts and, so, could not justify this expenditure in Newark.

Rosenfarb found this to be an unfavorable variance of $8,969,320.68. Rarick calculated the measure of the inefficiency to be the salaries and benefits of three employees and he removed $190,000 from the Base Budget.

Lindgren testified that the ODP was originally created to address the *Abbott*-mandated Long Range Facilities Management Plan. The office has existed for four years and originally had five employees. The staff was reduced approximately two years ago to three positions, two of whom were reallocated from other District offices.

He asserted that, given the scope of the undertaking involving Newark schools, which alone accounts for 20 percent of all new schools in the state and 25 percent of all projected expenditures, comparison to other Districts regarding the need for this office is unsound. He testified that 130 of 230 million dollars in School Construction Corporation Health and Safety projects are in Newark. Overall, Newark is building 40 new schools and restoring 35 others.

He explained that with each school, the ODP staff faces unique challenges regarding, among other things, state and municipal approvals, community interaction, land acquisition procedures and coordination of educational specifications, District standards and community needs. Lindgren said that it is not uncommon for the building of each school to implicate multiple parcels of land; in fact, Newark's new University High School impacts 60 separate parcels of land, by far the greatest number in the

state. According to Lindgren, the ODP staff is uniquely qualified to implement these tasks.

The legislative information officer, whose job description is in evidence, is responsible for, among other things, coordinating between the state and municipal government and working with the multiple agencies of the City on a regular basis. Among his many responsibilities is his role as District liaison to the City Planning Board. He is uniquely suited to the position because of his familiarity with the municipal officials and the process. Lindgren testified that it is far more efficient to assign one experienced individual to this function rather than distribute individual tasks to random District staff.

Lindgren explained that the function served by the legislative information officer does not duplicate the functions of the District's Office of Public Information and Community Development. This office interacts with the District parents, the community and the media.

The industrial arts/facilities research teacher/coordinator, whose job description is in evidence, participates in meetings with the Department, the SCC, and the Facilities Task Force. He ensures compliance and continuity and uniformity with educational specifications and is charged with retaining voluminous records and coordinating documents relating to the educational side of the building process. Lindgren advised that this individual is also uniquely qualified for this position given his experience, as well as his knowledge and expertise of educational issues, drafting and design.

Lindgren was aware of the functions of the District's Office of Public Information and Community Development. He explained that the role of this offices was completely different than the role of the ODP and that there were no overlapping functions, with the exception of the sharing of information among the offices for community awareness. He added that the ODP performs functions that are not duplicative of any other District staff.

Finally, Lindgren testified that neither Rarick nor Hoffman spoke to him about the inefficiency of the ODP. The first time the Department of Education advised the District of this was in the August 27, 2003 letter.

Based upon the testimony of Lindgren and Rarick's admission that he had no understanding of the function of this office, I **FIND** that it performs a necessary function and should not be classified as an inefficiency. Therefore, I **FIND** that the Department should restore $190,000 to the District's Base Budget

Inefficiencies – Resource Teachers/Coordinators

The next item of inefficiency, resource teacher/coordinator positions, was another matter agreed upon in the Projected Five Year Cost Saving Actions agreement. The District was to reduce the number of math research teacher coordinators from sixty-three to five by the 2003-2004 school year, a savings of $50,000 per employee. As of the present, the number of these employees has only been reduced to twenty-nine. The District was to reduce the number of language arts teacher/coordinators from sixty-three to five by the 2003-2004 school years, also at a savings of $50,000 per employee. As of the present time, the number of these employees has only been reduced to twenty-seven.

Rarick did not consider any District savings in this area if they were not realized in accord with the five year agreement. He was not aware that the District had reduced the number of facilitators and tutors that used to be in the District and did not take this into account. He explained that he did not consider the educational impact of reducing the number of resource teacher/coordinators because he felt that this should have been contemplated by the District when the five year agreement was developed and agreed upon.

Rosenfarb arrived at an unfavorable variance of $14,343,938.77 for these positions. Rarick compared the District to Jersey City and Paterson and found that there were a few employees performing similar functions but not on the scale found in

Newark. [illegible] inefficiency for this item in the following manner. $59,556.69, of a math resource teacher/coo[illegible] number of employees that should have been remo[illegible] of $1,452,772.67. He calculated the savings o[illegible] rce teacher/coordinators by taking their average s[illegible] by twenty-two. This resulted in a savings of $1,331,[illegible] on benefits for these forty-six employees in the mar[illegible] about $506,000. The approximate total of all of [illegible] emed to be the amount of funds spent inefficien[illegible] from the Base Budget.

Bol[illegible] er/coordinators as "master teachers" involved [illegible] ntoring teachers, assisting in curriculum development[illegible]

She[illegible] er/coordinators are a component of the District's [illegible]. She has reviewed this model with the Departmen[illegible] ve approval from the Commissioner. In fact, Bolds[illegible] ad reviewed the District's model and comment[illegible] he concluded that the Department's decision to elimina[illegible] research teacher/coordinator positions would have a se[illegible] rict's ability to implement its model.

Bo[illegible] urce teacher/coordinator position to WSR in compar[illegible] s and tutors. She found that the resource teachers [illegible] district from a programmatic standpoint given the fact th[illegible] vices were directly linked to an upswing in crucial te[illegible] cted that the work done by facilitators was not as closely [illegible] trict goals. Because of the value of the research[illegible] de the decision to reduce the number of facilitators[illegible] ar exceeded the cost savings proposed in the Septe[illegible] Specifically, the Superintendent reduced the

number of facilitators by 26.5 with a corresponding saving of $1.85 million and reduced the tutors by 50 with a corresponding cost saving of $3.53 million.

Bolden stated that the elimination of the research teacher/coordinators would deprive the District of the extensive additional training they have already received. She described in detail how the research teacher/coordinators were trained in programs that, in some instances, spanned two and one-half years. In addition to their greater effectiveness, she determined to retain the resource teacher/coordinators in math and language arts because of the high cost of training them. According to Bolden, the need for language arts and math resource teacher/coordinators was explained to Rarick and he approved the District's plan.

In addition, she noted that the proposed reduction of research teacher/coordinators would result in placing the District's $5.7 million National Science Foundation (NSF) grant in jeopardy. The grant required maintaining at least 30 resource coordinators in math as a condition of continued funding. Rarick testified that he was unaware of the NSF grant when he identified the math research teacher/coordinator position as an inefficiency and failed to talk to anyone in the District about the need for the position.

Based upon the evidence, I **FIND** that, irrespective of the five-year plan, the positions of math and language arts resource teachers/coordinators do not constitute an inefficient use of funds. I, therefore, **FIND** that $3,290,000 should be restored to the Base Budget for this purpose.

Inefficiencies – Department Chairpersons

Rarick calculated that the District had inefficient spending in the amount of $3,024,000 because its department chairpersons do not teach classes. This is a situation unique to the Newark district. He could not find any other Abbott districts where department chairpersons were not required to teach. The Newark chairpersons

teach voluntarily on occasion but Rarick could not factor this into the budget because there was no regularity.

In Paterson, the department chairpersons are required to teach at least one class. In Jersey City, the department chairpersons carry a full load of classes and receive a stipend for their additional administrative duties. In the District, the department chairpersons are full time administrators. Rarick suggested that department chairpersons were performing functions similar to supervisors and vice principals and suggested to the District that thirteen of them be reclassified to the latter position. He did not take into account whether any or all of them have the proper certification for this. According to Rarick, the department chairpersons not reclassified should be made to carry a full time teaching load and receive a stipend for their administrative duties.

The District has very few vice principals. In Rarick's opinion, if department chairpersons were reclassified, it would result in a more even distribution of vice principals throughout the District and bring it more in line with other districts.

Rarick calculated the dollar amount of this inefficiency to be the average salary of the fifty four department chairpersons ($45,000) times the fifty-four unnecessary positions plus the benefits associated with them. He arrived at $3,024,000, which he deducted from the Base Budget.

His analysis does not take into account that, if funding for the non-teaching positions were completely eliminated from the budget, the District would not have money to pay these individuals as vice principals and/or classroom teachers or to pay these teachers a stipend.

Bolden testified as to the responsibilities of department chairpersons as they exist in the District. In fact, she herself served as a department chairperson at one time and voluntarily taught while working in that capacity in order to remain current in her

content area. She agreed that having department chairpersons teach is generally a benefit to the teachers and the system.

Bolden noted that department chairpersons are the instructional leaders in their respective content areas in the District's secondary schools and, as such, they are critical from a programmatic standpoint. They carry out important staff development functions and assist teachers in implementing the curriculum in their content areas. They are also responsible for the disciplinary functions in their respective departments. She observed that, if the positions were eliminated, the District would lose the benefit of the twenty additional days department chairpersons are contractually required to work each school year.

The Superintendent challenged the Department's contention that department chairpersons could be re-classified as vice-principals by pointing out that vice principals do not engage in the staff development function. She consulted with her colleagues in other districts who indicated that they realized no cost savings from having department chairpersons teach. In addition, she found that, in these other districts, adding teaching responsibilities resulted in the need for additional positions such as "Deans of Discipline" to carry out duties presently performed by department chairpersons and/or necessitated paying a teacher a stipend for the staff development function. When reviewed in that light, Bolden noted that the number of administrators in the high schools in the three State-operated districts supervised by Rarick were equivalent.

This testimony was verified by Lindgren. He took into consideration that the District's department chairpersons serve dual functions in that they supervise instruction and enforce student discipline. Based on his discussions with administrators at Jersey City and Paterson, he compiled a chart that confirmed the District's administrative structure to be consistent with the other state-operated districts, because Newark does not have the position of "Dean." Lindgren testified that Paterson has six "Deans of Discipline" and Jersey City has 18. Further, Lindgren ascertained that Jersey City has now assigned a number of supervisors to the high schools to assist with supervision of instruction. This information was also confirmed by Rarick in his testimony.

Finally, Bolden outlined the limitations to department chairpersons teaching contained in the District's collective bargaining agreement. This document only allows these individuals to teach if a staffing shortage exists. She explained the difficulty in negotiating changes to clauses embedded in a collective bargaining agreement and admitted that she would change those terms if she could.

Based upon the evidence, I **FIND** that the comparison of the District to other districts with respect to the job functions of department chairpersons is invalid since it is undisputed that the functions are different in Paterson and Jersey City. I **FIND** that the District has demonstrated that the positions are necessary as the District is presently structured and elimination would not necessarily result in any particular cost savings. I, therefore, **FIND** that the non-teaching department chairpersons are not an inefficiency and $3,024,000 should be replaced in the Base Budget.

Inefficiencies – Food Service Deficits

The District has a food service deficit of $3,200,000, or $176 per child, the highest in the State. This problem has been the subject of discussion since the CAFR of 2000. The District must contribute money from the General Fund to make up for the deficit in the food service budget which was $8,000,000 in 1999. A few strategies were developed. The first was to reduce the number of staff. The second was to create a two-tiered salary structure so that newly hired workers would be employed at a lower hourly rate. According to Rarick, this should have produced a $2,000,000 reduction in the deficit by this time. Therefore, since the budget for the fiscal year 2001 showed a deficit of $7,000,000 and there should be a $2,000,000 savings, the current deficit should only be $5,000,000. The actual current deficit was $8,195,000, subject to adjustment at the time of the annual audit. Rarick determined that the dollar amount of the inefficiency was the difference between what the deficit is and what he determined it should be. As a result, he deducted $3,200,000 from the Base Budget.

Rarick was not aware of which of these remedial strategies had been implemented by the District to lower the food service deficit.

Rosenfarb identified the unfavorable variance for food service as $5,926,274, but Rarick relied upon his own method to attribute a dollar amount to this inefficiency.

The District commissioned a September 1998 study seeking ways to reduce the deficit. Valerie Wilson, the District's Executive Director of Operations, stated that the District implemented the majority of its recommendations. It addressed the District's high labor costs by reducing staffing levels through attrition and outsourcing.

Specifically, Wilson testified that the staffing level was reduced from a high of 446 employees in 1996 to the current level of 259. Outsourcing and the negotiation of a tiered wage level ensured that newly hired employees would receive a significantly lower wage rate. Wilson pointed out that no employee had been hired for a food service position since 1997. There are no District employees in schools where the food service is outsourced.

The study also found that the District would always carry a food service deficit unless it was able to implement a more efficient, cost-saving central food kitchen. Wilson testified that the District followed up on the recommendation by requesting, in a September 11, 2002 letter, that the Department, through the SCC, approve the central kitchen as part of the District's Long Range Facilities Plan. No specific response was provided, but verbal statements were made regarding the need for the District to do another study and noting that this project could not be completed unless it was attached to a school project.

Wilson detailed the effect that the proposed $3.2 million budget reduction would have on the District's ability to maintain its meal program. She explained that the reductions would eliminate the District's ability to provide a hot lunch meal, eliminate the breakfast program, and impede the District's ability to provide free lunches for children with limited financial resources.

In addition, Newark is a school district that requires its students to remain in their buildings for lunch. It is required to provide a number of meal choices for the children. They have only about twenty-five minutes for their lunch periods. The lunchrooms are crowded and, if there is a shortage of staff to move the process along expeditiously, the children may not be able to select, purchase and eat their meals in the allotted time. This would impinge on their subsequent instructional time.

Based upon the testimony, I **FIND** that, irrespective of the desire of the District and the Department to reduce the number of employees in the food service program, there is no way to do this at the present time without seriously impinging upon other necessary and required services. I **FIND** that, under the existing circumstances, the District has lowered its food service staff to the extent possible and the remaining staff can not be considered an inefficiency because the food service program will not work without them. I, therefore, **FIND** that the food service staffing, which is creating the deficit, cannot be considered an inefficiency and $3,200,000 should be replaced in the Base Budget.

Inefficiencies - Consultants

The next area of inefficiency is the amount spent by the District for the services of four consultants. The Department specified just four consultants in its testimony and only these allegations of inefficiency will be considered. A fifth consultant was identified for the first time at hearing during the cross-examination of the District's witness but no adjustment was made for it in the budget. Therefore, it will not be considered an inefficient use of funds in this appeal.

The four consultants identified by Rarick as inefficiencies are Ciber, Inc., Accuent, Systems 3000, and Brokerage Concepts. He stated that Ciber duplicates the District's staff in the payroll department as does Accuent ($479,052.75). Systems 3000 ($23,450) is involved in the District's budget functions which overlap the others.

Therefore, he asserts, there are three separate consultants performing overlapping functions.

Ciber Inc.:

Ciber was paid $424,041.70 in the fiscal year 2003. It provides day-to-day technical assistance to the District in running its payroll program. Its function is described as the provision of "facilities management of the PeopleSoft human resource/payroll system." The District uses PeopleSoft software to run its payroll.

Paul Mailloux, the District's Chief Information Officer since February 1997, testified that his office oversees the processing of over 9,000 payroll checks every two weeks. There are about eight different employee unions whose requirements need to be accounted for. He explained that the Newark Public Schools retained Ciber in October 1998 to provide the District with on-site technical support, operations support, and maintenance for its human resource payroll systems and Oracle-based systems (PeopleSoft, SubFinder, Resumix, Tuxedo, Pay Base, Citrix, and SASI).

Bolden testified that, when she became State Superintendent for the District in 1999, she found the District's payroll to be unstable. The District had 11 full-time employees associated with processing payroll, and it was not unusual for these employees to incur more than 350 hours of overtime on a bi-weekly basis, the equivalent of five additional employees. The vast majority of the overtime was associated with running the payroll operation and recovering from the frequently occurring payroll operations errors that plagued the system. For example, employees were not being paid; records, such as W-2 forms, were erroneous; and required reports, such as the Board Secretary's Report and the Treasurer's Report, could not be generated and were not submitted. Ciber was hired in order to remedy this situation.

After engaging Ciber, this work is now performed by a total of four individuals: a systems engineer with specific hardware certifications; an Oracle-certified experienced database administrator; and two computer system operators.

The District's present payroll employees collect employees' time records and prepare the data to be processed by Ciber into payroll. This is a large operation given the number of District employees involved.

Ciber also provides the district with a "Disaster Recovery Hot Site" and "hot site administrative services" for its payroll operations. This network and systems infrastructure provides backup of critical data offsite and supports Human Resources and Payroll operations during emergencies and secures delivery of critical payroll applications with remote point-to-point access and local check printing capabilities in the event of disaster. During the recent blackout of August 14, 2003, a Wednesday before a scheduled payday, his office was required to utilize these emergency services.

Mailloux stated that his office conducted a cost/benefit analysis and determined that it is cost beneficial for the District to engage Ciber. The analysis concluded that the estimated annual savings is approximately $230,000 to $300,000. Replacing Ciber's services would cost the District approximately $780,000. It was Mailloux's opinion that he would not be able to process payroll in the event the Ciber contract was terminated.

Mailloux testified that Rarick never spoke to him about Ciber's functions, and never questioned the efficiency of its operations.

Accuent and Systems 3000:

Valerie Wilson, the District's Executive Director of Operations, testified that the District needs both Accuent and Systems 3000. Accuent is a human resource/payroll software implementation partner for PeopleSoft, the human resource-related software. The PeopleSoft company requires an implementation partner. Its software is not "plug and play." It requires constant monitoring and adaptation to meet the needs of the District. Furthermore, the software is proprietary; that is, the information required to provide critical functional and technical support for it is not available to the District so

that no District employee can take the place of Accuent (which is licensed by PeopleSoft for this purpose).

The District had engaged another PeopleSoft certified partner before Accuent but Wilson described the situation as "a mess." This partner was replaced by Accuent and the system has been functioning well since. The function of Accuent does not overlap Ciber. Ciber is involved with the day-to-day operation of payroll while Accuent services and adjusts the payroll software.

Systems 3000 is proprietary software used for the District's finances as a whole, not just for human resources. It incorporates data generated by the consultants serving the District's human resources function for that segment of the budget but does not eliminate the need for their services nor do they eliminate the need for Systems 3000. Wilson testified that, as Director of Operations, she relies upon Systems 3000 on a daily basis.

Wilson confirmed that no other office or District staff provides the District with the services performed by these two consultants.

Brokerage Concepts:

Brokerage Concepts ($90,000) is the third party administrator for prescription, vision and temporary disability claims and administrative fees for the employees in two unions. There are a very small number of such employees. Rarick felt that this was an unnecessary function and deducted the cost even though the expense arises from an existing contract between the District and the union involved. The union has reserved the right to be serviced by this specific provider and, even though the Director of Labor Relations for the District believes this provision to be an infringement of management prerogative, it is still part of the existing contract.

Rarick found the costs for consultant services in the District to be significantly higher than those in other districts. He proposed that Newark create a Department of

Operations Technology consolidated and handled mainly by District empl ow quickly this could be accomplished, but neve tal amount paid to these consultants as inefficient al of $1,057,000 from the Base Budget correspond

Based upon the s of Ciber, Accuent and Systems 3000 are nec dundant and their services can not be provided by seeable future, if at all. I, therefore, **FIND** that the and $1,057,000 should be restored to the Base Bud

Inefficiencies - Drivers

The final inefficien ayment of $78,000 for two full-time drivers for Mario ndent. This payment was based upon an employ 7, 2001 between the New Jersey State Board of Ed xpired under its own terms on June 30, 2003.

The contract para

7. TRANSPORTA

In recogni NTENDENT will be required to travel such as the County Superintendent's on, etc., and in light of the fact that th m time to time travel throughout the S cts to carry on her responsibilities, t assigned a school District automobil used for work-related travel as well as is vehicle, but not the driver, may also b for her personal use.

Rarick explained prior State Superintendent of the District. It was p receiving death threats at

the time he assumed the position. The drivers were to serve as bodyguards, as well as transportation for the Superintendent. The Department states that, at the present time, there is no special threat to Bolden different from what the superintendents face in other Abbott districts. It thinks that she can be transported by other District employees as necessary and no full time drivers are needed.

Furthermore, the Department believes that this expenditure, although relatively small, is a highly visible one and symbolizes waste to the public. No other Abbott district superintendents have full time drivers.

Since Bolden's contract has expired and will no longer be in effect in the upcoming fiscal year, the Department believes that the two drivers' positions can be eliminated as unnecessary. Rarick deleted $78,000 from the Base Budget to correspond to the elimination of these position. He pointed out that the Department may reallocate these funds for classroom costs if the District requests it.

Bolden testified that she customarily works late hours and is concerned for her safety when leaving the District's offices on Cedar Street. Nelms, her deputy superintendent, works approximately the same hours and has no driver.

Bolden also explained that she spends a significant amount of time driving to various meetings and appointments. If she has a driver, she is able to conduct District business from her car, thus making more effective use of her time.

I **FIND** that the District has failed to demonstrate that it is not possible to transport Bolden safely and efficiently by using District employees that can be used for other purposes if not needed by her. I, therefore, **FIND** that the use of two full time drivers by the Superintendent is an inefficiency and the Department correctly removed $78,887 from the Base Budget for this reason.

DEPARTMENT CALCULATION OF ADDITIONAL ABBOTT AID

The Department determined that the District's preliminary maintenance budget, that is, its total state program budget and maintenance for the 2003-2004 school year is $744,264,093. The projected General Fund revenue in Newark's Budget submission for 2003-2004 is $764,501,305 including the District's request for additional Abbott aid in the amount of $201,226,579. It will also have ECPA revenues of $36,370,678 and DEPA revenues of $20,103,295 for a total of $820,975,278. When the District's request for Abbott aid is subtracted, this leaves projected revenues of $619,748,699.

The District will receive an unbudgeted increase of $198,344 in pre-school expense and Projected Carryforward Balances – ECPA of $228,318, resulting in revenues of $426,662. This makes $620,175,361, the 2003-2004 total General Fund revenues available.

If the District receives maintenance budget revenues of $109,186,765 in additional Abbott aid, the total state program budget and maintenance, adjusted for inefficiencies, will be $744,264,093.

REVISED CALCULATION OF ADDITIONAL ABBOTT AID, 2003-2004

The Department approved $109,000 in Supplemental Abbott aid for the 2003-2004 school year. Based upon the findings above, I **CONCLUDE** that the following additions should be made to the proposed additional Abbott aid in accord with the maintenance standards set by the Court and the regulations.

Restore from encumbrances	$9,735,823
Non-discretionary increases:	
Salaries	$1,830,496
Replace Instructional Staff	$11,376,000
Worker's Compensation	$3,500,000
Special Education	$626,184

CPI	$83,945
Non-Recurring Costs:	
Utilities	$1,055,681
Belmont Runyon	$1,387,756
Inefficiencies:	
SLTs	$1,208,080
Overtime	$700,000
ODC	$2,154,000
ODP	$190,000
Resource Teachers	$3,290,000
Department Chairs	$3,024,000
Food Service Deficit	$3,200,000
Consultants	$1,057,000
Total Additional Aid	$44,418,965
Proposed Additional Aid	$109,186,765
Total to be Provided	$153,605,730

ORDER

It is **ORDERED** that additional Abbott aid be provided to the District in the amount of $153,605,730 for the 2003-2004 fiscal 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 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.

October 3, 2003
DATE

EDITH KLINGER, ALJ

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

October 3, 2003
DATE

E-mailed Initial Decision to the parties on:

October 3, 2003
DATE

pb

APPENDIX

Witnesses:

For Petitioner:

Marion Bolden
Ronald Lee
Paul Mailloux
William Parrish
Steven Morlino
George Gottuso
Raymond Lindgren
Anzella Nelms
Valerie Wilson

For Respondent:

Mary Byrne
Ben Rarick
Steven Hoffmann
Keith Balla

Exhibits:

J-1 Notice of Preliminary Maintenance Budget Figure for 2003-2004

P-1 E-mail, Azzara to Rarick, May 31, 2002
P-2 SLT Staff Positions Not Funded Through the SLT Budget
P-3 Cornyn Fasano Group, Report, September 17, 1998
P-4 Letter from Department to District, May 30, 2003
P-5 Binder, Documents Related to Alleged Inefficiencies

P-6 Binder, Supporting Documents, 2003-2004 School Budget Appeal

P-7 Binder, Documents Relating to Encumbrances

P-8 Job Description, Legislative Information Officer

P-9 Job Description, Industrial Arts/Facilities Resource Teacher/Coordinator

P-10 Comparison of High School Administrators, Paterson, Jersey City, Newark

R-1 Department Worksheets

R-2 Independent Accountant's Report

R-3 Report of the Secretary to the Board of Education

R-4 Newark Reserve for Encumbrances

R-5 Department Worksheets, Projected Surplus, attached to R-1

R-6 Newark Public Schools, Governmental Funds, Balance Sheet

R-7 Department Worksheets, Auditor's Adjustment, attached to R-1

R-8 Worksheet, Salaries, Fund 11, 12, 13, Fund 15

R-9 Worksheet, Benefits, Fund 11, 12, 13, Fund 15

R-10 Worksheet, Special Education

R-11 Worksheet, Rent and Property Expenses

R-12 Compilation of Salary Accounts

R-13 No Exhibit

R-14 Documents, Belmont Runyon School

R-15 Projected Five Year Cost Saving Actions, 9-27-01

R-16 2001 Roster of Employees, SLTs

R-17 2003 Roster of Employees, SLTs

R-18 Salaries by SLT

R-19 RIF Assumptions, SLTs

R-20 Worksheet, Title 1 Funds

R-21 Comparison of Newark School District with Other Abbott Districts

R-22 Rosenfarb Winters Report

R-23 Memorandum, Rarick to Bolden, August 2, 2001

R-24 Overtime Paid, 2001

R-25 Staff, Office of Facilities

R-26 Roster, Office of Design and Construction, 2001

R-27 Policy Manual, Office of Design and Construction

R-28 Operation & Maintenance of Plant, Comparative Spending (Page 1)

R-29 Operation & Maintenance of Plant, Comparative Spending (Page 2)

R-30 Memorandum, Rarick to Bolden, August 1, 2001

R-31 Resource Teacher Roster, 7/2003

R-32 Resource Teacher Roster, 8/2001

R-33 Calculation of Savings on Resource Teachers

R-34 Vice-Principal Information, Paterson

R-35 Vice-Principal Information, Jersey City

R-36 No Exhibit

R-37 Newark Public Schools, General Fund, Budget Comparison Schedule

R-38 Audit of District's Food Services, December 27, 2000

R-39 Memorandum, Hespe to Bolden, Food Services, November 28, 2000

R-40 Consultants, Fiscal Year 2002-2003

R-41 Memorandum, Hoffman to Rarick, HRS/Payroll Costs

R-42 Newark Internal Audit, Brokerage Concepts, November 2001

R-43 Food Service, Comparative Spending Guide

OAL DKT. NO. EDU 5497-03
AGENCY DKT. NO. 193-6/03

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX 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. Exceptions were filed by both the Board of Education (Board) and the Department of Education (Department) in accordance with the schedule established in response to the Court's order for expedition, as were replies by each to the other's exceptions, and all were considered by the Commissioner in reaching his decision herein.

Initially, the Commissioner concurs with the ALJ that the Department's methodology in reviewing the District's budget fully comports with the "maintenance" standard established by the Court and implemented by regulations promulgated in accordance with *P.L.* 2003, *c.* 122. The Commissioner concurs that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C.* 6A:10-1.2, such determination being solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott,* 71 *N.J.* 40, 51-

52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). However, to the extent that he may appropriately do so in an administrative proceeding, the Commissioner also opines that the Department's definition of "maintenance budget," as set forth in *N.J.A.C.* 6A:10-1.2, is fully consistent with the language and intent of the Court. Thus, like the ALJ, the Commissioner finds the regulatory definition controlling herein, with no conflict between it and the underlying Court order.

Accordingly, pursuant to the standard set forth in rule, the Commissioner makes the following determinations on the specific points in dispute, adopting in part, rejecting in part and modifying in part the Initial Decision of the OAL.

ADJUSTMENTS TO THE BASE BUDGET

Encumbrances

The ALJ ordered restoration of the full amount of $9,735,823.31 excluded from the maintenance budget set by the Department, based on "undisputed" documentation of qualifying encumbrances presented by the District at hearing and on testimony to the effect that the Department has a history of not increasing aid when Comprehensive Annual Financial Report (CAFR) adjustments warrant. On exception, the Department reiterates that, at the time of the determination under appeal, the District had not yet shown this amount, or any part thereof, to represent 2002-03 expenditures in accordance with established guidelines, and it contends that the Commissioner should, instead of uncritically accepting the District's claims, direct preliminary adjustments to the maintenance budget based on the results of the now-in-progress review of the District's supporting documentation, which the Department saw for the first time during testimony at OAL despite repeated attempts to secure and review it so as to resolve this

matter prior to hearing. (Department's Exceptions at 1-3) In reply, the District characterizes the Department's position as "nothing more than a delay tactic designed to further impede the operation of schools in the District," and reiterates that its documentation at hearing, which it had every right to present at that point and not before, was "uncontested" and, thus, must stand as found by the ALJ. (District's Reply at 3-5, quotation at 4)

Upon review, the Commissioner concurs with the ALJ's recitation of the standard for determining whether encumbrances are to be considered part of the maintenance budget, but does not concur that the District's claim should be accepted wholesale merely because the Department was unable, in effect, to complete a detailed fiscal review of documentation previously available to the District but first proffered at OAL hearing. The Commissioner notes that the Court directed the Department to provide districts with preliminary maintenance figures for the 2003-04 school year by August 27, 2003, and, in fulfillment of that directive, the Department utilized the most recent information provided by the District. The Commissioner, therefore, finds it entirely appropriate and consistent with the Department's established accounting practices[1] for the Department to have excluded from the District's maintenance budget expenditures for which the District did not provide requisite documentation. Moreover, although the Commissioner recognizes the Court's "encouragement," as noted by the District, to accept ongoing supplemental documentation, the Court's holding cannot be construed to require the Commissioner to accept data without benefit of appropriate fiscal

[1] These practices are both set forth in testimony herein and embodied in instructions to districts with respect to the processing of year-end purchase orders as provided in Assistant Commissioner Richard Rosenberg's letter of September 16, 2003, see *Board of Education of the City of Burlington, Burlington County v. New Jersey State Department of Education*, decided by the Commissioner on October 20, 2003.

review, particularly where the District did not proffer the documentation when requested and the CAFR will be submitted in just over a week from the date of this decision so as to bring finality to the data in question.

Accordingly, while recognizing that adjustments in this area may well prove necessary, because the Commissioner is unable to determine definitively which of the District's encumbrances have become accounts payable by virtue of the receipt of the encumbered goods or services on or before June 30, 2003, the Commissioner concludes that the disputed encumbrances were properly excluded by the Department and rejects the ALJ's recommendation for adjustments to the maintenance budget, instead directing that such adjustments await the results of the impending CAFR.

Projected Surplus

The Commissioner concurs with the ALJ that the Department's calculation, to which the District did not object, shall stand, subject to final adjustment following the CAFR.[2]

Other Adjustments

The Commissioner notes the ALJ's recitation of corrections made to revenues and receivables, to which neither party objected and which did not result in a finding, conclusion or order.

[2] The Commissioner notes, however, that the ALJ errs in stating at page 8 of the Initial Decision that the District *must* maintain a surplus balance of 2%. Although that is the threshold for determining *excess* surplus, there is no requirement that surplus actually be *maintained* at 2%.

NONDISCRETIONARY ITEMS

Salaries

The ALJ ordered adjustment of the District's maintenance budget to allow for salary increases for substitutes, overtime, stipends, per-diem, summer school and nonaffiliated employees, reasoning that these were nondiscretionary based on past practice as evidenced by prior contracts; she declined, however, to disturb the 4.884% rate of increase applied by the Department to those salaries it found subject to nondiscretionary increase. The Department takes exception to the former, reiterating that these are not *contracted* increases, and that annual contracts expiring in June 2003 but not yet negotiated at the time of hearing are fully within the discretionary control of the District. (Department's Exceptions at 3-5) In reply, the District urges adoption of the ALJ's recommendation, reiterating that it provided evidence at hearing that these categories of employees are, in fact, subject to expected wage increases based on past practice. (District's Reply at 5-6)

The ALJ also found that any teaching or paraprofessional position filled by a permanent employee at the start of the 2002-03 school year, but later vacated, must be considered "provided" within the meaning of "maintenance budget," so that full-year salary amounts for such positions (237 Full-Time Equivalents at $11,376,000) must be added to the 2003-04 budget. The Department notes on exception that it does not disagree with the ALJ's determination as to positions filled for part of the year being "provided" for maintenance purposes, but contends that the District offered no credible evidence for its claims as to positions meeting this criterion. (Department's Exceptions at 5-7) The District, in reply, characterizes the Department's position as arbitrary and

baseless, with the potential to leave the District without critical staff through no fault of its own. (District's Reply at 6-7)

Upon review, the Commissioner modifies the ALJ's analyses, findings and conclusions with respect to additional salary monies for noncontractual salary increases and filling of specific vacancies. Initially, the Commissioner notes that the Department's overall charge in this matter was to determine the level of 2003-04 funding that would enable the District to continue in a "maintenance" mode, that is, to implement in 2003-04 the programs, services and positions provided in 2002-03. With respect to salary costs, the Commissioner recognizes that, while it is true that dollar amounts actually paid out for staffing prior to June 30, 2003 will not perfectly predict the cost of providing comparable staffing in the next, it is *equally* true that other types of projections are no less imprecise. Thus, in the Commissioner's view, a methodology which preliminarily establishes the 2003-04 cost of providing positions at "maintenance" levels by determining, as nearly as possible without benefit of audit, the actual approved cost of providing them in 2002-03 and then allowing for reasonable, nondiscretionary salary adjustments, is a uniform, fair and rational method for estimating future expenditures which cannot otherwise be determined with any degree of precision. With respect to salary increases, the Commissioner finds that applying the District's currently contracted increase rate of 4.884% was a reasonable method of projecting preliminary nondiscretionary costs for 2003-04, and, moreover, that increases requested in anticipation of upcoming annual negotiations where a contractual obligation does not presently exist cannot properly be considered "non-discretionary" costs appropriate for preliminary State support in a "maintenance" year occasioned in significant part by the

need for fiscal austerity. The Commissioner is likewise unpersuaded by the Board's argument that the Department's method does not take into account vacancies and positions filled for only part of the year, since variances of these types occur every year and a preliminary district-wide salary budget is appropriately based on the assumption that staffing is a flexible and continuous process, with ebbs and flows that, absent specific evidence to the contrary, generally permit the projection of one year's experience onto the next. Finally, while the Commissioner recognizes that the results of the Department's method may be imperfect, even after adjustment following audit, he is also cognizant that *N.J.A.C.* 6A:10-3.1(g) provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant. Therefore, the Commissioner adopts the ALJ's recommendation with respect to application of a 4.884% rate of salary increase for preliminary calculation purposes, but rejects her recommendations adding additional monies to the maintenance budget for noncontractual salary increases and filling of specific vacancies.

Benefits

The ALJ declined to make adjustments to the Department's calculations for benefits, generally because there was insufficient information on record or because the District did not provide evidence to support its claims. On exception, the District argues that the Court, in its July 23, 2003 Order, anticipated that nondiscretionary cost determinations would be based on actual, current numbers, not on a "reasonable methodology," so that the ALJ's acceptance of the Department's projections violates the Court's directive. The District also objects to the ALJ's determination not to order adjustments at this time, alleging that such ruling conflicts with her prior ruling on

encumbrances and ignores the District's testimony about the Department's historical failure to increase aid following the CAFR. Finally, the District contends that the ALJ, in rejecting the District's claim for increased pension costs, ignored testimony that such costs are based upon salaries and, thus, increase as salaries do. (District's Exceptions at 9-12) In reply, the Department reiterates that its method of calculating health benefits, which relies on applying the 2003-04 rate of increase in health benefit plan costs to the District's 2002-03 expenditures for health benefits, is superior to the District's, which takes a "snapshot" of its payroll at a specific point in time and then projects what those individuals' plans would cost in the following year, without regard for the fluctuations that occur during any given year in both numbers of employees and elections of coverage. The Department also urges adoption of the ALJ's finding on pension costs, noting that no documentation was offered in support of the referenced testimony. (Department's Reply at 3-4)

Upon review, the Commissioner concurs with the ALJ that no adjustments to the Department's calculations are warranted at this time, in the case of health benefit costs because the Department's methodology for preliminary determination is sound and the District's arguments and evidence are insufficient to disturb it, and in the case of pensions because no specific evidence was brought to the record to support the District's claims.

Workers' Compensation

The ALJ recommended adjustment of the District's maintenance budget to include $3.5 million in additional workers' compensation costs, based on the actuarial analysis of the District's fiscal agent for its self-insured workers' compensation program,

"[u]nless the Department subsequently analyzes the need for the large increase appropriately***." (Initial Decision at 18) On exception, the Department urges the Commissioner to direct the analysis suggested by the ALJ and decline to order adjustments to the District's maintenance budget until such analysis is completed. (Department's Exceptions at 7-8) In reply, the District again accuses the Department of delay tactics. (District's Reply at 7-8)

Upon review, although the Commissioner is mindful of the reasoned basis for the District's claim and the ALJ's conclusion, he is also mindful that the District is not *required* to maintain insurance reserves at the level recommended by its actuarial analyst, and that the need for fiscal austerity is one of the primary bases for the Court's maintenance order. Accordingly, in the interest of balancing competing concerns, and because this issue is not amenable to resolution by the CAFR, the Commissioner directs the Department to conduct forthwith the analysis suggested by the ALJ, and to make thereafter such adjustments to the District's budget and supplemental aid as may prove warranted.

Charter School Tuition and Pupil Transportation

The Commissioner notes the ALJ's recitation of the Department's determination that the District's charter school tuition and transportation costs represent nondiscretionary increases, so that $7,512,368 was included in the District's maintenance budget and no further order results herein.

Special Education Tuition—Private Schools for the Disabled

The ALJ found the evidence to show a need for $1,900,000[3] for private school tuition increases, as determined by the Department, rather than the $6,518,987 requested by the District; however, she also found that the total amount of the District's special education increase should be offset by $500,000 in anticipated IDEA monies rather than by $1,159,116 as determined by the Department. The District excepts to the ALJ's recommendation for IDEA offset, contending that she erroneously took into account the Department's disproved "transfer" analysis and failed to consider the substantially decreased IDEA resources available to the District, to which the Department replies that its calculations were not based on transferred funds, but rather on actual 2002-03 expenditures and actual numbers of new students and tuition increases. (District's Exceptions at 13-15; Department's Reply at 4-5) The Department, too, excepts to the ALJ's finding with respect to IDEA funds, without reply from the District, but does so on the basis that the District's IDEA Part B plan has not yet been approved by the Department and that, to the extent that the District is not required to do so as a result of a corrective action plan, it may allocate Part B funds to offset tuition increases. (Department's Exceptions at 8-9)

Upon review, the Commissioner finds the Department's calculation of a $1,932,929[4] nondiscretionary increase in this category of special education tuition, exclusive of any offset, to be fully supported by the record and not at all, as suggested by

[3] The ALJ's discussion references an adjustment of $1,900,000; however, Exhibit R-1, which sets out in summary form the calculations underlying the Department's maintenance budget and supplemental aid determinations as announced in it August 27, 2003 letter (Exhibit J-1), includes a total special education calculation of $4,673,797, confirming $1,932,929, as calculated in Exhibit R-10, as the actual amount of allowed increase in private school tuition.

[4] See note 3 above.

the Board, dependent on the Department's inquiries regarding transfers. With respect to allocation of IDEA funds for offset purposes, however, the Commissioner cannot conclude from the present record that the District has shown its inability to make further discretionary allocation from IDEA funds. Accordingly, the Commissioner directs that the District's total need for increased special education tuition, including the $1,932,929 disputed herein for tuition at private schools for the disabled, be set at $4,673,797 as determined by the Department, but that this amount be offset by $1,159,116 in IDEA funds for a total increase of $3,514,681; *subject,* however, to further increase should the District demonstrate to the Department that any portion of the referenced IDEA funds are, in fact, required to support positions and services required by a corrective action plan.

Rent/Lease Obligations and County Vocational School Tuition

The Commissioner notes the ALJ's recitation of the Department's acceptance of certain rent/lease obligations and vocational school tuition as nondiscretionary increases, so that $222,483 and $841,410,[5] respectively, were included in the District's maintenance budget and no further order results herein.

Consumer Price Index Adjustment

The ALJ found that the appropriate rate for Consumer Price Index (CPI) adjustment was 2.3%, obtained by averaging the 3% CPI for New York, Northern New Jersey, Long Island, NY-NJ-CT-PA, for July 2002—July 2003 with the 1.5% CPI for Philadelphia, Wilmington, Atlantic City, PA-NJ-DE-MD, for August 2002—August 2003. On exception, to which the District did not reply, the Department argues that the

[5] This amount is incorrectly reported in the Initial Decision as $932,228. *See* Exhibit R-1.

ALJ recognized the lack of data on record reflecting the fiscal year preceding the prebudget year as required by *N.J.S.A.* 18A:7F-3, yet went on to make a finding in the District's favor notwithstanding that it offered nothing cognizable to counter the Department's calculation. (Department's Exceptions at 9)

Upon review, the Commissioner finds that the District did not meet its burden of demonstrating that the CPI rate of adjustment employed by the Department, which was calculated pursuant to Department procedures for all school districts and in full accordance with applicable statutory requirements, was in any way infirm or improper. Accordingly, the ALJ's recommendation is rejected and the Department's calculation upheld.

NONRECURRING ITEMS

Legal Expenses

The Commissioner concurs with, and adopts as his own, the ALJ's analysis and conclusion, to which neither the Department nor the District took exception. Accordingly, the Department's calculation is upheld.

Insurance Expenses

The Commissioner notes the ALJ's recitation of this calculation, regarding which there is no dispute other than the Workers' Compensation issue discussed at page 66 above.

Utilities

The ALJ found that the District had demonstrated its need for the full amount of its utilities request and restored the Department's reduction of $828,352. On

exception, the Department argues that the District spent $828,352 more for utilities in 2002-03 than it budgeted in 2003-04; thus, that amount was properly treated by the Department as a nonrecurring expense in calculating a maintenance budget based on adjusted 2002-03 expenditures, and the District cannot use the supplemental funding appeal process to, in effect, revise its 2003-04 budget appropriations. (Department's Exceptions at 10-11) In reply, the District urges adoption of the ALJ's recommendation, as "corrected" to reflect *both* the $1,055,681 adjustment ordered in the Initial Decision *and* restoration of the Department's $828,352 reduction for a total increase of $1,884,033, contending that the actual and current information supplied at hearing was entirely appropriate and amply demonstrated the District's need. (District's Exceptions at 15-16; District's Reply at 8)

Upon review, the Commissioner finds the Department's rationale in considering $828,352 a nonrecurring expense for purposes of calculating a maintenance budget to be sound, and he further finds the present appeal process to be an inappropriate venue for the District to be, in effect, attempting to revise its approved 2003-04 budget. However, even if the Commissioner were to accept that the increase sought by the District could be considered in this context, he finds the evidence on record (Exhibit P-6, Tab 9) insufficient to support the District's claims, particularly in view of the unique considerations surrounding energy issues, such as ongoing fluctuations in rates and changing patterns of usage. Moreover, if it transpires that the District does, in fact, require funds for utilities beyond those appropriated, and additionally beyond those available through transfer of funds from over-budgeted accounts, the Commissioner notes that *N.J.A.C.* 6A:10-3.1(g) provides a mechanism by which the District can obtain

additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant. Accordingly, the ALJ's recommendation that $1,055,681 be added to the District's maintenance budget is rejected and the Department's calculation upheld.

Belmont Runyon School

The ALJ recommended no further increase to the District's maintenance budget beyond the additional $1,387,756 conceded by the Department at hearing, so as to permit the District, to the extent previously agreed by the Department, to use general fund dollars for completion of the Belmont Runyon School. On exception, the District claims that it provided ample evidence of its need for $2.9 million and of the Department's prior agreement to fund the project to completion, and that the ALJ clearly understood the difficulties of addressing completion of this project through the District's Long-Range Facilities Plan; therefore, the ALJ should have ordered additional funding consistent with the evidence. (District's Exceptions at 16-18) In reply, the Department contends that Newark is improperly seeking to extend its agreement to transfer a limited amount of 2001-02 and 2002-03 general fund monies, and it reiterates that the appropriate action to be taken by the District in addressing any remaining costs is amendment of its Long-Range Facilities Plan. (Department's Reply at 6-7)

Upon review, the Commissioner finds the evidence on record insufficient to support the District's claim that its maintenance budget should be increased by an additional $1.5 million dollars, over and above the approximately $1.4 million already conceded by the Department, so as to enable it to complete the Belmont Runyon School in 2003-04 with general fund monies supported by supplemental State aid rather than

through more appropriate and available means. Accordingly, the Commissioner adopts the ALJ's recommendation making no increase beyond the $1,387,756 conceded by the Department at hearing consistent with its prior agreement.

Replacement of Title 1 Funds

The Commissioner concurs with, and adopts as his own, the ALJ's analysis and conclusion, to which neither the Department nor the District filed exceptions. Accordingly, the Department's calculation is upheld.

INEFFICIENCIES

With one exception, the ALJ recommended restoration of amounts reduced by the Department on the basis of ineffectiveness or inefficiency, generally because, although the Department had demonstrated a *prima facie* basis for its various determinations, the District was able to counter with fact-specific demonstrations, largely unrebutted by the Department, to the effect that the structures, positions, and services at issue had a useful function and made sense in light of the District's particular circumstances.

On exception, the Department generally contends that the ALJ applied the wrong standard with respect to inefficiency/ineffectiveness, misunderstanding the controlling rule to extend the requirements of *N.J.A.C.* 6A:10-3.1(c)1i and 6A:10-3.1(c)1ii for consideration of "historical spending patterns" and "district-specific information regarding staffing needs" to *all* the listed bases for determination of effectiveness and efficiency, thereby ignoring that *N.J.A.C.* 6A:10-3.1(c)1 lists four *separate* bases, each with its own elements, and erroneously expecting the Department to

have addressed each and every element in any identified inefficiency.[6] Thus, the ALJ erred in considering "district-specific information regarding staffing needs" in any instance where the Department's determination of inefficiency was made on a basis other than *N.J.A.C.* 6A:10-3.1(c)1ii , and ignored that a district's particular circumstances are not pertinent where the Department's determination of inefficiency was made on the basis of a comparative analysis among Abbott districts pursuant to *N.J.A.C.* 6A:10-3.1(c)1i or cost savings and/or inefficiencies identified or proposed by the district or by the State Auditor or Office of Legislative Services audit pursuant to *N.J.A.C.* 6A:10-3.1(c)1iv. (Department's Exceptions at 11-16)

In reply, the District generally counters that the ALJ was correct in her application of the rule, and that the Department's suggested interpretation would compromise the integrity of the regulations. Moreover, according to the District, "virtually all of the Department's identified alleged inefficiencies--such as the elimination of an SLT, resource teachers, consultants, or entire departments--were in fact based upon an analysis of district *staffing needs*, an analysis that is inextricably intertwined with the comparative analysis," and "both the New Jersey Supreme Court and the Department have recognized that all Abbott districts are unique districts in terms of need," so that it is "fundamental that a credible and legitimate comparative analysis

[6] The Department notes that part of the confusion may result from the applicable rule as printed in the *New Jersey Register* (35 *N.J.R.* 4329) differing from the text adopted by the Commissioner and transmitted to the Office of Administrative Law, which was effective upon filing pursuant to *P.L.* 2003, *c.* 122; the District denies this, contending that the ALJ cited and quoted the appropriate regulatory language. (Department's Exceptions at 12, footnote; District's Reply at 9, footnote) In fact, examination of these documents reveals that *N.J.A.C.* 6A:10-3.1(c)1, as filed, is punctuated by periods consistent with the Department's contention that the bases listed are separate and distinct, whereas the punctuation in the *Register* version (a series of semicolons with a penultimate "; and") creates the impression that they are cumulative.

cannot be accomplished without an analysis of district-specific information." (District's Reply at 8-10, 12; quotations at 9-10, emphasis in text)

In considering the parties' positions on this issue, the Commissioner generally agrees with the Department, and modifies the Initial Decision, to the extent that it suggests that the Department could not identify areas of inefficiency, and have those identifications potentially sustained, without taking into consideration, collectively, the various criteria of *N.J.A.C.* 6A:10-3.1. However, the Commissioner does not agree with the Department that district-specific information has no relevance on appeal unless the Department's inefficiency determination was made on the basis of a district-specific criterion; indeed, given that the district bears the ultimate burden of proof in an appeal of this type, regardless of the basis for the Department's finding of inefficiency, district-specific information would appear to be the primary, perhaps even only, basis on which an attempt could reasonably be made to demonstrate that a district's expenditures were *not* inefficient or ineffective under the regulatory standard. However, in so holding, the Commissioner emphasizes that it is not enough in this context for a district to demonstrate that the structure(s), position(s) or service(s) under scrutiny are explicable under the circumstances and rooted in a plausible district need; rather, it must demonstrate both that they are *specifically* necessary and that they *cannot* be more effectively or efficiently provided than they presently are.[7]

[7] To the extent that the Initial Decision tends, in effect, to shift the burden of proof to the Department once the District has explained its circumstances, that approach is expressly rejected by the Commissioner. See July 23, 2003 Court Order, paragraph 5.

Within this general framework, then, the Commissioner makes the following determinations on the areas in dispute between the District and the Department.[8]

School Leadership Teams (SLTs)

The ALJ found that the five-team approach worked better for the District than the four-team plan proposed by the District in 2001 in order to reduce inefficiencies, but later abandoned as counterproductive; she further found that the savings to be effectuated by that plan had been accomplished in an alternative manner. On exception, in addition to the general objections discussed above, the Department notes that the District itself recognized that its SLT structure could be more efficient, and that the referenced savings occurred prior to development of the four-team plan in September 2001, with only about $450,000 of the plan's projected $2 million cost savings having materialized since that time. The Department also objects to the ALJ's summary dismissal of the Rosenfarb Report, noting that, to the extent that the Department's final determinations of inefficiency differed from the Report's, such differences were, as set forth in testimony and exhibits, based on the Department's specific knowledge of the District, and that the Report is not, as characterized by the ALJ, useless as a measure of inefficiency because it lacks district-specific analysis, but is instead directly responsive to the distinct regulatory criterion of comparison to other

[8] It is here noted that the District's Reply Exceptions on the subject of inefficiencies generally addressed the question of appropriate proofs and standards as set forth above. Where a more specific point was offered in relation to a particular inefficiency, it is included in the summations below.

districts. (Department's Exceptions at 16-20) In reply, the District urges adoption of the ALJ's analysis and recommendation.[9]

Upon review, the Commissioner is not persuaded by the evidence on record that the Department's reduction must be restored. To the contrary, the District is clearly inefficient in terms of comparison to other Abbott districts and has itself recognized that substantial economies needed to be undertaken in this area; to dismiss the criteria of *N.J.A.C.* 6A:10-3.1(c)1i and 6A:10-3.1(c)1ii out of hand, as the ALJ effectively did, is to nullify the clear intent of the controlling regulation. Moreover, even under a fact-specific analysis of the type sought by the District, there has been no showing that the District cannot structure and staff its SLTs in a more efficient manner while still meeting its stated objectives and addressing its stated concerns. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

Overtime

The ALJ found that the District justified its substantial blue-collar overtime expenditures based on historical spending patterns, the staffing required to address the District's unique custodial and maintenance needs, and the Department's failure to explain the basis for its determination. On exception, the Department notes that the basis for its determination was comparison to other districts, and that testimony clearly established the Department's calculation as an application of Jersey City's expenditure rate to the District's larger physical plant, with the difference being the amount of identified inefficiency. Additionally, it points to the District's contractual clauses providing for overtime in four-hour minimum increments and the undisputed fact

[9] See note 8 above.

that in 2002-03 some employees earned more in overtime than an equivalent full-time salary. (Department's Exceptions at 21-22) In reply, the District urges adoption of the ALJ's analysis and recommendation, noting that much of its overtime is weather-related or due to the number and condition of its buildings or the "huge" number of School Construction Corporation (SCC) projects. (District's Reply Exceptions at 11-12)[10]

Upon review, the Commissioner is unpersuaded that the Department's reduction must be restored. Again, the District is clearly inefficient in comparison to other Abbott districts and has itself recognized that economies should be attempted in the area under scrutiny, and, even under a more fact-specific analysis, there has been no showing that the District cannot address its custodial and maintenance needs in a more efficient and effective manner so as to reduce overtime expenditures; moreover, the District should not be provided with the means to avoid negotiation of changes in a clearly inefficient contractual provision. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

Office of Design and Construction

The ALJ recommended restoration of the Department's reduction, based on findings that the Office of Design and Construction (ODC) performed necessary services, that the District would incur greater costs by eliminating it, and that the Department failed to consider the staffing requirements of the District in making its determination. On exception, the Department notes that the basis for its determination was comparison to other large K-12 districts, which shows that the District has the highest per pupil expenditure in Operation and Maintenance of Plant, over $350 more

[10] See note 8 above.

than the next highest spending district, and comparison to other Abbott districts, which shows a similarly disproportionate amount of expenditure, due largely to the District's unique maintenance of a separate office solely responsible for design and construction of buildings. The Department also notes that the District is like all other Abbott districts in having buildings in various states of disrepair, and in having a Long-Range Facilities Maintenance Plan requiring interface with the SCC, which itself has no plans to provide additional staff to work with the District notwithstanding the District's plans to hire additional project managers. (Department's Exceptions at 22-25) In reply, the District urges adoption of the ALJ's analysis and recommendation, noting in particular how the Department's erroneous assessment of the ODC as overlapping with the functions performed by the SCC and duplicative of the functions performed by the Economic Development Authority (EDA) is, in fact, a staffing analysis, contrary to the Department's contention as to the distinctness of each regulatory criterion. (District's Reply at 10-11)[11]

Upon review, the Commissioner again finds that the District has explained the circumstances and needs to which the identified area of inefficiency responds, but has not demonstrated that these cannot be addressed in an alternative manner so as to bring the District's costs more into line with other districts; in this regard, the Commissioner finds insufficient as proof the ODC director's general, unsupported statement that, based on industry "soft" cost standards, it would cost more to eliminate the ODC than to maintain it. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

[11] See note 8 above.

Office of Development Planning

The ALJ recommended restoration of the Department's reduction, based on findings that the Office of Development Planning (ODP) performed necessary services and the Department failed to understand the function of the office. On exception, the Department again contends that the basis for its determination was a comparison to other districts, so that it was not required to consider district-specific information regarding staffing needs. The Department also reiterates that the District is like all other Abbott districts in having a Long-Range Facilities Maintenance Plan with requirements vis-à-vis the functions performed by the ODP, yet other Abbott districts do not incur expenditures at the District's level, and that one of the District's consultant firms handles many of the functions for which the ODP is purportedly responsible. (Department's Exceptions at 25-27) In reply, the District again urges adoption of the ALJ's analysis and recommendation, noting in particular how the Department's assessment of the ODP as overlapping with the functions performed by consultants or capable of performance by other District employees, is, in fact, a staffing analysis, contrary to the Department's contention as to the distinctness of each regulatory criterion. (District's Reply at 11)[12]

Upon review, the Commissioner again finds that the District has explained the circumstances and needs to which the identified area of inefficiency responds, but has not met its burden of demonstrating that these cannot be addressed in an alternative manner so as to bring the District's costs more into line with other districts. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

[12] See note 8 above.

Resource Teachers/Coordinators

The ALJ recommended restoration of the Department's reduction, based on findings that the sole basis for the Department's determination appears to have been the District's September 2001 cost savings plan and unfavorable comparison to Jersey City and Paterson and to other Abbott districts, and that the Resource Teachers/Coordinators did, in fact, constitute an effective use of funds, the District having achieved its planned savings through other means such as elimination of a number of facilitators and tutors. On exception, the Department reiterates its objection to consideration of district-specific factors when the basis for the inefficiency determination was a comparative analysis among Abbott districts pursuant to *N.J.A.C.* 6A:10-3.1(c)1i or cost savings and/or inefficiencies identified or proposed by the district pursuant to *N.J.A.C.* 6A:10-3.1(c)1iv, contends that the savings effectuated through elimination of other positions do not obviate the need to address the separately identified inefficiency herein, and notes that the responsibilities of Resource Teachers/Coordinators duplicate those of the District's Department Chairpersons. (Department's Exceptions at 27-30) In reply, the District urges adoption of the ALJ's analysis and recommendation.[13]

Upon review, the Commissioner determines to adopt the ALJ's recommendation. The Commissioner is persuaded that the District's evidence on record (Exhibit P-5, Tab 4) supports the representations made in testimony, and that, in light of his determination on Department Chairpersons below, that the District has demonstrated both the necessity and effectiveness of the Resource Teachers/Coordinator positions. Accordingly, $3,290,000 is hereby restored to the District's maintenance budget.

[13] See note 8 above.

Department Chairpersons

The ALJ recommended restoration of the Department's reduction[14] based on findings that the Department's comparison of the District to Paterson and Jersey City was invalid, that the positions were necessary, and that their elimination would not necessarily result in cost savings. On exception, the Department notes that the District is one of the few in the State with full-time non-teaching Department Chairpersons and points to the substantial overlap between the responsibilities of these positions and those of the Resource Teachers/Coordinators; it also contends that restoring this reduction would be, in effect, rewarding the District for an inefficiency in its collective bargaining agreement that the District itself recognizes. The Department further notes that, contrary to the ALJ's statement, funding for salary and benefits of reclassified Department Chairpersons *was* taken into account, and was not included in the District's inefficiency reduction. (Department's Exceptions at 30-33) In reply, the District urges adoption of the ALJ's analysis and recommendation.[15]

Upon review, the Commissioner finds that the District has once again explained the circumstances addressed by the identified area of inefficiency, but has not demonstrated the necessity for these positions, particularly in light of restoration of the Resource Teachers/Coordinators above, or shown that it cannot address its needs in a more efficient and effective manner. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

[14] The Department alleged, based on its August 27, 2003 determination letter (Exhibit J-1), that the ALJ ordered restoration of $3,024,000 when the Department's actual reduction was only $3,000,000. However, Exhibit R-1, which sets out in summary form the calculations leading to the Department's final determination of supplemental aid as announced in J-1, shows the ALJ to be correct in her statement of the actual number used.

[15] See note 8 above.

Food Service Deficit

The ALJ recommended restoration of the Department's reduction based on a finding that there is no way the District can further reduce its food service staffing without seriously impinging on the service itself as well as other required services. On exception, the Department again contends that the basis for its determination was a comparison to other districts, so that it is inappropriate to consider district-specific information regarding staffing needs. The Department further argues that an Office of Legislative Services (OLS) audit conducted in December 2000 identified high labor costs and staffing as the cause of the District's unusually high food services costs, and that, while the District may have allowed staff to decrease through attrition and may have negotiated a tiered wage level for new employees, it has done nothing to hire such employees at the new lower wage levels or terminate current employees who continue to receive the level of salary and benefits previously identified as the source of the District's problem. Additionally, the Department observes, the District has privatized food service operations in 30 schools, so that while its work force may have shrunk through attrition, the number of schools requiring staffing has *also* been substantially reduced; thus, the District has done nothing to address the high staff *ratio* identified in the OLS audit. (Department's Exceptions at 33-35) In reply, the District urges adoption of the ALJ's analysis and recommendation.[16]

Upon review, the Commissioner again finds that the District has explained the circumstances underlying the identified area of inefficiency, but he is not persuaded based on the present record that the District cannot address its food service needs in a

[16] See note 8 above.

more efficient and effective manner. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

Consultants

The ALJ recommended restoration of the Department's reduction[17] based on findings that the services provided by the identified consultants were necessary and could not be provided more efficiently by District employees, if at all. On exception, the Department repeats its objection to consideration of district-specific factors when the basis for its inefficiency determination was a comparative analysis among Abbott districts pursuant to *N.J.A.C.* 6A:10-3.1(c)1i. The Department also contends that every district in the State has to implement a payroll system, but the District appears to be the only one retaining consultants to do so, and, furthermore, employs a staff of 17 individuals in addition to multiple consultants; that every district in the State has to prepare budgets and maintain accounting records, but other districts do not incur ongoing consultant expenses for training and recording; and that condoning the District's retention of a third-party administrator for prescription drug, vision and temporary disability benefit plans as required by certain collective bargaining agreements, notwithstanding that the District could perform the necessary tasks itself, effectively rewards the District for inefficient labor agreements and provides no incentive to eliminate the pertinent

[17] The Department alleged, based on its August 27, 2003 determination letter (Exhibit J-1), that the ALJ ordered restoration of $1,057,000 when the Department's actual reduction was only $1,000,000. However, Exhibit R-1, which sets out in summary form the calculations leading to the Department's final determination of supplemental aid as announced in J-1, shows the ALJ to be correct in her statement of the number actually used.

provisions during negotiations. (Department's Exceptions at 35-38) In reply, the District urges adoption of the ALJ's analysis and recommendation.[18]

Upon review, the Commissioner finds that the District has once again explained the circumstances and needs to which the identified area of inefficiency responds, but has not demonstrated that these cannot be addressed in an alternative manner so as to bring the District's costs more into line with other districts; in this regard, the Commissioner particularly concurs with the Department that the District should not be provided with the means to avoid negotiation of changes in a clearly inefficient contractual provision. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

Drivers

The ALJ recommended sustaining of the Department's reduction of $78,000 for two full-time drivers for the State District Superintendent. On this point, the Commissioner concurs with the ALJ's analysis, conclusion and recommendation, to which neither the Department nor the District took exception.

SUMMARY

Accordingly, the Initial Decision of the OAL is adopted with respect to its recommendations as to OAL jurisdiction over challenges to the validity of the controlling regulation, use of 4.884% as the District's rate of salary increase, allowable amounts for health/pension benefits and legal fees, addition of funds for completion of the Belmont Runyon school consistent with a prior Department agreement, replacement of Title 1

[18] See note 8 above.

funds, restoration of funds for Resource Teachers/Coordinator positions and reduction of funds for salaries of full-time drivers, but modified or rejected in all other respects for the reasons set forth above. The Department is directed to conduct forthwith the required analysis of the District's workers' compensation needs and to make thereafter such adjustments to the District's budget and supplemental aid its results may warrant.

IT IS SO ORDERED.[19]



COMMISSIONER OF EDUCATION

Date of Decision: October 28, 2003

Date of Mailing: N/A

[19] 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.

597-03

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget" and supplemental aid, alleging that the Department's review and calculations were not in accordance with the July 23, 2003 Order of the Supreme Court. The District also challenged the Department's reduction of a nonrecurrent expense pursuant to a painting contract, and reductions, as part of its review of noninstructional expenditures for ineffectiveness or inefficiency, of proposed costs for a Fiscal Monitor position and a cooperative bid purchase contract.

The ALJ determined that OAL does not have jurisdiction to determine the validity of *N.J.A.C.* 6A:10-1.2, and that such regulation governed this matter. She also adopted the "interpretation" of maintenance budget espoused by the Honorable Richard McGill in *Board of Education of the Town of Harrison v. New Jersey State Department of Education*, and determined that the burden of proof was on the Department to establish the basis for proposed reductions in the District's budget. The ALJ: 1) concluded that the Department improperly excluded $3,427,560 in encumbrances from the District's budget; 2) rejected the Department's $9,252,814 increase in the District's salary accounts as not reflective of necessary new positions; 3) ordered an increase in the Department's health benefit calculation to reflect additional "necessary" positions and granted the District's requested increase of $638,756 for special education tuition; 4) agreed that the Department properly determined that cost overruns associated with the PaintSmart contract were an excludable nonrecurring cost; and 5) agreed that the position of Fiscal Monitor and costs of a cooperative bid program were properly excludable as "inefficient."

The Commissioner adopted in part, rejected in part and modified in part the Initial Decision. He first clarified the applicable burden of proof and the proper "interpretation" of the maintenance standard. He then: 1) reversed the ALJ with respect to encumbrances, the salary account and special education tuition costs; 2) modified the Initial Decision with respect to health benefits; and 3) adopted the determination of the ALJ as to the excludability of cost overruns under the PaintSmart contract and reductions of the Department, on the basis of inefficiency, for the Fiscal Monitor and the cooperative bid purchase contract.

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.

October 28, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5500-03

Agency Dkt. No. 204-6/03

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

Petitioner,

v.

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq, for petitioner
Gregory Johnson, Esq., for petitioner

Allison Cosley Eck, Deputy Attorney General, for respondent
(Peter Harvey, Attorney General of New Jersey, attorney)

Record Closed: September 18, 2003 Decided: October 3, 2003

BEFORE **MUMTAZ BARI BROWN**, ALJ:

STATEMENT OF THE CASE

The State Operated School District of the City of Paterson, Passaic County, (Paterson or District), an urban special needs *"Abbott"* school district appeals from the

decision by the Department of Education (Department or DOE) regarding Paterson's application for supplemental aid for fiscal year (FY) 2003-2004[1]. DOE applied a maintenance budget standard, which allows the school district to implement FY 2003-2004 programs, positions, and services that were approved for FY 2002-2003.

On June 9, 2003, the Commissioner of the Department of Education (Commissioner) transmitted the matter to the Office of Administrative Law (OAL) as a contested case. Hearings were held on September 3, 4, and 8, 2003. The parties were given a schedule for filing post-hearing briefs. DOE timely filed its brief on September 15, 2003. For good cause, I twice granted Paterson's request for extensions of time to file briefs. Paterson failed to submit its post-hearing brief on the scheduled date. Therefore, on September 18, 2003, I denied Paterson's request for an additional extension of time and the record closed.

Subsequent to the close of the record, on September 19, 2003 by facsimile transmittal, Paterson sought to include into the record data from the United States Department of Labor. On September 20, 2003, DOE objected to OAL taking judicial notice of an item after the record has closed. On September 21, 2003, Paterson replied to DOE's objection. Further, Paterson renewed its "request to file a post-hearing brief out of time".

On September 24, 2003, after considering the position of the parties and based on the whole of the record, I denied Paterson's requests to supplement the record with additional data and to file a post-hearing brief.

In accordance with a request from DOE, due to the overwhelming number of *Abbott* decisions it received, I have filed this Initial Decision on October 3, 2003.

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[1] *Abbott district* means one of the 28 urban districts identified in the appendix to *Abbott v. Burke,* 119 *N.J.* 287 (1990). *N.J.S.A.* 18A:7F-3; *see also N.J.A.C.* 6A:10-1.1 *et seq.*

FACTS

Based on the relevant evidence I **FIND** the following as **FACT**:

1. On March 24, 2003, DOE moved before the New Jersey State Supreme Court for an order to modify the decision in *Abbott v. Burke,* 153 *N.J.* 480 (1998)(*Abbott V*). Essentially, DOE sought to limit the supplemental aid to an amount sufficient to support programs, positions and services in the Districts' approved budgets for 2002-2003.

2. On July 23, 2003, the Court granted DOE's motion to relax the *Abbott V* remedies as applied to the 2003-2004 budget process. The Order states in part:

> (1) The DOE's application to extend the relaxation of remedies granted in *Abbott V* is granted as follows: The DOE shall have the authority to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional *Abbott v. Burke State Aid* for the *Abbott* districts. During 2003-2004, K-12 programs provided for in the 2002-2003 school year will be continued, subject to conditions set forth in this Order.
>
> (2) The Statewide aggregate amount of Additional *Abbott v. Burke* State Aid shall be presumptively calculated as the total amount of Additional *Abbott v. Burke* State Aid approved for the *Abbott* districts for Fiscal Year 2002-2003, subject to adjustment as required for a maintenance budget. A maintenance budget shall mean that a district will be funded at a level such that the district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were reduced in 2002-2003, or new programs, positions, or services, except in respect of Paragraph 2c of the Court's Order of June 24, 2003 (pertaining to those elementary schools without a whole school reform developer in place in 2002-2003 and permitting whole school reform contracts in certain circumstances), irrespective of the timing for the promulgation of regulations governing that provision.
>
> (3) For purposes of calculating Additional *Abbott v. Burke* State Aid and in furtherance of its pre-existing duty to implement administrative controls, the DOE shall promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs. (Non-instructional programs are defined as office/administrative expenditures and programs, positions,

> services and/or expenditures that are not school based or directly serving students.) Insofar as any *Abbott* district has not been informed of its total amount of last year's approved Additional *Abbott v. Burke* State Aid, the DOE shall provide written notice of that amount within two weeks of the date of this Order. The DOE's application of the effective and efficient standard in its review of a district's maintenance school budget may result in a reduction to a district's presumptive amount of Additional *Abbott v. Burke* State Aid.
>
> (3) Within 30 days of the issuance of this Order, the DOE shall provide in a Notice to each district preliminary maintenance budget figures for the 2003-2004 school year consisting of the 2002-2003 approved budget and an estimate of the supplemental funding that will be needed to support that currently approved budget. If the DOE deletes an expenditure from a district's 2002-2003 budget related to the district's non-instructional programs and based on the effective and efficient standard, the DOE must include in the written notice to the district the expenditure deleted along with a specific statement explaining why the program or part thereof is no longer effective and efficient.
>
> (5) *Abbott* districts may appeal any reductions to their maintenance budgets by the DOE's application of the effective and efficient standard, which appeals shall be heard by the [OAL]. In those appeals, the DOE shall bear the burden of moving forward to establish the basis for any proposed reductions to the district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations. If that initial burden is met, the district shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard.
>
> ***
>
> (6) To the extent that monies are deleted by the DOE in the districts' non-instructional programs based on the effective and efficient standard, those monies shall be made available to the districts as follows: an *Abbott* district may apply for and the State may award such aid for demonstrably needed programs or services. The allocation of such available funds shall not be viewed as inconsistent with this Court's approval of use of a maintenance budget for Fiscal Year 2003-2004.

3. On August 22, 2003, DOE promulgated emergency regulations, which defined "maintenance budget" as the standard for evaluating the Districts' programs. The regulation states:

> "Maintenance budget" means, for the 2003-2004 school year, a budget funded at a level such that the district can implement 2002-2003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions, or services that were provided in previous years or new programs, positions, or services unless necessary

> to meet paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke.* Maintenance also does not include non-recurring 2002-2003 expenditures.
>
> [*N.J.A.C.* 6A:10-1.2]

4. On August 27, 2003, DOE issued a notice of preliminary maintenance budget for 2003-2004 for Paterson in the amount of $388,549,971. Further, DOE determined Paterson's estimated need for discretionary Additional *Abbott v. Burke Aid* is $15,993,270. The notice states in part:

> This amount reflects the instructional and non-instructural programs approved and provided in the 2002-2003 school year and includes increases to the 2002-2003 budget to reflect non-discretionary costs and adjustments to the 2002-2003 budget based on actual 2002-2003 expenditures.
>
> Your district's preliminary maintenance number excludes $3,427,560 in 2002-2003 encumbrances that appear to be 2003-2004 expenditures based on the opinion of an independent accounting firm retained by the State.
>
> In addition, the Department has reviewed the expenditures in your 2002-2003 budget related to your district's non-instructional programs in light of the effective and efficient standard established by the Commissioner in emergency regulations. Listed below are the expenditures reduced or deleted and a statement explaining why the reduction or deletion was made:
>
> | | |
> |---|---|
> | $ 95,000 | salary and benefits for the position of Fiscal Monitor to be inefficient. |
> | $ 390,000 | overtime payments in FY03 for maintenance and custodial staff as inefficient. |
> | $ 93,000 | cooperative bid purchase program as inefficient. |
>
> [R-10]

ISSUES

The issues are as follows:

(1) Whether DOE properly calculated the District's maintenance budget of $388,549,971 for school year 2003-2004;

(2) Whether DOE properly excluded $3,427,560 from the 2002-2003 maintenance budget because the funding was for 2003-2004 expenditures;

(3) Whether DOE properly reduced or deleted funding of $95,000 for the salary and benefits of a Fiscal Monitor position as inefficient;

(4) Whether DOE properly reduced or deleted funding of $390,000 for overtime for maintenance and custodial staff as inefficient;

(5) Whether DOE properly reduced or deleted funding $93,000 for the cooperative bid purchase as inefficient; and

(6) Whether DOE properly determined the District's estimated need for discretionary Additional Abbott v. Burke State Aid to be $15,993,270.

The Department shall bear the burden of moving forward to establish the basis for any proposed reductions to the District's maintenance budget based on the standard set forth in the DOE's emergency regulations. If the initial burden is met, the District shall bear the burden of demonstrating that any budgetary reductions are not justified under that standard. (Order, July 23, 2003, at p.7).

DISCUSION AND CONCLUSIONS

The Court placed the burden of moving forward on DOE to establish the basis for any proposed reductions to the District's maintenance budget. Thus, DOE must present persuasive evidence that "$3,427,560 in 2002-2003 encumbrances are 2003-2004 expenditures". In addition, DOE must demonstrate it properly reduced or deleted expenditures under the effective and efficient standard promulgated in the emergency regulations. *N.J.A.C.* 6A:10.

The Department presented three witnesses: Benjamin D. Rarick, the Director and Budget Manager for the State-Operated School Districts of Paterson, Jersey City

and Newark; Douglas Triplett, accountant; and Glenn Forney, Acting Director for Fiscal Improvement, Department of Education.

Paterson presented seven witnesses: Edwin Duroy, District Superintendent; Elizabeth Shick, CPA; Anthony Campisi, Assistant Director, Whole School Reform; Paulette Waite, Director Special Service, Out-of-District; JoAnn Cardillo, Vice Principal, Academy Program; Dennis J. Mulvihill, Assistant Business Administrator; and Elaine Shafer, Director of Personnel.

Whether DOE properly calculated the Districts maintenance budget for school year 2003-2004.

The Department contends it correctly determined Paterson's 2003-2004 maintenance budget and *Additional Abbott v. Burke State Aid* award under *N.J.A.C.* 6A:10-3.1. The regulation "specifically provides that a district's budget shall only contain those programs, positions and services approved and provided in 2002-2003." (Respondent's Brief at p.8.) Moreover, the regulation requires all non-instructional expenditures, which are included in the maintenance budget, be effective and efficient. *N.J.A.C.*6A:10-3.1(c). *Ibid.* Thus, DOE reviewed Paterson's approved budget for 2002-2003, made adjustments for actual expenditures, allowed increases in non-discretionary cost centers, and deducted costs related to non-recurring and ineffective and inefficient expenditures. *Ibid.*

Challenges to DOE's definition of the maintenance standard were addressed by Hon. John R. Tassini, ALJ, in *Board of Education of the City of Asbury Park v. New Jersey Department of Education,* OAL Dkt. No. EDU 4095-03, (September 4, 2003) and Hon. Joseph F. Martone, ALJ, in *Board of Education of the Township of Neptune v. New Jersey Department of Education,* OAL Dkt. No. EDU 4096-03 (September 10, 2003). Although Paterson's counsel, who also represented the State-Operated School Districts of Asbury Park and Neptune, did not brief the issue here, the Asbury Park and Neptune school districts contend that DOE's emergency regulation is inconsistent with the Court's Order of July 23, 2003, and should be disregarded. DOE argues the "maintenance budget" definition cited in *N.J.A.C.* 6A:10-1.2 is consistent with the court's

order. Further, the contentions essentially challenge the regulation and therefore, must be decided by the Appellate Division. ALJs Tassini and Martone agreed with DOE. The ALJs concluded that the school districts were challenging the validity of a regulation, which must be brought before the Appellate Division, not the OAL. (*R.* 2:2-3(a)(2). *Ibid.* I agree.

I **CONCLUDE** that any challenge to the emergency regulation promulgated by the Commissioner of the Department of Education must be brought before the Appellate Division, not the OAL. (*R.* 2:2-3(a)(2). Consequently, I **CONCLUDE** that the regulation is the applicable standard in this case.

The remaining issues concern expenditures in FY 2002-2003. The Hon. Richard McGill addressed the application of the maintenance standard in *Board of Education of the Town of Harrison v. New Jersey Department of Education,* OAL Dkt. No. EDU 5494-03, (September 24, 2003). Judge McGill summarized the proper interpretation of the definition of "maintenance budget" in the new regulation and the Supreme Court Order. As follows:

> The starting point is that the maintenance budget will include expenditures at a level such that the school district can implement current approved programs, services and positions in the 2002-03 budget. The base amount will be reduced by the costs of programs, positions and services that were not in fact provided during the 2002-03 school year. The base amount will be adjusted for documented increases in non-discretionary expenditures such as contracted salaries, health benefits and special education tuition. Finally, the base amount will be reduced by the costs of any non-instructional programs, which lack effectiveness and efficiency.

In this matter, DOE reduced the approved budget for the FY 2002-2003 by the amount of unspent funds. Judge McGill noted the flaw in this methodology allows DOE to limit the District's maintenance budget for FY 2003-2004 to funds approved and actually spent during FY 2002-2003. Judge McGill concluded there is no support for this standard in the language of the Supreme Court Order or in the definition of "maintenance budget" in the new regulation. Further, this quantitative approach provides no assurance that a school district will be able to implement its current approved programs, services, and positions. Judge McGill stated, "It follows that the quantitative methodology used by respondent in this proceeding is inconsistent with the

applicable verbal standards, and therefore, its utilization in this processing is "impermissible." I agree with the analysis enunciated by Judge McGill. Indeed, the Court's driving concern in the Abbott cases is insufficient funding to poor urban school districts. Thus, methodologies cloaked under regulations and employed to limit on *Additional Abbott v. Burke* State Aid must be closely scrutinized

Whether DOE properly excluded $3,427,560 from Paterson's 2002-2003 maintenance budget because the funding was for 2003-2004 expenditures.

Benjamin D. Rarick has been employed by the Department for six years and has held the position of budget manager for three years. Rarick applied the maintenance budget standard to evaluate the proposed budget for Paterson for FY 2003-2004. He testified that his goal was to maintain programs and curriculum, which existed in FY03. Thus, he developed Paterson's 2003-2004 maintenance budget based on the approved budget for FY 2002-2003, with adjustments for actual expenditures and allowances for increases in non-discretionary cost centers. Rarick deducted costs that he believed were non-recurring, ineffective and inefficient expenditures.

Encumbrances:

In its notice of preliminary maintenance budget for 2003-2004, DOE states, "Your district's preliminary maintenance number excludes $3,427,560 in 2002-2003 encumbrances that appear to be 2003-2004 expenditures based on the opinion of an independent accounting firm retained by the State." (R-10). Rarick testified that he did not review the record of encumbrances or speak with Paterson administrators about the amount of encumbrances. Instead, he relied of the opinion of J.L. Ezyske & Co (Ezyske), the independent accounting firm hired by the State. In its report, Ezyske states in part:

> We have performed the procedures enumerated below for the Paterson Public Schools, which were agreed to by the State of New Jersey, solely to assist you and the New Jersey Department of Education in complying with State of New Jersey Supreme Court decision in *Abbott v. Burke,* dated July 23, 2003, in determining preliminary Additional Abbott v. Burke state aid awards for the year ended June 30, 2004....The sufficiency of these procedures is solely the responsibility of those parties specified in this report. Consequently, we make no representation regarding the sufficiency of the procedures

described below either for the purpose for which this report has been requested or for any other purpose.
We were not engaged to and did not conduct an examination, the objective of which would be the expression of an opinion on the accompanying schedules. Accordingly, we do not express such an opinion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

J.L. Ezyske & Co.
August 15, 2003

[R-1]

Rarick further testified that his communications with Ezyske were limited to telephone discussions concerning the budgets for the Paterson and other State-Operated School Districts. Moreover, Rarick did not know whether Ezyske spoke with Paterson administrators about their District's encumbrances or other budget items.

DOE presented Douglass Triplett, Ezyske's manager of accounting. Triplett and Rarick agreed that encumbrances are an accounting tool, which permits the District to reserve funding for purchase orders that have been issued, but the goods or services have not yet been received. Triplett further testified that he reviewed the documents presented by DOE and prepared an accounting report, R-1. The report's foreword states, "The 'Secretary Report' as was given to our office did not have any breakdown between what was a true account payable and what was an outstanding encumbrance. We analyzed the detail encumbrance run to differentiate between true accounts payable and open encumbrances. As you know, accounts payable are reflected as expenditures but encumbrances are merely a reservation of fund balance and do not necessarily represent any additional spending by the district." R-1.

Triplett further testified that DOE directed him to exclude encumbrances from Paterson's maintenance budget. Triplett's analysis included review of booked line item accounts payable and recorded additional spending by line item. Under cross-examination, Triplett conceded that prior to the hearing he did not review the Department's Notice of preliminary maintenance budget for 2003-2004, which excluded $3,427,560 in encumbrances. He further conceded that he did not review any purchase orders. (R-10). Indeed, he accepted at face value the "bulk" number in surplus-encumbrances that was provided to him. "Mr. Triplette agreed that as of August 2003, Paterson had listed $3,427,560 in encumbrances." (Respondent's Brief at p.9.)

Elisabeth Schick, CPA, conducted an audit for Paterson. Schick, in agreement with Rarick and Triplett, testified that services provided to Paterson before June 30, 2003 should be reflected as an account payable. Subsequent to the notice of preliminary maintenance budget, R-10, Schick reexamined the Districts' contracts and purchase orders. She concluded that some of the encumbrances appeared to be accounts payable. (P-6). Accordingly, an adjustment to DOE's calculation of $3,427,560 in 2002-2003 encumbrances is necessary.

I have carefully considered DOE's statement that it "excluded $3,427,560 in 2002-2003 encumbrances that appear to be 2003-2004 expenditures, based on the opinion of an independent accounting firm [Ezyske] retained by the state." The evidence presented by DOE fails to support its statement. Indeed, Ezyske explicitly made known that it did not conduct an examination or offer an opinion on the budget information concerning the State-Operated School District of Paterson.

Based on the whole of the record, I **FIND** and **CONCLUDE** that DOE has not demonstrated the reasonableness for excluding "$3,427,560 in 2002-2003 encumbrances that appear to be 2003-2004 expenditures." As DOE notes, "The final adjustment to encumbrances will correct any misclassification or misunderstanding by the parties concerning the amount of encumbrances." (Respondent's Brief at p.8.) I agree. The final adjustment to encumbrances will correct any misclassification or misunderstanding at the time the CAFR is received from Paterson.[2] Therefore, I **CONCLUDE** that $3,427,560 should not be excluded from Paterson's maintenance budget.

The remaining items in dispute for non-discretionary expenditures are salaries, health benefits, vocational education, and special education.

Rarick accepted the District's rate of 4.9% for salary increases for contracted and non-contacted employees as shown in the salary contract between the District and the

[2] The Comprehensive Annual Financial Report (CAFR)

Paterson Education Association, (R-4). Based on the amount Paterson spent on salaries in 2002-2003, adjusted at 4.9% to reflect salary increases, Rarick calculated FY 2003-2004 expenditures for salary expenditures at $9,252,814. (R-2).

Under cross-examination Rarick acknowledged that he did not consider money accrued from vacancies in budgeted positions. Rather, he allowed for the actual expenditures. For example, if a ten-month budgeted position was filled by a regular teacher, who took a leave of absence from the position after three months, and the position became vacant for the remaining seven months of the school year school year, DOE will fund the regular teaching position based on the amount the District actually paid to the individual. Thus, for FY 2003-2003 Paterson will receive funds to cover three months of the regular teacher's salary. While Rarick conceded there could be "some gaps in situations where you have a teacher replacing a substitute", Rarick feels, "that such incidences should not represent a significant portion of the salary budget."

Rarick further believed that the expiration of Federal Grants, *e.g.* CLASS and PEP21 will not affect the salaries of teachers because the grants did not fund teacher salaries. DOE conceded that although the salary adjustment may not capture every employee, it represents a reasonable calculation based upon actual 2002-2003 spending that should closely approximate the salary costs incurred for school year 2003-3004.

Edward Duroy, State–Operated Superintendent, oversees the day-to-day operation of the District. Duroy testified that Federal grants, *e.g.* CLASS, were used to support services and curriculum that were approved in 2002-2003. For example, the grants helped to fund the salaries of persons who conducted after school programs, tutored and counseled students. The grants expired on June 30, 2003.

Duroy further testified that Paterson seeks to employ regular teachers for positions that were filled by substitute teachers. Duroy believes regular teachers provide students consistency in their educational program. Substitute teachers are temporary and do not provide consistency and continuity of instruction. Moreover,

additional teachers are necessary to meet the need of an increase in the student enrollment at Kennedy High School. Duroy further testified that grade K to 5 uses out dated math and social studies textbooks. Textbooks with current and accurate information are necessary to comply with the curriculum that was provided in 2002-2003.

Elaine Shafer, Director of Personnel and Anthony Campisi each testified that additional teachers are needed to continue approved programs. However, the record is unclear, perhaps due to the expedited nature of these proceedings, as to the number of individuals needed to fill approved positions. Additionally, although it is undisputed that some positions were funded by grants that expired in June 2003, the record is unclear on the number of individuals that are needed to continue the programs that were approved and actually provided in FY 2002-2003. The salary adjustment should reflect this number.

I **FIND** and **CONCLUDE** that DOE has not established its burden that the increase in expenditures for salaries in the amount of $9,252,814 "represents a reasonable calculation based upon actual 2003-2003 spending that should closely approximate the salary costs incurred in the 2003-2004 school year."

Further, I **FIND** and **CONCLUDE** that the District has demonstrated that additional positions are required to continue the programs that were approved and actually provided in FY 2002-2003. Accordingly, this item is part of the maintenance budget, not a new expense. Additionally, I **FIND** and **CONCLUDE** that the District has demonstrated the reasonableness of replacing substitute teachers with regular teachers in programs that were approved and actually provided in FY 2002-2003. The salary adjustment should reflect the costs of these items.

Based on the whole of the record I **CONCLUDE** the salary adjustment of $9,252,814, as calculated by DOE, should not be approved. Instead, the adjustment should reflect positions necessary to continue the programs that were approved and actually provided in FY 2002-2003 and the costs of replacing substitute teachers with

regular teachers in programs that were approved and actually provided in FY 2002-2003. Accordingly, the District is directed to present to the Commissioner of Education the number of positions necessary to continue the programs that were approved and actually provided in FY 2002-2003 and the costs of replacing substitute teachers with regular teachers in programs that were approved and actually provided in FY 2002-2003.

With regard to health benefits, DOE claimed it allowed an increase in health benefits in the amount of $4,551,008 or 14.5%. The State Health Benefits Plan (SHBP) operates on a calendar year, and the District operates on a fiscal year. Thus, the amount of $4,551,008 recognizes the rate change in January. DOE argues that basing the projected increase in health benefit costs on actual spending in 2003-2003 is reasonable.

I agree. The costs of health care benefits should correspond to the actual number of employees who must be covered. I therefore **CONCLUDE** that DOE's increase in health benefits in the amount of $4,551,008 or 14.5% should be adjusted to reflect the number of positions necessary to continue the programs that were approved and actually provided in FY 2002-2003 and the costs of replacing substitute teachers with regular teachers in programs that were approved and actually provided in FY 2002-2003.

County Vocational Schools Tuition:

The District does not receive State funding to pay tuition for vocational school students. Paterson is obligated for this item. Campisi testified that 27,562 pupils attend vocational school. Rarick testified that DOE granted Paterson's request for vocational school tuition increase of $2,655,026 for school year 2003-2004. (R-2). "Rarick verified that amount of tuition by speaking with the County Superintendent and Dennis Mulvihill, Assistant Business Administrator." Consequently, it appears that the parties agree on the increase for this item.

Accordingly, I **FIND** and **CONCLUDE** DOE properly determined the vocational school tuition increase of $2,655,026.

Special Education

Paterson's 2003-2004 budget application requests an increase for special education tuition of $638,756. The Department determined that no additional special education funding was required in the 2002-2003 school year.

Rarick testified that because Paterson is receiving approximately $1 million in increased IDEA funds for the 2003-2004 school year, "the IDEA funding will more than cover Paterson's increased needs." (Respondent's Brief pp.11-12). With regard to specific special education positions, the parties acknowledged that the District had difficulty in finding employees to fill the vacancies. Consequently, "the Department is unwilling to fund unfilled special education positions, especially where the District has historically been unable to fill them". *Ibid* Rarick noted, however, that Paterson can make a request for supplemental funding for those additional special education costs pursuant to N.J.A.C. 6A:10-3.1(f) "should IEP's result in the need for additional teachers, and the teachers and/or specialists are actually hired." *Ibid.* The Department submits "since Paterson will be receiving IDEA revenues in excess of its projected increase in special education expenditures for 2003-2004". No additional funding for special education was required in FY 2002-2003. *Ibid.*

Paulette Waite, Director of Special Services, is responsible for costs related to for out-of-district placement and home instruction. Although there is no prohibition to use IDEA funding for out-of-district placement, the impact on Paterson would be drastic. Waite testified that currently, IDEA grants are used to supplement direct services to special education students such as teachers, supplies and materials. The funds are not used to pay tuition for out-of-district placement. Consequently, supplemental aid is required to ensure that special education students continue to receive free and appropriate public education and related services. Under federal and state law, New Jersey is obligated to provide eligible handicapped children with a free and appropriate

public education, which may include an out of district placement. *Lascari v. Board of Education of Ramapo-Indian Hills Regional School District,* 116 *N.J.* 30 (1989).

I **CONCLUDE** that Paterson has justified under the effective and efficient standard set forth in the DOE's emergency regulations, an increase for special education tuition of $638,756.

Non-recurring expenditures:

DOE determined that the contract between Paterson and Paintsmart resulted in excessive costs of $294,781 and thus, constituted an excludable non-recurring expenditure from FY 2002-2003. Rarick testified that the Paintsmart contract was a time and material bid, which is used only for emergency purposes. Rarick concluded that Paterson would have saved $294,781 in costs on this project had the District requested bids on a square foot cost rather than the time and material method.

Duroy testified that a time and material bids have previously been used and approved by the District. The Maintenance Department, the Business Department and the Legal Department reviewed and which approved Paintsmart bid within sixty days after it was submitted. There is one year remaining on the contract. Duroy conceded, however, that the time and material bid for painting was not the most cost effective and that he would not use that method in the future.

Based on the evidence presented, I **CONCLUDE** that the Department properly determined that the cost overruns associated with the Paintsmart painting contract for FY 2002-2003 constituted an excludable non-recurring cost.

Ineffective and Inefficient:

DOE reduced Paterson's 2003-2004 maintenance budget by amounts deemed to be ineffective or inefficient. DOE disallowed $95,000 for a fiscal monitor. The fiscal monitor's primary responsibility is to oversee the receipt and expenditure of grant

monies. P-1. Rarick determined that the cost for the position was ineffective because that during the four years, in which Paterson employed the fiscal monitor, the amount of federal and state money returned each year has averaged $500,000; it has not decreased or "decreased by only a small amount." The amount of federal and state grant money returned for FY 1999 to 2002 are as follows: 1999- $581,374; 2000- $448,571; 2001, $409,470; and 2002- $310,908. During this period, the District paid the fiscal monitor $380,000 or $95,000 each year.

I am persuaded by DOE's argument that that the fiscal monitor is not cost effective or responsible for any significant decrease in the grant money returned. Therefore, I **CONCLUDE** that the determination by DOE that the position of Fiscal Monitor is inefficient be upheld. Accordingly, I **CONCLUDE** that the salary of $95,000 and related benefits should be eliminated from the maintenance budget.

DOE identified an increase in maintenance overtime costs in the amount of $390,000. The parties have agreed to re-classify this item as a non-recurring expense, and Paterson will withdraw its appeal of this item. (Department's Brief at p.6).

The Department determined expenditures in the amount of $93,000 for a cooperative bid purchase contract to be inefficient. DOE argues that Paterson does not use the services of the cooperative bid program. In 2002-2003, the District purchased $450,000 worth of materials and supplies through the bid cooperative. Thus, $93,600 represents 20% of the cost of the goods purchased. A greater volume of goods or services provided would reduce the percentage cost of the yearly fee. Although Paterson concedes that the program is inefficient, it contends that it is obligated to continue the program for one more year. Contrary to Paterson's contentions, the Department is not requiring Paterson to breach its contractual obligations. Rather, the Department is not approving an inefficient and ineffective program or service. Therefore, the Department's determination to reduce the maintenance budget by $93,600 for the cooperative bid should be upheld.

Paterson presented no evidence to rebut DOE's argument. Therefore, I **CONCLUDE** that the Department properly determined that the expenditures in the amount of $93,000 for a cooperative bid purchase contract to be inefficient.

ORDER

It is **ORDERED** that DOE restore $3,427,560 in 2002-2003 encumbrances until the CAFR is received from Paterson.

It is **ORDERED** that DOE adjust the salary and health benefits increases to reflect positions necessary to continue the programs that were approved and actually provided in FY 2002-2003 and the costs of replacing substitute teachers with regular teachers in programs that were approved and actually provided in FY 2002-2003. It is further **ORDERED** that the District to present to the Commissioner of Education the number of positions necessary to continue the programs that were approved and actually provided in FY 2002-2003 and the costs of replacing substitute teachers with regular teachers in programs that were approved and actually provided in FY 2002-2003.

It is **ORDERED** that the District's request calculation of DOE for vocational school education in the amount of $2,655,026 be upheld

It is **ORDERED** that the District's request for an increase for special education of $638,756 be **GRANTED**.

It is further **ORDERED** that, in all other respects, DOE's determination of Paterson's maintenance budget for FY 2003-2004 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 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.

October 3, 2003
DATE

MUMTAZ BARI-BROWN, ALJ

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

October 3, 2003
DATE

E-mailed Initial Decision to the parties on:

October 3, 2003
DATE

APPENDIX

Witnesses:

Presented by Petitioner, The State-Operated School District of Paterson

Edwin Duroy
Elizabeth Shick
Anthony Campisi
Paulette Waite
JoAnn Cardillo
Dennis J. Mulvihill
Elaine Shafer

Presented by respondent, The Department of Education

Benjamin D. Rarick
Douglas Triplett
Glenn Forney

Exhibits:

Petitioner

P-1 Fiscal Monitor – Job Description

P-2 Memorandum regarding the return of federal and state grant money, dated September 2, 2003

P-3 Action Form – Paterson Contract

P-4 District Budget

P-5 Document from the Department of Education

P-6 Documents regarding General Funding

P-7 Allocation Notice, dated April 5, 2002

P-8 Allocation Notice, dated April 17, 2002

P-9 Action Report – Paterson School District

P-10 Budget Report – 2003

P-11 Budget Report – 2004

P-12 Action Form

P-13 Revised Health Benefits – 2003-2004

P-14 Memorandum – K-5 Math Bi-Lingual Textbooks

Respondent

R-1 Department of Education Budget Report – Paterson School District

R-2 Maintenance Work Sheet

R-3 Salary Information

R-4 Salary Workshop

R-5 Renewal Form of SHBP

R-6 Budget Analysis of Special Education

R-7 IDEA and Title I Revenues Verification

R-8 Worksheet on Utilities

R-9 Spread Sheet List (Consultants)

R-10 Notice of Preliminary Maintenance Budget, dated August 27, 2003

R-11 Schedule of Grant Refunds – FY 2000-2002

R-12 Schedule of Overtime – FY 2001-2002 vs. 2002-2003

OAL DKT. NO. EDU 5500-03
AGENCY DKT. NO. 204-6/03

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of Paterson and those of the Department, along with both parties' reply exceptions were duly submitted in accordance with the schedule established in response to the Court's order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, which it is noted included transcripts of the proceedings conducted at the OAL,[1] the Commissioner determines to adopt in part, reject in part and modify in part the Initial Decision of the OAL as detailed below.

Preliminarily, the Commissioner is compelled to correct a number of foundational errors which have inextricably colored the Administrative Law Judge's (ALJ) findings, leading to a number of inaccurate conclusions here. First of these is the ALJ's mistaken recitation of the "burden of proof" in this matter. The Supreme Court's Order provides that the Department

[1] Hearing in this matter was conducted on September 3, September 4 and September 8, 2003.

"shall bear the [initial] burden of moving forward to establish the basis for any proposed reductions to the [Abbott] district's maintenance budget *based on the effective and efficient standard* set forth in the DOE's emergency regulations."****Abbott v. Burke*, M-976 September Term 2002, at 7. (emphasis supplied) However, as indicated in the Department's preliminary maintenance decision letter dated August 27, 2003 (Exhibit R-10), only two adjustments, currently involved in this matter, *i.e.*, $95,000 related to the salary and benefits for the position of Fiscal Monitor and $93,600 for a cooperative bid purchase program contract, were made for reasons of inefficiency. Therefore, pursuant to *N.J.A.C.* 6A:24-9.6(c), with respect to the remaining adjustments made to the District's maintenance budget herein, the District bears the burden of proving that the Department's calculations were unreasonable.

Next, the Commissioner observes that the ALJ correctly determined that *N.J.A.C.* 6A:10-1.2, the regulation duly promulgated to implement the Court's July 23, 2003 Order, must control in the instant proceeding, and that the OAL does not have jurisdiction to determine, directly or indirectly, its validity, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott*, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Notwithstanding the ALJ's correct understanding of these issues, she errs in citing to and adopting that portion of the decision of the Honorable Richard McGill in *Board of Education of the Town of Harrison, Hudson County v. New Jersey State Department of Education*, OAL Dkt. No. EDU 5494-03, Agency Dkt. No. 195-6/03, decided by the Commissioner October 20, 2003, wherein he summarizes, what *he viewed* as "the proper interpretation of the definition of 'maintenance budget'" in the new regulation and the Supreme

Court Order. (Slip Opinion at 9) It is noted that the Commissioner's October 20, 2003 decision in *Harrison, supra*, specifically modified ALJ McGill's definition thusly:

> The ALJ next undertakes to address the issue of whether the Department's quantitative method of implementing its regulatory definition of "maintenance budget" is inconsistent with the literal language contained in the regulation and in the Supreme Court's Order of July 23, 2003. The ALJ concludes that the Department's methodology has, in effect, inappropriately substituted the phrase "funds approved and actually spent during the 2002-2003 school year" for the Supreme Court language authorizing funding for "current approved" programs, services and positions and for the regulatory language "approved and provided." The Commissioner observes that while it may be technically correct that merely looking at dollar amounts paid out prior to June 30, 2003 will not necessarily reflect actual costs of programs, services and positions provided, *i.e.*, payment for items actually provided prior to June 30 may not actually have been made by June 30, it is also true that the budgeted amount, likewise, does not necessarily reflect actual costs of programs, *etc.*, provided. Therefore, the ALJ's abrupt conclusion that the budgeted amounts for lines 11 and 15 must be reinstated does not follow from his analysis. Those services, programs and positions, which were provided and which are reflected on lines 11 and 15, were provided at an actual cost which was less than the budgeted cost. The Commissioner concludes that a methodology which begins by estimating the 2003-2004 cost of providing the same programs, services and positions by looking at the actual cost of providing these for 2002-2003 and then adds the projected costs of reasonable, nondiscretionary expenditures and adjustments is a reasonable method for estimating future costs which cannot otherwise be determined with any degree of precision. (*Harrison* Slip Opinion at 18-19)

The Commissioner, therefore, found the Department's implementation methodology fully consistent with the verbal standards set forth in the regulation and the Court's Order, and modified ALJ McGill's interpretation of "maintenance budget" to so reflect, emphasizing that should the Department's utilized methodology prove to be insufficient because of unforeseen circumstances arising during the budget year, *N.J.A.C.* 6A:10-3.1(g) provides a mechanism for addressing the need for additional supplemental funding.

Consequently, the Commissioner finds and determines that the interpretation of the definition of "maintenance budget" which he has articulated above is applicable herein.

With the underlying foundational precepts governing review of this matter thus clarified, the Commissioner turns to examination and evaluation of the substantive issues in controversy here.

NONDISCRETIONARY EXPENSES

Encumbrances

The Commissioner does not concur with the ALJ's finding that the Department erred in deducting $3,427,560 in encumbered funds from the District's maintenance budget, as it is evident that the ALJ's analysis and conclusion in this regard reflects her previously discussed misconception with regard to the parties' respective burdens of proof in this matter. In considering this issue, the Commissioner first finds that a clear appreciation of the differentiation between the terms "encumbrances" and "accounts payable" is beneficial here. In the context of close out procedures for the 2002-03 budget year, an encumbrance is an accounting tool that permits a school district to set aside funds for purchase orders that were issued during the 2002-03 school year for goods or services that were *not* received as of June 30, 2003. Unpaid purchase orders reserved as encumbrances on the June 30 general fund balance sheet, therefore, reflect liabilities to be honored in the next fiscal year for goods and services not received by June 30. An account payable, on the other hand, is an expenditure which was incurred in the 2002-03 school year for goods and services received and/or provided by June 30, 2003. Therefore, the Commissioner clarifies that, to the extent that Paterson's encumbrances represent charges for goods and services *provided* by June 30, 2003, *i.e.*, they have become accounts payable, these are properly chargeable to the District's 2002-03 budget and appropriately

included in its "maintenance budget.'" Those of its encumbrances representing goods and services not received by that date are properly excluded from the 2003-04 maintenance budget calculations.

This said, the Department's exceptions assert that, subsequent to the District's provision of the number $3,427,560 as its encumbrances figure to the outside auditor employed by the Department, such auditor contacted the District seeking a breakdown of these "encumbrances" as to whether they were "true" encumbrances or accounts payable. Respondent further reports "the evidence indicates that at the time the Department issued its August 27, 2003 maintenance budget determination, Paterson had identified $3,427,560 as encumbrances, even after Mr. Triplett [the Department's employed auditor] requested a further breakdown. ***Thus, prior to the August 27, 2003 maintenance budget determination from the Department, Paterson did not provide any information to the Department that would illustrate that the Department's determination was in error or unreasonable." (Department's Exceptions at 5) Respondent argues that only after the issuance of the Department's August 27, 2003 letter did Paterson *begin* reclassifying its encumbrances. (*Ibid.)*

The District's reply exceptions contend that, notwithstanding when the updated information with respect to its encumbrances was provided, the Department has a legal obligation to accept its supplemental documentation and to cure any deficiencies in the District's budget that were based on the Department's consideration of outdated and inaccurate information. (District's Reply Exceptions at 3, 4)

Upon consideration of the arguments advanced by the parties on this issue, the Commissioner is compelled to conclude that petitioner has not met *its* burden of demonstrating that the Department's deduction of $3,427,560 in encumbered funds from the District's

maintenance budget was improper. In so determining, the Commissioner recognizes that the Supreme Court's Order directed the Department to provide the districts with their preliminary maintenance budget figures for the 2003-04 school year by August 27, 2003. In its fulfillment of that directive, the Department, utilizing the most recent calculations provided by the District, made the requisite projections in its August 27, 2003 budget letter. Although the Commissioner recognizes the Supreme Court's encouragement to accept supplemental documentation from districts, the Court's holding cannot be construed to require acceptance of data without benefit of appropriate fiscal review, particularly where the District's Comprehensive Annual Financial Report (CAFR) will be submitted in a week or two from the date of this decision and there will then be finality in the very data in question.

While recognizing that it is entirely possible that adjustments in this area are necessary, in light of the District's burden in this regard and based on the proofs brought to the record, the Commissioner is unable to definitively determine here which of the District's encumbrances have become accounts payable by virtue of the receipt of the encumbered goods or services on or before June 30, 2003 so as to be considered 2002-03 expenditures. He, therefore, concludes that the District's encumbrances were properly excluded by the Department as a budget expense for 2002-03, and he directs that any required adjustments be made, based on updated information, in the course of the District's CAFR review scheduled to begin in November.

Salaries

In consideration of the Initial Decision's recommendation with respect to increases for salaries, the Commissioner disagrees with the ALJ's rejection of actual spending from 2002-03 as an appropriate approximation of salaries needed by the District for 2003-04 and

her determination that positions necessary to continue programs that were filled by substitutes for a portion of the year are required to be funded at the equivalency of a full-time, regular teacher's salary. Such conclusion was not only the result of her, once again, inappropriately shifting the applicable burden of proof but is also wholly inconsistent with the Court's directive and the maintenance standard which required the Department to consider only *actual* expenditures stemming from goods and services provided in 2002-03 in establishing a maintenance budget.

In this connection, it is first noted that the ALJ bases her conclusion in this area on her finding that the Department "has not established its burden that the increase in expenditures for salaries in the amount of $9,252,814 'represents a reasonable calculation based upon the actual 200[2]-2003 spending that should closely approximate the salary costs incurred in the 2003-2004 school year.'" (Initial Decision at 13) However, as previously established, pursuant to *N.J.A.C.* 6A:24-9(c), *the District bears the burden of proving that the Department's calculations here were unreasonable or otherwise improper*, a burden the Commissioner finds, on this record, it has failed to satisfy.

The ALJ next undertakes application of the previously rejected "interpretation" of maintenance budget which, as pointed out by the Department's exceptions, leads to a somewhat absurd result:

> The crux of [the ALJ's] findings with regard to maintenance may be characterized as a belief that even if the funds were approved in the 2002-2003 school year but were not needed by the school district in the 2002-2003 school year because a program, service or position was provided for with less money than was budgeted, that the school district should still get the benefit of that savings and be allowed to keep that unspent money in its maintenance budget for the 2003-2004 school year. It is hard to conceive that the Supreme Court envisioned the Department awarding aid in a maintenance year to school districts which is in excess of the amount of money

> that they were required to spend in the prior year with the noted cost adjustments. (Department's Exceptions at 2)

The ALJ's interpretation also fails to recognize that there will, inevitably, be leaves of absences, retirements and resignations in the 2003-04 school year which will have implications on the employment status of the District's employees, causing fluctuations in its salary account.

To the extent that the Initial Decision suggests, based on a "maintenance" analysis, the necessity of "new positions" to continue the provision of services approved and provided in 2002-03 or salaries for positions which the District asserts were partially funded by federal grants which expired on June 30, 2003, the Commissioner concludes that the District has failed to sustain its burden of establishing that the Department's refusal to fund these positions in its calculation of a "maintenance budget" was improper. Not only does the record lack specificity with respect to an actual "need" for such positions, it further fails to establish the number of positions or the dollar amount involved in this regard. Moreover, the District has not advanced a proffer that it will not be receiving other grant moneys or that funding of these salaries cannot be aided by some other source.

In contrast, and fully consonant with his prior determination with respect to the proper interpretation of "maintenance budget," the Commissioner underscores that the Department's overall charge in this matter was to determine the level of 2003-04 funding that would enable the District to continue in a "maintenance" mode, that is, to implement in 2003-04 the programs, services and positions provided in 2002-03. While it is true that dollar amounts actually paid out for staffing prior to June 30, 2003 will not perfectly predict the cost of providing comparable staffing in the next year, it is *equally* true that originally budgeted amounts and other similar projections are no less imprecise. Thus, in the Commissioner's view, a methodology which preliminarily establishes the 2003-04 cost of providing positions at

"maintenance" levels by determining, as nearly as possible without benefit of audit, the actual approved cost of providing them in 2002-03 and then allowing for reasonable, nondiscretionary adjustments, is a uniform, fair and rational method for estimating future expenditures which cannot otherwise be determined with any degree of precision. In this connection, the Commissioner is not persuaded that this method does not take into account vacancies, retirements, and positions filled for only part of the year, since variances of these types occur every year and a preliminary district-wide salary budget is appropriately based on the assumption that staffing is a flexible and continuous process, with ebbs and flows that, absent specific evidence to the contrary, generally permit the projection of one year's experience onto the next.

Consequently, the Commissioner finds and determines that, in contrast to the approach espoused by the ALJ, the Department's calculation of the District's maintenance budget of $9,252,814 in this expense category was fully appropriate and wholly consistent with the directives and intendment of both the Court's order and the governing regulation. It is, again, emphasized that to the extent that results of the application of the District's "maintenance budget" in this area may be imperfect, *N.J.A.C.* 6A:10-3.1(g) provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

Health Benefits

The Commissioner agrees with the ALJ's finding that "[t]he costs of health care benefits should correspond to the actual number of employees who must be covered." (Initial Decision at 14) The record reflects that the Department calculated an increase in health benefits of $4,551,008, a 14.5% increase, basing such projected increase on actual spending during the 2002-03 school year. This calculation is entirely appropriate, being consistent with the

regulatory mandate as well as the Court's order. The Commissioner specifically rejects the ALJ's conclusion that this number needs to be adjusted upward to reflect additional positions or the cost of replacing substitute teachers with regular teachers, as such adjustment, as was discussed above, antithetical to the concept of "maintenance budget."

County Vocational School Tuition

The Commissioner concurs with the ALJ, and notes the parties' agreement, that the Department properly calculated an increase of $2,655,026 in this area.

Special Education Tuition

Preliminarily, it is observed that the ALJ erroneously evaluated the Department's calculation of the District's special education maintenance budget under the "effective and efficient" standard, thereby improperly shifting the burden of proof in this area to the Department. Rather, the burden here is on the District to demonstrate, by a preponderance of the credible evidence, that the Department's calculation of its budget for this category of expenses was improper.

With the applicable burden thus clarified, the Department's exceptions point out:

> Paterson's 2002-2003 revised budget for special education tuition is $16,531,446 (P-11, R-6). ($30,854,387 total minus $13,318,328 in actual spending on regular instruction). Paterson's request for special education costs for the 2003-2004 school year is $17,170,202. (P-4). ($33,645,524 total minus $16,475,322 in regular instruction). Thus, based on Paterson's 2003-2004 budget submission, Paterson's request for special education costs is $638,756. (Department's Exceptions at 13)

While the District argues that having to channel some of its $1 million in increased IDEA funds in 2003-04 special education tuition costs would have a "drastic" impact on the District (Initial

Decision at 15), it makes no such demonstration on the record. Rather, given that the District is receiving $1 million in increased IDEA funds, while its projected increase in special education tuition costs is only $638,756, it is readily apparent that reallocation of a portion of the increased IDEA moneys to cover increased tuition costs, leaves the District with almost $400,000 of these increased funds to cover in-district services. Also particularly instructive here is the Department's exception observation that:

> Paterson actually spent $607,871 less than it budgeted last year (P-10, comparing expended at 6/30/03 of $16,531,446 with what was budgeted of $17,139,317). Therefore, given that the district spent close to $600,000 less than it budgeted, is receiving $1 million in IDEA which is [$361,244] more than the district's budgeted increase in special education, the Department's determination to require the district to utilize IDEA funding for special education cost and not provide any additional funding other than the amount the district spent last year, should be upheld.
>
> (Department's Exceptions at 14, 15)

It is noted that the District's reply exceptions object to such a reallocation of IDEA moneys, contending that the Department has overlooked a "critical fact" and a "critical legal point" in this regard. Overlooked factually, it argues, is that "[t]he District's IDEA application seeks funding for special education services to comply with the requirements in student IEPs not for special education tuition." (District's Reply Exceptions at 6) As to the overlooked legal point, it claims entitlement, pursuant to the Supreme Court's order, to established increases in special education tuition and maintains that "[i]t is unreasonable and contrary to law for the Respondent to suggest that the District should take needed funding for special education services to fulfill IEPs in order to reduce the Respondent's legal obligation under the Supreme Court's order to provide the District with needed funding for special education tuition costs." (*Ibid.*) The Commissioner disagrees. The record reflects that the District's 2003-04 IDEA application is not yet finalized and that amendment during the course of the school year is possible. Further, since use of these

moneys for special education tuition is not prohibited; and since the District has not established the necessity of the additional funds it requests; and, concomitantly, it has not established that the Department's calculation of its maintenance budget in this area was unreasonable or otherwise improper, it has not sustained its burden here. The Commissioner, therefore, rejects the ALJ's grant of $638,756 in additional funding for special education to the District.

CPI Adjustment

The District's exceptions object to the ALJ's refusal to take judicial notice of its official federal government documentation of the "proper CPI adjustment for Paterson." (District's Exceptions at 8) It argues that *N.J.A.C.* 1:1-15.2(a) allows for judicial notice to be taken of matters under *N.J.R.E.*[2] 201 "that are judicially noticeable - published statistics of the federal government that 'are capable of immediate determination by resort to sources whose accuracy cannot reasonably be questioned,'" and that the "ALJ erred in refusing to follow the mandate of *N.J.R.E.* 201(d)." (District's Exceptions at 8, 9)

Initially, it is noted that the ALJ had no obligation to grant the District's request, as *N.J.A.C.* 1:1-15.2(a), dealing with the granting of judicial notice, is discretionary rather than mandatory in this regard. Nonetheless, the Commissioner observes that the District was attempting to have the ALJ judicially notice documentation from the United States Department of Labor evidencing: 1) that the CPI for New York-Northern New Jersey is 3% and 2) that Paterson is included in the New York-Northern New Jersey area.

Irrespective of the content of the District's proffered document, *N.J.S.A.* 18A:7F specifically defines CPI as:

> the average annual increase, expressed as a decimal, in the consumer price index for the New York City and Philadelphia

[2] The District here is referring to the New Jersey Rules of Evidence.

> areas during the fiscal year preceding the prebudget year as reported by the United States Department of Labor.

Thus, even if the ALJ had chosen to acquiesce to the District's request that judicial notice be taken of its documentation, such materials would have been of no import as the Commissioner finds that the Department properly calculated the District's 2.11 CPI rate pursuant to statute.

NONRECURRING EXPENSE

PaintSmart Contract

Upon full review of the record and the parties' exception arguments in this regard, the Commissioner is in agreement with the ALJ's conclusion that the Department correctly determined that cost overruns, in the amount of $294,781, with respect to PaintSmart painting contract for 2002-03 were properly excludable from the District's maintenance budget as a non-recurring cost. In so determining the Commissioner notes that the District, on this record, has wholly failed to sustain its burden of establishing that this exclusion was in any manner improper.[3]

INEFFICIENCIES

Fiscal Monitor

The Commissioner agrees with the ALJ's determination that the position of Fiscal Monitor is inefficient, necessitating the removal of the salary of $95,000 and related benefits of this position from the District's maintenance budget. On exception, the District charges that the ALJ based her conclusion in this regard on "erroneous" factual findings. (District's Exceptions at 15) In this connection, it proffers: 1) the reduction in returned grant money each year from 1999 to 2002 exceeded the costs of the monitor's salary (District's Exceptions at 15, 16); and

[3] The within record does not contain a copy of any current contract with PaintSmart. Rather, the only documentation in this record with respect to PaintSmart is Exhibit P-12, a Bid Summary and Contract Award Recommendation and a District "Action Form" indicating that the Board had adopted a recommended *one year* contract with PaintSmart, effective July 1, 2001 to June 30, 2002.

2) the Department failed to consider all of the "numerous functions performed by the fiscal monitor" over and above those related to monitoring grants. (*Id.* at 16, 17)[4]

In reaching his conclusion here, the Commissioner finds that the Department has met its burden of advancing a *prima facie* case for the reduction of the budget item relating to the Fiscal Monitor's position, while the District's self-serving, conclusory statements are not sufficient to sustain the shifted burden of demonstrating that this budgetary reduction is not justified under the effective and efficient standard.

Cooperative Bid Purchase Contract

The Commissioner concurs with the ALJ that the Department properly reduced the District's maintenance budget by $93,600 for its ineffective use of its cooperative bid purchase contract under the inefficient standard. Noting that the District, itself, concedes that the program is inefficient (Initial Decision at 17), it, nonetheless, claims entitlement to funding because: 1) it claims the Department did not fulfill the specific criterion required by *N.J.A.C.* 6A:10-3.1(c) in order to satisfy its burden of establishing that this agreement is inefficient; and 2) it is contractually obligated to fulfill this contract for another year. (District's Exceptions at 19-21)

In reply, the Department advances that "the district does not use the cooperative bid program effectively and realize any cost savings***." (Department's Reply Exceptions at 12) The Department urges that, in reaching its determination on this issue, it did satisfy the test for ineffectiveness or inefficiency required by N.J.A.C. 6A:10-3.1, pointing out that, pursuant to *N.J.A.C.* 6A:10-3.1(c)(1)(i),

[4] Although it is noted that the majority of the "numerous" functions of the Fiscal Monitor, listed by the District in its exceptions, are identified in this individual's job description as "Performance Responsibilities" of his underlying "Job Goal" which is to "[m]onitor and insure compliance of expenditures related to funded programs and projects as established by local, state, and federal agencies" (Exhibit P-1), it additionally cites to testimony of Superintendent Duroy with respect to additional duties which he has, from time to time, assigned to this position.

> the Department can base its determination of an inefficient or ineffective program, position or service by reviewing the historical spending patterns of the district. Mr. Rarick testified that the district entered into a cooperative bid contract but did not use it.***Thus, he properly looked at the historical spending patterns in the district in compliance with *N.J.A.C.* 6A:10-3.1(c). Further, it is implicit that a district spending money on an unused and unnecessary program will not compare favorably to other school districts. (Department's Reply Exceptions at 12, 13)

Upon review, the Commissioner determines that the Department has sustained its burden of establishing a *prima facie* case for the reduction of this budget item. The District, on the other hand, has not sustained the shifted burden of demonstrating that this budgetary reduction is not justified under the effective and efficient standard. To the contrary, the District, concededly, recognizes that this program is inefficient. That the District may have incurred a contractual obligation in this regard,[5] cannot provide a concomitant requirement that the Department provide state aid, particularly in these difficult budgetary times, to an ineffective program. Furthermore, it is noted, the District has brought no demonstration to the record of its inability to fund this obligation, if it exists, from other sources. The Commissioner, therefore, sustains the Department's reduction of $93,600 from the District's maintenance budget.

Finally, the Commissioner notes and accepts the ALJ's Order that, except as specifically noted in the text of the Initial Decision (now modified), the Department's determination of Paterson's budget in all other respects is upheld.

Accordingly, the Initial Decision of the OAL is adopted in part, rejected in part

[5] The record does not contain a copy of the District's cooperative bid purchase contract.

and modified in part as set forth above, and the instant Petition of Appeal is hereby dismissed.[6]

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 10/28/03

Date of Mailing: N/A

[6] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the Comprehensive Annual Financial Report (CAFR) until November 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[7] 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.

598-03

598-03

T.C., on behalf of minor child, M.D.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

October 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4695-02
AGENCY DKT. NO. 167-6/02

T.C. o/b/o M.D.C.
Petitioner,
v.
EGG HARBOR TOWNSHIP BOARD OF EDUCATION
Respondent.

Gary P. Levin, Esquire for petitioner

Bret Wiltsey, Esquire for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: August 25, 2003 Decided: August 28, 2003

BEFORE **W. TODD MILLER,** ALJ:

This matter was transmitted by the Department of Education to the Office of Administrative Law on July 23, 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 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 on the attached settlement agreement dated August 18, 2003.

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.

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.

8-28-03
DATE

W. TODD MILLER, ALJ

Receipt Acknowledged:

9-2-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 3 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

File No. 12414-0030
Law Offices
PARKER, McCAY & CRISCUOLO, P.A.
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Attorneys for Defendant, Egg Harbor Township Board of Education

Michael D. Collins, a minor, Individually by and through his Guardian Ad Litem, Therese Collins, Plaintiff(s), vs. Egg Harbor Township Board of Education, Ralph Ridolfino, Kimberly A. Gruccio, Lynn Rosenkranz, Karen Yacovelli, Sharon Beloff, and Ann Forshaw, Defendant(s).	OFFICE OF ADMINISTRATIVE LAW ATLANTIC COUNTY DOCKET NO. EDUOS 04695-02S CIVIL ACTION

SETTLEMENT AGREEMENT

This Settlement Agreement is by and among Michael D. Collins, by and through his guardian Ad Litem, Therese Collins, ("Plaintiff") with an address at 411 Fourth Avenue, Egg Harbor Township, NJ 08232 and the Egg Harbor Township Board of Education, with an address at 202 Naples Avenue, West Atlantic City, NJ 08232 and all other named defendants all of whom work at Egg Harbor Township High School, (Collectively "Defendants") with an address at 24 High School Drive, Egg Harbor Township, New Jersey 08234.

WITNESSETH

WHEREAS, the parties have disputes which are the subject of actions entitled Michael

D. Collins, a minor, by and through his parent and guardian ad litem, Therese Collins v. Egg Harbor Township Board of Education, Ralph Ridolfino, Kimberly A. Gruccio, Karen Yacovelli, Sharon Beloff and Ann Forshaw, Office of Administrative Law, Commissioner of Education, Atlantic County, Docket No. EDUOS 04695-02S; and

WHEREAS, the above identified parties have agreed to resolve their disputes in accordance with the terms of this Settlement Agreement in the manner set forth below; and

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

1. Defendants agree to remove from plaintiff's permanent records any reference to a failed drug test, drug use or any other notation that in any way references the drug test and discipline that occurred in response that is the subject of this litigation. Defendants will take such action on or before October 1, 2003.

2. **NONDISCLOSURE**. As additional consideration for the Promises and covenants represented in this Settlement Agreement, it is further understood and agreed that neither the parties identified in this Settlement Agreement nor any agents, servants, attorneys or representatives of the parties shall, in any way, and to the extent allowed by law, at any time disclose for any reason or purpose whatsoever to any other person or entity either the fact of this settlement, the facts underlying the claims leading to this settlement, or the terms of the consideration, compensation or settlement reached by the parties.

3. All claims and counterclaims of whatever nature or kind, asserted or which could have been asserted by any party in an action entitled Michael D. Collins, a minor, by and through his parent and guardian ad litem, Therese Collins v. Egg Harbor Township Board of Education, Ralph Ridolfino, Kimberly A. Gruccio, Karen Yacovelli, Sharon Beloff and Ann

Forshaw, Office of Administrative Law, Commissioner of Education, Atlantic County, Docket No. EDUOS 04695-02S shall be dismissed with prejudice and without costs by way of Stipulations of Dismissal in the forms annexed hereto, subject to compliance with the terms of this Settlement Agreement.

4. The above identified parties agree that the Court in the above referenced action shall retain jurisdiction for the purpose of enforcement of this Settlement Agreement and shall enter a Judgment, in the event of default, as provided hereinafter.

5. Subject to compliance with the terms of this Settlement Agreement, the Plaintiff, with the advice of independent counsel and his guardian ad litem, hereby expressly releases defendants from any and all claims, counterclaims, actions and all other theories of liability asserted or which could have been asserted now or in the future in the above referenced action and Defendants release the Plaintiff from any and all claims asserted or which could have been asserted in the above referenced action.

6. Plaintiff is represented by counsel of his choice, has reviewed this Agreement with his counsel and agrees to same. The matter Michael D. Collins, a minor, by and through his parent and guardian ad litem, Therese Collins v. Egg Harbor Township Board of Education, Ralph Ridolfino, Kimberly A. Gruccio, Karen Yacovelli, Sharon Beloff and Ann Forshaw, (EDUOS 04695-02S) is "**SETTLED WITH PREJUDICE**." Thus, the parents of M.C. waive any and all claims, actions or allegations raised or that could have been raised whether known or unknown concerning their child M.C., M.C.'s education, his attendance, interaction, enrollment with the District or in any manner referring or relating to the District, its personnel or the Egg Harbor Township Board of Education.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals.

WITNESS:

7-18-03

DATED: _____

BY: _____
Michael D. Collins

WITNESS:

DATED: 7-15-03

BY: _____
Therese Collins

ATTEST:

, Board Secretary

DATED: 8/18/03

Egg Harbor Township Board of Education

BY: _____
Dr. Phillip W. Heery, Superintendent

OAL DKT. NO. EDU 4695-02
AGENCY DKT. NO. 167-6/02

T.C., on behalf of minor child, M.D.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement and Stipulation of Dismissal, 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 Agreement, as clarified below, as the final decision in this matter. Initially, the Commissioner observes that Item #1 of the settlement 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 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.

Secondly, with respect to Item #2 of the settlement, the Commissioner points out that, although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, in the absence of a motion to seal the record for good cause shown, Commissioner's decisions and the underlying documents are a matter of public record.

Finally, turning to Item #4 of the settlement wherein "the parties agree that the Court***shall retain jurisdiction for the purpose of enforcement of this Settlement Agreement***," the Commissioner clarifies that the OAL is not a "Court" within the judicial branch, but rather an executive branch agency charged with the responsibility, *inter alia*, of conducting *administrative hearings* of controverted matters for the state agencies. Litigants do not apply directly to the OAL for a hearing, but, rather, state agencies transmit contested cases to the OAL where the OAL conducts hearings, prepares initial decisions and transmits the matters back to the agencies for review. Upon the filing of an initial decision with the transmitting agency, such as has occurred herein, pursuant to *N.J.A.C.* 1:1-18.1(g), the OAL relinquishes jurisdiction over the case. Moreover, as a general rule, applications for enforcement of Commissioner's decisions, including approved settlement agreements, are taken to Superior Court.[1] In that the OAL cannot be bound by the provision agreed to by the parties in Item #4 of the within Settlement Agreement, Item #4 is, therefore, a nullity.

Accordingly, the Settlement Agreement, as clarified, is adopted as the final decision and the matter is dismissed, with prejudice, subject to compliance with the terms of the settlement.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10|14|03
Date of Mailing: 10|14|03

[1] An exception would be in matters where there is a school law issue which requires the Commissioner's education expertise in the examination of factual circumstances.

[2]Although neither the file nor the Settlement Agreement contains a copy of the Board's resolution approving the proposed settlement and designating the Superintendent of Schools to sign the agreement on its behalf, the Stipulation of Dismissal, which incorporates the Settlement Agreement, is signed by the Board's attorney, who is the Board's authorized representative in litigation.

503-03

503-03

COMMISSIONER OF EDUCATION DECISION SYNOPSIS

George Osborne v. Board of Education of the Township of Lakewood, Ocean County; Meir Grunhut, Board President; Norman Bellinger, Board Vice President; Chet Galdo, Harvey Kranz, Sara Lichtenstein, Irene Miccio, Abraham Ostreicher, Neal Price and Leonard Thomas, Members of the Board; and Dr. Ernest J. Cannava, Superintendent of the Lakewood School District

Petitioning taxpayer sought ruling that the Lakewood Board's busing policy, which provides for courtesy busing services for public and nonpublic school students, was unlawfully discriminatory and designed to segregate students based upon race, religion and gender. Respondents asserted that the Board's busing policy and its implementation was neutral with respect to race, religion and gender.

Initially, the ALJ concluded that petitioner, who was a voting Board member in 1995 when the busing policy was revised, filed his petition more than seven years after he was on notice of the existence of the policy and how it was being implemented. Thus, the petition was untimely filed and the ALJ concluded that the 90-day limitation should not be waived. The ALJ also concluded that laches and estoppel precluded petitioner's claims and that petitioner, who was neither a student nor the parent of a student in the District, did not have standing to challenge the Board's busing policy under the New Jersey Constitution and State Law. Moreover, the ALJ determined that petitioner failed to state a claim upon which relief could be granted; he failed to meet his burden of proving discrimination. The ALJ found that the Board chose to provide transportation to all children within its school district within reasonable limitations as to distance. Petitioner as taxpayer did not have standing to pursue any of his claims under the U.S. Constitution or Federal Laws with the exception that as taxpayer he brought a claim which attacked government expenditures on First Amendment Establishment Clause grounds. Petitioner, however, could not show that the Board's application of its busing policy violated the Establishment Clause of the First Amendment of the U.S. Constitution since the Board offered busing on the same terms to all school children in its District without regard to religion. Respondents' motion for summary decision was granted.

Following careful and independent review of the record, the Initial Decision and the parties' exceptions, the Commissioner modified the findings and determination in the Initial Decision. Initially, the Commissioner declined to apply the filing limitation of the 90-day period set forth at *N.J.A.C.* 6A:3-1.3(d) or to apply laches since respondents did not raise untimely filing or laches as affirmative defenses in this matter and, if the allegations of discrimination and violations of Federal and State laws were true, they would constitute a continuing violation. The Commissioner agreed that petitioner did not establish that he had standing to pursue his claims under the U.S. Constitution or Federal laws except for petitioner's claim that Lakewood's busing policy, as applied, violated the Establishment Clause of the First Amendment of the Constitution. The Commissioner also found that petitioner had standing with respect to his New Jersey Constitutional claims; petitioner presented convincing arguments that, as a resident and taxpayer, he was directly affected by the District's courtesy busing policy. Notwithstanding the finding that petitioner had standing to pursue his claim under the Establishment Clause of the First Amendment to the Constitution and his New Jersey Constitutional claims, the Commissioner found that petitioner did not meet his burden of presenting specific facts to demonstrate that the busing policy was applied in a discriminatory manner nor did he allege that the courtesy busing was not provided to all students residing in the District, without regard to whether they attend public, private or parochial schools. Thus, petitioner failed to demonstrate that Lakewood's Busing Policy No. 3541.31 and its implementation were contrary to law. Summary decision was, therefore, granted to respondents and the petition was dismissed.

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

August 26, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING RESPONDENT'S

MOTION FOR SUMMARY

DECISION

OAL DKT. NO. EDU 6438-02

AGENCY DKT. NO. 241-8/02

GEORGE S. OSBORNE,

Petitioner,

v.

TOWNSHIP OF LAKEWOOD BOARD OF EDUCATION, OCEAN COUNTY, MEIR GRUNHUT, PRESIDENT, NORMAN BELLINGER, VICE PRESIDENT, CHET GALDO, MEMBER, HARVEY KRANZ, MEMBER, SARA LICHTENSTEIN, MEMBER, IRENE MICCIO, MEMBER, ABRAHAM OSTREICHER, MEMBER, NEAL PRICE, MEMBER, AND LEONARD THOMAS, MEMBER, THE LAKEWOOD SCHOOL DISTRICT AND DR. ERNEST J. CANNAVA, SUPERINTENDENT OF THE LAKEWOOD SCHOOL DISTRICT,

Respondents.

George S. Osborne, petitioner, *pro se*

Michael I. Inzelbuch, Esq., for respondents

Mordechai Biser, Esq., Associate General Counsel, admitted *pro hac vice*, appearing for Lakewood School District, on Amicus curiae brief
Attorney of record: **Ronald D. Coleman**, Esq.

Record Closed: May 12, 2003 Decided: May 16, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In or about late August of 2002, the petitioner, George S. Osborne, requested that the Commissioner of Education issue a declaratory ruling and answer filed in the above-entitled matter before it arrived at the Office of Administrative Law. Upon receiving Mr. Osborne's request and the response of respondents (hereinafter "Lakewood"), which in my view consisted of a motion for summary decision, the Office of the Commissioner, on or about September 5, 2002, 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.

In his transmission letter of September 5, the Commissioner indicates the following:

> Upon review of the petition for declaratory ruling and answer filed in the matter entitled *George S. Osborne v. Board of Education of the Township of Lakewood, Ocean County*, wherein petitioner challenges the bus routes established by the board, I decline to consider the matter as one for declaratory judgment, pursuant to my authority under *N.J.A.C.* 6A:3-2.1(a). However, *to the extent petitioner raises issues that are within my jurisdiction*, this matter will be considered a contested case, pursuant to *N.J.A.C.* 6A:3-1.3 *et seq.* and is being transmitted to the Office of Administrative Law (OAL) for further proceedings.
>
> [Emphasis in original; citations omitted.]

On December 23, 2002, an in-person prehearing conference was conducted on the record (at the request of Mr. Inzelbuch) at the Office of Administrative Law in Mercerville, New Jersey. On that same date, I issued a three-page letter memorializing what occurred during the course of the conference. The audiotape is in the file. During the course of the conversation (and referred to in my letter of December 23), Lakewood had brought a motion for summary decision, and it appeared that part of that motion was addressed to the question of what issue or issues factually or legally are justicable before this forum. Because of the discussions, I advised Mr. Osborne that he could supplement his response to the brief (originally filed with the Commissioner)

opposing summary decision, and I also gave Lakewood the opportunity to reply, if it felt appropriate and within a reasonable time. Much of the discussion then centered upon the setting of a discovery schedule, which in fact was done and was memorialized in my letter. So as to maintain management over the proceedings, I scheduled another conference to be conducted in early April 2003 in person at OAL, Mercerville, New Jersey, commencing at 10:00 a.m. I concluded the letter by indicating:

> Finally, it should be noted that I made an effort to explain to Mr. Osborne, an articulate and intelligent non-lawyer, that as a *pro se* litigant, the Administrative Law Judge has a special obligation to assist him in proceeding with this matter, and I advised him that, should he have questions, to telephone my chambers and that I would do my best to answer them – *ex parte* if I can – or if need be, I would convene a telephone conference in which Mr. Inzelbuch would also participate.

On December 27, 2002, some four days after the in-person conference was conducted, my office received an informal letter motion submitted by Mr. Osborne asking that I be disqualified from hearing the matter. On January 10, 2003, my chambers issued a four-page ruling and order which denied Mr. Osborne's motion. I end the letter by advising that should Mr. Osborne choose to seek interlocutory review of the denial of his motion for my disqualification, that review should be taken to the Director of the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-14.10. Pursuant to that regulation, it is provided at subdivision B that any interlocutory review request must be made not later than five working days from the receipt of the written order or oral ruling, whichever is first rendered.

By letter to counsel and Mr. Osborne of January 24, 2003, I advised that the Acting Director of the Office of Administrative Law had not received any request for interlocutory review in respect to the denial of Mr. Osborne's motion for my disqualification. Since the five-day period had lapsed under regulation, I advised the parties that as of the issuance of this letter (the one issued on January 24), the matter shall proceed substantatively. I then set forth a motion schedule in which the parties were given the opportunity to respond and supplement their earlier submissions.

During this early stage of these proceedings, several other issues presented themselves. I had received a letter from a Reverend Jimmy Wilcox in early November 2002 in which he request the opportunity to appear as a nonlawyer representative on behalf of George S. Osborne in these proceedings. In my letter to Reverend Wilcox, I noted that since the matter was not a special education case, it was not governed by the special rules providing for nonlawyer representation, as set forth at *N.J.A.C.* 1:6A-5.1. Thus, the only legal basis under which a nonlawyer individual may appear as a representative for another in matters before OAL are set forth at *N.J.A.C.* 1:6A-5.4(a). Since none of the requirements were met by Mr. Wilcox, I indicated to him that "I must unfortunately deny your request to appear on behalf of Mr. Osborne." I then sought to reassure him that Mr. Osborne would not be at sea when I indicated in closing the letter, "As you may or may not know, when a *pro se* litigant appears in any proceeding, the judge has an affirmative obligation to assist him as well as he can, but not, of course, act as his attorney." And I also pointed out that in addition to my finding Mr. Osborne appeared fully competent to represent himself as a layperson; he also, of course, retained the opportunity to have counsel represent him.

On December 10, 2002, my office received a letter from a Mordechai Biser, Esq., dated December 4, 2002. Mr. Biser is Associate General Counsel to Agudath Israel of America, a national grassroots Orthodox Jewish organization with chapters throughout the United States. Mr. Biser requested the opportunity to submit an *amicus curiae* presentation in the case. By letter of December 19, 2002, addressed to Messrs. Inzelbuch, Osborne and Biser, I issued a ruling of three pages which granted Mr. Biser's request to submit an *amicus curiae* brief in the matter. I imposed the following qualifications on such submission:

> The *amicus curiae* brief could not in any way provide me with recommended findings of fact, but may be limited exclusively to legal argument. Mr. Biser's involvement in the case would be exclusively the submission of a brief. He was neither going to be treated as an intervenor nor a participant under *N.J.A.C.* 1:1-16.1 through 1:1-16.6. He was not permitted to sit at the counsel table or to engage in any *in camera* conversation throughout these proceedings.

I noted that he was welcome to attend the proceedings, as is anyone within a public forum. I also noted in the letter that after reviewing the New Jersey Lawyer's Diary, I came to the conclusion

Because the parties never actually ceased submitting further correspondence in the matter, I determined on my own initiative that the record in these proceedings would closed on May 12, 2003.

THE FACTS

Some of what I shall set forth has already been described in general fashion. Nevertheless, it is appropriate for purposes of addressing Lakewood's motion. This matter originated on or about July 30, 2002, with the filing of a Verified Petition by George S. Osborne, in the capacity of a taxpayer in the respondent school district, seeking declaratory judgment with the Commissioner of Education. The petition is concerned with how public funds are distributed by the respondent, Lakewood Board of Education, with respect to busing arrangements, in particular the courtesy busing of non-public school students. Osborne has alleged that Lakewood's financing of such busing arrangements is unlawfully discriminatory and designed to segregate students based upon race, religion and gender and in violation of the United States Constitution, particularly the Equal Protection and Due Process Clauses of the 14th Amendment and the Establishment Clause of the 1st Amendment, Federal Statutes, the New Jersey Constitution and the New Jersey Law Against Discrimination ("LAD").[1] Lakewood filed an answer on or about August 20, 2002, which denied the allegations of unconstitutional busing because, respondent asserted, it had implemented a busing policy that was neutral with respect to race, religion and gender, and set forth a variety of legitimate factors underlying the application of the policy.

On September 5, 2002, the Commissioner of Education issued a letter to both Osborne and Lakewood, in which he declined to consider the matter as one for declaratory judgment, but on or about September 12, 2002, transmitted the case to the Office of Administrative Law as a contested case for determination of the issues that are within the Commissioner's jurisdiction. Lakewood filed their current motion for summary decision on January 23, 2003. Osborne filed his response in opposition to the motion on February 13, 2003.

[1] It is not clear from his verified petition whether the petitioner asserts other constitutional claims (i.e. the petitioner mentions infringement on the right to travel in his motion papers and counsel for the respondent briefly addresses the petitioner's lack of standing), however these will be disposed of in the same fashion as the other federal constitutional claims, with the exception of his claim under the establishment clause.

On June 25, 1975, Lakewood adopted Local Policy 3541.31, which was revised on June 12, 1995, which provides that all school children are entitled to transportation between their homes and schools subject to clearly defined riding limits.[2] The petitioner served as a member of the respondent, Lakewood Board of Education, from 1994 to 1997. This local school district policy has allowed many non-public school students to receive free busing to their school of choice. A large segment of these non-public school students attend Orthodox Jewish parochial schools. Many of those schools either have boys only or girls only in attendance. The bus routes that go to and from the boys only schools are ridden by boys only and the bus routes that go to and from the girls only schools are occupied by girls only.

DISCUSSION

The rules governing practice at the Office of Administrative Law 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. The determination 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. *N.J.A.C.* 1:1-12.5(b).

The courts have further elaborated upon the issue of granting summary decision. The court, in *Brill v. Guardian Life Ins Co of America*, 142 *N.J.* 520, 541 (1995), encouraged trial judges to evaluate and analyze competent evidential materials presented with the application and to consider whether when they are viewed in the light most favorable to the non-moving they are sufficient to permit resolution of the alleged dispute in favor of the non- moving party. *Id.* at 540. Moreover, once the moving party has presented evidence in support of its application, the burden is on the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Id.* at 529.

[2] "Students living in the Lakewood school district shall be entitled to transportation between their homes and schools in accordance with the following riding limits as measured portal to portal: kindergarten through grade 6, a distance of one-mile or more; grades 7 through 8, one and one-half miles or more; and grades 9 through 12, two miles or more." Lakewood Bd. of Ed. Local Policy 3541.31.

The verified petition was not timely filed pursuant to the 90-day rule at* N.J.A.C. *6A:3-1.3(d)

The threshold issue that has emerged in this matter deals with whether Osborne's claim was timely filed pursuant to *N.J.A.C.* 6A:3-1.3(d).[3] *N.J.A.C.* 6A:3-1.3(d) governs the filing of an action arising under the school laws and states in part that:

> The petitioner shall file a petition no later that 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.
>
> [*N.J.A.C.* 6A:3-1.3(d).]

In *Kaprow v. Bd. of Ed. of Berkeley Township*, 131 *N.J.* 572 (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 limitation period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. ... The 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."
>
> [*Id.* at 582.]

The public policy, which favors providing school districts with a measure of repose must be weighed against the right of the petitioner, to be notified that the school board has taken a position adverse to it:

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[3] N.J.A.C. 6:24-1.2(c) was 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 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). These regulations are used interchangeably throughout this section of the memorandum.

> Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. ... [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." *Borough of Park Ridge v. Salimone*, 21 *N.J.* 28, 48 (1956).
>
> [*Id.* at 587.]

Adequate notice under *N.J.A.C.* 6A:3-1.3(d) should accommodate the dual purposes of the limitations period:

> [T]he first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. ... The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs.
>
> [*Kaprow*, *supra*, 131 *N.J.* at 587 (internal citations omitted).]

In *Kaprow*, a secretary of the respondent board of education notified the petitioner 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" by the respondent, as required by *N.J.A.C.* 6:24-1.2(c). *Id.* at 588.

The ninety-day requirement has been strictly followed and applied almost without exception. Specifically, in *Dreher v. Jersey City Bd. of Ed.*, OAL Dkt. EDU 2777-87 (December 18, 1987), *adopted* Comm'r. (February 2, 1988), *aff'd.* State Bd. of Ed. (July 8, 1988), a petition filed just two days after the ninety-day period was dismissed. *Ibid.* Other cases have also strictly applied the ninety-day rule. In *Eisenburg v. Bd. of Ed. of the Borough of Fort Lee*, EDU 9451-01, Final Decision, (October 3, 2002)<http://lawlibrary.Rutgers.edu/oal/search.html>, the Commissioner held that the petitioners informal appearance before the respondent board of

Gladden v. Public Employees' Retirement Sys., 171 *N.J. Super.* 363, 370-71 (App. Div. 1979); *Allstate Ins. Co. v. Howard Sav. Institution*, 127 *N.J. Super.* 479, 489 (Ch. Div. 1974).

The State Supreme Court addressed the doctrine of laches in an education context in *Lavin v. Bd. of Ed. of the City of Hackensack*, 90 *N.J.* 145 (1982). *Lavin* involved a petitioner's claim for employment credit as a teacher based on her prior military service. Because she asserted her claim nine years after her employment began, the Board of Education argued that laches barred her claim. The Supreme Court agreed and quoted the following from *Atlantic City v. Civil Serv. Comm'n.*, 3 *N.J. Super.* 57, 60 (App. Div. 1949):

> Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. More specifically, it is inexcusable delay in asserting a right.
>
> 'Long lapse of time, if unexplained, may create or justify a presumption against the existence or validity of plaintiff's right and in favor of the adverse right of defendant; or a presumption that if, plaintiff was ever possessed of a right, it has been abandoned or waived, or has been in some manner satisfied; or that plaintiff has assented to, or acquiesced in, the adverse right of defendant; or a presumption that the evidence of the transaction in issue has been lost or become obscured, or that conditions have changed since the right accrued; or a presumption that the adverse party would be prejudiced by the enforcement of plaintiff's claim.'
>
> [*Lavin*, *supra*, 90 *N.J.* at 151-52 (citations omitted)]

See also Windsor Card Shops, Inc. v. Hallmark Cards, Inc., 957 *F. Supp.* 562, 568 (D.N.J. 1997)(also citing *Atlantic City*, *supra*, and stating that laches, "similar to a statute of limitations, bars claims that were neglected for an unreasonable and unexplained length of time"). A court should consider and weigh the length of the delay, reasons for the delay, and changing conditions of either or both parties. *Id.* at 152. The length of the delay alone or combined with the other elements may result in laches. *Ibid.* "It is because the central issue is whether it is inequitable to permit the claim to be enforced that generally the change in conditions or relations of the parties coupled with the passage of time becomes the primary determinant." *Ibid.*

In the matter *sub judice*, the lengthy passage of time in conjunction with the petitioner's sophistication in such matters, justify a finding barring the petitioner from claiming that the local policy or that its application is improper. It is clear that from the petitioner's membership on the respondent board of education and from the fact that this policy was addressed during his term, that nothing short of willful blindness on the part of the petitioner could account for any lack of knowledge about the policy and its application. It is also clear that over seven years had passed from the date that the respondent school board, along with the petitioner as a member, addressed the policy and revised it. Knowledge and delay are prerequisites to the application of the doctrine of laches. *C.R. v. J.G.*, 306 *N.J. Super.* 214, 239 (Ch. Div. 1997). The petitioner seeks to question a policy that was implemented over twenty-three years ago (or, at the very least, over seven years since the revision) and that policy's application. This policy appears to have been consistently applied over that time period. The petitioner knew, at the very latest, in June 1995, of the existence of the policy and how it was applied in the school district. Yet he waited until July 30, 2002, to file a verified petition challenging the policy and its application. Osborne provides no explanation as to why he chose to file recently rather than seven or twenty-three years ago. It would be unfair to allow him at this point to pursue such claims after such an unreasonable and unexplained delay in filing the petition. Therefore, I **CONCLUDE** that laches precludes petitioner's claims.

In so far as the petitioner facially challenges the constitutionality of Lakewood's busing policy for students, the Commissioner and OAL lack the jurisdiction to entertain the constitutional arguments; however, jurisdiction exists to the extent that the petitioner's constitutional claims can be considered challenges to the constitutionality to Lakewood's policy as applied

"Normally in administrative proceedings, petitioners can attack the constitutionality of rules as applied, but they may not mount facial attacks." 37 *New Jersey Practice, Administrative Law and Practice*, § 3.8, at 107 (Steven L. Lefelt, Anthony Miragliotta & Patricia Prunty) (2d ed. 2000). "Pure legal questions are exclusively reserved for the courts. Accordingly, an agency has no power to determine constitutionality of a statute on its face." *Ibid.* The Commissioner of Education and ALJs do not have the authority to strike down statutes, rules, etc. *Ibid.* Thus, there is no jurisdiction for the ALJ to consider a facial constitutional challenge. However, "[i]n as applied challenges, the question involves whether an agency is applying its rule in such a way as to violate an individual's constitutional rights. Usually challenges to rules for being

unconstitutionally applied raise the need for both fact finding and agency expertise." *Ibid.* To the extent that the petitioner claims that Lakewood's Policy 3541.31 is unconstitutional, the Commissioner and ALJ do not have jurisdiction. In so far that the petitioner's constitutional challenges do not constitute a facial challenge and claim that Policy 3541.31 has been unconstitutionally applied, the Commissioner and ALJ have jurisdiction to consider these claims.

The petitioner has no standing to pursue any of his claims under the U.S. Constitution or Federal Laws, with the exception of his claims under the Establishment Clause of the 1st Amendment of the U.S. Constitution

The issue of standing must be addressed even if the parties have not raised it. *U.S. v. Hayes*, 515 *U.S.* 737, 742, 115 *S.Ct.* 2431, 2435, 132 *L.Ed.*2d 635 (1995).

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, ... and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' ... Second, there must be a causal connection between the injury and the conduct complained of-- the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." ... Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."
>
> [*Lujan v. Defenders of Wildlife*, 504 *U.S.* 555, 560-61, 112 *S.Ct.* 2130, 2136, 119 *L.Ed.*2d 351 (1992)(Internal citations omitted).]

The petitioner, who seeks jurisdiction, bears the burden of establishing these elements. *Ibid.* "At the pleading stage, general factual allegations of injury resulting from the [respondent's] conduct may suffice..." *Lujan*, 504 *U.S.* at 561, 112 *S.Ct.* at 2137. "In response to a summary judgment motion, however, the [petitioner] can no longer rest on ... 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts.' ... *Ibid.*

Generally people have no standing as "citizens" or "taxpayers" to claim that government expenditures violate federal law or the U.S. Constitution. *Lujan*, 504 *U.S.* at 573-76, 112 *S.Ct.* at

2143-44. However, there is a clear exception to this general rule, where such standing exists when a taxpayer brings a claim, which attacks government expenditures on First Amendment Establishment Clause grounds. *See Flast v. Cohen*, 392 *U.S.* 83, 88 *S.Ct.* 1942, 20 *L.Ed.*2d 947 (1968). The petitioner in this matter asserts all of his claims as a taxpayer; however in this status he does not have standing to challenge Lakewood's busing policy under any of his federal claims, with the exception of the claim that the policy as applied violates the Establishment Clause of the First Amendment of the U.S. Constitution.

Osborne does not have standing to pursue his claims against Lakewood under state law. Furthermore, the petitioner fails to state a claim upon which relief can be granted with respect to his New Jersey Constitutional claims and LAD claim.

Standing is a jurisdictional concept that requires that a litigant "have sufficient interest in the subject of the litigation so that a genuine clash between opposing viewpoints will be presented. *U.K. and G.K., o/b/o Minor D.K. v. Bd. of Ed. of the City of Clifton*, 82 *N.J.A.R.*2d (EDU) 71, 73 (*citing Kenwood v. Montclair Bd. of Ed.*, OAL Dkt. EDU 8858-81 (April 23, 1982), *adopted*, Comm'r. (June 23, 1982), *aff'd.* St. Bd. (September 8, 1982)). New Jersey courts have taken a very liberal approach toward standing, in order to allow easy access to the legal system. *Id.* at 73 (*citing Crescent Park Tenants Ass'n. v. Realty Equities Corp.*, 58 *N.J.* 98 (1971)). The approach to standing has been even more generous within the State administrative system, where even those with a mere "tangential interest" have been afforded the opportunity to challenge administrative decisions. *Id.* at 73 (*citing* 37 *New Jersey Practice, Administrative Law and Practice*, § 7.4, at 360-62 (Steven L. Lefelt, Anthony Miragliotta & Patricia Prunty) (2d ed. 2000)).

However, there are limitations to this rule. For instance, "mere intermeddlers" or "mere interlopers or strangers to the dispute" do not have standing. *Ibid.* Hence, generally there are two prerequisites to standing. "First, petitioner must demonstrate a sufficient stake in the outcome of the proceeding; and second, his position must be truly adverse to the opposing party." *Id.* at 73 (*citing Home Builders League of South Jersey, Inc. v. Berlin Twp.*, 81 *N.J.* 127, 132 (1979)).

Although taxpayer status has been recognized to confer standing upon plaintiffs in some cases, the Commissioner "has consistently refused to hear cases brought by individuals who would not be affected by the outcome in a direct and meaningful way." *D.K.*, *supra*, 93 *N.J.A.R.*2d (EDU) at 73 (*citing Kenwood*, *supra*, OAL Dkt. EDU 8858-81 (concerned citizen seeking to rewrite school attendance policy); *Lobis v. Maple Shade Bd. of Ed.*, OAL Dkt. EDU 3630-79 (June 11, 1980), *adopted* Comm'r. (August 11, 1980), *aff'd.* State Bd. (November 5, 1980)(parent whose son no longer attended school in the district complaining about the quality of education received by remaining students); *Delaney v. Woodbridge Bd. of Ed.*, OAL Dkt. EDU 382-78 (December 12, 1979), *adopted* Comm'r. (June 11, 1980)(Taxpayer questioning propriety of filling job vacancies); *Ricardelli v. Newark Bd. of Ed.*, OAL Dkt. EDU 1894-79 (September 26, 1979), *adopted* Comm'r. (November 16, 1979)(taxpayer challenging legality of school board's decision to transfer personnel); *accord G.G. v. New Providence Bd. of Ed.*, 1975 *S.L.D.* 502 (parent of high school graduate challenging attendance policy)).

One example where standing was held to be lacking is *D.K.*, *supra*. The matter was brought by the parents of D.K., a student who was injured by another student while at school. The parents appealed the disciplinary actions taken by the Board's against the offending student. The issue before the OAL was whether the parents had standing to challenge the appropriateness of disciplinary actions taken against another student. The ALJ held that the parents lacked standing because, among other reasons, they had not sought an additional benefit for themselves or their child and so their interests would not be "substantially, specifically and directly affected" by the outcome of the matter. *D.K.*, *supra*, 93 *N.J.A.R.*2d (EDU) at 73.

In the instant matter Osborne contends that his status as a resident taxpayer alone provides him with standing to pursue his claims. However, he is not affected in a direct and meaningful way by Lakewood's decision to adopt and implement courtesy busing to its students. He is neither a student nor the parent of student in the school district. Therefore, I **CONCLUDE** Osborne does not have standing to challenge Lakewood's busing policy under the New Jersey Constitution and state law.

The New Jersey Law Against Discrimination ("LAD") and Article I, § 1 and § 5 of the New Jersey Constitution extend protections to individuals on the basis of several enumerated categories. To state a claim under the LAD or these constitutional provisions, a petitioner must

claim discrimination on the basis of one of these protected classes. *J.P. v. Bd. of Ed. of South Brunswick*, (EDU 4969-01), Initial Decision, (December 17, 2002) <http://lawlibrary.Rutgers.edu/oal/search.html>. The petitioner alleges discrimination on the basis of race, gender and religion under the foregoing provisions. However, even with the presence of such allegations, "[m]ere inequality or difference in treatment does not suffice to support a charge of unconstitutional discrimination." *Kenny v. Byrne*, 144 *N.J. Super.* 243, 257 (App. Div. 1976), *affirmed* 75 *N.J.* 458 (1978). A "classification must be upheld under any reasonable set of facts unless there is a showing of invidious discrimination." *Ibid.* There is the presumption of constitutionality and Petitioners have "the burden of showing that it is arbitrary and without reasonable basis to support it." *Ibid.* Thus, even though the petitioner claims discrimination on the basis of three protected classifications, he has not met his burden. The petitioner does no more than present a variety of statistics indicating the racial and religious percentages in the population of the school district and the public schools. Even if Osborne's statistics are taken as true and accurate, they along with everything else in the record set forth no evidence of such invidious discrimination. Thus, I **CONCLUDE** Osborne fails to state a claim upon which relief can be granted under the LAD, Article I, § 1 of the New Jersey Constitution[5], or Article I, § 5 of the New Jersey Constitution[6].

The petitioner cannot show that the respondent's application of its busing policy violates the Establishment Clause of the 1st Amendment of the U.S. Constitution.

The Establishment Clause of the 1st Amendment of the U.S. Constitution bans any "law respecting an establishment of religion." In *Flast v. Cohen*, 392 *U.S.* 83, 88 *S.Ct.* 1942, 20 *L.Ed.*2d 947 (1968), the U.S. Supreme Court held that a taxpayer has standing to challenge a statute or rule under the Establishment Clause. However, the Court has routinely allowed governments to utilize tax dollars for aid programs as long as such provisions have a secular

[5] "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." Article I, § 1 of the New Jersey Constitution. "It has long been required that Article I, Paragraph 1 of the New Jersey Constitution requires, just as the Fourteenth Amendment to the United States Constitution, equal protection." H.A.B. as guardian ad litem for S.T.B. v. Manalapan-Englishtown Regional School District, 92 N.J.A.R.2d 640, 642.

[6] "No person shall be denied the enjoyment of any civil or military right, nor shall be discriminated against in the exercise of any civil military right, nor shall be segregated in the militia or in the public schools, because of religious principals, race, color, ancestry or national origin." Article I, § 5 of the New Jersey Constitution.

purpose and do not have the primary effect of advancing or inhibiting religion. In *Lemon v. Kurtzman*, 403 *U.S.* 603, 91 *S.Ct.* 2105, 29 *L.Ed.*2d 745 (1971), the Court "considered whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion." *Mitchell v. Helms*, 530 *U.S.* 793, 807, 120 *S.Ct.* 2530, 2540, 147 *L.Ed.*2d 660 (2000). But, in *Agostini v. Felton*, 521 *U.S.* 203, 117 *S.Ct.* 1997, 138 *L.Ed.*2d 391 (1997), the Court "modified *Lemon* for purposes of evaluating aid to school and examined only the first and second factors... [The Court] recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect [] and also acknowledged that [the] cases had pared somewhat the factors that could justify a finding of excessive entanglement." *Mitchell*, 521 *U.S.* at 807-08, 117 *S.Ct.* at 2540.

"[T]he question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could be reasonably attributed to governmental action." *Mitchell*, 521 *U.S.* at 809, 117 *S.Ct.* at 2541. Many cases have determined that the use of governmental aid for religious indoctrination could not be attributed to the state and therefore not a violation of the establishment clause. *See Mitchell*, *supra* (upholding the lending of educational materials and equipment to public and private, including parochial, schools); *Everson v. Bd. of Ed. of Ewing Twp.*, 330 *U.S.* 1, 67 *S.Ct.* 504, 91 *L.Ed.* 711 (1947)(upholding a New Jersey statute and its application, which mandated the provision of transportation to public and private, including parochial, school children); *Agostini*, *supra* (allowing public school teachers to provide remedial education to disadvantaged children in parochial schools); *Zobrest v. Catalina Foothills School District*, 509 *U.S.* 1, 113 *S.Ct.* 2462, 125 *L.Ed.*2d 1 (1993)(finding that providing the services of an interpreter to a deaf child in a parochial school does not violate the establishment clause); *Witters v. Washington*, 474 *U.S.* 481, 106 *S.Ct.* 748, 88 *L.Ed.*2d 846 (1986)(held that First Amendment did not preclude state from extending assistance under state vocational rehabilitation assistance program to blind person who chose to study at Christian college to become pastor, missionary, or youth director); *Bd. of Ed. of Central School Dist. No. 1 v. Allen*, 392 *U.S.* 236, 88 *S.Ct.* 1923, 20 *L.Ed.*2d 1060 (1968)(held that statute authorizing the loan of textbooks to students attending parochial schools was not a 'law respecting an establishment of religion, or prohibiting the free exercise thereof' in conflict with First and Fourteenth Amendments to Federal Constitution).

"In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the courts] have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." *Mitchell*, 530 *U.S.* at 809, 120 *S.Ct.* at 2541.

> [I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose. The government, in crafting such an aid program, has had to conclude that a given level of aid is necessary to further that purpose among secular recipients and has provided no more than that same level to religious recipients.
>
> [Mitchell, 530 *U.S.* at 810, 120 *S.Ct.* at 2541.]

To assure neutrality, courts will consider whether any aid goes to parochial schools because of the genuinely independent and private choices of a child's parents. *Ibid.* "[I]f numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment. Private choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program, and that could lead to a program inadvertently favoring one religion or favoring religious private schools in general over nonreligious ones." *Ibid.* "[T]he proportion of aid benefiting students at religious schools pursuant to a neutral program involving private choices [is] irrelevant to the constitutional inquiry." *Mitchell*, 530 *U.S.* at 812, 120 *S.Ct.* at 2542 (citing *Agostini*, *supra*, 521 *U.S.* at 229, 117 *S.Ct.* at 2013 (refusing "to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid")).

It is well settled that if a board of education chooses to provide transportation to all children within its school district within reasonable limitations as to distance there would be no violation of the Establishment Clause. The New Jersey Constitution permits the legislature to "... within reasonable limitations as to the distance to be prescribed, provide for the transportation of children within the ages of five and eighteen years inclusive to and from ***any***

school." New Jersey Constitution, Article VIII, § 4, ¶ 3 (emphasis added). Thus, the Legislature has made it mandatory for school districts to provide transportation for all students to and from their schools that meet certain distance requirements under *N.J.S.A.* 18A:39-1.[7] Also, pursuant to *N.J.S.A.* 18A:39-1.1, the Legislature has given the local boards of education the discretion as to whether or not to provide transportation for pupils not covered by *N.J.S.A.* 18A:39-1. *N.J.S.A.* 18A:39-1.1 states:

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[7] 18A:39-1. Transportation of pupils

Whenever in any district there are elementary school pupils who live more than two miles from their public school of attendance or secondary school pupils who live more than 2 1/2 miles from their public school of attendance, the district shall provide transportation to and from school for these pupils. When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil; except that if the district is located in a county of the third class with a population of not less than 80,000 and not more than 120,000 transportation shall be provided to a nonpublic school located outside the State not more than 20 miles from the residence of the pupil, if there is no appropriate nonpublic school within the State located closer to the residence of the pupil; provided the per pupil cost of the lowest bid received does not exceed $675 for the 1992-93 school year or the amount determined for subsequent years pursuant to section 2 of P.L.1981, c. 57 (C. 18A:39-1a), and if such bid shall exceed that cost then the parent, guardian or other person having legal custody of the pupil shall be eligible to receive $675 for the 1992-93 school year or the amount determined pursuant to section 2 of P.L.1981, c. 57 (C. 18A:39-1a) for subsequent years toward the cost of his transportation to a qualified school other than a public school, regardless of whether such transportation is along established public school routes. It shall be the obligation of the parent, guardian or other person having legal custody of the pupil attending a remote school, other than a public school, not operating for profit in whole or in part, to register said pupil with the office of the secretary of the board of education at the time and in the manner specified by rules and regulations of the State board in order to be eligible for the transportation provided by this section. If the registration of any such pupil is not completed by September 1 of the school year and if it is necessary for the board of education to enter into a contract establishing a new route in order to provide such transportation, then the board shall not be required to provide it, but in lieu thereof the parent, guardian or other person having legal custody of the pupil shall be eligible to receive $675 or the amount determined pursuant to section 2 of P.L.1981, c. 57 (18A:39-1a), or an amount computed by multiplying 1/180 times the number of school days remaining in the school year at the time of registration, times $675 for the 1992-93 school year or the amount determined pursuant to section 2 of P.L.1981, c. 57 (C. 18A:39-1a) for subsequent years, whichever is the smaller amount. Whenever any regional school district provides any transportation for pupils attending schools other than public schools pursuant to this section, said regional district shall assume responsibility for the transportation of all such pupils, and the cost of such transportation for pupils below the grade level for which the regional district was organized shall be prorated by the regional district among the constituent districts on a per pupil basis, after approval of such costs by the county superintendent. This section shall not require school districts to provide any transportation for pupils attending a school other than a public school, where the only transportation presently provided by said district is for school children transported pursuant to chapter 46 of Title 18A of the New Jersey Statutes or for pupils transported to a vocational, technical or other public school offering a specialized program. Any transportation to a school, other than a public school, shall be pursuant to the same rules and regulations promulgated by the State board as governs transportation to any public school.

The board of education may make rules and contracts for the pupil transportation provided pursuant to this section.

Nothing in this section shall be so construed as to prohibit a board of education from making contracts for the transportation of pupils to a school in an adjoining district, when such pupils are transferred to the district by order of the county superintendent, or when any pupils shall attend school in a district other than that in which they shall reside by virtue of an agreement made by the respective boards of education.

Nothing herein contained shall limit or diminish in any way any of the provisions for transportation for children pursuant to chapter 46 of this Title.

> In addition to the provision of transportation for pupils pursuant to N.J.S. 18A:39-1 and N.J.S. 18A:46-23, the board of education of any district may provide, by contract or otherwise, in accordance with law, and the rules and regulations of the State board, for the transportation of other pupils to and from school.
>
> Districts shall not receive State transportation aid pursuant to section 25 of P.L. 1996, c. 138 (C. 18A:7F-25) for the transportation of pupils pursuant to this section.
>
> [*N.J.S.A.* 18A:39-1.1.]

The New Jersey Supreme Court has held that the Legislature has not violated the Establishment Clause by extending to a private school student, the right to transportation on the same basis on which transportation would have been available if he attended public school in his district because it is "a measure to aid the student rather than the school he attends; its purpose and primary effect are not to advance religion." *West Morris Regional Bd. of Ed v. Sills*, 58 *N.J.* 464, 472, *cert. denied* 404 *U.S.* 986, 92 *S.Ct.* 450, 30 *L.Ed.*2d 370 (1971).

Lakewood, in its busing policy, provides for the transportation of any child to and from his or her school who resides beyond a specified distance from the school, which is less than the distance for which State law mandates such transportation. This policy applies to any child regardless of whether the child attends public school or private school, which includes parochial schools. Lakewood offers that the policy was instituted for the children's safety and that the policy itself is neutral with respect to race, gender, religion or the type of school a child attends. Lakewood suggests that its implementation of the policy was based upon a host of legitimate issues, such as varying school calendars, schedules and locations. For instance, the existence of an all boys or all girls bus route arises from the fact that the schools that these routes run to and from are attended respectively by boys only and girls only and the bus routes are set up so that each route will pick up children to go directly to their school and likewise drop them off only from that school. The petitioner presents no evidence to show that Lakewood's assertions are just a pretext for some non-secular purpose. He merely presents statistics in what seems like an attempt to somehow show that the children who attend Orthodox Jewish parochial schools disproportionately benefit from Lakewood's school transportation program. Even taking his statistics as true and accurate and even if the Orthodox Jewish children were disproportionately benefiting from the policy, petitioner can not show that Lakewood has violated the establishment

clause, as such factors are irrelevant to the constitutional analysis, simply because these children attend the parochial schools as the result of the private choices of their parents or guardians. Lakewood offers busing on the same terms to all school children in its district, without regard to religion. Such neutrality is present in the policy, as it provides no more to a parochial school student than is provided to a public school student. The petitioner has not presented any evidence, other than his naked assertions, that tend to show that the busing policy as implemented does not have a secular purpose or that it has a primary effect of advancing or inhibiting religion. Therefore, even if the facts and inference therefrom are construed most favorably to the petitioner, I **CONCLUDE** the petitioner cannot show that the respondent's application of its busing policy violates the Establishment Clause of the 1st Amendment of the U.S. Constitution.

In addition, I have dismissed as inherently irrelevant to these proceedings the various arguments made by Mr. Osborne that Lakewood's motion somehow was technically defective. Pursuant to *N.J.A.C.* 1:1-12.1(2), no technical reforms of motion are required. In a motion, a party shall state the grounds upon which the motion is made, the relief or order being sought and the date when the matter shall be submitted to the judge for disposition.

The motion submitted by Lakewood, although awkwardly presented in various submissions, is in full compliance with OAL procedures. In addition, with Mr. Inzelbuch's response to my letter, he set forth chapter and verse exactly what it was he was seeking and why. Penultimately, it should be noted that I have not set forth an exhibit list. The reason is simple. The numbers of submissions and their disarray makes it practically impossible to determine what was and was not meant to be utilized as part of the motion. I reviewed every document submitted in the case and all of those documents remain in the file for further review by the agency head. I cannot, however, rationally set forth in numerical, chronological order what those exhibits are and whether they are or not germane to the issues *sub judice*.

Accordingly, and based upon the foregoing, respondents' motion for summary decision 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.

5/16/03
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

May 20, 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 21 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

WITNESSES

For Petitioner:

For Respondent:

EXHIBITS

As noted at Page 24 of this decision, I could not reasonably list them, the exhibits;
They remain in the file.

OAL DKT. NO. EDU 6438-02
AGENCY DKT. NO. 241-8/02

GEORGE OSBORNE,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY; MEIR GRUNHUT, BOARD PRESIDENT; NORMAN BELLINGER, BOARD VICE PRESIDENT; CHET GALDO, HARVEY KRANZ, SARA LICHTENSTEIN, IRENE MICCIO, ABRAHAM OSTREICHER, NEAL PRICE AND LEONARD THOMAS, MEMBERS OF THE BOARD; AND DR. ERNEST J. CANNAVA, SUPERINTENDENT OF THE LAKEWOOD SCHOOL DISTRICT,	:	COMMISSIONER OF EDUCATION
RESPONDENTS.	:	DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions[1] and respondents' reply 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.

[1]Pursuant to *N.J.A.C.* 1:1-18.4, the parties were permitted to file written exceptions with the Commissioner within 13 days from the date the Initial Decision was mailed. In the instant matter, the Initial Decision was mailed to the parties on May 21, 2003. The parties' exceptions in this matter were therefore due on or before June 3, 2003. Petitioner timely filed exceptions on May 28, 2003 and subsequently submitted "Supplemental Exceptions." Although these "Supplemental Exceptions" were dated and mailed on June 2, 2003, they were not received until June 5, 2003. Since exceptions are considered filed upon receipt (*see N.J.A.C.* 6A:3-1.2), petitioner's "Supplemental Exceptions" were untimely filed and were therefore not considered in making this determination.

Initially, petitioner asserts that the Initial Decision must be rejected in its entirety because it does not contain the elements set forth at *N.J.A.C.* 1:1-18.3. (Petitioner's Exceptions at 2) Specifically, petitioner asserts that:

> 1. The written Initial Decision does not contain an appropriate caption as required by law;
> 2. The written Initial Decision does not contain an appearance of the parties and their representatives as required by law;
> 3. The written Initial Decision does not contain a statement of the issue(s) as required by law;
> 4. The written Initial Decision does not contain a factual finding as required by law;
> 5. The written Initial Decision does not contain a conclusion of law as required by law;
> 6. The written Initial Decision does not contain a disposition as required by law;
> 7. The written Initial Decision does not contain a list of exhibits admitted into evidence as required by law.[2] (*Ibid.*)

Petitioner also takes issue with the ALJ's concluding, without the benefit of discovery or the holding of a plenary hearing, that petitioner does not have standing to pursue any of his claims under the U.S. Constitution or Federal Laws, with the exception of his claims under the Establishment Clause of the First Amendment of the U.S. Constitution. (*Id.* at 3) *Citing, inter alia, Flast v. Cohen*, 392 *U.S.* 83 (1968), *Crescent Park Tenants Ass'n v. Realty*

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[2]It is unclear as to why petitioner objects to the form of the Initial Decision in that the Initial Decision contains an appropriate caption (Initial Decision at 1), clearly lists the appearance of the parties and their representatives (*ibid.*) and contains a disposition of the matter (*id.* at 23). Moreover, as petitioner himself points out, *N.J.A.C.* 1:1-18.3 states that the necessary elements may be combined and need not be separately discussed. (Petitioner's Exceptions at 2) Such is the case in the Administrative Law Judge's (ALJ) statement of the issues (Initial Decision at 7), factual findings (*ibid.*) and conclusions of law (*id.* at 8-23). With respect to the list of exhibits, the ALJ provides the following explanation:

> Penultimately, it should be noted that I have not set forth an exhibit list. The reason is simple. The numbers of submissions and their disarray makes it practically impossible to determine what was and was not meant to be utilized as part of the motion. I reviewed every document submitted in the case and all of those documents remain in the file for further review by the agency head. I cannot, however, rationally set forth in numerical, chronological order what those exhibits are and whether they are or are not germaine to the issues *sub judice*. (*Id.* at 23)

Equity Corp. of N.Y., 58 *N.J.* 98 (1971) and *Silverman v. Board of Ed., Tp. of Millburn*, 134 *N.J. Super.* 253, 257-258 (Law Div. 1975), *aff'd* o.b. 136 *N.J. Super.* 435 (App. Div. 1975), petitioner argues that he has standing to pursue his constitutional claims because there is no bar to taxpayers challenging allegedly unconstitutional federal taxing and spending programs because taxpayers have a personal stake in the outcome. (*Id.* at 4) Petitioner, therefore, contends that there is no reason why the State's liberal approach to standing should not apply to taxpayer suits challenging quasi-legislative actions of a board of education. (*Ibid.*) Petitioner additionally maintains that, since the ALJ determined that he had standing to pursue his Establishment Clause claims, it was erroneous for the ALJ to dismiss those claims without a hearing on the merits. (*Id.* at 8)

Moreover, petitioner avers that material facts in this matter are in dispute with respect to whether state and federal monies are being spent in violation of constitutional protection against the abuse of legislative power so as to preclude this matter from being decided on a summary basis. (*Ibid.*) Petitioner asserts that:

> Specifically, there exists a "genuine issue of material fact" as to whether federal and state taxpayers' money is being used under Lakewood's "courtesy busing" policies programs to:
>
> 1. foster and promote religion in ways that violate state, federal, and school laws, and discriminate against public school students
>
> 2. foster and promote religion in ways that violate state, federal, and school laws, and [segregate] public school students from private students, and boys and girls in violation of state, federal, and school, and
>
> 3. foster excessive government entanglement[.]
>
> (*Ibid.*)

Providing numerous citations with respect to the standards for the granting of summary judgment, *i.e.*, evidential materials must be viewed in the light most favorable to the non-moving party; discovery and a full hearing on the merits of a case should not be prevented simply because the ALJ favors one of several views of evidence; the non-moving party must present enough evidence to demonstrate that a dispute is genuine, *etc.*, petitioner concludes that the grant of summary judgment to respondents "should be reversed" because "there exists a 'genuine issue of material fact'" and respondents are not entitled to summary judgment as a matter of law. (*Id.* at 4-9)

Turning to the issue as to whether the petition in this matter was timely filed, petitioner asserts that he was severely prejudiced by the ALJ's abuse of discretion in concluding that the petition was untimely filed pursuant to *N.J.A.C.* 6A:3-1.3(d). (*Id.* at 9) Petitioner points out that the record is silent on the issue of the timeliness of the filing of the petition and he is now forced to respond to an issue never raised by respondents. (*Id.* at 9 and 12) *Citing Kaprow v. Bd. of Ed. of Berkeley Townsh*ip, 131 *N.J.* 572 (1993), *Borough of Park Ridge v. Salimone*, 21 *N.J.* 28 (1956) and *North Plainfield Ed. Ass'n v. Bd. of Ed. of North Plainfield Borough*, 96 *N.J.* 587 (1984), petitioner contends that he "was obligated to file his claims with the [Department of Education] within 90 days of the date on which he first became aware that he had a 'cause of action' against the board, and not when Local Policy No. 3541.31 was revised on June 12, 1995." (*Id.* at 11)

Moreover, petitioner claims that respondents were put on notice on June 7, 2002 by way of petitioner's signature on a petition calling for the termination of nonpublic school student transportation contacts and a letter of July 17, 2002 to the former Board president. (*Ibid.*) Since petitioner filed his petition on August 2, 2002, petitioner argues, both dates are well

within the 90-day rule specified in *N.J.A.C.* 6A:3-1.3(d). (*Ibid.*) Petitioner further argues that, as stated in *Lopez v. Swyer*, 62 *N.J.* 267, 272 (1973), the discovery rule "shields a plaintiff from the accrual of his cause of action 'until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim'" and that "although an injured party may be aware he suffered an injury, 'the injured party may not know it is attributable to the fault or neglect of another.'" (*Id.* at 12) The ALJ erred, petitioner claims, in dismissing his complaint on the erroneous assumption that petitioner "should have known that a 'facially neutral' local courtesy busing policy was discriminatory" by virtue of his service on the Lakewood School Board. (*Ibid.*) Petitioner therefore concludes that the 90-day rule should be waived and the Initial Decision rejected under the doctrine of fundamental fairness and abuse of discretion. (*Ibid.*)

Petitioner also excepts to the ALJ's raising the defense of laches, an issue which respondents failed to raise themselves, and then erroneously concluding that the petition was barred by laches. (*Id.* at 13) *Citing Dorchester Manor v. New Milford Bor.*, 287 *N.J. Super.* 163, 172 (Law Div. 1994), petitioner argues, *inter alia*, that "[I]n order for laches to apply, the party asserting the doctrine must have 'a justifiable reason to believe that the alleged rights are meritless or have been abandoned.'" (*Id.* at 14) Petitioner asserts that, generally, a factual hearing is required in determining whether the application of laches or estoppel is equitable. *Dorchester* at 173. (*Id.* at 15) Petitioner points to *Enfield v. FWL, Inc.*, 256 *N.J. Super.* 502, 520-521 (Ch. Div. 1991) in arguing that "the length of the delay in assertion of a party's rights is determined with reference to 'the date when alleged legal injury occurred'" and that "a party asserting laches must establish that the other party either knew or, with reasonable diligence and vigilance, could have known of such date of occurrence." (*Id.* at 14)

Clearly, petitioner submits, this means that the equitable defense of laches is to be asserted by a party to the action and respondent did not raise the defense of laches in their Answer to the petition or elsewhere in these proceedings. (*Id.* at 17) Therefore, petitioner reasons, in raising the issue of the timeliness of the petition and the defense of laches, the ALJ improperly abandoned his role as impartial judge and assumed the role of attorney for respondents. (*Ibid.*)

Additionally, petitioner argues, the nature of his complaint, which goes to policy considerations which affect the school tax burden on Lakewood property owners, should dictate hesitation by the Commissioner in applying laches or estoppel in the instant matter. (*Ibid.*) Rather, petitioner asserts that, in challenging the Board's spending habits, he has exercised express statutory rights and that the applicability of laches and estoppel should be determined based on policy considerations related to tax appeals where the right of appeal is constitutionally protected, quoting *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 *U.S.* 18, 36, 110 *S. Ct.* 2238, 110 *L.Ed.*2d 17, 35-36 (1990), which states that "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." (*Id.* at 16-17)

Respondents' reply exceptions acknowledge that the 90-day requirement for the timely filing of relief from the Commissioner was never specifically raised, but notes that respondents did raise the factual issue that petitioner was a sitting member of the Board when the policy in question was revised. (Respondents' Exceptions at 1-2) In so acknowledging, respondents submit that there is no bar to the raising of this issue by the ALJ, noting that an ALJ in *K.C. and C.C. o/b/m J.C. v. Lakewood Board of Education* (OAL Docket No. EDS 739-03/Agency Reference No. 75-3/03), similarly raised said time bar on his own volition. (*Id.* at 2)

Despite protestation by petitioners in that matter, respondents aver, the Commissioner concurred with the ALJ's determination. (*Ibid.*)

Moreover, respondents argue that the application of the 90-day rule will not result in any legally based injustice. (*Ibid.*) Therefore, respondents assert, the strict application of the rule should be applied in that: 1) petitioner was a voting member of the Board when the policy in question was revised; 2) while petitioner's claims are couched in state and federal constitutional terms, none are novel; and 3) the OAL has no jurisdiction to confer much of the relief sought. (*Id.* at 2-3) With respect to petitioner's Establishment Clause claim, respondents state that they will rely on previously submitted legal memoranda. (*Id.* at 3)

BACKGROUND DISCUSSION

Initially, in reviewing the Petition of Appeal,[3] containing 96 enumerated items variously categorized under the headings of "Authority," "Parties," "Standing," "Statement of Facts," and "Counts" I through IV, it is noted that petitioner sets forth the context from which his claims arise by providing a description, from his perspective, of the alleged influence of the Orthodox Jewish population in Lakewood on policies and actions of the Lakewood Board, particularly in the creation and implementation of the school district's busing policy. In summary, petitioner avers that Lakewood has a population of over 60,000 persons, 50% of which are ultra Orthodox Jews and that the ultra Orthodox Jewish community's bloc voting controls the election process. (Petition of Appeal at 4 and 11) Petitioner also states that "[i]f, the ultra Orthodox Jewish community where [sic] to sneeze, the township committee, and the board of

[3] This petition was originally filed as a Verified Petition for Declaratory Judgment. On September 5, 2002, the Commissioner declined to consider this matter as one for declaratory judgment, pursuant to his authority under *N.J.A.C.* 6A:3-2.1(a), and transferred this matter to the OAL for further proceedings.

education would catch a cold. The board is more than 'excessively' entangled with religion. It is joined at the hip with it." (*Id.* at 11) Thus, petitioner claims, the public school district and the sectarian nonpublic schools are "woven together as one fabric with one common goal, and that is to ensure that members of the ultra Orthodox Jewish community are transported to their 'pervasively' sectarian schools in a segregated and separate manner." (*Id.* at 15) Petitioner also claims that "[w]hat the district calls courtesy busing for nonpublic school students has become a private taxi service for the transportation of Orthodox Jewish children." (*Ibid.*) Additionally, petitioner asserts that the courtesy busing of over 6,000 children[4] via routes that: 1) segregate public and nonpublic school students and 2) segregate Orthodox Jewish students by sex violates the federal and state constitutions, the Civil Rights Act, the Law Against Discrimination, and creates an undue burden on the taxpayers of the district.[5] (*Id.* at 5, 9 and 16-18)

Moreover, the following is a *summary* of specific claims asserted by petitioner in the Petition of Appeal. Petitioner seeks a decision that:

> 1. Remedies the distribution of public monies that are being used by the district to finance unlawful discriminatory segregated busing policies that have the "effect" of advancing religion. These unlawful discriminatory busing policies deny public school students free exercise and enjoyment of the right to travel free of discrimination upon intrastate highways, in violation of the Equal Protection and Due Process Clause of the Fourteenth Amendment of the United States Constitution. (Petition of Appeal at 1)

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[4]Respondents contend that the Board transports 4,231 nonpublic school students with non-mandated transportation, and that, of these 4,231 students, 3,805 are Orthodox Jewish students, representing 64% of the total number of students that are transported daily via the school district's courtesy busing services, but that regardless of the numerical discrepancy, "the District's busing policies are neutral in nature and apply equally to all students regardless of race, religion, gender or school of attendance." (Answer at 9 and 11)

[5]Petitioner presents calculations indicating that the Lakewood School District spends in excess of 4 million dollars yearly to transport its students and that over 2 million dollars of these transportation costs are for courtesy busing services. (Petition of Appeal at 5) Although respondents in their Answer state that they leave petitioner to his proofs with respect to these costs, it is noted that respondents' Exhibit F confirms that these costs are accurately represented. (Answer at 8-11 and Exhibit F)

2. Finds that the Lakewood School District has disbursed federal funds under the Elementary and Secondary Education Act of 1965 to finance instruction and the purchase of educational materials for use in religious and "pervasively" sectarian schools, in violation of the Establishment and Free Exercise clause of the First Amendment. (*Ibid.*)

3. Finds that respondents have created unlawful discriminatory segregated routes that are designed solely for the transportation of "pervasively" sectarian Orthodox Jewish parochial school students. (*Id.* at 19)

4. Finds that respondents have adopted, implemented and maintained student transportation policies that discriminate against similarly situated pubic school students and have failed to revise transportation policies to ensure that similarly situated public school students are not discriminated against. (*Ibid.*)

5. Finds that respondents have failed to desegregate and have failed to eliminate segregation in the transportation of all public and nonpublic school students. (*Ibid.*)

6. Finds that respondents have failed to assure that the district transportation policies are in full compliance with the Constitutional, Federal, and State antidiscriminatory provisions and have failed to require plans providing for the transportation of public and nonpublic students in an integrated setting. (*Ibid.*)

7. Finds that respondents have failed to require the development and implementation of concentrated and aggressive outreach and recruitment efforts to improve and maximize integrated travel for all pupils. (*Ibid.*)

Petitioner's constitutional claims are as follows:

1. Respondents have created unlawful discriminatory and segregated routes designed solely for the transportation of Orthodox Jewish parochial school students in violation of the Equal Protection and Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. (*Id.* at 17)

2. Respondents have designed bus routes solely for the purpose of transporting parochial nonpublic school students in a manner that is different from that of public school students, *i.e.*, Orthodox Jewish students are transported to their parochial

schools in a segregated manner so as to not come into contact with public school students and Orthodox Jewish boys and girls are transported to their respective schools on separate buses. These acts of respondents violate the Establishment Clause of the First Amendment to the U.S. Constitution. (*Ibid.*)

3. The discriminatory, segregated routes designed solely for the transportation of Orthodox Jewish parochial nonpublic school students violates Section 201(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000a (a) (1964 ed.) and Section 207 (b) of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. 2000a-6 (b) (1964 ed.) The Board is also in violation of Section 601 of Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, "prohibits any recipient of federal financial assistance from discriminating on the basis of race color, or national origin in any federally funded program. (*Id.* at 18)

4. The discriminatory, segregated routes designed solely for the transportation of Orthodox Jewish parochial nonpublic school students violates Article I.1 and 5 of the New Jersey Constitution which provides in part: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."[6] (*Ibid.*)

5. The discriminatory, segregated routes designed solely for the transportation of Orthodox Jewish parochial nonpublic school students violates the New Jersey Law Against Discrimination, Title 10:1-5, which provides, in part: "The remedies provided

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[6]Notwithstanding petitioner's "quote" from Article I.1 and 5 of the New Jersey Constitution, the Commissioner observes that the language contained in these sections is as follows:

Article I.1

All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

Article I.5

No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.

> in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right." (*Ibid.*)

Additionally, referring to his petition, petitioner states in his exceptions that:

> The complaint alleged that Lakewood's "courtesy busing" policies and programs were carried-out in a manner that violates the New Jersey Law Against Discrimination, Title10:1-5; Article I.1 and 5 of the New Jersey Constitution; The [Establishment] Clause of the First Amendment to the United States Constitution; The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; Section 601 of Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, "prohibits any recipient of federal financial assistance from discriminating on the basis of race, color, or national origin in any federally funded program."[7] (Petitioner's Exceptions at 3)

Additionally, petitioner states that he "seeks to invalidate the Lakewood Board of Education Local Policy 3541.31, and all district state-sponsored, NON-MANDATED, public school 'courtesy busing' transportation policies, practices, and programs***." (Petitioner's February 10, 2003 Memorandum of Law in Opposition to Respondents' Motion for Summary Judgment at 26) Thus, the *primary* focus of petitioner's claims is directed toward the Board's busing policy and its implementation.

Respondents answer petitioner's claims by stating that the transportation service provided to all children residing in Lakewood "is *not* discriminatory, does *not* advance religion in an impermissible manner, nor is same in violation of Federal or State law." (Answer at 1,

[7]It is noted that petitioner makes no mention in his exceptions of his claim that the Lakewood School District has disbursed federal funds under the Elementary and Secondary Education Act of 1965 to finance instruction and the purchase of educational materials for use in religious and sectarian schools.

emphasis in text) Respondents further claim that, with the adoption of Local Policy No. 3542.31 on June 25, 1975, and revised on June 12, 1995 providing all school children transportation between their homes and schools within clearly defined riding limits, the Board has been directly busing children, whether public, nonpublic, religious or nonreligious to their school of attendance for nearly thirty (30) years. (Motion for Summary Judgment at 3) Moreover, respondents claim that children are bused upon public policy concerning the safety of children and other neutral factors, such as school calendars and school schedules. *(Id.* at 3-4) While acknowledging that boys and girls are transported in separate buses to those Orthodox Jewish parochial schools that are same sex schools, respondents point out that "[s]everal parochial schools, including, but not limited to, Holy Family, Calvary Academy, and the Bezalel Yeshiva (an Orthodox Jewish day school), have bus routes wherein boys and girls are transported together***." (*Id.* at 6)

With respect to petitioner's allegation that the Lakewood School District has disbursed federal funds under the Elementary and Secondary Education Act of 1965 to finance instruction and the purchase of educational materials for use in religious and sectarian schools in violation of the Establishment and Free Exercise clause of the First Amendment, respondents deny the allegations "based on a Corrective Action Plan filed by the Lakewood Board of Education and accepted by the State Department of Education." (Answer at 1-2) Additionally, respondents point out that "[t]he Lakewood Board of Education has a responsibility to fulfill 'child find' requirements as delineated in Section 613 (a)(3) of the Individuals with Disabilities Education Act ("*IDEA*") including religious school children, 20 U.S.C. § 1412(a)(10)(A)(ii) and 34 CFR § 300.451; equitable participation under "IDEA" Part B, *N.J.A.C.* 6A:14-6.1; Chapter 192 services such as Child Study Team Examination and Classification Services, the provision of

textbooks, Chapter 226 services such as Nursing and Transportation Services." (Certificate of Counsel in Support of Respondents' Motion for Summary Judgment at 6)

COMMISSIONER'S DECISION

TIMELINESS OF THE FILING OF THE PETITION AND APPLICATION OF LACHES

Initially, the Commissioner finds that consideration of the timeliness of the filing of the petition and the application of laches by the ALJ was inappropriate in this matter as these were not affirmative defenses raised by respondents.[8] In so concluding, it is noted that the Supreme Court in *Zaccardi v. Becker*, 88 *N.J.* 245, 256 (1982), found that:

> At the outset we note that statutes of limitations are not self-executing. Such statutes are based on the goals of achieving security and stability in human affairs and ensuring that cases are not tried on the basis of stale evidence. *Galligan v. Westfield Centre Service*, 82 *N.J.* 188, 191-92 (1980); *Tevis v. Tevis*, 79 *N.J.* 422, 430 (1979); *Kaczmarek v. N.J. Turnpike Authority*, 77 *N.J.* 329, 337-38 (1978). Because they are based on these specific policies, *they must be raised as affirmative defenses*, subject to judicial modification in appropriate circumstances. Mechanistic application of such statutes could unnecessarily sacrifice individual justice in particular circumstances. (emphasis added)

Moreover, assuming, *arguendo,* for purposes of this discussion, that Lakewood's busing policy and its implementation are discriminatory and contrary to Federal and State laws as petitioner claims, each act in designing and implementing the discriminatory and unlawful busing policy would constitute a pattern of discrimination and a continuing violation of law and, thus, the statute of limitations would begin only when the wrongful action ceases. As set forth by the Appellate Court in *Bollinger v. Bell Atlantic,* 330 *N.J. Super.* 300, 306 (App. Div. 2000):

[8] The Commissioner observes that the record is devoid of any claim by respondents that they have suffered prejudice or that they are unable to present a defense because petitioner did not assert his claims in a timely manner.

> For causes of action arising under anti-discrimination laws, however, a judicially created doctrine known as the continuing violation theory has developed as an equitable exception to the statute of limitations. (citations omitted)
>
> New Jersey recognizes the existence of a similar "continuing tort doctrine," which is unrestricted to discrimination claims and provides that when an individual experiences a "continual, cumulative pattern of tortious conduct" the limitations period begins only when the wrongful action ceases. *Wilson v. Wal-Mart Stores* 158 *N.J.* 263, 272, 729 A.2d 1006 (1999).***
>
> Two types of continuing violations are recognized in the federal context: (1) "systemic violations," which originate in a discriminatory policy or practice that continues into the limitations period, and (2) "serial violations," which consist of a various number of discriminatory acts, all emanating from the same discriminatory animus, where each act nonetheless constitutes a separate actionable wrong. *Thomas v. Eastman Kodak Co.*, 183 *F.*3d 38, 53 (1st Cir.1999), *cert denied*, ____U.S.___, 120 *S. Ct.* 1174, 145 *L.Ed.*2d 1082 (2000); *accord Bullington v. United Air Lines, Inc., supra,* 186 *F.*3d at 1311.

Additionally, the Supreme Court in *Wilson, supra,* at 273 observed that "***a significant number of courts recognize that the cumulative effect of a series of discriminatory or harassing events represents a single cause of action for tolling purposes and that the statute of limitations period does not commence until the date of the final act of harassment." *See also Terry v. Mercer County Bd. of Chosen Freeholders,* 173 *N.J. Super.* 249 (App. Div. 1980).

Accordingly, in that respondents did not raise untimely filing or laches as affirmative defenses in this matter, and given the probability that petitioner's allegations of discrimination and violations of Federal and State laws, if found to be true, would constitute a continuing violation, the Commissioner declines to apply the filing limitation of the 90-day

period set forth at *N.J.A.C.* 6A:3-1.3(d) or to apply laches in this matter.[9]

SUMMARY DECISION

After an exhaustive review of the papers filed in this matter, the Commissioner has determined that grant of summary decision to respondents 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 petitioner's assertion to the contrary, 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." Thus, all the issues characterized by petitioner as "genuine issues of material fact" set forth in petitioner's exceptions, *i.e.*, whether federal and state taxpayers' money is being used under Lakewood's courtesy busing policy to foster and promote religion, discriminate against public school students, segregate public and private school students and segregate boys and girls in violation of state, federal and school laws are issues calling for a legal conclusion

[9] Notwithstanding this conclusion, the Commissioner cannot ignore that petitioner failed to file a petition with respect to Lakewood's busing policy for seven years following its revision to its present form. The busing policy at issue is neither a new busing policy nor a new burden to petitioner as a taxpayer. The Board's Policy No. 3541.31, which provides courtesy busing services to all children residing in the school district within specified distance limitations, was adopted on June 25, 1975 and revised on June 12, 1995. Petitioner was a voting member of the Board seven years ago when Lakewood's busing policy in its present form was revised and implemented. There is nothing in the record to suggest that petitioner voted against the busing policy when it was revised or that he raised any concerns at the time of the revision. Moreover, there is also nothing in the record to suggest that petitioner raised any concerns with respect to the implementation of Lakewood's busing policy during the two years he served on the Board following the revision. Nor does petitioner assert that anything has changed with respect to the busing policy or its implementation in the five years since his service on the Board. Thus, it is reasonable to conclude that petitioner bears some responsibility for the formation and the implementation of the busing policy which he now claims is contrary to State and Federal laws.

with respect to the effect, consequence or interpretation of the school's busing policy as applied, not disputed "material facts" as presented by petitioner.[10] "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 agrees that respondents are entitled to prevail as a matter of law for reasons provided in the Initial Decision and explicated below.

DISBURSEMENT OF FEDERAL FUNDS UNDER THE ELEMENTARY AND SECONDARY ACT OF 1965

Initially, the Commissioner notes that petitioner's claim that the Lakewood School District has disbursed federal funds to finance instruction and the purchase of educational materials for use in religious and sectarian schools stems from the ALJ's findings in the matter entitled *C.L. and B.L., on behalf of C.L. v. Lakewood Township Board of Education*, OAL Dkt. No. EDS 878-01, decided August 3, 2001. (Petition of Appeal at 11) As a result of the ALJ's

[10] It is noted that respondents do not dispute that some of its bus routes transport boys and girls separately to same sex Orthodox Jewish parochial schools, but points out that bus service provided to parochial schools also includes the transportation of boys and girls together to parochial schools, including an Orthodox Jewish day school. (Answer at 12)

determination in that matter, the Board filed a "Plan of Compliance" with the Department of Education on March 18, 2002, which was revised on April 11, 2002 and approved by the Department of Education on April 15, 2002. (Certification of Counsel in Support of Respondents' Motion for Summary Judgment, Exhibit A, Answer at 34 and Respondents' Exhibit B Attached to Answer) In that petitioner merely quotes verbatim from the ALJ's decision in that matter (Petition of Appeal at 11, Nos. 46, 47, 48 and Affidavit of George S. Osborne in Opposition to Respondents' Motion for Summary Judgment at 4-7), and does not present any facts or allegations beyond what was resolved in that case, nor does he allege that the Board's "Plan of Compliance" approved by the Department is not being followed, the Commissioner dismisses petitioner's claim with respect to this issue.[11] Accordingly, petitioner's remaining claims all relate to the Lakewood Board's courtesy busing policy and its implementation.

JURISDICTION AND STANDING

Initially, as fully set forth by the ALJ, the Commissioner emphasizes that, to the extent that petitioner is asserting a facial constitutional challenge to Lakewood's busing policy, the Commissioner lacks jurisdiction to consider his claims. (Initial Decision at 14-15) However, jurisdiction does exist to the extent that petitioner is asserting that Lakewood's Policy No. 3541.31 regarding the busing of students has been unconstitutionally applied by the Lakewood Board.[12] (*Ibid.*)

[11] It is noted that the ALJ did not address this issue in the Initial Decision. Neither did petitioner address this claim in his exceptions.

[12] The Commissioner notes that "[a]dministrative agencies have power to pass on constitutional issues only where relevant and necessary to the resolution of a question concededly within their jurisdiction." *Christian Bros. Inst. v. No. N.J. Interschol. League*, 86 *N.J.* 409, 416 (1981), *citing to Hunterdon Cent. High Sch. Bd. of Ed. v. Hunterdon Cent. High Sch. Teachers' Ass'n,* 174 *N.J. Super.* 468, 474-475 (App. Div. 1980), *aff'd* o.b., 86 *N.J.* 43 (1981).

With respect to the question of petitioner's standing to pursue his claims under the U.S. Constitution or Federal Laws, the Commissioner fully agrees that, with the exception of petitioner's claim that Lakewood's busing policy as applied violates the Establishment Clause of the First Amendment, petitioner has not established that he has standing to pursue his claims under the U.S. Constitution or Federal Laws. Notwithstanding petitioner's assertion that there is no bar to taxpayers challenging allegedly unconstitutional federal taxing and spending programs because taxpayers have a personal stake in the outcome (Petitioner's Exceptions at 4), as pointed out by the ALJ, in responding to a motion for summary judgment petitioner bears the burden of establishing specific facts showing that he has suffered an "injury in fact--an invasion of a legally protected interest"; and that, generally, people have no standing as taxpayers to claim that expenditures violate federal law or the U.S. Constitution, except when a taxpayer brings a claim that a policy as applied violates the Establishment Clause of the First Amendment of the Constitution. *Lujan, supra,* and *Flast, supra.* (Initial Decision at 15-16) In the instant matter, petitioner claims that he has standing to pursue his claims under the U.S. Constitution or Federal Laws *solely* on the basis that he is a resident taxpayer. In so doing, petitioner has presented no specific facts, only naked assertions, that he has, in fact, suffered an injury from which he is legally protected under the U.S. Constitution or Federal Laws. The Commissioner, therefore, finds that petitioner has standing only with respect to his claim that Lakewood's busing policy, as applied, violates the Establishment Clause of the First Amendment of the Constitution.

The Commissioner, however, disagrees with the ALJ's conclusion that petitioner does not have standing with respect to his New Jersey Constitutional claims. As noted by the ALJ, the New Jersey Courts and the State administrative system have adopted a very liberal approach to standing in order to provide easy access to the legal system. (Initial Decision at 16)

In *In the Matter of Camden County v. Board of Trustees of the Pub. Employees Retirement System (PERS) and William J. Simon*, 170 *N.J.* 439, 446-447 (2002), the Supreme Court observed that:

> Only "[a] substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision is needed for the purposes of standing." *New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n*, 82 *N.J.* 57, 67, 411 *A.*2d 168 (1980) (citations omitted). Generally, a person who has suffered any economic detriment as a result of an administrative agency action can gain standing for judicial review of that action without proving any unique financial damages. See *Walker v. Borough of Stanhope*, 23 *N.J.* 657, 662-63, 130 *A.*2d 372 (1957) (noting numerous decisions of courts adopting broad approach to standing where residents and taxpayers sought to set aside wrongful official action).

Thus, while petitioner in this matter is neither a student nor the parent of a student in the school district, petitioner has presented convincing arguments that, as a resident and a taxpayer, he is directly affected by the annual expenditure of 2 million dollars for courtesy busing of students in the Lakewood School District. *See also West Village Civic Club, Inc. and Arthur Silverstein v. Board of Education of the Township of Manchester and Joel P. Oppenheim, Superintendent of Schools, Ocean County*, decided by the State Board, June 5, 1996, where petitioning resident taxpayers were found to have standing to challenge a superintendent's contract which guaranteed an additional annual expense which had not been included in the superintendent's previous contract. Accordingly, the Commissioner concludes that petitioner has demonstrated a sufficient stake in the outcome of the proceedings to confer standing to pursue his New Jersey Constitutional claims.

Notwithstanding this conclusion, however, the Commissioner finds that petitioner has not met his burden of presenting specific facts to demonstrate that Lakewood's busing policy is being applied in a discriminatory manner in violation of Article I.1 and/or 5 of the New Jersey

Constitution, nor does he allege that the courtesy busing services being provided in accordance with Policy No. 3541.31 are not being provided to all students residing in Lakewood without regard to whether they attend public, private or parochial schools. Respondents aver that its bus routes are designed to transport students to their individual schools to account for varying school calendars, schedules and locations and acknowledge that, in some instances, boys and girls are transported separately because the students have chosen to attend boys only or girls only parochial schools. While it is true that this individual school transportation scheme also means that public and private students do not ride together because they attend different schools, petitioner has presented no evidence that Lakewood's busing program transporting students to their individual schools has been designed as a pretext for discrimination.

Turning to petitioner's claims of discrimination on the basis of race, gender and religion under the New Jersey Law Against Discrimination (LAD), even accepting all of petitioner's statements regarding the religious and racial statistics in Lakewood as true and considering the undisputed fact that boys and girls are being transported separately to their individual schools by the Lakewood School District, as well as other information in the record, petitioner has provided no evidence of invidious discrimination. As found in *Kenny, supra,* at 257, "[m]ere inequality or difference in treatment does not suffice to support a charge of unconstitutional discrimination." Moreover, "a classification must be upheld under any reasonable set of facts unless there is a showing of invidious discrimination." (*Ibid.*) Accordingly, the Commissioner concludes that petitioner has failed to establish a claim upon which relief can be granted under the LAD.[13]

[13] The Commissioner notes that petitioner did not except to the recommended dismissal of his claims under the LAD for failure to state a claim upon which relief can be granted as set forth in the Initial Decision.

ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT OF THE U.S. CONSTITUTION

As noted above, in that the U.S. Supreme Court has held that taxpayers have standing to challenge statutes or rules under the Establishment Clause of the First Amendment, the Commissioner finds that petitioner has standing to pursue his Establishment Clause claim.[14] *Flast, supra.*

In evaluating petitioner's Establishment Clause claim, the Commissioner points out that the Courts have consistently held that governments are permitted to use tax dollars to aid religious schools as long as the aid has a secular purpose and does not have the primary effect of advancing or inhibiting religion. *See Lemon, supra; Mitchell, supra,* and *Agostini, supra*; and Initial Decision at 19. With respect to the use of tax dollars to transport students to school, the New Jersey Legislature has made it mandatory that school districts provide transportation to *all* students, including private and parochial school students, to and from their schools within certain specified distance requirements[15] and, additionally, has provided school districts the discretion to provide non-mandated transportation, *i.e.* courtesy busing, to its students. *N.J.S.A.* 18A:39-1 *et seq.* Moreover, as noted by the ALJ in quoting *West Morris Regional Bd. of Ed., supra,* "[t]he New Jersey Supreme Court has held that the Legislature has not violated the Establishment Clause by extending to a private school student, the right to transportation on the same basis on which transportation would have been available if he attended public school in his district because it is 'a measure to aid the student rather than the school he attends; its purpose and primary effect are not to advance religion.'" (Initial Decision at 22)

[14] The Establishment Clause prohibits the making of any law respecting the establishment of any religion.

[15] Payment of aid in lieu thereof is permitted in certain specified circumstances.

In the instant matter, Lakewood's busing policy provides for the transportation of all resident students, including children in public, private and parochial schools, to and from his or her school within certain specified distances that are less than the distances mandated in *N.J.S.A.* 18A:39-1, as follows:

> The Lakewood Board of Education may, in addition to other factors, take into consideration in determining authorized bus routes, the existing unsafe conditions that pupils be subjected to if required to walk.
>
> Students living in the Lakewood school district shall be entitled to transportation between their homes and schools in accordance with the following riding limits as measured portal-to-portal: kindergarten through grade 6, a distance of one mile or more; grades 7 through 8, one and one-half miles or more; and grades 9 through 12, two miles or more.
>
> Students, upon approval of the Superintendent of Schools or his/her designee, with at least ten (10) days prior notice, shall be transported other than between their homes and schools, when on those special occasions the destination changes due to school-related activities, provided that there is no additional cost to the district. (Answer, Exhibit I, Board's Policy No. 3541.31)

Respondents assert that this policy was instituted for student safety and that its policy applies to all students within the school district without regard to race, gender, religion or the type of school the student attends. As noted above, respondents maintain that bus routes are designed to transport students separately to their individual schools to account for varying school calendars, schedules and locations. It is undisputed that, as a result of this scheduling decision, boys and girls are, in some instances, transported separately because the students have chosen to attend boys only or girls only parochial schools. It is also undisputed that all students in the school district, whether public, private, or parochial, are provided transportation services separately to their individual schools in the same manner.

Moreover, petitioner presents no facts to contravene Lakewood's explanation that its decision to provide courtesy busing services to its students is because of safety concerns, nor has petitioner offered facts that would support a conclusion that the implementation of Lakewood's busing policy is a pretext for some non-secular purpose or that the busing policy has the *primary* effect of advancing or inhibiting religion. Petitioner's arguments primarily focus on the expense of providing courtesy busing and the makeup of the population in Lakewood and his perception that the Orthodox Jewish children benefit disproportionately from Lakewood's busing policy due to the large Orthodox Jewish population. While this *may* be true, there is nothing in the record to suggest that Lakewood does not offer the same transportation services to all children in the school district, without regard to religion, so the mere fact that significant numbers of the children in Lakewood attend parochial schools as a result of parental choice does not establish that the busing policy at issue and its implementation has a non-secular purpose. Even construing the facts and the inferences therefrom in the light most favorable to petitioner, therefore, the Commissioner concludes that petitioner has not shown that respondents' application of its busing policy violates the Establishment Clause of the First Amendment of the U.S. Constitution.

Finally, the Commissioner recognizes petitioner's frustration that 4 million dollars (2 million dollars of which is spent for courtesy busing) is spent to bus children to and from school each year and acknowledges that this expenditure has an impact on the taxpayers in Lakewood. However, even if petitioner would prefer to eliminate the 2 million dollar expense to provide courtesy busing services for students or choose to spend this money in a different manner, *N.J.S.A.* 18A:39-1.1 provides boards of education with the authority (but not the obligation) to provide courtesy busing services. Thus, it is the Lakewood Board, as elected

representatives of the community, which is vested with the discretion to make the determination as to whether to provide non-mandated busing services.

Accordingly, in that petitioner has failed to demonstrate that Lakewood's Busing Policy No. 3541.31 and its implementation are contrary to law, respondents' motion for summary decision is granted and the petition in the instant matter is dismissed for the reasons set forth above.

IT IS SO ORDERED. [16]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 26, 2003

Date of Mailing: August 27, 2003

[16] 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.*

600-03

IN THE MATTER OF THE TENURE	:	
HEARING OF DARIN MC DONALD,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
CAMDEN, CAMDEN COUNTY.	:	

October 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL Dkt. No. EDU 2800-03

Agency Ref. No. 53-2/03

CAMDEN CITY BOARD OF EDUCATION,

Petitioner,

v.

DARIN MCDONALD,

Respondent.

Karen A. Murray, Esq., for petitioner (Murray and Murray, attorneys)

Keith Waldman, Esq., for respondent (Selikoff and Cohen, PA, attorneys)

Record Closed: May 22, 2003 Decided: August 28, 2003

BEFORE **ANA C. VISCOMI**, ALJ:

Respondent has filed a letter brief in support of its motion to dismiss the tenure charges in lieu of filing an answer in accordance with *N.J.A.C.* 6A:3-1.4 and *N.J.A.C.* 6A:3-1.10. The basis for which respondent seeks to dismiss the tenure charges is respondent's contention that the

charges were not properly certified by the Camden Board of Education in accordance with *N.J.S.A.* 18A:6-11. Respondent's motion is hereby **DENIED** for reasons set forth below.

I **FIND** the following to be the facts with regard to the pending motion. A special Board of Education meeting was held on February 5, 2003. Seven of nine Board members were present. In accordance with the Tenure Employee Hearing Act, *N.J.S.A.* 18A:6-11, the Board deliberated the charges and voted on the issues of certification and suspension in closed session. Furthermore, in accordance with an established procedure, one Board member moved to certify the charges to the Commissioner of Education and another member seconded the motion. In the context of the closed session, the Board Secretary conducted a roll call and recorded the votes of all seven members present on an official voting sheet. All seven members present voted in favor of certifying the charges to the Commissioner.

Respondent asserts that the charges were not properly certified by the Board in that the resolution indicating the charges were certified by a recorded roll call vote of a majority of the members at the special meeting on February 5, 2003 does not indicate that such a vote was taken. Relying upon *N.J.A.C.* 18A:6-11, respondent asserts the charges must be dismissed as the Board's official minutes of that meeting contradict the claim in that no such vote is recorded. In addition, respondent asserts that as Camden is subject to the Municipal Rehabilitation and Recovery Act, *N.JS.A* 52:27BBB-63i., every official Board action must comport with the requirements of the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et seq.*

Respondent's rationale is rejected. The Tenure Employee Hearing Act at *N.J.S.A* 18A:6-11 requires that the considerations and actions of the Board as to any charge "shall not take place at a public meeting." The Open Public Meetings Act has not been frustrated as the Board complied with the procedural requirements at the special meeting held on February 5, 2003. Had the minutes of the meeting included the Board's deliberation and vote, the Board would have been in violation of the Tenure Employee Hearing Act. The regulations promulgated pursuant to the Tenure Employee Hearing Act at *N.J.A.C.* 6A:3-5.2(a) provides that:

> the certificate of determination which accompanies the written charges shall contain a certification by the district Board of Education secretary or the state district superintendent:
>
> 1. that the district board of education of the state district superintendent has determined that the charges and evidence in support of the charges are sufficient, if true in fact, to warrant dismissal or a reduction of salaries;
>
> 2. are the date, place and time of the meeting at which such determination was made and whether or not the employee was suspended and, if so, whether such suspension was with or without pay;
>
> 3. that such determination was made by a majority vote of the whole number of members of the district board of education or by the state district superintendent in accordance with *N.J.S.A.* 18A:7a-39; and
>
> 4. in the case of a charge of inefficiency, that the employee was given at least 90 days prior notice of the nature and particulars of the alleged inefficiency.

Petitioner complied with the statute and regulations. Section 9 of the Introductory Statement to the Open Public Meetings Act provides in pertinent part that

> Minutes must be promptly available to the public, except for the material covering meetings or portions of meetings closed to the public.

Based on the foregoing, respondent's motion to dismiss in lieu of filing answer is hereby **DENIED** and respondent is directed to file an answer to the petition and this matter shall be returned to the Commissioner for a determination on the sufficiency of the charges.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 28, 2003
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

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

August 28, 2003
DATE

Mailed to Parties:

SEP 5 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/jck

OAL DKT. NO. EDU 2800-03
AGENCY DKT. NO. 53-2/03

IN THE MATTER OF THE TENURE	:	
HEARING OF DARIN MC DONALD,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
CAMDEN, CAMDEN COUNTY.	:	

The record and Initial Decision issued by 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 in this matter, the Commissioner concurs with the determination of the Administrative Law Judge that the instant tenure charges are not appropriately dismissed on procedural grounds. *See In the Matter of the Tenure Hearing of Caricella Major, School District of the City of Orange,* 1991 *S.L.D.* 1143; *also see In the Matter of the Tenure Hearing of Thomas L. Puryear, School District of the City of Newark*, 1977 *S.L.D.* 934.

It is noted that prior to the issuance of the Commissioner's decision herein, respondent submitted an Answer to the underlying tenure charges in this matter. Subsequent to receipt of respondent's Answer, the Commissioner reviewed the tenure charges and deems them sufficient, if true, to warrant respondent's dismissal or reduction in salary.

Accordingly, the Initial Decision of the OAL is adopted. This matter is being transmitted to the OAL, pursuant to *N.J.S.A.* 18A:6-16 as amended by *P.L.* 1998, *c.* 42, for adjudication.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10|14|03
Date of Mailing: 10|15|03

* 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.*

602-03

IN THE MATTER OF THE TENURE HEARING :

OF MARLENE L. KAMLER, NEW JERSEY : COMMISSIONER OF EDUCATION

STATE DEPARTMENT OF HUMAN SERVICES. : DECISION

October 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 00022-03S

AGENCY DKT. NO. 396-12/02

NEW JERSEY DEPARTMENT OF HUMAN SERVICES,

Petitioner,

v.

MARLENE L. KAMLER,

Respondent.

Steven L. Scher, Deputy Attorney General, for petitioner (Peter C. Harvey, Attorney General of New Jersey, attorney)

Nicole DeCrescenzo, Esq., for respondent (Weissman & Mintz, attorneys)

Record Closed: August 21, 2003 Decided: September 3, 2003

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

This matter arises from filing of tenure charges by the New Jersey Department of Human Services ("petitioner"), against Marlene L. Kamler ("respondent") for excessive absenteeism. The case was transmitted to the Office of Administrative Law ("OAL") from the Department of Education on January 9, 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.

September 3, 2003
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

9-4-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 5 2003

DATE

OFFICE OF ADMINISTRATIVE LAW

Attachment

mjm

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STATE OF NEW JERSEY
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2003 AUG 21 P 2:47

PETER C. HARVEY
ACTING ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625
Attorneys for Respondent

By: Steven L. Scher
Deputy Attorney General
(609) 292-8555

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL Docket No.: EDUTH 00022-03
Agency Ref. No.: 396-12/02

IMO Tenure Hearing for: Marlene Kamler	)	**SETTLEMENT AGREEMENT**

This matter was transmitted to the Office of the Administrative Law pursuant to N.J.S.A. 52:14B-1.18 and N.J.S.A. 52:14B-14F-1 to 15.

This Settlement is made between Marlene Kamler, employee (appellant), and the New Jersey Department of Human Services, Agency. The parties agree to settle this matter in accordance with the following terms:

1. The appellant Marlene Kamler will withdraw her appeal of the Certificate of Determination of Tenure Charges assessing a ten day suspension without pay.

2. The respondent shall reduce the suspension from ten days without pay to five days without pay. The Agency shall within a reasonable time, reimburse the appellant for 5 days back pay or $1,158.23.

3. Both parties agree to fully comply with the provisions of the Federal Family and Medical Leave Act ("FMLA"). The Agency acknowledges that the FMLA provides for intermittant leave.

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 personnel file for the appellant shall be amended to reflect the provisions of this settlement.

6. This settlement shall not constitute a precedent in any other matter involving another employee.

7. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. The disciplinary penalty cited in this agreement may be utilized in determining the appropriate penalty in future disciplinary actions.

8. This agreement will only become effective when it is approved by the Department of Education. Any disapproval by the Department shall operate to return the parties to the status quo pre-agreement

9. 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: 7/31/03

, for Dept. of Human Services

DATED: 6/25/03

Marlene Kamler

DATED: 6/17/03

Appellant's Attorney

DATED:

PETER C. HARVEY
ACTING ATTORNEY GENERAL

By:
Steven L. Scher
Deputy Attorney General

OAL DKT. NO. EDU 00022-03
AGENCY DKT. NO. 396-12/02

IN THE MATTER OF THE TENURE HEARING :

OF MARLENE L. KAMLER, NEW JERSEY : COMMISSIONER OF EDUCATION

STATE DEPARTMENT OF HUMAN SERVICES. : 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. *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.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10|17|03

Date of Mailing: 10|17|03

603-03

LOUIS SORRENTINO, BRENDA SORRENTINO, MARIO SORRENTINO, ANNA SORRENTINO, AND BRAD SORRENTINO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

October 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 0108-03

AGENCY DKT. NO. 4-1/01

LOUIS SORRENTINO, BRENDA SORRENTINO, MARIO SORRENTINO, ANNA SORRENTINO AND BRAD SORRENTINO,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,

Respondent.

Robert G. Daroci, Esq., for petitioners

Ben A. Montenegro, Esq., for respondent (Wilbert, Montenegro & Thompson, attorneys)

Record Closed: August 14, 2003 Decided: September 3, 2003

BEFORE **JOHN SCHUSTER III**, ALJ:

In this matter petitioners challenge the respondent's determination that petitioner, Brad Sorrentino, did not reside in the respondent's school district at the time he was attending the

respondent's high school. This matter was transmitted to the Office of Administrative Law (hereafter "OAL") on January 15, 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 scheduled for hearing at the OAL in Mercerville, New Jersey, on August 11, 2003. Prior to that date, the parties met and negotiated the matter.

The parties have agreed to a settlement and have prepared a Settlement and Stipulation of Dismissal (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 representatives' signatures on said document.

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.

September 3, 2003
DATE

JOHN SCHUSTER III, ALJ

Receipt Acknowledged:

9-5-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 9 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jh

DOCUMENTS IN EVIDENCE

Joint exhibits:

J-1 Settlement and Stipulation of Dismissal

WITNESS LIST

For petitioners:

None

For respondent:

None

8/14/03

FILED
STATE OF N.J.
OFFICE OF ADM'N LAW

2003 AUG 14 A 10:06

Wilbert, Montenegro & Thompson, P.C.
531 Burnt Tavern Road
P.O. Box 1049
Brick, NJ 08724
(732) 295-4500
Attorneys for Respondent, Brick Township Board of Education

LOUIS SORRENTINO and BRENDA SORRENTINO, h/w; MARIO SORRENTINO and ANNA SORRENTINO, h/w; and BRAD SORRENTINO

Petitioner,

v.

BRICK TOWNSHIP BOARD OF EDUCATION,

Respondent.

OFFICE OF ADMINISTRATIVE LAW

DOCKET NO. EDUOS-00108-03S

Civil Action

SETTLEMENT AND STIPULATION OF DISMISSAL WITH 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 costs against any party, with prejudice.

Dated: 8/7, 2003

By _____
Robert Daroci, Esq.
Attorney for Petitioners

WILBERT, MONTENEGRO & THOMPSON, P.C.

Dated: 8/11, 2003

By _____
BEN A. MONTENEGRO, ESQ.
Attorney for Respondent

40

LOUIS SORRENTINO, BRENDA SORRENTINO, MARIO SORRENTINO, ANNA SORRENTINO, AND BRAD SORRENTINO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Dismissal with Prejudice, 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 notes the absence of the terms of the parties' settlement so as to permit his review, pursuant to *N.J.A.C.* 1:1-19.1. The Commissioner has, therefore, determined to consider the parties' Stipulation of Dismissal with Prejudice as the parties' withdrawal of the asserted claims and counterclaims in this matter, pursuant to *N.J.A.C.* 1:1-19.2.

Accordingly, the Commissioner approves the parties' withdrawal of their claims in the instant matter. Given this conclusion, this matter is no longer deemed to be a contested case before the Commissioner and the within matter is, therefore, dismissed, with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/03

Date of Mailing: 10/22/03

605-03

R.P., on behalf of minor child, J.J.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY, AND BARKER BUS COMPANY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner challenged her daughter's record of suspensions and discipline.

The ALJ concluded that the Board demonstrated that there were no genuine issues of material fact requiring a hearing and that the Board was entitled to prevail as a matter of law. Some of the allegations were time barred (strip search and harassment by a bus driver) while other allegations failed since the Board proved it acted within its authority and its decisions were entitled to a presumption of correctness (dress code, assault and detention matters). The ALJ granted the Board's Motion for Summary Decision and dismissed the Petition of Appeal.

The Commissioner determined that to the extent he has jurisdiction to hear and decide this matter, he concurred with the findings and conclusions of the ALJ. He determined, however, that the evidence later placed on the record concerning J.J.B.'s classification for special education indicated that this matter was not properly before the Commissioner. The petition was dismissed.

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

October 27, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 738-03

AGENCY DKT. NO. 362-11/02

R. P., ON BEHALF OF MINOR CHILD, J. J. B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY, AND BARKER BUS COMPANY,

Respondents.

R. P., petitioner, *pro se*

Paul H. Green, Esq., for respondent Board of Education (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

No appearance has been entered by or on behalf of respondent Barker Bus Company

Record Closed: July 28, 2003 Decided: September 11, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner R.P. filed papers with the New Jersey Commissioner of Education on November 13 and 27, 2002, and January 8, 2003, that together were deemed to constitute a

verified Petition of Appeal. Respondent Board of Education of the Township of Bedminster filed an Answer to the Petition of Appeal on February 10, 2003. Respondent Barker Bus Company did not submit an Answer. On March 6, 2003, the matter was transmitted to the Office of Administrative Law for determination as a contested case, and a prehearing conference was held on June 13, 2003. Petitioner's core challenge concerns her daughter J.J.B.'s record of discipline and suspensions, and she alleges various incidents that she asserts demonstrate that respondents have conspired against J.J.B., have harassed her, and have punished her excessively.

Respondent Board of Education has moved for summary decision, pursuant to *N.J.A.C.* 1:1-12.5, asserting that there are no genuine issues of material fact and that it is entitled to prevail as a matter of law. Petitioner responded in opposition to the motion, and respondent Board thereafter filed a reply to petitioner's papers. On July 28, 2003, I determined that all of the papers on the motion for summary decision had been received, and the record closed on that date.

DISCUSSION

Petitioner's request for relief alleges that J.J.B. was given excessive punishment as compared to other children on one occasion during the 2001-02 school year and on two occasions in October 2002. Petitioner further alleges that Diane Schmidt, Interim Principal of the Bedminster School, improperly questioned J.J.B. about an assault allegedly committed by J.J.B. at the A&P, that at the end of the 2001-02 school year, J.J.B. was strip-searched by school personnel after a student had told them that J.J.B. was in possession of marijuana, and that several years ago, J.J.B. was verbally harassed by a bus driver of the Barker Bus Company, with which the Board had contracted for student transportation services.

In its moving papers, the Board set forth the following facts, supported by the affidavits of its employees, Interim Principal Diane Schmidt, and Andrew Rinko, Ed.D., Superintendent of Schools:

> During the 2002-03 school year, J.J.B. was a seventh grade student at the Bedminster School, a public school operated by the Board. On or about October 11, 2002, J.J.B. was issued a one day out-of-school suspension for being disrespectful towards authority figures. In late

> October of 2002, J.J.B. was issued a ten day out-of-school suspension after she hit a male student on the back of his head, causing the child to suffer a recurrence of a previous head injury. The decision to suspend J.J.B. for a period of ten days was made by the Interim Principal in consultation with the Superintendent of Schools and the school's child study team. Petitioner does not deny that J.J.B. engaged in the misconduct which resulted in her suspensions. *See* November 6, 2002 Petition.
>
> Prior to the October suspensions, J.J.B. had engaged in other misconduct earlier in the 2002-03 school year for which she had not been suspended. The suspensions of J.J.B. in October were based solely upon J.J.B.'s misconduct and were not excessive as compared to discipline received by other students of the Bedminster School.
>
> In November of 2002, J.J.B. and her mother moved out of the Bedminster Public School District. J.J.B. no longer attends school in the District. Upon transfer of a student to a school outside of the District, the Board forwards the student's academic records to the new school. The Board generally does not transmit the student's disciplinary records to the new school.

The Board contends on several grounds that it is entitled to prevail as a matter of law. First, it asserts that petitioner's claims are moot. Petitioner and her minor daughter moved out of the District on or about November 14, 2002, just after filing the petition in the present matter. Since there is no continuing relationship between J.J.B. and the Board, the Board's actions regarding J.J.B. are not capable of being repeated. The Board cites *Spivak v. Westwood Regional High School District*, 97 *N.J.A.R.2d* (EDU) 270, 272, for the proposition that an action is considered moot when it no longer presents a justiciable controversy because the issues involved have become academic. A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.

The Board also contends that most of petitioner's claims are time-barred, and therefore must be dismissed. 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." Thus, petitioner's claims regarding a suspension occurring during the 2001-02 school year, a strip-search occurring during the 2001-02 school year, and harassment of

J.J.B. by a bus driver several years ago are time-barred and must be dismissed. For the same reason, petitioner's claims against Barker Bus Company are time barred and must be dismissed.

The Board further contends that to the extent any of petitioner's claims are deemed to be neither moot nor time barred, those claims must nevertheless be dismissed since they do not constitute claims upon which relief can be granted. Specifically, the only claims raised by petitioner that may be in compliance with the 90-day limitation concern the two suspensions given to J.J.B. in October 2002, and the allegation that Interim Principal Schmidt questioned J.J.B. regarding an assault allegedly committed by J.J.B. at an A&P. As to the latter claim, although the Board denies that the questioning actually occurred, such questioning of a student regarding an assault that allegedly involved the student is well within the scope of a school principal's authority, regardless of where the alleged assault occurred. *In re State in the Interest of G.C.*, 121 *N.J. Super.* 108, 117 (J. & D. R. Ct. 1972).

With regard to petitioner's claims concerning the October 2002 suspensions, a local board of education has the authority to impose discipline upon the students under its care, and the decision of a local board as to the appropriate penalty to be imposed upon a student for a disciplinary infraction should not be disturbed absent evidence that the board's action was arbitrary, capricious, or unreasonable. In J.D. *and E.D. obo B.D. v. Bd. of Ed. of Toms River Reg. Sch. Dist.*, OAL Dkt. No. EDU 6009-97 (February 17, 1998), the Commissioner of Education adopted the determination of the administrative law judge granting summary decision in favor of the local board of education:

> Upon careful and independent review, the Commissioner concurs with the ALJ that the Board's motion for summary decision may be properly granted. Even accepting as true the facts alleged by petitioners the Commissioner finds that they have failed to meet their burden of proving that the Board's decision to suspend B.D. for one day, out of school, is arbitrary, capricious or unreasonable. In this regard, the Commissioner underscores the ALJ's observation that B.D.'s use of profanity was the result of her own exercise of free will in her choice of words, and may not be viewed as an act of "self-defense," deserving of a lesser penalty.

The Board further notes that under the New Jersey School Laws, suspensions may be imposed for continued or willful disobedience, open defiance of authority, physical assault on another pupil, as well as other forms of student misconduct. *N.J.S.A.* 18A:37-2. Significantly, petitioner does not deny that J.J.B. engaged in the misconduct for which she was suspended in October 2002. The Board argues moreover that petitioner has presented no evidence to support her conclusory allegation that J.J.B. was disciplined more severely than other students, and emphasizes that, in light of the severity of J.J.B.'s misconduct, petitioner cannot show that the suspensions were arbitrary, capricious, or unreasonable.

The Board's final argument in its moving papers is that petitioner is not entitled to the relief she seeks in her petition. Petitioner requests that the Commissioner permanently remove Interim Principal Schmidt from her position with the Bedminster School and charge her with harassment and conspiracy against an emotionally disabled child. The Board notes that non-tenured certificated staff of a local board of education, such as Mrs. Schmidt, may be removed from their employment by the local board only upon the recommendation of the Superintendent of Schools. *N.J.S.A.* 18A:16-1.1; *N.J.S.A.* 18A:27-4.1(b). The Commissioner has no authority to remove a non-tenured building principal from her position, and has no authority to charge a school employee with "harassment" and "conspiracy," as these are criminal charges under *N.J.S.A.* 2C:33-4 and *N.J.S.A.* 2C:5-2, respectively, over which the Commissioner would have no jurisdiction. *N.J.S.A.* 18A:6-9.

Petitioner also requests financial relief. However, the Board asserts that the Commissioner of Education's authority to award monetary damages is very limited, occurring in cases such as those seeking lost earnings or restoration of an increment improperly withheld. *Spivak, supra,* at 272. There is no authority to award monetary damages in circumstances such as those present in this case.

In her response to the motion for summary decision, petitioner disagreed with respondent Board's legal arguments that her claims are moot, time barred, or not susceptible to relief by the Commissioner. She further stated in her brief that she charges the respondents with the following:

1. Mrs. Schmidt harassing J.J.B. and S.B. about "headbands being gang related" because they wore a headband to School on or about October, 2002 when other children wore Headbands without anyone saying anything. Mrs. Roth and Mrs. Fitzmaurice were present with Petitioner. Testimony is required in trial.

2. Mrs. Schmidt harassing J.J.B. and asking her to confess to assault about A&P incident which was a non-school incident because "she was part of a gang in that incident" around October, 2002. Mrs. Schmidt stated "Sometimes children are good, but when they get together they do things they normally would not do by themselves" on October, 2002, with Mrs. Roth and Mrs. Fitzmaurice were present with Petitioner. Testimony is required in trial.

3. Fabricating story about J.J.B. giving child [J.G.] receiving a head injury from child play slap. J.J.B. was suspended for 10 days for this alleged injury under false pretences. I will subpoena Mr. and Mrs. [G.] to court for the trial to get their testimony on this story. BOE has not furnished any facts about any other child that suspended for 10 days at Bedminster for doing anything.

4. Stating that J.J.B. is a "violent child" to fit conspiracy and discrimination against children story in Bedminster on October, 2002 with Mrs. Roth and Mrs. Fitzmaurice were present with Petitioner. These people need to testify in a trial.

5. In June 2002 J.J.B. was required to pull her pants down and searched because a child falsely accused her of having marijuana. Mrs. Fitzmaurice, Mrs. Shabot, and Mr. Beltramba need to testify in a trial. Report by DYFS take by Ms. Stephanie Wilson about June 30, 2002 will support this fact in trial. Report taken by James Gregory in May, 2003 will state his finds in this Institutional Abuse complaint by the Petitioner.

6. J.J.B. was accused of her "kid's tattoo" being gang related by Mrs. Schmidt with Petitioner, Mrs. Roth, and Mrs. Fitzmaurice present in October, 2002. These witnesses need to testify.

7. Mrs. Schmidt stating harassing remark about J.J.B. "When children act like this their parents take them to St. Clairs Hospital," with Petitioner, Mrs. Roth, and Mrs. Fitzmaurice present in October, 2002. These people need to testify in a trial.

8. During the school year 2000/2001 J.J.B. was continually harassed by the Barker Bus Company driver. Mr. Beltramba did not investigate the bus driver's story and kept issuing bus suspensions.

A parent [M.M.] came forward and said J.J.B. was not doing anything except the first time with the bus driver. BOE or Barker Bus Company did nothing to apologize to J.J.B. or issue any punishment to the driver. She was extremely upset and punished over and over for something she did not do. J.J.B. was given cruel and excessive punishment for something she did not do over and over again.

9. In the school year 2002, J.J.B. was given a detention for waiving to a teacher during a detention. This is excessive and cruel punishment to an emotional disabled child.

10. J.J.B. was sent to the office for saying "I found my paper" in a loud voice. This is excessive punishment.

11. J.J.B.'s disciplinary records were transferred to the new school where the original suspension notice in blue pen signed by Diane Schmidt sits in her file. There are other documents written by hand without any signature or any indication who wrote them they look extremely suspiciously false. There are multiple copies of one disciplinary sheet that was copied and whited out to look like there were occurrences of this document.

In its reply to petitioner's opposition brief, respondent Board argues that none of the eleven separate allegations requires an evidentiary hearing, either because the allegations are stale and barred by the applicable statute of limitations, or because the allegations, even if accepted as true, do not constitute a claim upon which relief can be granted. The Board further contends that it is entitled to summary decision based upon the arguments set forth in its initial brief. I agree.

Summary decision may be granted by an administrative law judge "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b). This evidence is to be considered in the light most favorable to the non-moving party. *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 523 (1995). The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." *Id.* at 536. The rationale behind the procedure is clear. Summary decision is:

> designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly shows not to present any genuine issue of material fact requiring disposition at a trial. *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954).

As respondent aptly argued, some of petitioner's claims are time barred, pursuant to *N.J.A.C.* 6A:3-1.3(d), because her petition of appeal was filed subsequent to the expiration of the 90-day limitation. The first petition document was filed November 13, 2002. Thus, the claims concerning discipline and a strip search allegedly occurring during the school year ending in June 2002 are time barred and must be dismissed. I so **CONCLUDE**. For the same reason, I **CONCLUDE** petitioner's allegations regarding harassment by a bus driver and claims against Barker Bus Company from previous years are time barred and must be dismissed. Petitioner was aware of each of the actions or events at the time they occurred; yet she failed to file a petition of appeal within the requisite 90-day limitation.

It is axiomatic that when a local board of education acts within its authority, its decision is entitled to a presumption of correctness. The Board's decision may not be disturbed absent a finding that it was arbitrary, capricious or unreasonable. Petitioner's claims that are not time barred must be evaluated in this context.

As to petitioner's claim that J.J.B. was asked to remove her headband on the basis that it appeared to be gang related attire, such an action would be well within the authority of a local board of education. *N.J.S.A.* 18A:11-9 provides in part that a board of education may adopt a dress code to prohibit students from wearing on school property any type of clothing, apparel or accessory which indicates that the student has membership in, or affiliation with, any gang associated with criminal activities. In the absence of evidence showing that respondent Board acted in an arbitrary, capricious, or unreasonable manner, petitioner cannot prevail on this claim as a matter of law and it should be dismissed. I so **CONCLUDE.** By the same reasoning, I **CONCLUDE** that petitioner's claim that J.J.B. was accused of wearing a gang related tattoo should be dismissed.

It is well within the scope of a school principal's authority to question a student regarding an assault in which the student was allegedly involved. *In re State in the Interest of G.C.*, 121 *N.J. Super.* 108, 117 (J. & D. R. Ct. 1972). So, even if Interim Principal Schmidt actually questioned J.J.B. about an alleged assault, which the Board denies, I **CONCLUDE** that petitioner cannot prevail on this claim as a matter of law and it should be dismissed. Respondent Board also denies petitioner's allegations that Mrs. Schmidt stated that J.J.B. is a "violent child" and that "when children act like this their parents take them to St. Clair's Hospital." Even if these statements were made, petitioner has not shown how they are beyond the scope of authority of the Board's employee. These do not constitute claims upon which relief may be granted, and I **CONCLUDE** these claims should be dismissed.

On or about October 11, 2002, while she was a seventh grade student at the Bedminster School, J.J.B. was issued a one day, out-of-school suspension for being disrespectful towards authority figures. Petitioner acknowledges that her daughter was openly defiant. Later that month, J.J.B. was issued a ten day out-of-school suspension after she hit another student on the back of his head. While petitioner disputes the degree of injury J.J.B. caused the other child to suffer, she admits that this misconduct occurred. The decision to suspend J.J.B. for a period of ten days was made by the Interim Principal in consultation with the Superintendent of Schools and the school's child study team. The suspension decisions are authorized by the New Jersey School Laws, which provide that suspensions may be imposed for continued or willful disobedience, open defiance of authority, physical assault on another pupil, as well as other forms of student misconduct. *N.J.S.A.* 18A:37-2. Absent any evidence in this matter that could support a conclusion that the Board's action was arbitrary, capricious, or unreasonable, the decision of the local board as to the appropriate penalty to be imposed for these disciplinary infractions should not be disturbed. Petitioner cannot prevail on her claims regarding the suspensions as a matter of law and they should be dismissed. I so **CONCLUDE.**

In regard to petitioner's allegations that J.J.B. was excessively punished by a detention for waiving to a teacher while in detention, and by being sent to the office for saying "I found my paper," it is well settled that a local board of education has the authority to discipline its students. Given the presumption of correctness that applies to the Board's actions, such discipline should not be overturned absent evidence that the actions were arbitrary, capricious, or unreasonable.

There is no such evidence here, so I **CONCLUDE** that petitioner cannot prevail as a matter of law and these claims should be dismissed.

Petitioner and J.J.B. moved out of the Bedminster School District in November 2002. Petitioner alleges in her response to the motion for summary decision that J.J.B.'s disciplinary records were transferred to her new school. Such a transfer would be in accordance with the law's requirements. *N.J.S.A.* 18A:36-25.1(b) provides that when a child transfers from one school district to another, the receiving school shall obtain the child's school record from the district from which the child has transferred. The school district of last attendance shall provide to the receiving district all information in the child's record related to disciplinary actions taken against the child by the district, and written consent of the parent shall not be required as a condition of the transfer of information. Thus, petitioner's assertion does not constitute a claim for which relief can be granted.

Petitioner is not entitled to the relief she seeks in her petition. Her request that the Commissioner permanently remove Interim Principal Schmidt from her position with the Bedminster School and charge her with harassment and conspiracy cannot be granted. Non-tenured certificated staff of a local board of education, such as Mrs. Schmidt, may be removed from their employment by the local board only upon the recommendation of the Superintendent of Schools. *N.J.S.A.* 18A:16-1.1; *N.J.S.A.* 18A:27-4.1(b). The Commissioner has no authority to remove a non-tenured building principal from her position, and the Commissioner is also without jurisdiction to bring criminal charges against a school employee under *N.J.S.A.* 2C:33-4 or *N.J.S.A.* 2C:5-2 for harassment or conspiracy. *N.J.S.A.* 18A:6-9. Finally, petitioner's claims gain no greater legal sufficiency for being accompanied by a claim for monetary damages, inasmuch as such damages cannot be awarded by the Commissioner. *Spivak v. Westwood Regional High School District*, 97 *N.J.A.R.2d* (EDU) 270, 272.

Based upon the foregoing reasons, I **CONCLUDE** that respondent Board has demonstrated that there are no genuine issues of material fact requiring a hearing and that it is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b). Therefore, respondent Board's Motion for Summary Decision is **GRANTED** and I **ORDER** that the Petition of Appeal be **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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 11, 2003
DATE

Joseph F Fidler
JOSEPH F. FIDLER, ALJ

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

September 11, 2003
DATE

Mailed to Parties:

SEP 15 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For petitioner:

Brief in Opposition to Motion for Summary Decision

For respondent:

Brief in Support of Motion for Summary Decision, with attached Affidavits; Brief in Reply to Opposition Motion

WITNESSES

For petitioner:

None

For respondent:

None

OAL DKT. NO. EDU 738-03
AGENCY DKT. NO. 362-11/02

R.P., on behalf of minor child, J.J.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY, AND BARKER BUS COMPANY,	:	DECISION
RESPONDENTS.	:	

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

This matter was opened before the Commissioner of Education by Petition of Appeal and a letter requesting emergent relief dated November 13, 2002. By letter dated November 14, 2002 from the New Jersey Department of Education, petitioner was apprised of the deficiencies in her petition and request for emergent relief. Additionally, due to the nature of her claims, petitioner was specifically advised therein:

> that to the extent any issues related to your claim(s) herein implicate education programming and services regulated by Section 504 of the Rehabilitation Act of 1973 and/or the Individuals with Disabilities Education Act (IDEA), any such claim must be pursued before the Office of Special Education pursuant to *N.J.A.C.* 6A:14-1.1 *et seq.* (Letter from Director, Bureau of Controversies and Disputes at 2)

A copy of the letter was also sent to the Board Secretary, Superintendent and County Superintendent. Thereafter, although petitioner perfected her Petition of Appeal, she did not file

a proper application for emergent relief pursuant to *N.J.A.C.* 6A:3-1.6. Neither did petitioner clarify, amend or withdraw her petition in response to the Director's advisement, noted above.

The Board filed its Answer with Separate Defenses on February 6, 2003.[1] Notably, although the Answer addressed petitioner's substantive claims regarding the discipline issued to J.J.B. as raised in the Petition of Appeal, the Board did not indicate that J.J.B. had been classified while attending school in its District. Neither did the Board raise, within its Separate Defenses, the issue of the Commissioner's jurisdiction herein. Therefore, this matter was transmitted to the OAL for proceedings.

While at the OAL, the following evidence was placed on the record:

- A copy of a report from an IEP conference held for J.J.B. April 11, 2002, when J.J.B. was in sixth grade. The report indicates that J.J.B. is "eligible for special education services in the category of Emotionally Disturbed based on her initial assessment and eligibility of 4/6/01." (Bedminster Township School District IEP, received by the OAL on May 1, 2003 and again on May 28, 2003)
- A letter dated November 1, 2002 from Joyce Fitzmaurice, Director of Student Services for the Board, to petitioner, stating, in pertinent part:

> As [J.J.B.] has been suspended for more than ten days this academic year, it is required that we hold a "manifestation determination" meeting to address such issues as to the appropriateness of [J.J.B.'s] IEP and placement and whether her behavior is manifestation of her disability.
>
> We will hold this meeting on Monday, November 11th, at 9:00 a.m. [J.J.B.'s] teachers, the Child Study Team, the principal and I will be present. You are invited to attend.*** (Fitzmaurice's Letter, November 1, 2002, received by OAL on May 28, 2003)

[1] The delay in filing an Answer was due to petitioner's improper service of the Petition of Appeal.

- A letter dated November 20, 2002 from Joyce Fitzmaurice, enclosing a copy of the manifestation determination that was developed at the aforementioned meeting, wherein it was found that J.J.B.'s "behavior is judged to be a manifestation of her disability."[2] (Fitzmaurice's Letter and Report, November 20, 2002, received by OAL on May 28, 2003)

- An Affidavit dated April 23, 2003 from Diane Schmidt, Interim Principal of the Bedminster School, affirming, in pertinent part:

> In late October of 2002, J.J.B. was issued a ten (10) day out of school suspension after she hit a male student on the back of his head, causing the child to suffer a recurrence of a previous head injury. The decision to suspend J.J.B. for a period of ten (10) days was made by me in consultation with the Superintendent of Schools as well as the Director of the Child Study Team.*** (Brief on Behalf of Respondent Board of Education of the Township of Bedminster In Support of Motion for Summary Decision Pursuant to *N.J.A.C.* 1:1-12.5, Affidavit of Diane Schmidt at 2)

Upon careful review of the record as supplemented at the OAL, the Commissioner determines that to the extent he has jurisdiction to hear and decide this matter, he concurs with the findings and conclusions of the ALJ. However, notwithstanding the parties' silence in their initial pleadings as to J.J.B.'s classification for special education, a fact which is of paramount importance when considering student discipline issues, the evidence later placed on this record strongly indicates that this matter is not properly before the Commissioner.[3] *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; s*ee also*, *East Brunswick Board of Education v. New Jersey*

[2] Petitioner was not listed as attending the meeting.

[3] The Commissioner so concludes, notwithstanding that the record additionally contains a letter dated July 10, 2003 from petitioner to respondent's counsel, wherein petitioner states, in pertinent part, "Let me also remind out [sic] that JJB is not classified as an emotionally disturbed child.*** (Letter from Petitioner to Paul Green, Esq., July 10, 2003, received by the OAL on July 11, 2003)

State Board of Education, EHLR DEC. 554:122 (DCNJ 1982); *A.N. v. Clark Bd. of Ed.*, 6 *N.J.A.R.* 360 (1983).

Accordingly, the within Petition of Appeal is dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 10/27/03

Date of Mailing: 10/27/03

[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.*

606-03

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
RESPONDENT.	:	

October 27, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2711-03

AGENCY DKT. NO. 108-4/03

C.B. O/B/O C.B. AND J.B.,

Petitioner,

v.

PENNSVILLE OF EDUCATION

Respondent.

C.B. parent appearing *pro se* for petitioners

Gary M. Salber, Esq., for respondent (Karr & Salber, attorneys)

Record Closed: September 8, 2003 Decided: September 8, 2003

BEFORE **W. TODD MILER,** 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).

The hearing was secheulded for July 7, 2003. Prior to a hearing, the parties conferred and arrived at a settlement agreement, and the terms were reduced to writing in the attached stipulation of 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 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)

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.

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.

9-8-03
DATE

W S Miller
W. TODD MILLER, ALJ

Sept. 11, 2003
DATE

M Kathleen Duncan (ta)
DEPARTMENT OF EDUCATION

SEP 12 2003

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

FILED

SEP 0 12 51 AM '03

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,	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
vs.	:	OAL DOCKET NO. EDUOS 02711-03S AGENCY REF. NO. 108-4/03
TOWNSHIP OF PENNSVILLE BOARD OF EDUCATION Respondents.	:	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:

Dated: August 5, 2003

OAL DKT. NO. EDU 2711-03
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
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 President[1] of the Pennsville Township Board of Education signed the Stipulation of Settlement and 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 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.

[1] The Commissioner notes that the proposed settlement agreement does not identify the name and title of the person signing the agreement on behalf of the Board, nor is the Commissioner able to discern the name of the person signing on behalf of the Board from the signature. However, a letter in the file from counsel for the Board states:

> Enclosed please find original and two (2) copies of the Stipulation of Settlement which has been signed by both (C.B.) and the President of the Pennsville Township Board of Education in connection with the above-referenced matter. (Board Counsel's Letter of August 5, 2003)

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.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 10/27/03

Date of Mailing: 10/27/03

[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.*

607-03

J.K. AND S.K., on behalf of minor child, D.K.. :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY, : DECISION

RESPONDENT. :

October 27, 2003



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09074-02

AGENCY DKT. NO. 265-8/02

J.K. AND S.K. ON BEHALF OF MINOR CHILD D.K.,

Petitioners,

v.

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,

Respondent.

Brian J. Halligan, Esq., for petitioners (Crawford & Hillgan, attorneys)

Philip E. Stern, Esq., for respondent (Sills, Cummis, Radin, Tischman, Epstein and Gross, attorneys)

Record Closed: July 24, 2003 Decided: September 12, 2003

BEFORE **LESLIE Z. CELENTANO,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on October 11, 2002, 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 September 12, 2003. Prior to the date of hearing the parties agreed to settle this matter. The attached Settlement Agreement was submitted 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.

September 12, 2003
DATE

LESLIE Z. CELENTANO, ALJ

Receipt Acknowledged:

9/16/03
DATE

M. Kathleen Duncan (CT)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 22 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

da

SETTLEMENT AGREEMENT

This Settlement Agreement is made this 24 day of July, 2003, by and between the Village of Ridgewood Board of Education ("Board"), and J.K. and S.K. o/b/o of minor child, D.K. ("Petitioners").

RECITAL

WHEREAS, the Board and Petitioners have been involved in a Litigation styled, J.K. and S.K. o/b/o of minor child, D.K. v. Board of Education of the Village of Ridgewood, Docket No.: EDU DS-09074-02M (hereinafter referred to as "the Litigation"); and

WHEREAS, the Board and Petitioners desire to resolve amicably and in good faith all matters and issues arising out of the Litigation;

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 acknowledge, the Board and Petitioners agree as follows:

ARTICLE I

WITHDRAWAL OF PETITION

For its obligations pursuant to this agreement, Petitioners hereby withdraw the Litigation styled J.K. and S.K. o/b/o of minor child, D.K. v. Board of Education of the Village of Ridgewood, Docket No.: EDU DS-09074-02M.

ARTICLE II

TERMS OF SETTLEMENT

2.1 Consideration - As consideration of Petitioner's withdrawal of the Litigation as set forth herein, the Board hereby rescinds the suspension of Petitioners' minor child that is underlying the cause of the Litigation. The Board has signed a letter on its letterhead attached hereto stating that the suspension of the child that took place on or about May 9, 2002, is hereby

rescinded.

ARTICLE III

MISCELLANEOUS

3.1. Entire Agreement – This 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 to set forth herein, and as set forth in any other documents executed directly or in connection with this Agreement. No condition or provision of this Agreement may be modified, waived or revised in any way except in writing executed by all parties and referring specifically to this Agreement.

3.3. No Admissions – Nothing contained in this 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.

3.4 Binding Effect – This 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.

3.5 Governing Law and Choice of Forum – This 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.

3.6 Partial Invalidity – In the event any provision of this Agreement is held to be contrary to or invalid under the laws of any country, state, municipality or other jurisdiction, such illegality or invalidity shall not affect in any way any of the other provisions hereof, all of which shall continue in full force and effect.

3.7 Captions – The captions set forth in this 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 Agreement.

3.8 Signature in Counterpart - This 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.

3.9 Authorization - The undersigned officer of the Board hereby represents that he/she is fully authorized by the Board to execute this agreement on the Board's behalf.

3.10 Investigations - The parties to this Agreement acknowledge and agree that they have entered into this 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 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 Agreement.

3.11 Construction and Enforcement - The terms of this 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 Agreement to be drafted.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date above written.

BOARD
Robert A. Weakley
Director of Human Resources

Dated: July 24, 03

PARENT - Susan Knudsen

PARENT - John Knudsen

689244.1

J.K. AND S.K., on behalf of minor child, D.K..	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN 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 Director of Human Resources of the Ridgewood Board of Education signed the Settlement Agreement on behalf of the Board.[1] In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Director of Human Resources 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

[1] Notwithstanding the provision in Item 3.9 of the Settlement Agreement that states that "The undersigned officer of the Board hereby represents that he/she is fully authorized by the Board to execute this agreement on the Board's behalf," the Board's attorney is the only individual who may sign on behalf of the Board without submission of a Board resolution approving the settlement.

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: 10/27/03

Date of Mailing: 10/27/03

[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.*

610-03

610-03E

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

October 29, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING PETITIONERS' MOTION FOR EMERGENT RELIEF

OAL DKT. NO. EDU 6982-03

AGENCY DKT. NO. 382-10/03

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

Petitioners,

v.

BRIDGEWATER –RARITAN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent.

D.T. and M.T., petitioners, *pro se*

Daniel C. Soriano, Jr., Esq., for respondent (Soriano & Soriano, attorneys)

Record Closed: October 21, 2003 Decided: October 21, 2003

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

PROCEDURAL HISTORY

This matter was initiated by the petitioners D.T. and M.T. instituting a motion for emergency relief seeking to bar the imposition of a five-day bus suspension for their child, N.T., pending appeal of the matter on a plenary basis. This suspension is scheduled to commence tomorrow, Wednesday, October 22, 2003. The matter was heard commencing at 1:00 p.m. in the afternoon of the preceding day, October 21, 2003, the morning having been set aside for in-depth

in chambers discussions which weren't successful in respect to a settlement. Nevertheless, the Board has withdrawn and will formally do so by letter of counsel all other disciplinary actions pending against N.T. occurring during the 2002-2003 school year. That includes the withdrawal of a matter already and currently pending before the OAL docketed EDU 470-03. At my request, counsel will submit a formal letter of withdrawal as soon as possible.

The current motion for emergency relief seeks to stay the implementation of a five-day school bus suspension imposed upon N.T. based upon conduct allegedly committed by him on a school bus on October 7, 2003. The supportive documentation in respect to that conduct has been provided by the Board via affidavits of the bus driver as well as by the Bridgewater-Raritan Regional Board of Education principal of the middle school. The Zimmerman Affidavit notes that she has been employed with the District as a school bus driver and that she was, in fact, performing her duties on October 7, 2003 when the incident occurred at approximately 2:30 p.m. There is no dispute that N.T. was a passenger on the bus. The bus had been parked along the curb of the middle school loading students to return them to their bus stops and allow them to go home. The rear emergency roof hatch had been opened approximately three inches above the bus roof for purposes of ventilation only. Zimmerman alleges that when N.T. entered the bus, N.T. wanted to shut the rear emergency roof hatch. Zimmerman told him not to touch the roof hatch. N.T. did not listen to her and turned the red handle of the emergency roof hatch "causing the roof hatch to open as an emergency exit and setting off an alarm." Zimmerman Affidavit, Paragraph 4. As a consequence, it was necessary for the District's safety coordinator to reset the hatch in order to turn off the emergency alarm.

She further alleges that following this incident, she proceeded on her bus route and N.T. proceeded to exit the bus at a stop which was not his. Zimmerman attests that she admonished him two or three times to return to the bus but N.T. refused. He had neither permission nor authority to get off the bus at a stop other than his bus stop.

As an incident to the affidavit, Ms. Zimmerman and the respondent submitted a bus conduct report dated the date of the incident, October 7, 2003, and attached to the affidavit. In the report, Zimmerman notes in handwriting, "I had the emergency door and roof opened for air, he [illegible] back windows and wanted to shut emergency door. I told him not to touch it but he

didn't listen. He released the door completely from bus using red handle. Then [N.T.] got off bus" at a stop other than his own despite admonition by the driver to the contrary. The affidavit submitted by Nancy Mahoney, the principal of the middle school, indicates that when she became aware of the allegations set forth by Ms. Zimmerman, she concluded that N.T.'s conduct violated school policy 3711-3-R. That policy, which is attached to the affidavit, sets out the parameters of students' conduct on the bus and sets forth the justification for the imposition of discipline should that conduct be improperly exercised by the student. It is clear that the alleged actions by N.T. would directly violate the policy.

Ms. Mahoney notes as well that this was the second infraction by N.T. during the current school year which required an exclusion from the bus for a period of five school days. Mahoney advised as well that she sent a letter to N.T.'s mother, dated October 13, 2003, advising of the suspension, and based upon the mother's request, the suspension was delayed until October 22, 2003.

In addition, Ms. Mahoney notes that the policy previously alluded to mandates that students exit and enter the bus at their designated bus stops. This, by N.T.'s own written admission, was not done. Mahoney also advises that it was her understanding that when she made an effort to discuss the incident of October 7 with N.T., she was advised that based upon his father's instructions, he would not speak with her when summoned to her office. She characterizes this as an unacceptable situation indicating that under law N.T. must submit himself to authority.

As noted previously, N.T. submitted a handwritten statement which was neither certified nor in the form of an affidavit. In the interest of justice, however, I permitted the document to be admitted for purposes of the motion. He acknowledges closing the emergency roof hatch; however, he indicates that he was given permission to do so by the driver, Ms. Zimmerman. He further acknowledges making an effort to pull the roof hatch down but he was unable to move it, so he consequently pulled the red handle thinking that it would be effective to accomplish his ends. Once he did this, and presumably once the alarm was activated, Ms. Zimmerman, pursuant to N.T.'s written statement, screamed "I told you not to turn the red handle." N.T., in his written statement, denies having heard her say that. N.T. acknowledges getting off the bus at an

impermissible bus stop with a friend so as to visit the friend's home. He further notes that he was never admonished by the driver to remain on the bus.

A temporary restraint is an extraordinary equitable remedy, utilized primarily to preclude and prevent irreparable harm; it must, therefore, be administered with sound discretion and always upon consideration of justice, equity and morality in a given case. *See New Jersey Bar Association v. Northern New Jersey Mortgage Associates*, 22 *N.J.* 184, 194 (1956); *Citizens Coach Company v. Camden Horse R.R. Co.*, 29 *N.J. Eq.* 299, 303 (1878). Through the common law, it has been well established over a long term that a temporary restraining order or a stay will not issue unless the petitioner demonstrates:

1 A probability of eventual success on the merits of the appeal at the plenary hearing;

2. A threat of immediate and irreparable harm to the petitioner; and

3. The inconvenience or loss to the opposing party will be minimal if the relief is obtained. *See Crowe v. Degioia*, 90 *N.J.* 126, 132-134 (1982).

It should be noted that the standards have been promulgated in various ways and pursuant to various regulations. *See e.g. N.J.A.C.* 1:6A-12.1 (applying specifically to special education hearings) and *N.J.A.C.* 1:1-12.6, which applies to all OAL emergency matters. In reviewing the record in this case, it is my view that the petitioners are not entitled to emergent relief. Based upon the record before me, which excludes the disallowed testimony of N.T.'s father (who has no personal knowledge of the incident), it is my view and I **CONCLUDE** that the petitioners have failed to demonstrate that they have a likelihood of prevailing on the merits of this matter. The affidavits and accompanying exhibits clearly spell out that what N.T. was purported to have done was sworn to by the bus driver. The bus driver, based upon the evidence, has absolutely no reason to prevaricate or to make up a story. Of course, N.T.'s statement which, while acknowledging much of what he's accused of, indicates that he was never advised not to exit the bus or to close the hatch. This seemed somewhat strange because in respect to the latter, he does note that the driver screamed "I told you not to turn the red handle on." He then notes that he never heard her say it. If he's acknowledging that she screamed it, it's difficult to reconcile that with his inability to have heard her say it. Nevertheless, if anyone in this matter has a reason to

distort the facts or to mislead or to convince himself that he was not guilty of any wrongdoing, it would have to be N.T. Since if the case were to go to plenary hearing the issue of credibility would be crucial, then there is no probable likelihood that an administrative law judge would accept the credibility of the disciplined party over that of an objective witness. N.T.'s father indicated that it was his understanding that there was a Board policy mandating that all bus trips be videotaped. In response to my questioning him concerning the authority for that position, he cited a Board policy which merely authorized the District to utilize videotape on school buses. Thus, it is my view that the District is not mandated to use videotape on every single bus ride. That it didn't choose to use it on the bus trip in question is not to conclude that the District erred.

N.T.'s father also argues that it's a violation of law to have the hatch of the school bus opened. He is suggesting that the driver contravened law and, therefore, whatever actions his son may have taken could not be considered misconduct. No evidence was offered to convince me that the law imposes a requirement on the school bus driver to keep the hatch roof closed in the fashion in which it was. Mr. Soriano, although not an expert, did represent as an officer of the court that it is his understanding that the emergency hatch was not opened; rather, the vent latch was opened which allowed air to circulate through the bus and that keeping that hatch open is perfectly permissible. It seems somewhat tertiary to resolve the emergency issue to determine whether the bus driver did or did not do what was advised of her. Assuming for the moment that she did not comply with all of the legal requirements does still does not provide an excuse for N.T. to behave in a manner which is contrary to school policy.

In addition, it is my view that the petitioners have been unable to demonstrate that if the five-day bus suspension were imposed that N.T. would suffer irreparable harm. The Board of Education cites to the unreported decision of the Commissioner of Education issued on June 4, 1993 affirming an administrative law judge's decision denying an application for emergency relief. *See W.H.V.P. and J.P.V.P. on behalf of their minor child, T.L.V.P. v. Board of Education of the Township of Edison, et al, Middlesex County*. In that matter, the administrative law judge determined that it was not irreparable harm to suspend a student from school and classes for three days. Clearly, a suspension from classes for three days is much more severe than a suspension from the school bus. The impression clearly given to me by the petitioners was that they would somehow and in some way get their child to and from school during the suspension. While there

is no doubt that there is some harm inuring to N.T. because of a suspension and the consequential discipline attached to it, based upon prior case law, that harm does not rise to the level of irreparability such that it would warrant the imposition of emergency relief. Based upon the foregoing, I **CONCLUDE** that the petitioners have failed to meet the standards for granting emergency relief. Accordingly, I **ORDER** that the petitioners' application for emergency relief is **DENIED**. Since there are no other issues remaining in this matter once the emergency relief matter has been resolved, I deem this decision to be the final decision issued by the Office of Administrative Law subject, of course, to review by the Commissioner of Education. Should the Commissioner choose to reverse, then, of course, the matter will be remanded, a stay will be imposed and a plenary hearing will determine the outcome. If the decision is affirmed, then it becomes a final decision in the matter.

Without prejudice to N.T.'s rights and/or without in any way assessing the other matters against him, it is my understanding based upon conferences in chambers that there were numerous acts of alleged misconduct committed by N.T. last school year on the bus, and there were at least two allegedly committed this year on the school bus. It would seem to me that given that N.T. apparently is a good student and well liked by faculty and peers, the conduct engaged in on the bus is a significant departure from his conduct, behavior, and acting out everywhere else. Under those circumstances, I would recommend to the Board that serious consideration be given to conducting an evaluation of N.T. I am not suggesting that N.T. requires classification. I am merely suggesting that perhaps an evaluation – given his record of discipline may be appropriate and beneficial.

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.

10/21/03
DATE

STEVEN C. REBACK, ALJ

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

10/24/03
DATE

cmo

OAL DKT. NO. EDU 6982-03
AGENCY DKT. NO. 382-10/03

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

The record of this emergent matter, including the audiotapes of the hearing conducted by the Administrative Law Judge (ALJ) of the Office of Administrative Law on October 21, 2003, and the Order Denying Petitioners' Motion for Emergent Relief issued by the ALJ denying emergent relief and dismissing the petition in this matter have been reviewed.

Upon such review, the Commissioner concurs that petitioners have 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. As set forth by the ALJ, petitioners' application does not, on its face and granting petitioners every inference for purposes of this motion, meet the standards required by *Crowe* for the granting of extraordinary relief and must, therefore, be denied.

However, in reviewing petitioners' Motion for Emergent Relief, it is noted that the Board has not made a decision with respect to petitioners' appeal of the bus suspension imposed on their son.[1] As the merits are not properly before him at this juncture, therefore, the Commissioner makes no findings on the underlying conduct which constitute the merits of this matter.

Accordingly, the Commissioner adopts the Order Denying Petitioners' Motion for Emergent Relief in the instant matter, as modified above, for the reasons expressed therein.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 10/29/03

Date of Mailing: 10/29/03

[1] Petitioners specifically state that "[a]fter this granted stay the Commissioner should remand Appeal back to the Board of Education to be heard, pending petition of Appeal back with the Commissioner." (Motion for Emergent Relief at 2)

[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.*

611-03

BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,	:	
PETITIONER,	:	
AND	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
BOARD OF EDUCATION OF GALLOWAY TOWNSHIP, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION,	:	
RESPONDENTS.	:	SYNOPSIS

In consolidated matter, petitioning Boards contested the calculation of their school year aid being contrary to CEIFA.

The ALJ concluded that respondents and the Appellate Court had correctly addressed the issues in this matter and observed that the legislative intent of the FY03 Appropriations Act was to limit expenditures of the State treasury and that the Legislature's action to enact the FY03 Appropriations Act superseded any and all statutory provisions which would increase such expenditures including, among others, CEIFA. The ALJ concluded that petitioners failed to demonstrate that respondents were required to recalculate CEIFA aid based upon petitioners' student population counts; nor did petitioners demonstrate that respondents were required to apply any new or increased student population count for an updated calculation formula to increase their Core Curriculum Standards Aid, Demonstrably Effective Program Aid, or any other aids. The ALJ entered Summary Decision on behalf of respondents and denied petitioners' Motions for Summary Decision.

The Commissioner concurred with the ALJ and the Appellate Court that the funding formula as set forth in CEIFA cannot coexist with the Legislature's enacted State budget appropriation, and, consequently, must be deemed to be suspended by the adoption of the FY03 Appropriations 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.

October 27, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 4613-02;
EDU 4614-02, and EDU 6458-02
AGENCY REF. NOS. 125-4/02;
123-4/02, and 153-5/02
(CONSOLIDATED)

BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, ATLANTIC COUNTY,

Petitioner,

and

EGG HARBOR TOWNSHIP BOARD OF EDUCATION, ATLANTIC COUNTY,

Petitioner,

and

BOARD OF EDUCATION OF GALLOWAY TOWNSHIP, ATLANTIC COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION; WILLIAM LIBRERA, COMMISSIONER OF EDUCATION, DEPARTMENT OF EDUCATION,

Respondent.

William S. Donio, Esq., for Board of Education of the Township of Hammonton and Egg Harbor Township Board of Education, petitioners (Cooper Levenson, attorneys)

William S. Cappuccio, Esq., for Galloway Board of Education, petitioner

Michael C. Walters, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: August1 11, 2003 Decided: September 12, 2003

BEFORE **LILLARD E. LAW,** ALJ t/a:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, the Boards of Education of the Town of Hammond and the Township of Egg Harbor (Boards), contests the calculation of its Comprehensive Education Improvement and Financing Act of 1966 (CEIFA) and seeks an Order from the Commissioner of Education (Commissioner) directing the New Jersey Department of Education (DOE) to recalculate its CEIFA aid based upon petitioners' student population; directing the DOE to provide the mid-year adjustment as required by law; directing the DOE to use said new pupil count in an updated calculation of the district's local share formula and increase petitioner's Core Curriculum Standards Aid; Demonstrably Effective Program Aid and all other aids, among other things.

In lieu of an Answer to the Verified Petitions of Appeal before the Commissioner, the DOE submitted a letter brief in support of its Motion to Dismiss the matters, pursuant to N.J.A.C. 6A:3-1.5(g), among other things.

Prior to filing of the Verified Petition by the Hammonton Board before the Commissioner, the Board filed a Verified Complaint in Lieu of Prerogative Writ and Order to Show Cause with Temporary Restraints before the Superior Court against the DOE, William L.

Librera, Commissioner, Honorable James McGreevey, Governor of the State of New Jersey and the New Jersey Legislature, defendants. The Board sought, among other things, an Order directing defendants to recalculate CEIFA aid based upon the Board's pupil population counts; directing the defendants to provide the mid-year adjustment set forth in CEIFA; and directing defendants to use said count in an updated calculation of the Board's local share formula and adjust the Board's Core Curriculum Standards Aid, Demonstrably Effective Program Aid and all other aids as required by CEIFA.

The Honorable Valerie H. Armstrong, PJSC, dismissed the Complaint for lack of jurisdiction and reasoned that the Board's judicial remedy lies with the Appellate Division of Superior Court because the trial court had no jurisdiction over the subject matter which is purely a matter of school law and which arises out of State agency action.

On March 26, 2002, the Appellate Division denied the Board's emergent application for temporary relief. On March 26, 2002, the New Jersey Supreme Court denied the Hammonton Board's motion for emergent relief pending appeal in the Appellate Division.

On April 25, 2002, petitioners filed the instant Verified Petitions of Appeals which raises issues identical to those raised in the Verified Complaint in Lieu of Prerogative Writ. On July 18, 2002, the matters were transmitted to the Office of Administrative Law (OAL) for determination, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The parties filed cross-motions for summary decision and the date of the hearing record was extended to August 11, 2003, due to illness, with a close of the record now September 25, 2003.

LEGAL ARGUMENTS OF THE PARTIES

The Board's Position

Background Facts

It is noted here that the Egg Harbor Township Board's legal arguments are similar to the legal arguments set forth in the Hammonton Board's Legal Brief. Therefore, the legal arguments set forth by the Hammonton Board are relied upon here.

The Hammonton Board observes that its schools consist of (1) an early childhood center housing pupils in grades Pre-Kindergarten through First Grade; (2) an elementary school housing pupils in Second Grade through Sixth Grade; (3) a middle school housing pupils in Seventh and Eighth Grades; (4) a high school housing students in Ninth Grade through Twelfth Grade. The Board is also currently the receiving district for Folsom Borough pupils in Grades Nine through Twelve. The Egg Harbor Board operates a K-12 school district.

School districts in the State of New Jersey have been divided by the DOE since 1974 into socioeconomic groups known as District Factor Groups (DFG) and designated DFG "A" through "J", with "A" the group with the lowest socioeconomic status and "J" with the highest socioeconomic status. Another statistical category adopted by the DOE was the urban or Abbott district. Hammonton has been designated as a DFG "B" district by the DOE, categorizing it in the second lowest socioeconomic group.

On December 20, 1996, the New Jersey Legislature adopted the CEIFA to provide funding by the State in order to comply with its constitutional mandate of providing a thorough and efficient education (T & E). The T & E mandate is expressly provided in the New Jersey Constitution, a clause the New Jersey Supreme Court has interpreted as a mandate to ensure equal opportunity in education for children of the State. Robinson v. Cahill, 69 N.J. 449, 473 (1975). Prior funding laws, including the Public School Education Act of 1975 and the Quality of Education Act, have been ruled unconstitutional by the New Jersey Supreme Court. Abbott v.

Burke, 119 N.J. 287 (1990); Abbott v. Burke, 136 N.J. 444 (1994).

The Boards observes that school districts have been operating under CEIFA since 1997. See Stubaus v. Whitman, 339 N.J. Super. 38 (App. Div. 2001), cert. den. 171 N.J. 442 (2002). CEIFA has been found unconstitutional as applied to special needs districts in Abbott v. Burke, 149 N.J. 145 (1997), resulting in the New Jersey Supreme Court retaining jurisdiction to ensure the remedial relief it ordered would be implemented by the State with regard to special needs districts. Hammonton, although a "B" district, is not an urban school district and, therefore, does not receive additional special needs aid. The Appellate Court, however, has recently rejected a challenge on equal protection clauses to the constitutionality of the CEIFA funding formula. See Stubaus, 339 N.J. Super. 38. Thus, for these petitioners, CEIFA is, and remains, the funding law governing their aid.

Under CEIFA, core curriculum standards have been established which "provide a substantial framework detailing what children need to know in order to participate as workers and citizens in contemporary society, which is the goal of the T & E public education system. 339 N.J. Super. at 45. CEFIA sets forth a model of prototypical school district that efficiently provides the programs and services necessary for pupils to achieve the core curriculum standards and it is the program that the Legislature believed would satisfy the T & E constitutional requirements. Id. The basis for distributing State education aid is then derived from the per pupil cost to implement the prototypical model, combined with the local school district's ability to contribute to that cost. Id.

In Stubaus, the Appellate Court set forth succinctly the framework for deriving state aid under CEIFA as follows: In order to implement CEIFA, the Commissioner is required under the Act to establish what is called the T & E amount which is "based on the costs necessary to provide the programs and services that will enable an elementary school pupil to achieve the core

curriculum standards. N.J.S.A. 18A:7F-3; N.J.S.A. 18A:7F-12. The T & E amount is then weighted for the additional cost of middle and high school pupils and a half-day kindergarten program. Ibid. The T & E weighted amount is then multiplied by the number of pupils in the district to arrive at the T and E budget. N.J.S.A. 18A:7F-3; N.J.S.A. 18A:7F-13." Id.

It is the T & E budget that is used in determining and calculating a district's State Aid. Id. A district's local share of the T & E budget is established by the relative wealth of a school district based upon property values and income. A district's core curriculum standard aid is the "T and E budget figure less the local share." Id. 46.

Student enrollment data, that is, the number of children attending a district's schools, plays a critical part in determining each district's school aid. In fact, aid is based on certain student enrollment data as defined under CEIFA, including "school enrollment," "modified district enrollment" and "resident enrollment." N.J.S.A. 18A:7F-3.

Aid is generally calculated in February for the following school fiscal year which begins in July. However, because enrollment data changes, CEIFA provides that districts receive what is called mid-year adjustments based on the actual enrollment of the fiscal year determined by pupil enrollment in October. Under CEIFA, each year in or about March, adjustments to state aid are made to reflect actual pupil enrollments as of October 15 of the budget year. N.J.S.A. 18A:7F-5. The mid-year adjustments are reported to a district and are required to be shown as account receivables for the following year's budget.

In sum, as the Supreme Court noted, the CEIFA funding provisions are critical in determining constitutionality because "they determine the types and amounts of resources that will be available to enable students to achieve a thorough and efficient education, as defined by the content standards." Abbott, 149 N.J. at 163.

Moreover, the funding time schedule set forth in CEIFA is critical as each year districts prepare their budget. The CEIFA statute also sets forth a timeline for receipt by the DOE state aid figures. The timeline begins with the Governor's budget address. In the year 2002, under N.J.S.A. 52:27B-20, the Governor was required to submit by February 15, a budget to the Legislature that includes the amount of state aid to be provided to public school districts. Thereafter, under N.J.S.A. 18A:7F-5, within two days, the Commissioner notifies each public school district of the amount of aid payable to that particular district. Prior to this fiscal year, state aid figures had been released by the DOE at the time school budgets were prepared in January of that year. However, for the year challenged here, in or about late January 2002, Governor James McGreevey requested and the Legislature approved his request to wait until March 26, 2002, to submit his fiscal year budget to the Legislature. The Commissioner had the legislative power to make adjustments to the school budget and election calendar. P.L. 2002, Ch. 2. The DOE, however, failed to make corresponding postponement in the date for the public hearings for local school budgets of the date of the April 16, 2002 school elections. Consequently, the last day to hold budget hearings and adopt budgets to be voted upon at the school election was March 26, 2002, despite the fact that the school districts had been deprived of certified state aid figures and/or state aid figures calculated in accordance with CEIFA.

Moreover, and in direct contravention of CEIFA, the DOE provided to the Boards in early March 2002, anticipated state aid figures for the 2002-2003 fiscal year and advised that the preloaded aid amounts for 2002-2003 SAI's printout (the 2001-2002 cash payment). The end result is that Hammonton, like other districts, was forced to complete a budget with flat, or level, state funding. The unofficial state aid numbers became official on March 26, 2002. Consequently, Boards' state aid numbers for fiscal year 2002-2003 were based exactly on 2001-2002 school fiscal year school aid numbers, in complete disregard of the CEIFA statutory formulas. Petitioners asserts that the DOE did, in fact, recalculate its debt service, school choice

aid and parity aid, however, it does not receive such aid nor did it recalculate its other aid; i.e., core curriculum, demonstrably effective program aid or district learning network aid. The end result was that the Boards are to receive, and is currently receiving, in state aid that which it received the prior year, without regard to its increased enrollment or its failure to receive its midyear adjustment.

The Hammonton Board's pre-budget total entitlement state aid for fiscal year 2002-2003 is $8,522,542. For the categories set forth therein including core curriculum aid. The Board's 2001-2003 state aid numbers for the same categories was $8,522,524. For example, core curriculum aid in 2002-2003 is $4,377,2 55, and in 2001-2002 was the same $4,377,255.

However, although State aid was frozen, the Boards' enrollment has increased. For the budget year 2001-2002, the Hammonton Board's State aid was based on the DOE's projected resident enrollment of 2,125 pupils and a weighted projected resident enrollment of 2,146 pupils. The actual resident enrollment on October 15, 2001 was 2,286.5 pupils. The Board's and DOE's projected resident enrollment for the budget year 2002-2003 was 2,374 pupils and the projected weighted enrollment was 2,376 pupils.

Similarly, the Egg Harbor Board's pre-budget total entitlement State aid for fiscal year 2002-2003 is $27,872,214, for the categories set forth therein including core curriculum aid. The Egg Harbor Board's 2001-2002 State aid numbers for the same categories was $27,872,214, where the core curriculum aid in 2002-2003 was $20,341,417, the same as 2001-2002.

The Egg Harbor Board's State aid was based on the DOE's projected resident enrollment of 6,008 pupils and a weighted projected resident enrollment of 6,027 pupils. The actual resident enrollment on October 15, 2001 was 6,130 pupils. The Board's projected resident enrollment for the budget year 2002-2003 was 6,428 pupils and the projected weighted enrollment was 6, 474

pupils.

As a result of the DOE's failure to calculate State aid, the Boards' proposed State aid for 2002-2003 was based incorrectly on the Boards' 2001-2002 enrollment data and failed to take into account an increase of 230 and 420 respectively, in projected resident enrollment. The DOE's failure to make mid-year required adjustments and failure to use appropriate enrollment data, contravene and ignore the express statutory requirements set forth in CEIFA. The end result is that the school districts have been deprived of State aid due it under CEIFA, and in particular, the mid-year adjustment that would be shown as an account receivable.

The 2002-2003 T & E education per pupil ranges announced on March 4, 2002 were as follows: $7,734 to $8,548. Under the Hammonton Board's 2002-2003 advertised budget, which was soundly defeated by the voters, the Board's per pupil spending based upon the Board's projected weighted enrollment was $6,352, well below the State's T & E range. Similarly, the Egg Harbor Board's 2002-2003 advertised budget was defeated at the polls, its per pupil projected weighted enrollment was $7,500, again, well below the State's T & E range.

As a result of the State's failure to provide state aid as required under CEIFA, the Board filed a Verified Complaint in Lieu of Prerogative Writ with Order to Show Cause with Temporary Restraints against the New Jersey DOE, the Commissioner of Education, the Governor of New Jersey and the New Jersey Legislature on March 19, 2002 in the Superior Court, Law Division, Atlantic County. The complaint was dismissed for lack of jurisdiction and, subsequently, the Appellate Division and the New Jersey Supreme Court denied the Board's request for emergent relief.

The annual school election occurred on April 16, 2002 and the Board's school budget was defeated. After the defeat of its school budget on April 16, 2002, the Board filed the herein

Petition of Appeal on April 25, 2002 with the Commissioner based upon the certified state aid numbers supplied on March 26, 2002, that failed to include current student population counts despite the statutory requirement to do so. On the budget front, the Town of Hammonton reduced the Board's advertised budget by the amount of $880,000, the same amount the Board claimed it had lost through state aid. The Board appealed, seeking restoration of that amount, and the Commissioner reinstated $737,000 in cuts made by the Town Council on June 26, 2002.

By this Petition of Appeal, the Board seeks an order from the Commissioner for the DOE to recalculate the state aid numbers in accordance with CEIFA. The exact relief the Board seeks is as follows:

a. Directing the DOE to recalculate 2002-2003 CEIFA aid based upon Petitioner's pupil population counts as set forth in CEIFA;
b. Directing the DOE to provide the mid-year adjustments as required by law;
c. Directing the DOE to use the CEIFA formulas in an updated calculation of the district's local share formula and the Board's Core Curriculum Standards Aid, Demonstrably Effective Program Aid and all other aids.

The Boards' Legal Arguments

I. Standard For Summary Decision

Under the Uniform Administrative Procedural Rules, a motion for summary decision may be granted "if there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). This rule is essentially the same as N.J. Court Rule 4:46-2 and the legal principles under that rule apply to administrative

proceedings. Summary judgment is "designed to provide a prompt, businesslike and inexpensive method of disposing of any case" where the record establishes that there is no genuine issue of material fact. Brill v. Guardian Life Ins. Co. Of Am., 142 N.J. 520, 523 (1995). As such, "by its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward" with specific facts showing that there is a genuine issue for trial. Brill, 142 N.J. at 529 [emphasis in original]. In addition, "a non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Id. [emphasis in original]. Disputed issues of fact that are not significantly probative and "of an insubstantial nature" or simply colorable cannot preclude summary judgment. Id. Rather, Rule 4:46-2 (c) expressly sets forth that a dispute of fact only will be genuine if "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." Only when there is a need for trial should summary judgment be denied. Id.

In this regard, the following material facts are undisputed:

1. CEIFA expressly requires that state aid amounts be calculated using projected enrollment. CEIFA, in relevant part, provides as follows: "aid amounts payable for the budget year **shall be based on budget year pupil counts**, which shall be projected by the Commissioner using data from prior years. Adjustments for the actual pupil counts of the budget year shall be made to State aid amounts payable during the school year succeeding the budget year. Additional amounts payable shall be reflected as revenue and an account receivable for the budget year." N.J.S.A. 18A:7F-5 (emphasis added).

2. Respondent admits in its answer that the State Aid figures for the 2002-2003 fiscal year are the same as the previous fiscal year, without regard to any changes in enrollment figures.

3. The District had a projected increase for the budget year 2002-2003 of 230 resident enrollment pupils for the Board from the 2001-2002 year.

4. Respondents have failed to make any mid-year adjustments to aid based on enrollment.

II. THE BOARDS ARE ENTITLED TO THE RELIEF THEY SEEKS AND THE DEPARTMENT SHOULD BE ORDERED TO CALCULATE THE BOARD'S STATE AID PURSUANT TO CEIFA

The Boards' action here challenges the Respondents' failure to calculate the Boards' State aid in accordance with CEIFA - regardless of whether the Legislature chooses to appropriate less or more funds. It is the CEIFA formulas that must be utilized to calculate the Boards' State aid amounts. CEIFA is designed as its own funding mechanism for school State aid and its statutory definitions and formulas are required to be followed regardless of whether the annual appropriations act sets forth a decrease or increase in the overall appropriated aid amount.

The DOE had not, and indeed cannot, dispute that the State aid it allocated to the Boards directly contradicts CEIFA. Rather, the entire defense of the DOE's action is that their inactivity or otherwise failure to adhere to the CEIFA requirements was either permitted or ultimately excused by the FY03 Appropriations Act. However, the Boards asserts that the Appropriations Act, a general statutory annual enactment, does not supercede the carefully tailored statutory language of CEIFA, which was specifically enacted to address constitutionally required funding and certainly does not cure the Department's admitted violation of the statutory requirements last March. Moreover, even if the FY03 Appropriations Act excuses the Department's failure to calculate state aid figures in accordance with CEIFA, Petitioners here are entitled to a least its mid-year adjustment - an amount that was payable and vested prior to the enactment on June 30, 2002 of the Appropriations Act.

A. The Appropriations Act Cannot Supercede or Excuse the Department's Failure to Calculate Aid Pursuant to the CEIFA Statutory Formulas.

The New Jersey Constitution mandates that:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the Instruction of all the children in the State between the ages of five
> and eighteen years. [*N.J. C*onst. art. VIII, §4.]

The Legislature in enacting CEIFA declared that CEIFA would establish:

> (1) A definition of a thorough and efficient system of public education which is uniformly applicable to all districts in the State and specifics what must be learned with reference to academic standards that must be achieved by all students.
> (2) The types of programs and services that will accomplish these goals in a manner that is thorough and efficient.
> (3) A level of financial support sufficient to provide those program and services.
> (4) A funding mechanism to ensure that support.
> (5) A system which ensures that the expenditure of public funds will be undertaken both with prudence and sound management and with accountability that includes mechanisms for enforcement in the event a district fails to meet the substantive standards established as set for herein.
> N.J.S.A. 18A:7F-1 [emphasis added]

Moreover, the Legislature in CEIFA set forth the time, mode and occasion for the state funding mechanism. Specifically, 18A:7F-5a states in pertinent part:

> "Beginning in the 1998-99 school year, unless otherwise specified within this act, aid amounts payable for the budget year shall be based on budget year pupil counts, which shall be projected by the commissioner using data from prior years. Adjustments for the actual pupil counts of the budget year shall be made to State aid amounts payable during the school year succeeding the budget year. Additional amounts payable shall be reflected as revenue and an account receivable for the budget year."
> N.J.S.A. 18A:7F-5a [emphasis added]

CEIFA is not ambiguous as it relates to determination of aid calculations. Specifically, CEIFA defines aid in part based on enrollment and enrollment is determined utilizing enrollment figures from October 15 of the current school year plus projections based on prior years. N.J.S.A. 10A:7F-5

The Legislature expressed legislative intent that CEIFA would be a permanent funding formula when it stated that CEIFA provides and establishes "a funding mechanism" to ensure a thorough and efficient education. N.J.S.A. 18A:7F-2b (4). Moreover, there is nothing discretionary in the language of 18A;7F-5, which states in pertinent part, "Beginning in the 1998-99 school year, unless otherwise specified **within this act**, any amounts payable for the budget year shall be based on budget year counts, which shall be projected by the Commissioner using data from prior years." N.J.S.A. 18A:7F-5a [emphasis added]. That is, CEIFA stands alone and independent of other legislative machinations. It is through CEIFA that the Legislature answered its constitutional obligations, and it is CEIFA which directs how to answer the Legislature's constitutional obligations.

In its moving papers to dismiss the Boards' petitions, respondents relied upon the case of City of Camden v. Byrne, 82 N.J. 133 (1980), and at first glance it would appear that the Boards' actions is rendered moot by FY03 Appropriations Act. But careful analysis demonstrates that the Camden case in inapposite. In Camden, a number of municipalities and counties brought several court actions against the State to have certain amounts appropriated for their use claiming that the

funds were required purportedly under several state statutes. The lower courts in the actions granted summary judgment in favor of the defendants and the decisions were affirmed on appeal. The actions were consolidated before the New Jersey Supreme Court which used the cases to embark upon an analysis of the constitutional framework in the state budgetary process. In rejecting the municipalities' claim, the New Jersey Supreme Court noted that withdrawal of monies from the State treasurer can be accomplished only by legislative appropriations, Id. at 145, and that the power and authority to appropriate funds lies solely and exclusively with the legislative branch. Id. In reaching its conclusions, the Court noted that the statutes in question which called for disbursements of tax revenues - sales and use tax - were not legislative appropriations in and of themselves and determined they gave way, in part, because of other constitutional provisions including a constitutional provision requiring appropriations to be incorporated into a single balance budget and the constitutional debt limitation provisions. Id.

Here, the Boards in these petitions are not directing or requesting that more money be appropriated to the education line item in the State budget for school districts, although the Boards' assert that educational funding should certainly be the top priority in disbursing State funds. Rather, remedy sought here is their share of the State aid amount appropriated in accordance with the CEIFA formula. The first step in achieving those amounts is for the Court here to direct the DOE to calculate the aid payable as determined under CEIFA.

Similarly, the respondent's reliance in their motion to dismiss on the case of County of Camden v. Waldman, 292 N.J. Super. 268 (App Div. 1996), cert. den. 149 N.J. 139 (1997) is not determinative. In Waldman, the Department of Human Services refused to provide to counties funds received by the State from the federal government, in essence, the counties were challenging the Legislature's decision not to appropriate the funds. But unlike here, there was no asserted constitutional mandate as there is for the Legislature to fund education. Nor are the detailed funding levels under CEIFA to be casually disregarded in the annual appropriations act -

certainly the contrary is true. CEIFA and its formulas were enacted to provide a funding mechanism. N.J.S.A. 18A:7F-1.

Moreover, it can be stated, without the need of lengthy citations, that "there generally exists a strong presumption against any implied negation of statutory enactments." Id. at 154. In fact, the presumption may be overcome only "when there is a clear showing that two legislative measures are patently repugnant or inconsistent." Id. In Camden, the Court examined the complete failure of the Legislature to appropriate funds and concluded that the failure was an intentional and an advertent act. Id. Here, however, the expressed determination of the Legislature was to hold Districts harmless. Indeed, the FY03 Appropriations Act states in relevant part that "each district shall receive no less of a total State aid amount payable for the 2002-2003 year than the sum of the district's total State aid amount for the 2001-02 school year."

Thus, there is nothing inconsistent in directing the DOE to make the CEIFA calculations, which once finally made, will permit the petitioners to have at least a baseline of the State aid under the "permanent funding mechanism." N.J.S.A. 18A:7F-1. This is indeed important even if the end result is that the petitioners are unable to obtain additional funds.

Presumably, the DOE will argue that its inaction in calculating State aid in direct contradiction of CEIFA is somehow excused by the budget Appropriations Act and that the DOE's actions were prudent because the failure to calculate the requisite aid levels under CEIFA gave districts advance warning of the State aid cuts. This argument, apparently relying on a pre-CEIFA case of Board of Education of Fairfield Twp. v. Kean, 188 N.J. Super. 244, 250 (Ch. Div. 1982), however, turns the entire statutory framework upon which CEIFA was enacted on its face. Under CEIFA, N.J.S.A. 18A:7F-5, within two days of the budget address, the Commissioner was to notify each public school district of the amount of aid payable to that particular district. The CEIFA statute did not permit the DOE to just ignore the CEIFA formulas. Thus, when the

Governor announced flat funding, it was incumbent upon the DOE to at least use that set flat amount to calculate the aid in accordance with the CEIFA funding requirements including, without limitation, the enrollments. The DOE ignored the statutory requirements and now uses an end justifies the means defense: claiming that since no calculations were done, the Districts have to receive the same amount as the prior year. Of course, the actual result for districts, as petitioners, with increased enrollments is that petitioners did not receive the same aid as the prior year based on a per pupil analysis while districts with decreased enrollments received a windfall. Certainly, the CEIFA statutory framework was not enacted with such detail in order to be generally ignored at the arbitrary and capricious notion of the DOE. The FY03 Appropriations Act does not expressly relieve the DOE from its statutory duties.

For all of the above reasons, the petitioners should be entitled to the relief it seeks: namely, requiring the DOE to engage and calculate the CEIFA statutory formulas.

B. Even Under the appropriations Act, the Boards are Entitled to Receive their Mid-Year Adjustments.

Even, if the Court were to determine that the FY03 Appropriations Act excused the DOE from its failure to comply with CEIFA in March, the Appropriations Act clearly stat that:

> Notwithstanding any other law or regulations to the contrary, each district shall receive no less of a total State aid amount payable for the 2002-2003 school year than the sum of the district's total State aid amount payable for the 2001-2002 school year for the following aid categories: Core Curriculum Standards Aid, Supplemental Core Curriculum Aid, Early Childhood Program Aid, Instructional Supplemental Aid, Demonstrably Effective Program Aid, Rewards and Recognition, Stabilization Aid, Stabilization Aid 2, Stabilization Aid 3, Large Efficient District Aid, Aid for Districts with High Senior Citizen Populations, Regionalization Incentive Aid, Distance Learning Network Aid, Adult and Postsecondary Grants, Bilingual Education Aid, Special Education Aid, County Vocational Program Aid, Transportation Aid, and Aid for Enrollment

Adjustments.

Aid for Enrollment Adjustments is determined under N.J.S.A. 18A:7F-5, which expressly provides that "Adjustments for the actual pupil counts of the budget year shall be made payable during the school year succeeding the budget year." However, despite this clear statutory authority, the DOE failed to make any enrollment adjustments for the school year 2001-02. The net effect of failing to make the adjustments is that petitioners have been deprived of its cash adjustments payable to in the school year 2002-03. Certainly, the FY03 Appropriations Act cannot strip petitioners or, in other words, divest petitioners of the amount the law vested under CEIFA prior to June 30, 2002. The fact that the amount was payable during the 2002-2003 school year does not in any way excuse the DOE's failure to make the enrollment adjustments.

Indeed, the net result of the DOE's failure to calculate and book mid-year adjustments is that districts with increased enrollment the prior year and no increase in 2001-2002 received a windfall bonus; whereas, districts that experienced continued growth have a continued and exacerbated hardship. Surely, the constitutional mandate to fund a through and efficient education does not relieve the DOE from making the calculations so that some districts get bonuses, and districts, such as petitioners, suffer further hardship. It is hard to imagine action which could be more readily characterized as arbitrary and capricious action.

Finally, it is anticipated that the DOE will assert a "no harm" defense. Specifically, the DOE's steadfast refusal to calculate aid is premised solely on the idea that since there is only one pot of monies (and no Court can order more money), and districts are to obtain the same amounts as prior years, there was no reason to calculate aid amounts under CEIFA. However, this position ignores the basic tenet of CEIFA. CEIFA's formulas - mid-year adjustments, enrollment data, stabilization growth limits - are all based on formulas that reflect prior budget years. If the 2002-2003 numbers are never run, districts such as petitioners will lose any incremental base or adjustments in upcoming budget years. It will be as if 2002-2003 never occurred, and the CEIFA

formula would be all for naught. Certainly, this Court should not permit the DOE to be derelict in its obligations to make the adjustments and calculations under CEIFA.

In conclusion, the Board asserts that there is no disputed issue of fact. The matter is really solely of law and remedy. The Boards have met their burden demonstrating that the CEIFA laws have not been followed. The Court should order respondent to calculate the petitioners' 2002-2003 aid in accordance with CEIFA, including mid-year adjustments.

Respondent Department of Education Legal Arguments

Respondent, DOE, asserts that the "inaction" alleged by the Boards is that the certified State school aid figures for the 2002-2003 fiscal year were not calculated pursuant to CEIFA. The Boards' argument, however, ignores the fact that the purpose of certifying the State aid amounts is to provide an accurate estimate upon which the public can rely when it is voting on the local tax levy in the school budget. See, *e.g.*, Board of Educ. of Fairfield Twp. v. Kean, 188 N.J. Super. 244, 250 (Ch. Div. 1982) (while dismissing plaintiffs action the court agreed with plaintiffs that it "would have been better for [plaintiffs] to have received some advance warning of [state aid] cuts"). Thus, State aid figures are not required to be provided to districts until after the Governor's budget message so that the figures provided are a more reliable estimate of what school districts are likely to receive. Often, the budget message and the Appropriations Act adopted in response to that budget message have altered the formula distributing aid to school districts. To that end, the Legislature wisely decided not to require certification of State aid numbers until after the Governor's budget message. Compare N.J.S.A.18A:7A-27 (repealed by L. 1990, c. 52 § 90) (On or before November 1, Commissioner shall determine for local budget purposes the amounts payable to each of the counties and districts under the Public School Education Act of 1975); and N.J.S.A. 18A:7D-26 (amended by L. 1992, c. 159 § 2) (Annually,

on or before December 15, the Commissioner shall notify each district of the maximum amount of aid payable under the Quality Education Act for succeeding school year); with L. 1992, c. 159, § 2 (repealed by L. 1996, c. 138, § 85) (Annually within seven days following transmittal of the budget message to the Legislature by the Governor, the Commissioner shall notify each district of the maximum amount of aid payable to the district under the act).

Moreover, the Commissioner's certification of State aid amounts at the same amount that the districts received for the 2001-2003 school year clearly cannot constitute agency "inaction" in light of the FY03 Appropriations Act. As demonstrated below, the FY03 Appropriations Act provides a clear legislative intent to maintain the amount of total State aid for school districts for the 2002-2003 school year at the same amount they received for the 2001-2002 school year, rather than distribute State aid pursuant to CEIFA. The FY03 Appropriations Act provides:

> Notwithstanding any other law or regulation to the contrary, each district shall receive no less of a total State aid amount payable for the 2002-2003 school year than the sum of the district's total State aid amount payable for the 2001-2002 school year for the following aid 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, Distance Learning Network Aid, Adult and Postsecondary Education Grants, Bilingual Education Aid, Special Education Aid, County Vocational Program Aid, Transportation Aid, and Aid for Enrollment Adjustments.
> [L. 2002, c. 38]

Notably, the FY03 Appropriations Act appropriates the same amount of funds for each of the above-listed aid categories that was appropriated for those aid categories in the FY02 Appropriations Act. For example, $3,080,318,000 was appropriated for Core Curriculum Standards Aid in both the FY02 and FY03 Appropriations Acts. Thus, in order for each district to receive no less of a total State aid amount payable for the 2002-2003 school year than the sum

of the district's total State aid amount payable for the 2001-2002 school year for the listed aid categories, it follows that no district can receive more total State aid for the 2002-2003 school year than it received for the 2001-2002 school year. Accordingly, the FY03 Appropriations Act reflects a clear legislative intent to maintain the amount of State aid for the listed aid categories for the 2002-2003 school year at the same amount districts received for the 2001-2002 school year.

Similarly, petitioners' argument that is entitled to additional Aid for Enrollment Adjustments must be rejected. The FY03 Appropriations Act explicitly provides that the same amount of Aid for Enrollment Adjustments that was appropriated for that aid category in the FY02 Appropriations Act is appropriated for FY03. Again, in order for each district, including petitioners, to receive no less of a total State aid amount payable for the 2002-2003 school year than the sum of the districts' total State aid amount payable for the 2001-2002 school year for the listed aid categories (including Aid for Enrollment Adjustments), it follows that no district can receive more Aid for Enrollment Adjustments for the 2002-2003 school year than it received for the 2001-2002 school year. Otherwise, some districts would receive less total State aid amount payable for the 2002-2003 school year than the sum of the district's total State aid amount payable for the 2001-2002 school year for the listed categories.

It follows that such a definitive legislative intent as reflected in the FY03 Appropriations Act supersedes any previously expressed legislative desires, *i.e.*, CEIFA, at least for the duration of the FY03. Clearly, the funding formula as set forth in CEIFA for the listed categories cannot coexist with the enacted appropriation and, consequently must be deemed to be suspended by the adoption of the FY03 Appropriation Act. See City of Camden v. Byrne, 82 N.J. 133, 153-55 (1980); see also County of Essex v. Waldman, 292 N.J. Super. 268, 290-93 (App. Div. 1996), cert. den. 149 N.J. 139 (1997. Therefore, the FY03 Appropriations Act dictated the Boards' statutory entitlement of State aid. To this end, the Commissioner's certification of State aid

figures at the same amount as the previous school year cannot constitute "inaction." Rather, the Commissioner, in accordance with the statutory time frame, provided an accurate certification of the State aid districts would receive for the 2002-2003 school year. Moreover, the Commissioner's certification of State aid figures at the same amount as the previous school year is consistent with the FY03 Appropriations Act which dictates the Boards' statutory entitlement of State aid.

Petitioners attempt to distinguish the statutes at issue in City of Camden v. Byrne, is hollow. CEIFA, similar to the statutes at issue in City of Camden v. Byrne, does not constitute a legislative appropriation in and of itself. CEIFA does not serve as valid authority for the withdrawal of monies from the State treasury under the State Constitution. Rather, CEIFA requires subsequent legislative appropriations to be effective authorizations of the expenditure of public monies. See e.g. FY2002 Appropriations Act. P.L. 2001, c. 130. Thus, the legal principles established in City of Camden v. Byrne apply equally to the present matter.

Finally, respondent submits that it is immaterial that the Hammonton Board's 2002-2003 district budget, as submitted to the local voters, was below the T&E range. First, the Verified Petition of Appeal contains no allegations that the Hammond Board is unable to provide a through and efficient education. Second, the Hammonton Board is statutorily entitled to submit such a budget as long as Hammonton is not failing to meet the core curriculum content standards. See, N.J.S.A. 18A:7F-6(a).

For the reasons set forth above, as well as those set forth in respondent's previous filings, respondent's motions for summarily decision should be granted in the above-captioned matters and petitioners' motions for summary decision should be denied.

Unpublished Appellate Division Opinion

Subsequent to the submissions of the parties briefs, the Deputy Attorney General submitted the unpublished Appellate Division opinion in the matter of Hammonton Board of Education v. New Jersey Department of Education, et. al. Docket No. A-3836-01T5, delivered by the Honorable Michael P. King, P.J.A.D. The Boards object, to the submission asserting, among other things, that unpublished opinions do not constitute precedent and is not binding upon any court. R. 1:36- 2. The respondent, on the other hand, asserts that the Appellate Division opinion deals with the very same issues contested in the instant matter.

Having reviewed and considered the arguments of the parties and having further considered the Appellate Court's opinion in Hammonton, supra, it is incumbent upon this tribunal to address the Court's analysis of the issue of the legislative function with respect to the Appropriations Act. To that end, the following is the Court's analysis of that issue:

The Honorable Michael P. King, in the opinion of the Court, observed:

> . . . Our courts have repeatedly affirmed that only the Legislature may appropriate funds. City of Camden v. Byrne, 82 N.J. 133, 148 (1980) (asserting that "New Jersey Courts have consistently adhere to the principle that the power and authority to appropriate funds lie solely and exclusively with the legislative branch of government"); Stubaus v. Whitman, 339 N.J. Super. 38 60, (App. Div. 2001) (holding that it is "the Legislature's responsibility to allocate the State's resources"); Franklin v. DHS, 225 N.J. Super. 504 (App. Div. 1988) (the "Constitution has placed matters [of appropriations] in the Legislature and it is that branch of government which must weigh the interests of its citizens"); Bd. of Ed. of Fairfield v. Kean, 188 N.J. Super. 244, 250 (App. Div. 1982) ("It is a rare case . . . in which the judiciary has any proper constitutional role in making budget allocations").
> (Slip op. at p. 15)

Judge King continues to state that:

> The principle is also well established that statutes which rely on State funding are not "self-executing." City of Camden, 82 N.J. at 147. Thus, even were "the Legislature has mandated a particular program, it is subject, insofar as it requires appropriations, to the Annual Appropriations Act." Franklin, 225 N.J. Super. at 516. Accordingly, "the judiciary is unable to compel a requested appropriation even where a statutorily defined substantive right to the monies is established." City of Camden, 82 N.J. AT 148. Furthermore, and most relevant to the claim mad in this case concerning the supposed "inaction" of the defendants, our Supreme Court has held that there can be "no redress in the courts to overcome either the Legislature's action or refusal to take action pursuant to its constitutional power over state appropriations." Id at 470. An order by the judiciary to appropriate funds would "constitute a judicial intrusion upon the legislative and executive authorities in violation of the doctrine of separation of powers." Smith v. Goldman, 159 N.J. Super. 297, 303 (App. Div. 1978). (Slip op. at pp. 15-16)

With respect to the alleged conflict between the Appropriations Act and CEIFA, the Court had this to say:

> The current appropriations act at issue in this case, the FY03 Appropriations Act, L. 2002, c. 38 (FY03), has the full effect of law and expresses a "definite legislative intent." City of Camden, 82 N.J. at 142. To the extent that the two enactments - CEIFA and FY03 – are irreconcilable, they cannot coexist. Our courts, consistent with federal statutory interpretation, have declined to apply the doctrine of "implied repeal." Id. See also Friends of the 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 of appropriations on standing legislation as an implied "suspension rather than an implied repeal"; however, for practical purposes, the effect is the same. City of Camden, 82 N.J. at 153. A suspension of an existing law in favor of an appropriations act overcomes the presumption against repeal "when the two legislative measures are patently repugnant or inconsistent." Id. at 154.
> (Slip op. at 16-17)
> . . . . . .
>
> . . . . .Where a legislative failure to appropriate funds is "an intentional and

> advertent act," the appropriations law will supersede "any previously expressed legislative desire at least for the duration of the particular appropriation act. Id. (Slip op. at 17)
>
> . . . .
>
> A suspension, as in the City of Camden, is appropriate because the appropriations bill, which defendants acknowledge disregards CEIFA's mandatory formula, expresses the clear legislative intent to supersede CEIFA's requirements. . . . . (Slip op. at 18)

CONCLUSIONS

The respondents and the Appellate Court have clearly and succinctly addressed the issues of these contested matters and observed, among other things, that the legislative intent of the FY03 Appropriations Act was to limit expenditures of the State treasury and that the Legislature's action to enact the FY03 Appropriations Act superseded any and all statutory provisions which would increase such expenditures including, among others, CEIFA. As observed in the matter of City of Camden v. Byrne, 82 N.J. 133, 148 (1980), that our courts "have consistently adhered to the principle that the power and authority to appropriate funds lie solely and exclusively with the legislative branch of government." (emphasis supplied).

The Legislature, in adopting the FY03 Appropriations Act, clearly limited the amount of State aid for each of the State's school public school districts. It specifically provided that ". . . .each district shall receive no less of a total State aid amount payable for the 2002-2003 school year than the sum of the district's total State aid amount payable for the 2001-2002 school year. . ." The language of the Act continues to list the categories for which aid was appropriated. There is nothing in the Act which provides for additional aid for any of the listed categories, including Aid for Enrollment Adjustments.

Having considered and assessed the arguments of the parties and having also considered the analysis of the Appellate Court, **I CONCLUDE** that petitioners' have failed to demonstrate that respondents are required to recalculate CEIFA aid based upon petitioners' student population counts. Nor have petitioners' demonstrated that respondents are required to apply any new or increased pupil population count for an updated calculation formula to increase their Core Curriculum Standards Aid; Demonstrably Effective Program Aid; or any other aids.

I **CONCLUDE**, therefore, that Summary Decision is hereby entered on behalf of respondents. I **FURTHER CONCLUDE**, that petitioners' Motions for Summary Decision is hereby **DENIED** and **DIMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 12, 2003
DATE

Lillard E. Law - Dec'd. W/
LILLARD E. LAW, ALJ t/a

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

9-11-03
DATE

Mailed to Parties:

SEP 16 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

OAL DKT. NOS. EDU 4613-02, EDU 4614-02 AND EDU 6458-02 (CONSOLIDATED)
AGENCY DKT. NOS. 125-4/02, 123-4/-02 AND 153-5/02

BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,	:	
PETITIONER,	:	
AND	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
BOARD OF EDUCATION OF GALLOWAY TOWNSHIP, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION,	:	
RESPONDENTS.	:	
	:	

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Joint exceptions of the Boards of Education of Egg Harbor and Hammonton, were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

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

Upon his full and independent review, the Commissioner concurs with the ALJ and the guidance provided by the unpublished Appellate Division opinion of the Honorable Michael P. King, that the funding formula as set forth in CEIFA cannot coexist with the Legislature's enacted state budget appropriation and, consequently, must be deemed to be suspended by the adoption of the FY 03 Appropriations Act, at least for the duration of this particular Act. *See City of Camden v. Byrne*, 82 *N.J.* 133 (1980); *see, also, County of Essex v. Waldman*, 292 *N.J. Super.* 268 (App. Div. 1996), *certif. denied* 149 *N.J.* 139 (1997). Consequently, as the FY 03 Appropriations Act dictates the parties' statutory entitlement to state aid, petitioners cannot prevail on their claim that respondents are required to increase their CEIFA aid.

Accordingly, the Initial Decision of the OAL granting summary decision to respondents is adopted and the within Petitions of Appeal are hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/27/03

Date of Mailing: 10/29/03

* 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.*

612-03

612-05

RADAR SECURITY, INC., AND ROSE LOCKMAN,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY, AND ATLANTIC COUNTY ALARM, INC.,	:	
RESPONDENTS.	:	

October 29, 2003

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 06220-97S

AGENCY DKT. NO. 265-7/97

RADAR SECURITY INC., AND ROSE LOCKMAN,

Petitioner,

v.

CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY, AND ATLANTIC COUNTY ALARM, INC.

Respondent.

Thomas H. Ward, Esq., for petitioner (Albertson, Ward & McCaffrey, attorneys)

Samuel Serata, Esq., for respondent Cumberland Regional School District

Patrick F. Geubtner, Esq., for respondent Atlantic Coast Alarm Inc. (George K. Miller, attorney)

Record Closed: June 19, 2003 Decided: September 15, 2003

BEFORE **JEFF S. MASIN,** Acting Director and Chief ALJ:

This matter, alleging that respondent Cumberland Board of Education awarded a contract in violation of the public bidding statutes, was filed with the Office of Administrative Law on July 27, 1997. The matter was assigned to Administrative Law Judge Kathryn Clark who entered an order granting emergency relief on August 8, 1997.

No information has been received from the parties since that time. On June 9, 2003, I contacted the parties requesting information as to the status of this matter and as to whether or not the case had been resolved. I further informed the parties that if I did not receive response within ten (10) days, the file would be closed.

More than ten (10) days having passed without a response from either party, this matter is **DISMISSED** for failure to prosecute.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 15, 2003
DATE

JEFF MASIN, Acting Chief ALJ,

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

Sept. 16, 2003 (Via Email)
DATE

Mailed to Parties: M. Kathleen Duncan (Ex)

SEP 24 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625
(609) 588-6582
Fax - (609)588-6536

JEFF S. MASIN
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

June 9, 2003

Thomas H. Ward, Esq.
Albertson, Ward & McCaffrey
36 Euclid Street
P.O. Box 685
Woodbury, NJ 08096

Samuel Serata, Esq.
20 Franklin Street
Bridgeton, NJ 08302

Patrick F. Geubtner, Esq.
Law Offices of George R. Miller, Jr., Esq.
26 Penn Avenue
Atlantic City, NJ 08401

Re: *Radar Security Inc. and Rose Lockman v. Cumberland Regional School District, Cumberland County and Atlantic Coast Alarm, Inc.*
OAL Dkt. No. EDU 6220-97
Agency Dkt. No. 265-7/97

Dear Counsel:

We are attempting to clarify our records concerning the status of the above-referenced matter. The case was assigned to Administrative Law Judge Kathryn A. Clark for an administrative proceeding. An order granting emergency relief was issued by Judge Clark on August 8, 1997. No information has been received since that time. Please provide any information you may have as to whether the case was resolved. If I do not receive a response within 10 days, I will assume that this contested case has been resolved and will close our file administratively.

Very truly yours,

Jeff S. Masin

JSM/cmo

OAL DKT. NO. EDU 06220-97
AGENCY DKT. NO. 265-7/97

RADAR SECURITY, INC., AND ROSE LOCKMAN,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY, AND ATLANTIC COUNTY ALARM, INC.,	:	
RESPONDENTS.	:	

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 dismissal of this matter is warranted by petitioners' failure to pursue their claim subsequent to the Administrative Law Judge's August 8, 1997 ruling[1] on their application for emergent relief.

Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Issue: 10/29/03

Date of Mailing: 10/29/03

[1] Adopted by the Commissioner on August 15, 1997.

[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.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

617-03

SEAN BENSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY	:	DECISION
	:	
RESPONDENT.	:	

October 31, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03110-03

AGENCY DKT. NO. 310-7/01

SEAN BENSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

Sanford R. Oxfeld, Esq. for petitioner (Oxfeld, Cohen, LLC, attorneys)

Mary E. Hennessy-Shotter, Esq., for respondent (Murray and Murray, attorneys)

Record Closed: September 5, 2003 Decided: September 11, 2003

BEFORE **THOMAS E. CLANCY**, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 19, 2003, 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 Settlement Agreement.

Having reviewed the contents of the attached Settlement Agreement, 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 Settlement Agreement 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.

9/11/03
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

Receipt Acknowledged:

9/16/03
DATE

M. Kathleen Duncan (Ea)
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 22 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

SETTLEMENT AGREEMENT
Between
THE ELIZABETH BOARD OF EDUCATION
and
SEAN BENSON

1. This Agreement is being entered into between the Elizabeth Board of Education ("Board") and Sean Benson ("Benson") to resolve the litigation pending between them before the Commissioner of Education, Agency Docket No. 310-7/01 and O.A.L. Docket No. EDUOR 03110-03N and all grievances filed by Mr. Benson against the Board of Education, as well as any litigation that could have been brought.

2. The Board agrees to pay Mr. Benson's for twelve (12) sick days representing days deducted from his sick bank which shall be paid at his salary for the 2000-2001 school year minus standard and ordinary deductions.

3. Mr. Benson agrees to withdraw his case before the Commissioner of Education, Agency Docket No. 310-7/01 and O.A.L. Docket No. EDUOR 03110-03N

4. Neither party makes any admission in the settlement of this case.

5. Mr. Benson acknowledges that this Agreement is in settlement of disputed issues of fact and law, that he has had the right and opportunity to discuss all aspects of this Agreement with his legal counsel prior to entering into it and that he has availed himself of this right, that he has carefully read and fully understands all of the provisions of this Agreement, and that he is entering into this Agreement knowingly and voluntarily in exchange for good and valuable consideration.

6. In consideration for this Agreement, Benson irrevocably and unconditionally releases the Board, and any employee and/or official of the Board, from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, causes of action, rights, costs, losses, debts and expenses of any nature whatsoever, known or unknown, which Benson, his heirs, executors, administrators, successors and assigns ever had, now have or

hereafter can, shall or may have (either directly, indirectly, derivatively or in any other representative capacity) by reason of any matter, fact or cause whatsoever from the beginning of time to the date of this Agreement, including without limitation, all claims arising under Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the New Jersey Law Against Discrimination Act, the New Jersey Conscientious Employee Protection Act, the Civil Rights Act of 1866, 42 U.S.C. §1983, The Americans with Disabilities Act, Title 18A of the New Jersey Statutes, Title 6 and 6A of the New Jersey Administrative Code, all claims arising under the public policy of the State of New Jersey, all tortious claims (including intentional infliction of emotional distress and inducing breach of contract) and all other federal, state and local labor and anti-discrimination laws, the common law and any other purported restriction on the Board's employment related decisions.

7. In consideration of this Agreement, the Board releases Mr. Benson from any claims the Board may have against his.

8. Each party hereto represents that, in executing this Agreement, such party has not relied and does not rely upon any representation or statement of any other party not set forth herein with regard to the subject matter, basis or effect of this Agreement or otherwise.

9. This Agreement sets forth the entire agreement among the parties hereto. This Agreement supersedes all prior agreements and understandings concerning the subject matter hereof, and it may not be changed orally but may be changed only in a writing signed by all parties. This Agreement shall be interpreted in accordance with New Jersey law.

10. Mr. Benson has voluntarily and without coercion entered into this Agreement.

11. The parties agree that this Agreement must be approved by the Administrative Law Judge and the Commissioner of Education. The Board of Education will make payment to Mr. Benson upon the approval of this Agreement by the Commissioner of Education.

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement as of the date set forth below.

For the Elizabeth Board of Education :

THE MURRAY LAW FIRM, LLC

Mary E. Hennessy-Shotter

By: Mary E. Hennessy-Shotter

Dated: 9/5/03

For Sean Benson

OXFELD COHEN, LLC

By: Sanford Oxfeld, Esq.

Dated: 9-2-03

Sean Benson

Dated: 8/26/03

OAL DKT. NO. EDU 03110-03
AGENCY DKT. NO. 310-7/01

SEAN BENSON,	:	
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: 10/31/03

Date of Mailing: 10/31/03

618-03

P.C., on behalf of minor child, P.A.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

October 31, 2003

OAL DKT. NO. EDU 9719-02
AGENCY DKT. NO. 258-8/02

P.C., on behalf of minor child, P.A.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS 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 on June 12, 2003, providing thirteen (13) days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner within the time specified,[1] this matter is no longer deemed to be a contested matter before the Commissioner[2] and is hereby dismissed with prejudice.[3]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/31/03

Date of Mailing: 10/31/03

[1] On September 19, 2003, petitioner filed a letter stating that she did not appear at the June 12 hearing because she did not know that she had to appear and that she could not afford to pay tuition.

[2] In its Answer to the Petition of Appeal, the Board filed a counterclaim for tuition for the days of P.A.E.'s ineligible attendance. Accordingly, the Board was requested to notify the Director of the Bureau of Controversies as to whether it wished to pursue its counterclaim for tuition in light of petitioner's failure to appear at hearing. By letter of August 31, 2003, the Board responded by stating:

> [W]hen Petitioner did not appear in the case and removed P.A.E. from the District, it was the intention of the Board that the matter, including its counterclaim, be dismissed. Accordingly, please enter the dismissal of this matter upon the record.

[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.* 6:2-1.1 *et seq.*

619-03

619-03

T.A., on behalf of minor child, R.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

November 3, 2003



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01360-03
AGENCY DKT. NO. 311-10/02

T.A., ON BEHALF OF MINOR CHILD, R.A,
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: September 25, 2003 Decided: September 25, 2003

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

On or about October 2, 2002, petitioner, T.A., filed a petition of appeal with the Commissioner of Education, challenging respondent's residency determination in regard to his brother, R.A. On November 22, 2002, respondent filed its answer seeking dismissal of the petition and counterclaiming for tuition for the period of ineligible attendance. On January 31, 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 a 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 February 28, 2003, and a telephone prehearing conference held on April 8, 2003. At that time, the issues were isolated, and a hearing was scheduled for August 5, 2003 at the OAL. In addition to the hearing schedule set forth in the prehearing order, notice of the time and place of hearing were sent to both T.A. and counsel for respondent reiterating the date, time and place of the hearing.

On August 5, 2003, counsel for respondent appeared. No appearance was made by or on behalf of T.A. Counsel for respondent attempted to reach T.A. at the telephone number he had listed for T.A. and was informed that it was the wrong number. Counsel for respondent called information and received a different telephone number. However, when he telephoned that number there was no answer. No appearance was made by T.A., although the court and counsel for respondent waited one hour for him to appear. Further, the court has not received any other information or contacts from T.A. since the date of the scheduled hearing. Thus, T.A.'s petition will be **DISMISSED.**

With respect to the counterclaim by respondent for tuition owed by T.A., counsel for respondent provided the affidavit of Karen Perkins, Business Administrator and Board Secretary for respondent. The affidavit was sent to T.A. by counsel for respondent. T.A. filed no response or objection to it.

Perkins' affidavit indicates that as Business Administrator, she is responsible for providing annual reports to the New Jersey Department of Education regarding the total annual per pupil costs for respondent. 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 R.A. was enrolled in respondent school district from October 4, 2002 to the present, August 20, 2003, the date of the affidavit. She stated that the annual per pupil cost for each minor child for that period of time at Clifton High School was $7,509.00 per year. She computed the cost for R.A.'s attendance of 159 days to be $6,633.48. T.A. has not

filed a response to Perkins' affidavit filed on August 25, 2003 and sent to T.A. by counsel for respondent by letter dated September 3, 2003.

Based on the foregoing, petitioner has failed to prove that respondent's residency determination in regard to R.A. was improper. Thus, it remains undisputed that T.A. did not meet the requisite family or economic hardship which would allow R.A. to attend respondent school district free of charge, pursuant to *N.J.S.A.* 18A:38-1b(1).

Based on the affidavit submitted, I **CONCLUDE** that R.A. was improperly enrolled in the Clifton School system between October 4, 2002 and the present. I further **CONCLUDE** that the proper tuition reimbursement for that period of time (159 days) is $6,633.48.

Thus, it is **ORDERED** that petitioner's appeal is **DISMISSED.** It is further **ORDERED** that tuition reimbursement in the amount of $6,633.48 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, 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.

September 25, 2003
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

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

September 25, 2003
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 2 9 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

da

EXHIBIT LIST

For Respondent:

R-1 Affidavit of Karen Perkins dated August 20, 2003

OAL DKT. NO. EDU 01360-03
AGENCY DKT. NO. 311-10/02

T.A., on behalf of minor child, R.A.,	:	
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 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, petitioner is directed to compensate the Board in the amount of $6,633.48 for the period of his child's ineligible attendance in the Board's schools. The instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11|03|03

Date of Mailing: 11|03|03

* 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.*

621-03

621-03

JOSEPH LOPEZ, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY, :

DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioner, nontenured campus police officer, alleged the Board improperly denied him back pay pursuant to *N.J.S.A.* 18A:6-8.3, when he was suspended without pay on November 14, 2000, prior to and during his period of indictment which occurred in January 2001. The charge of child endangerment was later dismissed. The Board questioned the timeliness of the petition.

The ALJ concluded that petitioner's request for relief was timely filed and that he should be awarded back pay with compensation from the first day of his suspension. The ALJ found that petitioner was involved in an unfortunate family matter, for which he was totally exonerated in October 2001. Moreover, the ALJ found that there was no evidence offered by the Board that petitioner should have remained suspended in the absence of criminal charges. The ALJ concluded that withholding back pay and benefits, under the circumstances herein, was not justified.

The Commissioner adopted the findings and determination in the Initial Decision with modification. *Citing Busler*, the Commissioner noted that there is no basis under education law to award back pay regardless of the disposition of the criminal indictment. The Commissioner, however, directed the Board to compensate petitioner for all back pay and emoluments due from November 14, 2000 until the date of his indictment in January 2001.

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.

November 6, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6786-02

AGENCY DKT. NO. 244-8/02

JOSEPH LOPEZ,

Petitioner,

v.

BOARD OF EDUCATION OF THE

CITY OF BRIDGETON, CUMBERLAND COUNTY,

Respondent.

Cristen D'Arrigo, Esquire for petitioner (D'Arrigo & D'Arrigo, attorneys)

A. Paul Kienzle, Esquire, for respondent (Casarow, Kienzle, & Raczenbek, attorneys)

Record Closed: September 12, 2003 Decided: October 3, 2003

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 relief on August 7, 2002. Respondent filed an answer to the petition on August 23, 2002. The matter was transmitted to the Office of Administrative Law (OAL) on October 11, 2002. 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 May 15, 2003. The May date was adjourned and the matter rescheduled for July 18, 2003. Respondent requested that the July 18, 2003, date be adjourned. During the July 17, 2003, telephone conference, all parties agreed to submit a stipulation of facts and legal argument, in lieu of a evidentiary hearing. The schedule was confirmed in writing on July 29, 2003. (C-1). The stipulation of facts was due on August 18, 2003, and respondent's opposition brief was due to be filed on like date. Petitioner had already filed a detailed legal memorandum with the Commissioner of Education upon filing its petition.

Petitioner prepared a stipulation of facts and submitted it to respondent on or about July 18, 2003. (C-2, C-3, C-5). Respondent did not respond or object to the proposed stipulation. (C-4). On September 8, 2003, this ALJ advised respondent that:

> Pursuant to my letter/order of July 29, 2003, respondent was to have filed its opposition brief and executed stipulation of facts by August 18, 2003. See letter attached. Respondent has failed to file an opposition brief or an executed stipulation of facts. No request for an extension has been received.
>
> This matter was scheduled for trial on May 15, 2003 and July 18, 2003. Both dates were adjourned at the request of the respondent. The purpose my July 29, 2003 letter, which followed a conference call arrange by me, was to avoid any further delay in hearing and deciding this matter. I made that clear during the conference call on July 17, 2003. The parties agreed that this matter could be decided summarily. Petitioner had already filed an extensive brief with the petition. I accepted that brief in support of petitioner's motion for a determination.
>
> I am mindful that this matter was filed with the Commissioner of Education on August 7, 2002. It was transmitted to the OAL on October 11, 2002. Two trial dates been adjourned and a briefing schedule ignored. No extension has been requested. Enough time has passed and petitioner is entitled to have his case decided in an efficient and timely manner.
>
> Therefore, be advised that I am accepting the stipulation of facts submitted to the court by petitioner on August 13, 2003. I will close the record on September 12, 2003. I will then decide this matter based upon the papers filed with the court at the close of business on September 12, 2003.
>
> (C-8).

As of September 12, 2003, respondent did not respond, object or otherwise seek an extension to file anything in this matter. Accordingly, the stipulation was accepted as filed and

the record closed on September 12, 2003. I note respondent did not file any additional papers through October 3, 2003.

STATEMENT OF STIPULATED FACTS:

At all times relevant to this proceeding, the petitioner, Joseph Lopez, (hereinafter referred to as the "Petitioner") was employed by the Bridgeton Board of Education (hereinafter referred to as the "B.B.O.E.") as a Campus Police Officer.

In October of 2000, the B.B.O.E. suspended the Petitioner subsequent to his arrest on October 6, 2000, under charges of 2nd degree child endangerment.

The arrest was predicated upon an accusation made by the Petitioner's daughter who was at that time a student at the middle school where the Petitioner was employed.

On or about November 14, 2000, the B.B.O.E. issued a suspension without pay to the Petitioner, even though the Petitioner had not yet been indicted on the charges.

On or about November 30, 2000, the Petitioner sent a written objection to the Board of Education concerning his suspension without pay.

The Petitioner was indicted in January 2001, on the insistence that the Cumberland County Prosecutor either prosecute or dismiss the charges against the Petitioner.

The Petitioner contended that the charges were the result of an on-going custody dispute between him and his former wife who is the mother of the child who made the statements that were the basis of the accusation. The child had been in the custody of Petitioner for 8 years prior to his arrest. Furthermore, the child had, a year earlier, made a known false accusation similar to that which supported this charge. Furthermore, the physical evidence contradicted the assertions made by the girl.

In June of 2001, plea negotiations were conducted and the Prosecutor made an offer to amend the charges to 4th degree and admit the Petitioner to PTI with a subsequent dismissal within 30 days. Petitioner rejected the plea after discussions with the B.B.O.E. on the impact of any plea to his future employment and back pay and sought a trial on the merits of the case.

The indictment against the petitioner was dismissed by the Gloucester County Superior Court in November of 2001, on motion of the defendant. The Court considered the nature of the indictment and the evidence offered by the State and found *inter alia* that the indictment was unsupported by credible evidence and had been improperly obtained.

The dismissal WAS NOT as a result of PTI and the motion for dismissal was actively opposed by the County Prosecutor.

There are no charges against the Petitioner and no action for termination has been brought by the B.B.O.E.

The B.B.O.E. reinstated the Petitioner to his former position in November of 2001.

On December 7, 2001, Petitioner by letter from counsel to the B.B.O.E. solicitor, made a request for information on how to proceed to request back pay from the B.B.O.E. As part of that request, counsel requested a hearing before the School Board and that the solicitor of the B.B.O.E. instruct him as to any necessary procedures to be followed in making said request for back pay.

On December 10, 2001, the solicitor responded by claiming that the discussions that had taken place concerning the plea had provided for no back pay.

On January 10, 2002, the Petitioner responded to the solicitor's letter of December 10, 2001 by reminding the solicitor that the plea had been rejected by the Petitioner precisely because of the conditions placed on his return to employment by the B.B.O.E., if he had accepted the plea. Furthermore, the charges against the Petitioner were dismissed on its merits by the court without the benefit of plea bargain or P.T.I.

On January 15, 2002, the solicitor wrote and indicated that no back pay would be forthcoming and invited a response from the Petitioner. No hearing had been held and the Petitioner was not afforded an opportunity to appear or otherwise present his claim to the B.B.O.E. The letter did not reference any meeting by the board of Education on the matter and the letter was not consistent with the content and format of other notices that had been issued by the Board of Education. There was no resolution denying the request for back pay, nor was any notice of denial issued to the Petitioner from the School Board.

On January 30, 2002, Petitioner again wrote to the solicitor and again requested back pay predicated upon certain case law that had developed in the preceding 6 months and asked for a response on that request in light of these cases.

Thereafter, during a telephone conversation between counsel and the solicitor, the solicitor requested that counsel for the Petitioner provide a copy of the Supreme Court case cited in the January 30th letter of the Petitioner. A copy of that opinion and other related cases were hand delivered to the solicitor in February, 2002. Several telephone calls over the succeeding months indicated that the solicitor had not had an opportunity to review the material and could not therefore respond.

No response was ever provided by the B.B.O.E. to the letter of January 30, 2002, nor the material that was dropped off thereafter. No hearing or notice of denial was issued by the B.B.O.E.

Thereafter, having received no response from the B.B.O.E., the Petitioner filed this action before the Commissioner.

See, Stipulation of Facts (C-5).

LEGAL ANALYSIS

The matter at hand involves the interpretation of *N.J.S.A.* 18A:6-8.3 and whether it provides for the payment of back pay and other benefits where a school board employee is vindicated of criminal charges. Petitioner is a campus police officer for the district. Petitioner was suspended without pay effective November 14, 2000. He was exonerated of all charges on October 21, 2001. Petitioner seeks all back pay and benefits from the date of his suspension to the date of his reinstatement. The applicable statute is covering campus police is *N.J.S.A.* 18A:6-8.3 and provides:

> Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.

Petitioner contends that his right to back pay is contained in the School Laws under *N.J.S.A.* 18A:6-8.3. In support of that contention, the Petitioner relies upon the case of *Griffin v. Board of Education of the City of Paterson*, 93 *N.J.A.R.* 2d (EDU) 882 (Decided November 12, 1992; *affm'd,* October 19, 1993) and *Driggins, v. Board of Education of the City of Newark*, 93 *N.J.A.R.* 2d (EDU) (Decided February 27, 1992; *affm'd,* April 9, 1992) as well as *Beatty v. Newton Bd. Of Ed.*, 1991 *S.L.D.* (Comm'r. June 25, 1991), and *State of New Jersey, Department of Corrections v. International Federation of Professional and Technical Engineers, Local 195*, 27 *NJPER* P 32109, Docket No. A-20-2000 decided July 12, 2001.

Petitioner relies upon the Initial Decision in *Griffin v. Board of Education of the City of Paterson, supra.* Therein the ALJ cited *Beatty, supra.* and stated:

> "It is reasonable to conclude that there is no express statutory right to back pay subsequent to an acquittal. Notwithstanding, in a recent case involving the question of whether a suspended teacher should receive back pay following acquittal of criminal charges, the Commissioner held that 'fundamental fairness' dictated that the teacher be granted back pay, including sick pay and vacation pay,

in light of the fact that a trial by jury yielded a verdict of not guilty on an indictment. *Beatty v. Newton Bd. Of Ed.*, 1991 S.L.D. (Comm'r. June 25, 1991)"

The Administrative Law Judge then went on to find:

"Notwithstanding the absence of specific statutory language, the Commissioner believes that in weighing the equities of this matter, fundamental fairness dictates that petitioner be granted back pay for the period of his unpaid suspension given that a trial by jury yielded a verdict of not guilty on the indictment which provided the basis for his suspension without pay under *N.J.S.A.* 18A:6-8.3. **At the present time, petitioner has not been found guilty of any wrongdoing and the indictment upon which the suspension is based has been disposed of in his favor**; therefore, it is concluded that as a matter of equity, back pay is warranted under the circumstances..."

In the present matter, the legal arguments offered by petitioner were unopposed by respondent. (*See*, procedural history, *supra.*). Notwithstanding the arguments by petitioner are unopposed, they still must be evaluated in accordance with the applicable law governing education. Notably, *N.J.S.A.* 18A:6-14 provides that should the criminal charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Arguably, this section applies exclusively to tenured teachers. However, petitioner makes the argument that the statute (*N.J.S.A.* 18A:6-8.3) covering all employees is silent on the issue of back pay. But, the language in *N.J.S.A.* 18A:6-14 suggests that granting back pay is permissible for employees of the district who are exonerated.

Petitioner was criminally charged with child endangerment. *N.J.S.A.* 2C:24-4(a). The indictment against petitioner was based upon questionable or even specious accusations. "The charges were the result of an on-going custody dispute between [petitioner] and his former wife who is the mother of the child who made the statements that were the basis of the accusation. The child had been in the custody of Petitioner for 8 years prior to his arrest. Furthermore, the child had, a year earlier, made a known false accusation similar to that which supported this charge. Furthermore, the physical evidence contradicted the assertions made by the girl." (C-5). The indictment was dismissed on motion before the criminal trial Judge. (C-6). The Court concluded that the allegations were baseless or unsupported. Moreover, the Superior Court

Judge's Decision reveals that the entire incident was influence by an ongoing custody dispute and involved matters associated child discipline. Specifically, Hon. John Tomasello, JSC stated:

> Should the discipline have produced a favorable change in the child's behavior, it would have been highly justified. All of the evidence available to the State indicates that if there was any contact between the defendant and the alleged victim, it did not rise to the level required for criminal prosecution. Thus, it can be seen that the State did not offer sufficient proofs of this element of the offense to obtain an indictment.
>
> The need to discipline children arises both as a matter of morality, the protection of one's neighbor from the misbehavior-or-worse-of one's offspring, and as a matter of legal compulsion. See: definition of "neglect" at *N.J.S.A.* 9:6-1, "failure to do or permit to be done any act necessary for the child's physical or moral well-being," and various parental responsibility laws.
>
> There are increasing demands on parents to see that their children are law abiding, and they are given precious few sources to do so by the State. One of them is the right to use physical force in discipline. *N.J.S.A.* 2C:3-8.
>
> The State may well argue that this is a trial issue. However, it is more than that, because this grand jury was not properly charged with regard to the law and could well have indicted based on the statements of criminality. It is highly inappropriate to fail to charge the grand jury with definitions of criminality, as it may lead to an indictment that is not otherwise obtainable, as here. Thus, the Court must dismiss the indictment on either theory. (C-6).

In the matter at bar, I **FIND** that petitioner, a school employee, was involved in an unfortunate contentious family matter. An immediate suspension appeared to be justified given the nature of the allegations and pending charges. However, as of October 12, 2001, petitioner was totally exonerated of the charge. There has been no evidence offered by the district that petitioner should have remained suspended, even in the absence of criminal charges. The record is barren of any evidence that petitioner acted wrongfully or was a risk to students. In essence, petitioner did nothing wrong if measured by a criminal or civil standard. The allegation of any wrongdoing was dismissed as baseless. In fact petitioner asserts that "Mr. Lopez was arrested because of an overzealous prosecutor who pursued a cause of action on untrue assertions in the face of evidence that contradicted the compliant by an adolescent seeking to shed the parental yoke of her father in favor of a permissive lifestyle wit her mother who never enjoyed the custody the child." (Petitioner's brief at page 10). Apparently, the criminal trial Judge agreed. In the

spectrum of possible outcomes, a pretrial dismissal of an indictment is about the best possible vindication. In view of the aforementioned, the district reinstated petitioner but refused to do so with back pay and other benefits. Had petitioner been culpable in a civil sense, applied for Pretrial Intervention, accepted a plea agreement or presented some other concern to the district, then withholding back pay would be plausible. However, none of the aforementioned occurred.

Therefore, I **CONCLUDE** that petitioner must be awarded all of his back pay, vacation time, benefits, pension credit and any other benefits from the first day of such suspension. *Griffin, supra., N.J.S.A.* 18A:6-8.3; *N.J.S.A.* 18A:6-14. To suspend a school employee, without pay, because they were involved in a contentious family matter resulting in criminal charges is reasonable. However, if they are fully exonerated, as in this case, it is unreasonable to not fully reinstate the teacher with all rights and emoluments. The districts failure to do so does not comport with "fundamental fairness" as expressed in *Griffin*, *Beatty, supra*. This type of action could have a chilling effect upon school board employees involved in difficult family matters. It may impact or deter necessary child discipline for fear losing one's wages and benefits. Mere "trumped up charges" and the fear of the related consequences, including a suspension with no right to recover back pay, could negatively impact important family matters and decisions. The threat of filing charges could disrupt the process of resolving family matters. The present matter is a clear indication of just how family matters can carelessly spiral out of control and spill over in a way that seriously affects the family unit's financial well being. I **CONCLUDE** that withholding back pay and benefits, under the circumstances presented in this case, is simply not justified.

Finally, petitioner addressed the timeliness of his request for relief. *N.J.A.C.* 6A:3-1.3. The regulation requires that a petition for relief be filed with the Commissioner "no later than 90 days from the date of the notice of a final order, ruling or other action by the district board of education...." *N.J.A.C.* 6A:3-1.3. Petitioner argues that his request for relief was timely because the district never issued a final order, resolution or decision. The charges against petitioner were dismissed by the Superior Court on October 21, 2001. The Order and Decision were mailed to petitioner on December 17, 2001. Back pay negotiations between counsel for the district and petitioner ensued but did not yield a final order or decision from the board of education. There were extensive negotiations between counsel but no formal board action was taken. (C-7).

Alternatively, petitioner was not served with notice of any formal decision or order of the board. Accordingly, petitioner argues that its action was timely.

I **FIND** and **CONCLUDE** that petitioner's request for relief was filed timely in accordance with *N.J.A.C.* 6A:3-1.3. There was nothing presented by respondent that could be construed as a final order, resolution or decision by the Bridgeton Board of Education. Hence, petitioner did not fail to act in a timely manner absent notice of (and proper service) a final action, resolution or decision by the Bridgeton Board of Education.

CONCLUSION AND ORDER

For the reasons set forth above, it is hereby **ORDERED** that petitioner's request for relief is hereby **GRANTED.** I **CONCLUDE** and **ORDER** that petitioner be awarded all of his back pay, plus interest, vacation time, benefits, pension credit and any other benefits from the first day of such suspension subject to mitigation for any earnings, wages or unemployment benefits gained by petitioner during the relevant period.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

10-3-03
DATE

W. TODD MILLER, ALJ

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

10-3-03
DATE

Mailed to Parties:

OCT 8 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Documents In Evidence

By the ALJ:

C-1 Letter of ALJ Miller, July 29, 2003

C-2 Letter of Cris D'Arrigo, Esq., August 13, 2003

C-3 Letter of Cris D'Arrigo, Esq., July 18, 2003

C-4 Letter of Cris D'Arrigo, Esq., August 26, 2003

C-5 Stipulation of Facts

C-6 Opinion, Hon. John Tomasello, JSC, October 21, 2001

C-7 Letter of A. Paul Kienzle, Esq. January 15, 2002

C-8 Letter of ALJ Miller, September 8, 2003

OAL DKT. NO. EDU 6786-02
AGENCY DKT. NO. 244-8/02

JOSEPH LOPEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND 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 review of the record in this matter, and assuming, *arguendo,* that this matter was timely filed, *N.J.A.C.* 6A:3-1.3(d), the Commissioner is compelled to modify the legal conclusion of the Administrative Law Judge.

Initially, the Commissioner notes that the pertinent statute provides that:

> Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 [18A:6] of which this section is a supplement.[1] *N.J.S.A.* 18A:6-8.3.

[1] It is undisputed that petitioner is a campus police officer and, as such, is not a tenured employee. The exception noted herein, then, is not applicable.

It is clear from the undisputed facts in this matter, that, contrary to the plain language in statute, the Board suspended petitioner *without pay* on November 14, 2000, although he was *not indicted* until January 2001.[2]

Notably, however, the statute is silent on the issue of back pay subsequent to the disposition of a criminal indictment. In this connection, the Commissioner has recently declared, and the State Board has affirmed, that there is no basis under education law to award back pay *regardless of the disposition of the criminal indictment. Robert Busler v. Board of Education of the City of East Orange, Essex County*, decided August 30, 2001, *aff'd* State Board of Education February 6, 2002. *See, also, Pawlak v. Board of Education of the Borough of Hopatcong, Sussex County*, 1988 *S.L.D.* 154. Thus, although petitioner attempts to distinguish *Busler* as "not relevant to this case because the defendant in that action availed himself of the PTI program as a way of avoiding the prosecution for which he was indicted" (Petitioner's Memorandum of Law at 8-9), the Commissioner does not find the holding in *Busler* to be so limited.

Accordingly, the Initial Decision is modified as set forth herein. The Board is hereby directed to compensate petitioner for all back pay and emoluments due from November 14, 2000 until the date of his indictment in January 2001.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 11|06|03
Date of Mailing: 11|06|03

[2] The Superior Court Judge's decision states that "On or about January 10, 2001 the matter was presented to the Cumberland County Grand Jury on a single count of 2nd degree child endangerment." (Exhibit C-6)

[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.*

622-03

SILVER FOX LEARNING CENTER, INC., ET AL.,	:	
PETITIONERS,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY; DR. ANNA DE MOLLI, ASSISTANT SUPERINTENDENT OF THE PATERSON PUBLIC SCHOOL DISTRICT; NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES; WILLIAM LIBRERA, NEW JERSEY COMMISSIONER OF EDUCATION; THE CITY OF PATERSON; AND FELIX ESPOSITO, IN HIS CAPACITY AS PATERSON CODE ENFORCEMENT OFFICIAL,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	SYNOPSIS
	:	

Petitioning early childhood education center sought funding for *Abbott* services it allegedly provided to the District from September 4, 2001 through January 31, 2002. The District contended the center was not functioning or contracted as an approved *Abbott* provider during the period in question.

The ALJ found that, even though the issues in this matter involve a contract dispute, since the resolution of these issues was grounded in the regulations governing the establishment of *Abbott* preschools, they are proper issues to be determined by the Commissioner. In light of the testimony of the witnesses and the record in evidence, the ALJ found that the center failed to sustain the burden of proving that it was in compliance with the regulatory requirements for an approved "Abbott" preschool from September 2001 through January 2002, notwithstanding the absence of a contract. Petition was dismissed.

The Commissioner concurred with the ALJ that petitioners had failed to demonstrate by a preponderance of the evidence that the center was providing authorized and verifiable subcontractor *Abbott* preschool services during the time in question. The Commissioner agreed that the center was not functioning as a *de facto Abbott* preschool prior to its execution of a contract with the District. Moreover, the Commissioner found that petitioners failed in their burden of proof to establish the accuracy of their claims that they were compliant with *Abbott* guidelines. The petition was dismissed.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1014-03

AGENCY DKT. NO. 368-11/02

SILVER FOX LEARNING CENTER, ET AL.,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, NEW JERSEY DEPARTMENT OF HUMAN SERVICES, COMMISSIONER OF EDUCATION, CITY OF PATERSON, ET AL.,

Respondent.

Ronald T. Nagle, Esq., appearing for Petitioner

Jack Gillman, Esq., appearing for Respondent
(Hanly & Ryglicki, attorneys)

Record Closed: June 3, 2003 Decided: June 27, 2003

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASEAND PROCEDURAL HISTORY

In this case, Petitioner, Silver Fox Learning Center, an Early Childhood Education Center seeks funding for "*Abbott*" services allegedly provided to eligible three

and four year olds residing within the District, from September 4, 2001 through January 31, 2002. Respondent District asserts center was not functioning or contracted as an approved "*Abbott*" provider during the period at issue.

This matter was transferred by order of the Honorable Burrell I. Humphrey from the Superior Court of New Jersey on September 18, 2002, with direction that it be heard and decided on an expedited basis. In the matter before the Commissioner, the City of Paterson, the individual Respondent DeMolli, were dismissed as parties to the matter before the Commissioner.

The Department of Human Services did not file an answer because, pursuant to a consent agreement, if the Center is found to have a valid "*Abbott*" contract with the District for the period at issue, it will fund the services for which it is responsible.

On January 6, 2003, the Department of Education transmitted the matter 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. The scheduling of this matter was hampered by severe weather conditions and heavy caseload with statutorily imposed deadlines. It was ultimately scheduled to be heard on June 2, 3 & 5, 2003.

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. Silver Fox Learning Center (hereinafter "Silver Fox"), a non-profit corporation located in Paterson, New Jersey, was formed to provide early childhood education in accordance with the Supreme Court directives in *Abbott v. Burke*, 153 *N.J.* 480 (1998) (hereinafter "*Abbott V*").

2. *Abbott V* requires the Commissioner of Education to make funds available to poor districts to provide educational services and facilities to three and four year olds in designated school districts.

3. The State-Operated School District of the City of Paterson (hereinafter "Paterson") is one of these districts.

4. Construction of Silver Fox began in Paterson in the Spring of 2001.

5. Silver Fox was opened for the start of the 2001 school year in September 2001.

6. The Silver Fox Board of Trustees was created on November 9, 2001.

7. Silver Fox currently has enrolled 45 students, who are each provided one hot meal and one cold meal per day pursuant to federal guidelines. The hours of operation are between 7:30 a.m. and 6:00 p.m., Monday through Friday, as required by *Abbott V, supra*. The services are provided free to the residents of Paterson but should be paid portionally by Paterson and the New Jersey Department of Human Services (hereinafter "DHS").

8. Silver Fox has not received any funding from either source for the time period from September 4, 2001 through January 31, 2002.

9. Silver Fox has been unable to pay all of its vendors and has not made lease payments and certain required tax payments.

10. Silver Fox was required to borrow money to pay operating expenses and salaries which resulted in a regular pay check.

11. Silver Fox's lack of funding has also resulted in the incursion of fines and penalties from the State and Federal taxing authorities.

12. Silver Fox executed an "Abbott Preschool Educational Contract" (hereinafter "the contract") with Paterson on February 4, 2002.

ANALYSIS AND CONCLUSION

Because the petition in the opening statements of counsel sounded in theories of breach of contract, unjust enrichment and equitable estoppel, I raised the issue of the Commissioner's jurisdiction to hear and decide the matter.

For the reasons set forth below, I **CONCLUDE** that the Commissioner has jurisdiction to determine whether Silver Fox is entitled to funds as a provider of early childhood education for services rendered prior to the execution of the contract with the State-Operated School District of Paterson.

The Commissioner of Education has "fundamental and indispensable" jurisdiction pursuant to *N.J.S.A.* 18A:6-9, which provides, in relevant part, "[t]he commissioner shall have jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws."[1] *N.J.S.A.* 18A:6-9; see, *Balsley v. N. Hunterdon Bd. of Educ.,* 117 *N.J.* 434, 438 (1990); *Hinfrey v. Matawan Regional Bd. of Educ.,* 77 *N.J.* 514, 525 (1978). The courts have "repeatedly reaffirmed the great breadth" of this power, yet it is not limitless. *Id.* at 524. Where a controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel. *East Brunswick Bd. of Educ. v. Twp. Council,* 48 *N.J.* 94, 102 (1966).

Generally, contractual disputes are excepted from the Commissioner's jurisdiction because an interpretation of contractual language, rather than school law, is

[1] *N.J.S.A.* 18A:6-9 provides in its entirety:

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner. For the purposes of this Title, controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws.

necessary to determine the outcome of the claim, and the expertise of the agency is not needed. The courts have affirmed this lack of jurisdiction over contractual disputes. *See Picogna v. Bd. of Educ. of Cherry Hill Twp.*, 249 *N.J. Super.* 332, 335 (App. Div. 1991) (no jurisdiction over contract claim of non-tenured school employee because no interpretation of school laws is required); *South Orange-Maplewood Educ. Ass'n. v. Bd. of Educ. of South Orange*, 146 *N.J. Super.* 457, 463 (App. Div. 1977) (no jurisdiction where dispute involved interpretation of sabbatical leave provisions of agreement and no statutory interpretation was required); *Newark Teachers Union v. Bd. of Educ. of Newark,* 149 *N.J. Super.* 367, 372 (Ch. Div. 1977) (no need to defer to administrative expertise since the only question properly before the court is one of contract interpretation). However, the courts have also considered circumstances that resulted in a determination to split jurisdiction between the court and agency. In *Archway Programs, Inc., v. Pemberton Township BOE,* 352 *N.J. Super.* 420 (App. Div. 2002), the court stated:

> The basic proposition that no administrative officer or agency, absent a specific grant of legislative authority, is empowered to decide questions of law, such as those arising in contract actions, applies to the Commissioner of Education even in the context of his plenary authority to decide controversies and disputes arising under the school laws. The Commissioner's authority is not exclusive where particular statutes provide alternate routes for issue resolution ... or where the matter involves a question of law outside the purview of the school laws.
>
> [*Id.* at 426 (citations omitted).]

Finally, a dispute involving both contractual and statutory interpretations has been found to be within the jurisdiction of the Commissioner. See *New Jersey Educ. Ass'n. v. Trenton, Bd. of Educ.,* 92 *N.J.A.R.* 2d (EDU) 481, 489 (incidental interpretation of the contract that is necessary to resolve education claims is within the Commissioner's jurisdiction); *Kohn v. Bd. of Educ., City of Vineland*, EDU 8705-00, Initial Decision, (July 26, 2001), *adopted,* Comm'r. (Sept. 14, 2001) <http://lawlibrary.rutgers.edu/oal/search.html> (since superintendents are tenured for

the term of their contract, violation of the contract may be a violation of school laws and as such is within the Commissioner's jurisdiction).

The matter herein involves an *Abbott* district, the subject of numerous decisions rendered by our Supreme Court. In *Abbott V,* the Court direct:

> the Commissioner to exercise his power under *N.J.S.A.* 18A:7F-6b and –16 to require all *Abbott* districts to provide... pre-school for three- and four-year olds. ... In directing the implementation of pre-school programs in the *Abbott* schools, the Commissioner must ensure that such programs are adequately funded...
>
> [*Abbott, supra* 153 *N.J.* at 508.]

The Court went on to hold:

> We recognize that disputes will occur in the administration of ... these reforms. Those disputes will involve issues arising from the implementation, extension, or modification of existing programs, ... the allocation of budgeted funds, the need for additional funding ... *Such disputes shall be considered "controversies" arising under the School Laws. N.J.S.A.* 18A:7A-1 to 7F-34.
>
> [*Id.* at 526 (emphasis added).]

N.J.A.C. 6A:24-9.1 to –9.6, which governs appeals of *Abbott* district reforms states:

> An aggrieved applicant for Department authorization to improve or amend an existing program, adopt a supplemental program or service, implement a required secondary program, build or renovate a school facility or seek additional *Abbott v. Burke* State aid may *appeal to the Commissioner* in accordance with the provisions of this subchapter.

[*N.J.A.C.* 6A:24-9.1 (emphasis added).]

The current dispute is seeking a determination of whether payment of funds to Silver Fox is appropriate. Such a determination requires an initial analysis of whether Silver Fox was operating an approved preschool learning center as of September 1, 2001. If not, was Silver Fox operating in compliance with the regulation so as to be a *de facto Abbott* preschool? If so, is funding permissible for such a program without an executed a contract with the *Abbott* district? The resolution of these issues is grounded in the regulations governing the establishment of "*Abbott*" preschools; thus, they are proper issues to be determined by the Commissioner.

Petitioner asserts that Silver Fox relied on actions and representations of Respondent, Paterson School District and proceeded to borrow and expend money to initiate a model preschool *Abbott* program based on those representations. Analysis of the testimony, however, reveals that whatever representations may have been made were vague hearsay statements made to Carol Ann Gauthier, the Silver Fox representative at least from the inception of the program until some time in October or November 2001, or to Laverne Davis, the first Director of Silver Fox, neither of whom testified. Although, pursuant to the rules of this forum, hearsay may be admissible, the testimony regarding the representatives made by Respondent to Gauthier and Davis are recounted accounts to Mr. Ambrosio and Dr. Powers. They are, therefore, even less reliable in addition to which there is no corroborative evidence to validate this testimony.

Moreover, the testimony of Respondent's witnesses places the circumstances under which the representations were made in the context of budget development for the next school year, *i.e.,* the discussions which took place between Petitioner and Respondent in the Fall of 2001 were in contemplation of the next school year; moreover, the budget funds for the 2001-02 school year had been committed in the Fall of 2000.

Based on the foregoing, as well as the further testimony of Respondent's witnesses that, at the time in question, Respondent did not consider them an "*Abbott*" preschool because Petitioner was not a member of the Paterson preschool collaborative and, thus, were not monitored by Respondent, I **FIND** that Petitioner was not an approved "*Abbott*" preschool during the time in question.

Turning next to the issue of whether Silver Fox was *de facto* operating an *Abbott* preschool program, in compliance with the regulatory requirements, from September 2001 to January 2002, notwithstanding the absence of a contract, an examination of the regulatory requirements is appropriate. The regulations require the Board to cooperate with or utilize a licensed child care provider whenever practical to implement required early childhood education programs; such cooperative efforts shall not duplicate programs or services otherwise available in the community.

The relevant regulations provide minimum standards which the licensed day care provider must meet in order to provide preschool services to children in *Abbott* districts. *N.J.A.C.* 6A:24-3.3(c) et seq. Analysis of the testimony presented by Petitioner discloses first that Silver Fox received a temporary approval to operate a child care center from the Department of Human Services on September 19, 2001. (P-5). The approval expires 30 days from the date of issuance. According to the testimony of Dr. Powers, President of the Board of Trustees, the temporary license was continuing at the time of hearing.

Although Dr. Powers and Mr. Ambrosio, who is also a member of the Board of Trustees, testified at great length to their compliance with the requirements of the regulations, much of their testimony was conclusory rather than specific. Moreover, that which offered specific details was unsupported by documentation. For example, Mr. Ambrosio testified that he has personal knowledge of the facility's compliance with all requirements and that he spent a great deal of time making sure they were in compliance. However, it was not clear whether he was testifying whether he meant compliance with the contract or compliance with the regulatory provision. In any case,

the testimony offered on such issues as whether they were in compliance with the regulation was evasive and vague at best.

Although it is clear from some of the documentation that the facility was in compliance with some of the regulations, there are omissions on other points. For example, it is clear that there was at least one teacher for every 15 children and that class size did not exceed 15 children as required by *N.J.A.C.* 6A:24-3.3(c)1. However, the following section of the regulation requires that the programs provided meets the department's early childhood program expectations linked to the core curriculum content standards and integrated with the Whole School Reform models utilized in the district. There is no indication in the record, other than Dr. Powers' testimony that the program planners wished to design a program to exceed the minimum standards that Silver Fox was in compliance with this regulation. In addition, there is nothing in the record which reflects the Board of Trustees imposed an obligation upon the existing teachers who lacked academic credentials to make progress toward a Bachelor's degree and a teacher of preschool through grade three endorsement by September 2004, as required by the regulations.

Based on the foregoing I **FIND** that Petitioner has failed to sustain the burden of proving that Silver Fox was in compliance with the regulatory requirements for an approved "*Abbott*" preschool during the period from September 1, 2001 to January 31, 2002, notwithstanding the absence of a contract. Accordingly, I further **FIND**, therefore, it is unnecessary to reach the issue of whether funding is permissible for such a program since I have found that Petitioner has failed to prove compliance. Accordingly, I **CONCLUDE** that this petition should be dismissed with prejudice.

ORDER

I hereby **ORDER** that 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 27, 2003
DATE

Maria Mancini La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

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

June 27, 2003
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 30 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses

John J. Ambrosio

Dr. Harry L. Powers

Corradina Fronte

Dr. Anna DeMolli

Exhibits

For Petitioner:

- P-1 Invitation
- P-2 Picture of Sign
- P-3 Certificate of Inc, (Non Profit)
- P-4 By Laws of Silver Fox
- P-5 Statement of Approval to Operate a Child Care Center
- P-6 Letter from Dr. Powers to Dr. Duroy, undated
- P-7 Program Requirements Manual 2000-01
- P-8 Silver Fox Parent Handbook
- P-9 Employment Contract
- P-10 Employment Contract
- P-11 Record Book
- P-12 Lease
- P-13 Silver Fox Balance Sheet Detail
- P-14 Contract between Paterson Public Schools and Silver Fox
- P-15 Silver Fox Balance Sheet
- P-16 Certification of Carlotta Blakely

For Respondent:

- R-1 Tuition Payments September 2001 – June 2002
- R-2 Minutes of Meeting, November 9, 2001
- R-3 Letter from Ms. Davis to Dr. DeMolli, December 17, 2001
- R-4 Letter from Ms. Davis to Dr. DeMolli, January 9, 2002

OAL DKT. NO. EDU 1014-03
AGENCY DKT. NO. 368-11/02

SILVER FOX LEARNING CENTER, INC., ET AL.,	:	
PETITIONERS,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY; DR. ANNA DE MOLLI, ASSISTANT SUPERINTENDENT OF THE PATERSON PUBLIC SCHOOL DISTRICT;[1] NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES; WILLIAM LIBRERA, NEW JERSEY COMMISSIONER OF EDUCATION;[2] THE CITY OF PATERSON; AND FELIX ESPOSITO, IN HIS CAPACITY AS PATERSON CODE ENFORCEMENT OFFICIAL,[3]	:	COMMISSIONER OF EDUCATION DECISION
RESPONDENTS.	:	

The record of this matter, including hearing transcripts, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the District's reply thereto were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4, and were fully considered by the Commissioner in reaching his determination herein.

Initially, petitioners except to the Administrative Law Judge's (ALJ) finding that the Commissioner has jurisdiction to decide this matter, asserting that, in directing the parties to

[1] On November 22, 2002, the parties submitted a Stipulation of Dismissal, without costs against either party and without prejudice, with respect to Dr. Anna DeMolli as a respondent.

[2] A Consent Order of Settlement between petitioners and State respondents, the New Jersey State Department of Human Services and the Commissioner of Education, was entered on June 4, 2003, providing that, if Silver Fox Learning Center, Inc., is found to have a valid "*Abbott*" contract with the Paterson School District for the period at issue, the Department of Human Services will fund the services for which it is responsible.

[3] Prior to the Superior Court's transmittal of this matter to the Commissioner, the City of Paterson and Felix Esposito were dismissed by the Court as respondents in this matter, without prejudice, as the result of a settlement agreement.

submit briefs as to whether the Trial Court/Commissioner has jurisdiction to decide this case, the "Trial Court" rightly perceived this matter as a breach of contract action that alleged other common law causes of action. (Petitioners' Exceptions at 4) Pointing to *Archway Programs, Inc. v. Pemberton Township Board of Education*, 352 *N.J. Super.* 420, 432, 426 (App. Div. 2002), petitioners acknowledge that the Appellate Division held that the Commissioner had primary jurisdiction in addressing the claims of the parties in the *Archway* matter, including petitioner's breach of contract and other asserted claims of unjust enrichment or quantum merit in that matter, but petitioners herein assert that the Appellate Division also found that, absent a specific grant of legislative authority, the Commissioner, even in the context of his plenary authority to decide controversies and disputes arising under the school laws, is not empowered to decide questions of law, such as those arising in contract disputes. (*Id.* at 4-5) Thus, petitioners submit, they are entitled to have their "strong common law claims," which were not addressed or disposed of by the ALJ's decision, decided by the Superior Court. (*Id.* at 5)

Petitioners also argue, *inter alia*, that the ALJ's findings that: 1) Silver Fox Learning Center, Inc. (Silver Fox) was open from the start of the school year; 2) Silver Fox was formed to provide *Abbott*[4] educational services; 3) the lack of funding from September 4, 2001 through January 31, 2002 caused Silver Fox many problems; and 4) a contract was entered into between the Board and Silver Fox, do not support the ALJ's ultimate conclusion that Silver Fox should not be funded for the period in question because it was not compliant with the *Abbott* guidelines. (*Id.* at 6) These "material inconsistencies," petitioners' proclaim, call for the rejection of the Initial Decision. (*Ibid.*) Petitioners further assert that the ALJ's conclusion that

[4] On May 21, 1998, the Supreme Court of the State of New Jersey issued its decision in *Abbott v. Burke*, 153 *N.J.* 480 (1998) (*Abbott V*) containing, among its mandates, the requirement that the Commissioner of Education "exercise his power under *N.J.S.A.* 18A:7F-6b and -16 to require all *Abbott* districts to provide half-day pre-school for three-and four-year olds." (at 508) The Court further clarified the requirements of *Abbott V* as to early childhood education and required Department of Human Services (DHS) licensed child care providers to meet enhanced standards in its decision in *Abbott v. Burke*, 163 *N.J.* 95 (2000) (*Abbott VI*). In response, the State Board adopted regulations requiring local boards of education, in cooperation with DHS licensed child care providers, to provide full-day, full-year early childhood education programs by the 2001-2002 school year. *See N.J.A.C.* 6A:24-3.3(a).

Silver Fox should not be funded for the period in question is also directly at odds with the objective facts and evidence in the record, *i.e.*, Silver Fox's possession of a sign that is given only to schools that are part of the District's collaborative, and the content of the Philosophy Statement appearing in the parent handbook stating Silver Fox's goals to meet or exceed the educational and professional guidelines required of it. (*Id.* at 7-8) Citing to the transcripts, petitioners posit that Silver Fox was compliant with the other *Abbott* guidelines in all other relevant respects in that:

1. Silver Fox had a license from the Division of Youth and Family Services;
2. Silver Fox had certified teachers with experience in other *Abbott* schools;
3. Silver Fox had classrooms of 15 students with a teacher and a teacher's aide;
4. Silver Fox had separate contracts with its teachers and teacher's aides;
5. Silver Fox had performed background checks on its staff;
6. Dr. Harry Powers, President of the Board of Directors of Silver Fox, testified that a curriculum was developed that was exemplary;
7. Silver Fox had professional development procedures in place for its teachers;
8. Silver Fox had a certified School Board Administrator working on its budget between September 2001 and January 2002. (*Id.* at 9-10)

Additionally, petitioners aver that the District did not rebut the testimony of petitioners' witnesses, Dr. Powers and John Ambrosio, who testified that no one from the Paterson School District challenged Silver Fox's compliance with the *Abbott* guidelines at any time during the period from September 1, 2001 to January 30, 2002. (*Id.* at 10)

Moreover, petitioners claim that the ALJ failed to consider any of the three causes of action raised in the petition, *i.e.*, breach of contract, unjust enrichment and equitable estoppel. (*Id.* at 11) With respect to the allegations of breach of contract, petitioners aver that the express language of the contract requires Silver Fox to be open from September 1, 2001 through June 30, 2002, and that District's Database Management Specialist Corey Fronte's explanation

that her failure to change the mandated opening date in the contract was an oversight is "simply not believable in light of Ms. Fronte's expressed ability to make changes to the form [of the] Contract and the fact that she changed several critical dates in the Contract." (*Id.* at 12) *Citing In re Miller's Estate*, 90 *N.J.* 210 (1982) and *Kearney & Trecker Corp. v. Master Engraving Co., Inc.*, 234 *N.J. Super.* 466 (Law Div. 1988), petitioners claim that any ambiguity in the contract is to be construed against the District as the party who drafted it. (*Ibid.*) Additionally, pointing to *Dontzin v. Myer*, 301 *N.J. Super.* 501, 507 (App. Div. 1997) and *Burley v. Prudential Ins. Co. of America,* 251 *N.J. Super* 493, 500 (App. Div. 1991), *inter alia*, petitioners posit that Section I of the contract is specific, while Section III of the contract is general[5] and that it is well-settled that specific terms of a contract have control over general terms. (*Id.* at 12-13)

With respect to petitioners' claim of unjust enrichment, petitioner avers that the District was well aware of Silver Fox's status as an *Abbott* school, that Assistant Superintendent DeMolli had first-hand knowledge that Silver Fox was open as of September 4, 2001, and that the District benefited from the provision of *Abbott* services by Silver Fox during the period at issue. (*Id.* at 13) In that the Abbott services provided by Silver Fox fulfilled the mandate imposed on the District by the Commissioner to provide full-day, full-year early childhood education services, petitioners assert that the District has been unjustly enriched at Silver Fox's expense. (*Id.* at 14)

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[5] In pertinent part, Section I of the contract states:

> The Provider shall provide a full-day, full-year early childhood educational program to children residing in the Paterson Public Schools District commencing September 1, 2001 and ending June 30, 2002***. (Exhibit P-14 at 2)

Section III(A) of the contract states:

> The Term of this Agreement shall be from February 1, 2002 to August 31, 2002. (Exhibit P-14 at 4)

Turning to petitioners' argument that the District should be precluded from denying payment based on the doctrine of equitable estoppel, petitioners claim that: 1) Silver Fox notified the District that it was opening an *Abbott* school; 2) the Assistant Superintendent attended the Silver Fox opening ceremonies in September 2001; 3) Silver Fox was given a sign by the District that represented to the citizens of Paterson that it was a "Participating" *Abbott* school; and Carlotta Blakely, an aide to Assistant Superintendent DeMolli, testified that she expressly told Dr. DeMolli that Silver Fox was enrolling students as an *Abbott* school. (*Id.* at 15) If Silver Fox was not considered an *Abbott* school as the District claims, petitioners submit, with the District's knowledge that Silver Fox was operating as an *Abbott* school, "it is both appalling and astonishing" that Dr. DeMolli, who oversees the District's *Abbott* schools, did not feel an obligation to advise the parents of Silver Fox's students that Silver Fox was not an *Abbott* school, nor did she ask Silver Fox to shut down as an *Abbott* school. (*Id.* at 14-17) Since the District allowed Silver Fox to open as an *Abbott* school, never notified Silver Fox that it was not considered to be an *Abbott* school, never notified Silver Fox that it was not compliant with the *Abbott* or District requirements and never notified Silver Fox that it would not be funded for the Fall of 2001-2002, petitioners assert that the District should be equitably estopped from denying payment for the period from September 1, 2001 through January 31, 2002. (*Id.* at 17-18)

In reply, the District claims that, although Silver Fox did operate prior to February 1, 2002, when it became authorized by written contract with the District to provide *Abbott* pre-school services to Paterson children, it did so without authorization by the District. (Respondent's Reply Exceptions at 2) The District avers that, since it did not authorize Silver Fox to operate as an *Abbott* preschool prior to February 1, 2002, it did not monitor the center nor budget for payment to Silver Fox. (*Ibid.*) The reason Silver Fox did not become part of the Paterson collaborative until February 2002, the District asserts, is that it was not properly managed. (*Ibid.*) The District further proffers that when the District became aware of Silver

Fox's situation in the Fall of 2001 during budget planning for the 2002-2003 school year, it worked with Silver Fox to develop a budget that would allow the District to contract with Silver Fox mid-year for 2001-2002. (*Ibid.*) That contract, the District argues, was within the District's budget for that year and specified the period of time of the contract and also specified the dollar amount. (*Ibid.*) Additionally, the District submits that there are no funds set aside or available for an *Abbott* preschool to operate on its own without approval from the District or the State. (*Ibid.*)

The District explains that when the Silver Fox contract was prepared to reflect mid-year commencement of services the standard Department of Education form was used and all of the dates were adjusted to reflect the mid-year commencement, except for the provision that delineates the responsibility for DHS wrap around and supplemental day services, which was not changed due to an oversight. (*Id.* at 3) The District claims that the incorrect date makes no sense in the context of the entire agreement and was properly explained as a clerical error. (*Ibid.*)

With respect to petitioners' claim that it had a Paterson *Abbott* Preschool banner, the District avers that it does not know how Silver Fox acquired the banner because Silver Fox was not authorized to provide contracted services until February 1, 2002, and that a banner is no substitute for a contract. (*Ibid.*) The District expresses its agreement with the ALJ's finding that "there was no clear and convincing evidence that Silver Fox was providing authorized and verifiable subcontractor Abbott preschool services." (*Ibid.*) The District also submits that the only testimony offered by Silver Fox was that of a developer of the project, who is also a member of the Board, and a consultant who serves as Board President, and that neither of these two individuals possessed first-hand knowledge of the day-to-day operations of Silver Fox. (*Id.* at 4)

With respect to the Commissioner's jurisdiction to hear this matter, the District relies on *Archway, supra,* and argues: 1) that it is both permissible and appropriate for the Commissioner to decide if an educational provider may claim reimbursement for a period in which there is no contract, and 2) that the within matter is under the primary jurisdiction of the Commissioner to decide whether "the services purportedly provided, but never proven to be provided, are subject to comprehensive early childhood guidelines." (*Ibid.*)

Turning to the question of whether Silver Fox was an approved *Abbott* preschool during the period in question, the District points out that the only two individuals who provided testimony on behalf of Silver Fox executed "Resolutions" stating that they had absolutely no participation in the affairs of Silver Fox prior to November 9, 2001. (*Id.* at 5) Thus, the District claims, Silver Fox relied upon witnesses who could not supply the necessary proofs and that petitioners could not prove, after the fact, that all the necessary requirements, *i.e,* teacher qualifications, class sizes, attendance and the like had been met. (*Ibid.*)

Moreover, the District argues that, although Silver Fox may have been formed in 2001 and may have opened in September 2001, it was not an *Abbott* preschool until the District agreed to contract for services with it, commencing February 1, 2002. (*Id.* at 6) Although petitioners claim to have common law claims, the District avers that, as in *Archway, supra,* petitioners have failed to meet the initial hurdles regarding entitlement for these claims to be considered in that such claims can proceed to a court only if petitioners can meet their burden of proving that Silver Fox met the regulatory requirements for the period in question. (*Ibid.*) The District concludes that there is no need for further proceedings in that primary jurisdiction rests with the Commissioner. The District, therefore, concludes that Silver Fox is not entitled to funding for September 2001 through January 2002 because Silver Fox did not meet all of the regulatory requirements and because it did not have a contract. (*Ibid.*)

Upon a thorough and independent review of the record, the Initial Decision, the transcripts, the exceptions and the reply thereto filed in this matter, the Commissioner concurs with the ALJ that petitioners have failed to sustain their burden of proving that Silver Fox Learning Center, Inc., was in compliance with the regulatory requirements to be considered an approved *Abbott* preschool during the period from September 1, 2001 through January 31, 2002.

With respect to the Commissioner's jurisdiction to determine whether Silver Fox in entitled to receive funds for its early childhood education program prior to the execution of a contract with the District, the Commissioner points out that it is well-settled that jurisdiction to hear and determine all controversies and disputes arising under the school laws rests with the Commissioner of Education. *See N.J.S.A.* 18A:6-9; *Balsley, supra*; and *Hinfey, supra.* As noted by the ALJ, generally, contractual disputes are not within the Commissioner's jurisdiction. However, there are circumstances where the jurisdiction to hear a matter is split between the Commissioner and the courts and where a contractual dispute requires an interpretation of the underlying school law. *See Archway, supra; New Jersey Educ. Ass'n, supra; and Kohn, supra.* In the instant matter, a determination is required as to whether Silver Fox was operating an approved *Abbott* preschool as of September 1, 2001, and, if not, whether Silver Fox was operating in compliance with regulations so as to be considered as operating a *de facto Abbott* preschool, notwithstanding the fact that a contract for preschool services was not executed with the District until February 4, 2002.

The Supreme Court in *Abbott V, supra,* directed the Commissioner to require that all *Abbott* school districts provide preschool education for three- and four-year-olds. The resolution of whether Silver Fox was operating an approved *Abbott* preschool or, if not, was operating a *de facto Abbott* preschool during the period in question is grounded in the implementing regulations governing the establishment of *Abbott* preschools. As such, the Commissioner has jurisdiction to make this determination. Moreover, the Court in *Abbott V*

recognized the possibility of disputes arising with the implementation of its directed preschool requirement and addressed this issue, as follows:

> We recognize that disputes will occur in the administration of public education in the era ushered in by these reforms. Those disputes will involve issues arising from the implementation, extension, or modification of existing programs, the need for additional supplemental programs, the allocation of budgeted funds, the need for additional funding, and the implementation of the standards and plans for the provision of capital improvements and related educational facilities. Such disputes shall be considered "controversies" arising under the School Laws. *N.J.S.A.* 18A:7A-1 to 7F-34. *Abbott V* at 526.

For the reasons expressed above, therefore, the Commissioner concludes that the issues herein are proper issues to be decided by the Commissioner. In so concluding, the Commissioner points out that, notwithstanding petitioners' stated objections in their exceptions to the ALJ's conclusion that the Commissioner has jurisdiction in this matter, petitioners refer to the above quotation from *Abbott V* at 526 in response to the ALJ's request that the parties brief the issue of jurisdiction, and state that "[p]etitioner submits that the source of this Court's jurisdiction comes from *Abbott* itself." (Petitioners' Post-Trial Brief at 7) *Citing Archway, supra,* in support of its claim that the Court (OAL)[6] has jurisdiction to decide the matter, and arguing that the "City"[7] should not be permitted to argue that the Commissioner does not have jurisdiction over this matter, petitioners further state:

> Petitioner submits that it would be in bad faith now to allow the City to argue that this Court does not have jurisdiction.
>
> This case has been tried to a conclusion. The Petitioner has spent its time and has incurred legal fees to try this case. In the event that it is now forced to re-try the case in the Trial Court, it asks this

[6] Although petitioners repeatedly refer to OAL as a "Court," in fact, the OAL is a quasi-judicial forum established to provide hearings and proposed findings to New Jersey's administrative agency heads who are charged with final decision-making authority.

[7] Although petitioners refer to arguments anticipated by the "City," the sole remaining respondent in this matter at the time petitioners' post-hearing brief was submitted was the Paterson School District. A Settlement Agreement was executed between petitioners and the City of Paterson at Superior Court prior to this matter's transmittal to the Commissioner by that Court. *See* footnote 3.

> Court to award its attorney's fees and costs associated with the prosecution of this matter before the Commissioner and in this Court. (*Id.* at 9)

Next, the Commissioner turns to the question of whether petitioners have met their burden of proving that, during the period of September 1, 2001 through January 31, 2002, Silver Fox was an approved *Abbott* preschool or was operating in compliance with *Abbott* early childhood regulations so as to be considered a *de facto Abbott* preschool, and if so, whether funding is permissible. It is undisputed that it was the *intent* of the founders of Silver Fox to establish an *Abbott* preschool, that Silver Fox held its grand opening on September 6, 2001, that classes began on September 10, 2001, and that there was not an executed contract between the District and Silver Fox at the time of opening, nor until some five months later. Notwithstanding the founders' intent that Silver Fox would be an *Abbott* preschool upon opening in September, however, upon a thorough review of the record, the Commissioner concludes that Silver Fox was not operating as an *Abbott* preschool nor operating in compliance with *Abbott* early childhood regulations so as to be considered a *de facto Abbott* preschool during the period in question, but, rather, during the period from September 1, 2001 through January 31, 2002, Silver Fox can best be described as a work in progress towards becoming an *Abbott* preschool.

In this regard, the Commissioner points out that, since its opening in September 2001, Silver Fox has been operating under a series of Temporary Certificates of Occupancy (CO) issued for a period of 30 days, and, at the time of the hearing at OAL, Silver Fox was still operating on temporary CO's. (Tr. 6/2/2003 at 43) Moreover, with respect to the license to operate a Child Care Center, the Board President, Dr. Powers, testified at hearing that:

> Q And do you know at the time of opening or shortly thereafter whether or not Silver Fox obtained a license from the State?
>
> A We were in the process. The thing that we understood from Doctor DeMali's (sic) office, from the State Department of Education, from Human Services, the reason that we

couldn't get a full license was because of the CO, and we anticipated getting the CO on a weekly basis.***

Q Well, when you say you didn't have a license, did you have a temporary license?

A Yes, we had a temporary license.

Q Was that, the temporary license continues through today?

A Correct.
(Tr. 6/2/03 at 75-76)

Thus, Silver Fox was experiencing difficulty in getting all the approvals in place necessary to keep the school open as a Child Care Center, a threshold prerequisite for becoming an *Abbott* preschool as such approvals, were, and apparently still are, being issued on a month-to-month basis.[8]

Notwithstanding the claim by Silver Fox that its financial problems were a result of not being compensated as an *Abbott* preschool, the Commissioner finds that the failure to meet all of the criteria for establishing an *Abbott* preschool can be attributed squarely to its founders. By undated letter, Silver Fox advised the Paterson School District of its intent to participate in the Paterson Early Childhood Education Collaborative. (Exhibit P-6, in evidence) However, there is nothing in the record, absent third-party hearsay, to substantiate that there was any attempt by Silver Fox, prior to the school's opening in September 2001, to contract with the Paterson School District so as to establish the required relationship with the District to become an *Abbott* preschool. Under the auspices of founder Carol Ann Gauthier, Silver Fox began experiencing financial difficulties shortly after opening. The Charter Foundation of New Jersey, Inc., was responsible, under an August 14, 2001 Letter of Agreement between the Charter Foundation of New Jersey, Inc. and the Silver Fox Learning Center, for the fiscal management of the school and for performance of certain fiscal services. (Exhibit R-2, in evidence) As Board

[8] The record contains a copy of the initial Approval to Operate a Child Care Center for serving children ages 2 1/2-6 years of age from the Department of Human Services, issued September 19, 2001. The Approval indicates that it expires 30 days from the issuance date. (Exhibit P-5, in evidence)

member Ambrosio testified, Carol Ann Gauthier, a founder of Silver Fox and also a trustee for the Charter Foundation of New Jersey, Inc., initially managed the financial affairs of Silver Fox, but when she began to write checks with insufficient funds:

> We--one of the other things we did after we--we got the CPA to give us an audit, opened up the new account, told the bank not to honor any checks from the old Silver Fox account, which was Ms. Gothie's (sic) signature, and then, we proceeded to fire Ms. Gothie (sic)—not have her resign. She was fired for cause." (Tr. 6/2/03 at 32)

> So, I think that she got swept up in the problem of not knowing how to handle the situation, and therefore, got indicted by the prosecutor because of -- not our school, because we didn't file charges against her, but Hovey filed charges against her with his school, and it had to do with checks that were cashed she claimed were owed her, and she was a signature on a check. So, that was simultaneous to this all happening when we fired her for cause. And the cause that we fired her for was mismanagement of the school--school funds, not the school. (Tr. 6/2/03 at 33)

Prior to November 9, 2001, Silver Fox was still operating under the auspices of the Charter Foundation of New Jersey, Inc. The Record does not reflect when Carol Ann Gauthier was removed for "mismanagement of school funds." It is noted, however, that, when the Board of Directors of Silver Fox was formed on November 9, 2001, Ms. Gauthier was still affiliated with Silver Fox as a nonvoting Board member. (Exhibit R-2, in evidence) The minutes of that meeting, as amended on November 16, 2001, state that:

> The stated purpose of the meeting was to constitute an official Board for the Silver Fox Learning Center, isolate the activities of Silver Fox Learning Center from all other entities and to clarify the relationship between the Silver Fox Learning Center, New Jersey Charter School Foundation, 236 Ellison Street LLC and Silver Fox LLC. (Minutes of Meeting, November 9, 2001, R-2, in evidence)

Additionally, as late as December 17, 2001, in a letter to Paterson Assistant Superintendent DeMolli, Silver Fox's Director, Laverne Davis, acknowledges that Ms. Gauthier was responsible for the financial problems at Silver Fox, stating "Dr. DeMolli, at present, we are operating

without any funds of any kind due to poor planning by Ms. Carolann Gautier (sic) ***." (Exhibit R-3, in evidence)

Moreover, during its first five months in existence, in addition to experiencing initial mismanagement of its funds, operating without a signed contract with the Paterson School District, operating under temporary CO's and temporary approvals from DHS, Silver Fox was still in the process of forming its Board of Director's[9] and obtaining appropriate insurance. In this regard, the Commissioner observes that the standard Department of Education contract form utilized for contracting for the provision of *Abbott* preschool services requires the contracted Child Care Center to carry General Liability Insurance of $3 million and Comprehensive Automobile Liability Insurance of $2 million. If the required insurance is not in effect, the District may refuse to make payment of any further monies until such times as the provider reinstates the insurance. (Paterson Public Schools Abbott Preschool Educational Program Contract 2001-2002 School Year, Exhibit P-14, in evidence) When queried as to when Silver Fox obtained insurance compliant with the terms of an *Abbott* preschool contract, Board Member Ambrosio testified that: "Silver Fox had no money to purchase insurance at all for the first half of the year" (Tr. 6/3/03 at 41) and, subsequently, testified that he didn't know for sure when Silver Fox became insured, that "you'd have to find out from Bolinger [the insurer]." (Tr. 6/3/03 at 41-42) The minutes of the Silver Fox Learning Center's Board meeting of January 9, 2002 indicate that some four months after opening, Silver Fox was attempting to secure insurance and provide the required certification documentation. The minutes reflect, *inter alia*, that: 1) "[r]elevant documentation pertaining to certification is being submitted as required;" 2) "T. Ambrosio is following through to obtain liability insurance;" and 3) "L. Davis will check

[9] The January 9, 2001 Board minutes contain a "Resolution" (R-2) stating that, prior to November 9, 2001 there was no formal Board of Directors of Silver Fox.

companies for health benefit quotations***."[10] (Exhibit R-2, in evidence) Thus, during the first five months of its operation, Silver Fox was operating without a signed contract for the provision of *Abbott* preschool services, was operating under temporary CO's and temporary approvals from the Department of Human Services to operate a Child Care Center, experienced initial mismanagement of its funds, did not establish a Board of Directors for the school until November 9, 2001, and in January 2002 was still attempting to resolve its insurance issues so as to fulfill the contract provisions required as a provider of *Abbott* preschool services for the Paterson School District.

Moreover, notwithstanding petitioners' claim that Silver Fox was compliant with *Abbott* guidelines in other respects during the period in question, *i.e.,* that Silver Fox used certified teachers with experience in other *Abbott* schools; that Silver Fox had classes of 15 students with a teacher and a teacher's aide; that Silver Fox had a curriculum that was exemplary; that Silver Fox had professional development procedures in place for its teachers; that Silver Fox offered health services as the year progressed (Tr. 6/2/03 at 111); and that Silver Fox had a certified School Board Administrator working on its budget between September 2001 and January 2002 (Petitioners' Exceptions at 9-10), the Commissioner finds that petitioners have failed in their burden of proof to establish the accuracy of these claims. Silver Fox provided no witnesses with first-hand knowledge of the day-to-day operations of the school and did not provide adequate documentation to support its claims that its teachers were properly certified and that classes were comprised of Paterson residents and had the appropriate teacher-pupil ratio. With respect to whether Silver Fox's curriculum was consistent with that required to be considered an *Abbott* preschool, it is notable that petitioners did not submit any documentation of the curriculum content and whether it was consistent with requirements, but offered only the

[10] Silver Fox acknowledges that it did not provide its employees with health benefits from September 2001 through January 2002 due to financial difficulties.

unsupported testimony of Board President Powers that "[w]e developed a curriculum, an instructional modality that was exemplary." (Tr. 6/02/03 at 75)

Finally, the Commissioner finds that petitioners have failed to establish that Silver Fox had the required relationship with the Paterson School District during the period September 1, 2001 through January 31, 2002 so as to become an *Abbott* preschool. As stated above, Silver Fox did not execute a contract with the Paterson School District until February 1, 2002. Petitioners claim that a relationship existed between Silver Fox and the Paterson School District prior to that time and offer as proofs of that relationship an undated letter of Silver Fox's intent to participate in the Paterson Early Childhood Education Cooperative, the possession of a banner given only to *Abbott* preschools, the attendance at Silver Fox's grand opening of Paterson School District staff assigned to monitor *Abbott* preschools, and a site visit by one of the staff members assigned to monitor Abbott preschools.

With respect to petitioners' claim that the banner was given only to *Abbott* preschools, and that possession of the banner alone proves that the Paterson School District considered Silver Fox to be an *Abbott* preschool, the Commissioner disagrees, pointing out that, although the District cannot explain how Silver Fox came into the possession of the banner, the banner itself is not specific as to Silver Fox and there are a number of possible explanations as to how Silver Fox obtained the banner, a recruitment tool to encourage parents to enroll their children in *a* Participating Preschool Center in the Paterson School District, as follows:

ATTENTION PATERSON PARENTS
Free Full Day Preschool Program
For 3 and 4 Year Old Children
REGISTER NOW!
Visit a Participating Preschool Center
973-321-0544
Dr. Edwin Duroy
State District Superintendent
(Exhibit P-2, in evidence)

Moreover, the Commissioner finds that petitioners have failed to adequately document how Silver Fox came into possession of the banner, claiming that the banner was given to Ms. Gauthier, who did not testify at hearing, by some unnamed staff member of the Paterson School District at some unknown time.

Turning to the Grand Opening invitation, the Commissioner also observes that there is nothing in the invitation itself that indicates that Silver Fox is an *Abbott* preschool or that Silver Fox is affiliated in any manner with the Paterson School District. The invitation simply states:

> You're Invited
> Thursday, September 6th, 2001
> at 12 Noon
> To the dedication of
> Silver Fox Learning Center
> By the
> Charter Foundation of New Jersey, Inc.
> R.S.V.P. – September 4th at 973-278-8428
> (Exhibit P-1, in evidence)

Thus, attendance at the grand opening by Paterson School District staff does not lead to a conclusion that the District considered Silver Fox to be an *Abbott* preschool. Nor can the Commissioner conclude from the proofs presented that a site visit to Silver Fox by a District staff member constitutes the monitoring and reporting required of an *Abbott* preschool.

Accordingly, for the reasons set forth above, the Commissioner concludes that the preponderance of the evidence does not establish that Silver Fox was providing authorized and verifiable subcontractor *Abbott* preschool services during the period September 1, 2001 through January 31, 2002 so as to entitle it to *Abbott* preschool funding during that period. It was presumptuous for Silver Fox to have assumed that, without an executed contract with the Paterson School District, simply by notifying the District of its intent to join the Paterson Early Childhood Education Collaborative and then proceeding to open a child care center under the auspices of the Department of Human Services that Silver Fox was automatically an *Abbott*

preschool. To the extent that petitioners made such assumption, they did so at their own peril. Given the Commissioner's ultimate conclusion that Silver Fox Learning Center, Inc., was not functioning as a *de facto Abbott* preschool prior to its execution of a contract with the Paterson School District, it is unnecessary to reach to the issue of whether funding is permissible for a *de facto Abbott* preschool program operating without an executed contract with an *Abbott* district, or to reach to petitioners' claims of unjust enrichment and equitable estoppel. To the extent petitioners' assert other contractual claims, the Commissioner notes that he lacks jurisdiction to consider these claims. Moreover, the court which transferred this matter to the Commissioner did not retain jurisdiction[11] and, therefore, there is no mechanism for the Commissioner to return this matter to the court.

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

IT IS SO ORDERED.[12]



COMMISSIONER OF EDUCATION

Date of Decision: 11/6/03

Date of Mailing: 11/6/03

[11] See *Archway, supra,* at 432.

[12]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.*

623-03

IN THE MATTER OF RONALD UDY, :

DAVID A. EWART AND FRANK B. FRAZIER, :

WOODSTOWN-PILESGROVE BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, SALEM COUNTY. : DECISION

:

SYNOPSIS

In consolidated matters, the School Ethics Commission determined that respondent Board members violated *N.J.S.A.* 18A:12-24.1 *et seq.* After considering the nature of the charges, the Commission found that Respondent Udy violated *N.J.S.A* 18A:12-24.1(a), (c), (d) and (f) of the Code of Ethics and Respondents Ewart and Frazier violated *N.J.S.A.* 1A:12-24.1(a) and (f) of the Code of Ethics when they overruled the recommendation of the superintendent not to renew the District's former Supervisor of Guidance, C.L., who did not have the requisite certification for such position, and when they voted to create a new administrative position for C.L. without the recommendation of the superintendent, surrendering their independent judgment to supporters of C.L. The Commission recommended removal for Udy and censure for Ewart and Frazier.

Upon review of the record, the Deputy Commissioner, to whom this matter has been delegated for review pursuant to *N.J.S.A.* 18A:4-33, and whose decision was restricted solely to a review of the Commission's recommended penalties, concurred with the Commission's recommendations of removal for Udy and censure for Ewart and Frazier. The Deputy Commissioner, however, in light of comments raising the troubling allegation of procedural errors in these consolidated matters, determined to stay the implementation of the penalties ordered, pending respondents' timely appeal to the State Board of Education.

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.

November 10, 2003

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No. C20-03/C21-03**
RONALD UDY, DAVID A. EWART and FRANK B. FRAZIER	:	**CONSOLIDATED DECISION**
WOODSTOWN-PILESGROVE BOARD OF EDUCATION	:	
SALEM COUNTY	:	

PROCEDURAL HISTORY

The above matter arises from a complaint filed by Woodstown-Pilesgrove Board of Education (Board) member John W. Morrison on May 2, 2003 alleging that fellow Board members Ronald Udy, David A. Ewart and Frank B. Frazier violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Complainant also named Matthew Nowicki in the complaint, but withdrew his complaint against him. First, the complainant alleges that Mr. Udy, Mr. Ewart and Mr. Frazier violated N.J.S.A. 18A:12-24.1(a) of the Code of Ethics for School Board Members when they overruled the recommendation of the superintendent to not renew the District's former Supervisor of Guidance (C.L.) and voted to retain C.L. for the same position. Second, the complaint alleges that Mr. Udy, Mr. Ewart and Mr. Frazier violated N.J.S.A. 18A:12-24.1(a), (c), (d) and (f) when they voted to create a new administrative position for C.L. without the recommendation of the superintendent. Third, the complainant alleges that the respondents surrendered their independent judgment to supporters of C.L. in violation of N.J.S.A. 18A:12-24.1(f).

Mr. Udy and Mr. Ewart filed answers to the complaint through their counsel, John D. Jordan, Esquire, on June 13, 2003. Mr. Frazier filed a separate answer on June 3, 2003. In their answers, the respondents admit that they voted in favor of rehiring C.L. for the same position for which the superintendent recommended her non-renewal and voted to create a new administrative position for C.L. The respondents assert that it was in the best interest of the District to keep C.L. in the school system and that they had the legal right to take such action.

The Commission invited the parties to its August 26, 2003 meeting to present witnesses and testimony to aid in the Commission's investigation. Mr. Udy and Mr. Ewart were represented by Mr. Jordan. Mr. Frazier and the complainant appeared *pro se*. The Commission also heard testimony from board secretary, Susanne Fox; superintendent of schools, Michael Schreiner; and board members, Karen Malos and Patricia Parazewski. After hearing testimony, the Commission voted at its public meeting that Mr. Udy's conduct was in violation of the Code of Ethics, N.J.S.A. 18A:12-24.1(a), (c), (d) and (f). The Commission found the conduct of Mr. Ewart and Mr. Frazier to be in violation of N.J.S.A. 18A:12-24.1 (a) and (f) of the Code of Ethics.

FACTS

The Commission found the following facts to be undisputed.

At all times relevant to the allegations in the complaint, Mr. Udy, Mr. Ewart and Mr. Frazier were members of the Woodstown-Pilesgrove Board of Education. Mr. Udy was elected vice-president of the Board in 2002 and has worked 32 years in the District, serving as superintendent of schools, high school principal and teacher. Mr. Ewart has intermittently served on the Board, with more than 6 years of experience, and is currently serving as the Board president. Mr. Frazier is currently a member of the Board.

In 1999, the Board filled the position of Supervisor of Guidance. C.L. held a teaching certificate and supervisor certification from the State of New Jersey, but did not hold certification for the position of Director of Student Personnel Services. C.L. was hired by the Board with the understanding that she would obtain the aforementioned certifications. In January, 2000, the job title for the position of Supervisor of Guidance was changed to Director of Guidance and C.L. was "flagged" by the New Jersey Department of Education (NJDOE) for not having the necessary certification for the Director of Guidance position. The Board subsequently changed the title back to Supervisor of Guidance. No further "flags" were issued by the NJDOE.

A letter, dated January 17, 2001, to C.L. from the Pennsylvania Department of Education indicated:

> We have carefully reviewed and evaluated your application and accompanying credentials using certification Standards and Regulations of the State Board of Education of Pennsylvania, Chapter 49 Certification of Professional Personnel. Based upon the information you have submitted, the evaluation reveals that you have not met the requirements for the certificated [of Pupil Personnel Services].

The Superintendent received a letter, dated September 6, 2001, from the New Jersey Department of Education stating that in order for C.L. to qualify to serve as a Director of Student Personnel Services, C.L. would need to present a regular New Jersey Student Personnel Services endorsement. At the Board meeting of April 4, 2002, the superintendent recommended the non-renewal of C.L. in the position of Supervisor of Guidance and indicated that C.L. did not possess the required certification.

On April 22, 2002, the Superintendent issued a letter of non-renewal to C.L. On May 15, 2002, a hearing was held on the matter, at the request of C.L., who provided a letter dated February 26, 2001, from the Associate Dean for the Center for Education at Widener University. The letter indicated that C.L. had completed the course requirements for certification as Pupil Personnel Services Supervisor. The Board solicitor attended the hearing and advised the Board

of N.J.A.C. 6:11-11.10 regarding the Director of Personnel Services certification, which provides in pertinent part:

> (a) This endorsement is required for any person who is assigned as a director, administrator or supervisor of guidance and student personnel services of a school system, including the supervision of educational activities in areas related to and within the guidance program.
>
> (b) The requirements are:
>
> > 2. A standard New Jersey student personnel services certificate or its equivalent...

During the May 15, 2002 Board meeting, Mr. Udy made a motion to retain C.L. as the Supervisor of Guidance. The motion was defeated by 5-6 vote. Mr. Udy, Mr. Ewart and Mr. Frazier voted in favor of retaining C.L.

At the request of the Board president, the county superintendent confirmed, in his letter of May 30, 2002, that any person in the position of Supervisor or Director of Guidance is required to hold the required certifications for Director of Student Personnel Services. At its meeting of June 4, 2002, the Board approved, by 10-1 vote, a resolution encouraging C.L. to gain the Student Personnel Services Certification and encouraged the superintendent to leave open the Supervisor of Guidance position for one year, to give CL the opportunity to obtain the required certifications.

During the Board's meeting of June 6, 2002, Mr. Udy made a motion to create a new administrative position for C.L. The Superintendent was not present at the meeting to make a recommendation to create the position, but did write a letter to the Board members indicating that she had reviewed Mr. Udy's proposal and was supportive of it. The motion was defeated by 5-6 vote. Mr. Udy, Mr. Ewart and Mr. Frazier voted in favor of the creation of a new position for C.L.

After C.L.'s non-renewal, her supporters organized to recall the Board president and vice-president. Board member, Patricia Parazewski, testified that during the public session of the Board's meeting of May 15, 2002, she saw Mr. Udy call Margaret Scholl, a member of the recall committee who was sitting across the room, on his cell phone to tell her that the Board had defeated his motion to retain C.L. for the position of Supervisor of Guidance. Ms. Parazewski indicated that she did not hear Mr. Udy's conversation, but read his lips. Mr. Udy denied the allegation.

There is no information to show that C.L. obtained the necessary certification for Student Personnel Services from the State of New Jersey, or that she completed the necessary coursework to obtain the certification

ANALYSIS

Complainants allege that Mr. Udy, Mr. Ewart and Mr. Frazier overruled the recommendation of the superintendent and voted to rehire C.L. in violation of N.J.S.A. 18A:12-24.1(a). The Commission notes that in complaints alleging a violation of the Code of Ethics, the complainant has the burden of proving factually that the respondent's conduct is in violation of the Act.

Section 24.1(a) provides in pertinent part:

> I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools.

The Commission notes that the respondents were advised by the Board solicitor of the legal requirements under N.J.A.C. 6:11-11.10(a) and (b)(2), which mandate that Supervisors of Guidance hold a certification in Director of Student Personnel Services or Student Personnel Services. The Commission also recognizes the notification from the New Jersey Department of Education advising the superintendent of schools that C.L. did not hold the requisite certification. There is no information to show that C.L obtained the proper certifications. Mr. Udy, Mr. Ewart and Mr. Frazier argue that their decision to vote in favor of retaining C.L. was in the best interest of the District. The Commission disagrees. Although the Department of Education may not have "flagged" C.L. at the onset of her employment as Supervisor of Guidance, the law is clear. Under the aforementioned Department regulations, persons who hold the position of Supervisor or Director of Guidance must hold the Student Personnel Services certificate. Therefore, the Commission finds that Mr. Udy, Mr. Ewart and Mr. Frazier failed to enforce the regulations of the State Board of Education and violated N.J.S.A. 18A:12-24.1(a).

Complainant also alleges that Mr. Udy, Mr. Ewart and Mr. Frazier voted to create a new position without the recommendation of the superintendent in violation of N.J.S.A. 18A:12-24.1(a), (c), (d) and (f).

The Commission has found that the respondents violated N.J.S.A. 18A:12-24.1(a) for failing to adhere to the law and voting to retain C.L. Similarly, the Commission finds that Mr. Udy, Mr. Ewart and Mr. Frazier did not adhere to the law when they voted to create a new position for C.L., despite the requirement of N.J.A.C. 6:11-11.10(a) and (b)(2). Therefore, the Commission finds that Mr. Udy, Mr. Ewart and Mr. Frazier violated N.J.S.A. 18A:12-24.1(a).

Section 24.1(c) provides:

> I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

The Commission finds that Mr. Udy's motions to retain C.L and to create a new position for her when there was no evidence that C.L. did hold the required certification, went beyond his duty of policy making, planning and appraisal.

Section 24.1(d) of the Code of Ethics provides:

> I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

Based upon Mr. Udy's extensive experience, serving in the District for 32 years and holding such positions as the superintendent of schools, it is presumed that he knows the laws pertaining to the schools. The Commission finds that Mr. Udy attempted to undermine the authority of the superintendent and circumvent the requirements under N.J.A.C. 6:11-11.10 when he made the aforementioned motions. Therefore, the Commission finds that Mr. Udy administered the schools in violation of N.J.S.A. 18A:12-24.1(d).

Section 24.1(f) states:

> I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.

The Commission finds that Mr. Udy, Mr. Ewart and Mr. Frazier violated N.J.S.A. 18A:12-24.1(f) when they voted to retain C.L. as Supervisor of Guidance and voted to create a new position for her, although there was information to demonstrate that she had not gained the necessary certification and no evidence to show that she had completed the necessary coursework to obtain the certification for the position. The Commission finds that the facts lead one to conclude that this was done for C.L.'s gain, because she was a friend.

However, the Commission finds insufficient proof that Mr. Udy, Mr. Ewart and Mr. Frazier surrendered their independent judgment to the supporters of C.L. in violation of the second prong of N.J.S.A. 18A:12-24.1(f). Since it does find that all three respondents violated the first part of the section, the Commission finds a violation of N.J.S.A. 18A12-24.1(f).

DECISION

For the foregoing reasons, the Commission finds that Mr. Udy violated N.J.S.A. 18A:12-24.1(a), (c), (d) and (f) of the Code of Ethics and Mr. Ewart and Mr. Frazier violated N.J.S.A. 18A:12-24.1(a) and (f).

PENALTY

Based on the findings set forth above, demonstrating that Respondents violated the Code of Ethics for Board Members, the Commission recommends that the Commissioner of Education impose a penalty of censure regarding Mr. Ewart and Mr. Frazier. The Commission further recommends to the Commissioner the penalty of removal from office for Mr. Udy.

This decision, having been adopted by the Commission, 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 thirteen (13) days from the date on which the Commission's decision was mailed to the parties, the respondent 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 – C20/21-03

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof; and the testimony, and,

Whereas, the Commission found that Ronald Udy violated N.J.S.A. 18A:12-24.1(a), (c), (d) and (f) and David A. Ewart and Frank B. Frazier violated N.J.S.A. 18A:12-24.1(a) and (f) of the Code of Ethics For School Board Members; and

Whereas, the Commission believes that the penalty of removal is the appropriate sanction for Mr. Udy and the penalty of censure is appropriate for Mr. Ewart and Mr. Frazier;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter finding the respondents in violation of the Code of Ethics and recommends that the Commissioner of Education impose the aforementioned penalties.

Paul C. Garbarini, Chairman

I hereby certify that the School
Ethics Commission adopted this decision
at its public meeting on September 23, 2003.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 346-9/03

IN THE MATTER OF RONALD UDY,	:	
DAVID A. EWART AND FRANK B. FRAZIER,	:	
WOODSTOWN-PILESGROVE BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, SALEM COUNTY.	:	DECISION
	:	

The record of this consolidated matter and the decision of the School Ethics Commission ("Commission") finding that Mr. Udy, Mr. Ewart and Mr. Frazier violated the Code of Ethics found at *N.J.S.A.* 18A:12-24.1 *et seq.* have been reviewed. Therein, the Commission found that Mr. Udy violated *N.J.S.A.* 18A:12-24.1(a), (c), (d) and (f) of the Code of Ethics and that Mr. Ewart and Mr. Frazier violated *N.J.S.A.* 18A:12-24.1(a) and (f) of the Code of Ethics. The Commission recommended a penalty of removal for Mr. Udy, and censure for Mr. Ewart and Mr. Frazier. Upon issuance of the decision of the Commission, respondents were provided 13 days from the mailing of the decision to file written comments on the recommended penalty for the Commissioner's consideration.

Comments were filed on behalf of Mr. Udy and Mr. Ewart,[1] who primarily contend that they were denied due process in this matter. Respondents explain that the current matter was commenced by the filing of two complaints by John W. Morrison. Letters to

[1] On October 14, 2003, the Bureau of Controversies and Disputes received a letter from counsel for Mr. Udy and Mr. Ewart which made reference to "exceptions" that were filed on October 3, 2003. However, since there was no record of that filing with the Bureau, counsel was asked to forward another copy, which was received on October 16, 2003. Additionally, counsel's correspondence of October 14th appended a letter in support of the comments/exceptions. However, the Deputy Commissioner notes that in his review of a Commission decision, he is bound by the facts found by the Commission, as well as the Commission's determination that the facts constituted a violation of the Code of Ethics. Since it is his role to act upon the Commission's recommendation regarding sanction based upon the record it transmits to him, together with any written comments regarding the Commission's recommended penalty that may be filed by a party to the matter, the additional evidence could not be considered.

respondents dated May 8, 2003 from the School Ethics Commission provided notice of the complaints and also acknowledged that the complaints alleged violations of the School Ethics Act, *N.J.S.A.* 18A:12-21 *et seq.* (Respondent Udy's and Ewart's Comments at 1-2)

Subsequent to the filing of their Answers, respondents were notified, by letters dated June 30, 2003, that, at the upcoming meeting scheduled for July 22, 2003, the Commission may take one of several actions; that is, the Commission "may table the matter and ask for additional information and/or advice, the Commission may dismiss the matter or the Commission may determine that probable cause exists." (*Id.* at 2) Thereafter, the meeting scheduled for July 22, 2003 was adjourned and rescheduled for August 26, 2003.

Respondents Udy and Ewart assert that, based on the aforementioned communications, "the litigants, including the Petitioner proceeded with the understanding that the August 26, 2003 meeting was to determine the existence of probable cause." (*Ibid.*) After that meeting, however, respondents report they were informed that the Commission found violations in both cases. Respondents Udy and Ewart, therefore, argue:

> The Commission did not proceed in accordance with the Administrative Code. Accordingly, the Respondents have been deprived of a meaningful opportunity to be heard with regard to the allegations made against them. Since the Complaints alleged violations of the School Ethics Act, the Respondents had the right to expect that their case would be heard in accordance with the provisions of *N.J.A.C. 6A:28-1.14* if the Commission found probable cause. That procedure was clearly communicated to the Respondents by the Commission through the letter of its Executive Director dated June 30, 2003. There is no fairness in advising parties that they are attending a probable cause hearing, and then informing them, after the hearing, that they have been found guilty. (*Ibid.*)

Moreover, Udy and Ewart find it implausible that the Commission could, on this record, conclude that there were no facts in dispute. However, assuming, *arguendo*, that the

district. Under these circumstances, even a reprimand is a harsh result. (*Ibid.*)

Mr. Frazier submitted written comments which also addressed the Commission's findings and conclusions. With respect to the recommended sanctions, Mr. Frazier merely stated, "Mr. Udy is no more responsible then [*sic*] I am and should NOT be removed from the board. We all played an equal part and we should all be charged accordingly.***" (emphasis in text) (Frazier's Comments at 2)

Mr. Morrison, the complainant in this matter, submitted written comments, as well.[4] He acknowledges that there are "some minor errors in the Decision," (Morrison Comments at 1), but asserts that the Commission has drawn appropriate conclusions and recommended appropriate sanctions. (*Ibid.*)

Initially, the Deputy Commissioner, to whom this matter has been delegated for review pursuant to *N.J.S.A.* 18A:4-33, emphasizes that pursuant to *N.J.S.A.* 18A:12-29(c), the Commission's determination as to violation of the Act or Code of Ethics *is not reviewable by him.* Only the School Ethics Commission may determine whether a violation of the School Ethics Act or Code of Ethics has occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation by the School Ethics Commission. Therefore, this decision is restricted solely to a review of the recommended penalties for the respondents and its implementation and *cannot* reach in substance to the weaknesses in either procedure or content which were alleged by the respondents.

[4] Although complainants do not have standing to participate in proceedings held in accordance with alleged School Ethics Act violations, see, *In the Matter of Frank Pannucci, Board of Education of the Township of Brick, Ocean County,* State Board Decision March 1, 2000, slip opinion at 6-9, this decision was issued as a Code of Ethics violation. As such, the pertinent regulations provide that a complainant "has the burden to prove factually a violation under the Code of Ethics," *N.J.A.C.* 6A:28-1.13(b), and therefore, may be fairly considered a participant in this matter.

Commission did so find, respondents maintain that it was then obliged to notify them of their right to submit written statements setting forth the reasons they should not be found in violation of the Act, as provided in regulation. (*Id.* at 3) *N.J.A.C.* 6A:28-1.14.[2] Respondents reason that the Commission's failure to afford them due process has harmed their respective reputations and, in Mr. Udy's case, will serve to disenfranchise "the significant majority of residents" who voted for him. (*Id.* at 2) Respondents also take exception to the factual errors contained in the Commission's decision which, they argue, demonstrate that the process used by the Commission "was defective and that its decision is unreliable." (*Id.* at 3)[3]

On the issue of their respective penalties, although Respondents Udy and Ewart maintain that they did not violate either the Code of Ethics or the School Ethics Act, they urge the Commissioner to consider "the whole dispute, the merits of the positions advanced by the parties, the reasons for the actions of the Respondents and the extensive and distinguished service of the Respondents to their community." (*Id.* at 7) They continue:

> With regard to the proposal to rehire C.L., the respondents did nothing different than [*sic*] three predecessor Boards of Education. The proposal to fill the vacant position of Assistant Principal was supported by the Superintendent and would have helped to supply the District's need for administrative staff. The Respondents have advanced plausible reasons to support their understanding that their votes were not only legal, but in the best interests of the school

[2] As a demonstration of the harm that followed from these procedural errors, respondents note that the Commission found, at page 3 of its decision, that Mr. Udy made a call to Ms. Scheule, a member of the recall committee, on his cell phone during a public session of the Board's meeting on May 15, 2002. Respondents contend, however, that they had no notice that Mr. Morrison intended to introduce such evidence and, therefore, Mr. Udy had no opportunity to rebut the allegation. "Of course," respondents reason, "had the August 26th meeting proceeded as a probable cause hearing, there would be no harm in allowing the testimony." (*Id.* at 5)

[3] Respondents detail the following errors: Mr. Udy worked in the District for 14 years, rather than 32, as stated by the Commission (*id.* at 3); with respect to Mr. Udy's second motion, there are no facts on the record to support a finding that a "new position" was created, but, rather, the Assistant High School Principal position had existed for years and was merely vacant (*id.* at 5); the certification required for the Assistant Principal position is different from that required for Supervisor of Guidance and C.L., indeed, possessed the proper certification to be an Assistant Principal (*id.* at 5-6); and this record does not support a finding that Mr. Udy attempted to undermine the authority of the Superintendent when he made the two motions. (*Id.* at 6)

Consequently, the Deputy Commissioner is constrained to accept the Commission's recommendations that censure is the appropriate penalty in this matter for Mr. Ewart and Mr. Frazier for violating *N.J.S.A.* 18A:12-24.1(a) and (f) of the Code of Ethics, and that removal is the appropriate penalty for Mr. Udy, for violating *N.J.S.A.* 18A:12-24.1(a), (c), (d) and (f) of the Code of Ethics. However, in light of comments raising the troubling allegation of procedural errors in these consolidated matters, the Deputy Commissioner determines *to stay implementation of the respective penalties ordered herein*, pending respondents' timely appeal to the State Board of Education. If no appeal is filed pursuant to *N.J.A.C.* 6A:4-1.1 *et seq*, the penalties ordered herein shall be effectuated immediately.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 11/10/03

Date of Mailing: 11/10/03

624-03

IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD HAMMARY,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF ASBURY PARK, MONMOUTH	:	DECISION ON REMAND
COUNTY.	:	

SYNOPSIS

The Board filed tenure charges of unbecoming conduct and other just cause against respondent special education teacher/guidance counselor for three incidents involving racial remarks, profanity, failure to counsel students and use of excessive force to discipline a student.

At the OAL, the parties agreed to a settlement. The Commissioner rejected the settlement, as it did not comport with the *Cardonick* standards for settling tenure matters in that it failed to set forth the nature of the charges and the circumstances justifying settlement, and failed to reflect respondent's understanding that the matter would be referred to the Board of Examiners for possible revocation of his certificates. The matter was remanded to OAL for further proceedings. The matter proceeded to hearing.

Following 20 days of testimony, the ALJ found that the Board's witnesses were more credible than respondent and most of his witnesses. The ALJ concluded that the Board had proven its charges of unbecoming conduct against respondent and had demonstrated his unfitness to be a teacher. The ALJ ordered respondent terminated from his employment.

In light of the record and the credibility determinations of the ALJ, the Deputy Commissioner, to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-33, adopted the Initial Decision as his own and ordered respondent dismissed from his tenured position as of the date of this decision. The Deputy Commissioner directed that a copy of this decision be transmitted to the State Board of Examiners for action as it deems appropriate.

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.

November 10, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 803-02

AGENCY REF. NO. 327-8/01

IN THE MATTER OF THE TENURE HEARING OF DONALD HAMMARY, BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY.

Mark H. Zitomer, Esq.; **Carol R. Smeltzer**, Esq.; and **Nicholas Celso, III,** Esq., for petitioner (Schwartz Simon Edelstein Celso & Kessler, attorneys)

Kevin E. Daniels, Esq., for respondent (Daniels & Davis, attorneys)

Record Closed: August 13, 2003 Decided: September 24, 2003

BEFORE **ROBERT S. MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is a teacher tenure proceeding under *N.J.S.A.* 18A:6-10 to –18. Petitioner ("Board of Education" or "Board") brought three charges of unbecoming conduct and/or just cause for dismissal against Donald Hammary ("respondent"). The incidents that comprised two of the charges are alleged to have occurred on November 10, 1999; the third incident is alleged to have occurred on May 4, 2001. Specifically, petitioner accuses respondent of uttering offensive racial

remarks during a classroom presentation on November 10, 1999; failing to counsel children on November 10, 1999; and uttering profanity and using excessive force to discipline a student on May 4, 2001.

On September 14, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case under the Administrative Procedure Act. On January 4, 2002 the parties entered into a stipulation of settlement, whereby respondent agreed to resign from his position of teacher-guidance counselor and to surrender all of his New Jersey teaching and guidance counselor certificates to the State Board of Examiners. On January 9, 2002 I issued an initial decision approving the settlement and filed it with the Commissioner.

On February 25, 2002 the Commissioner rejected the settlement and remanded the matter to the Office of Administrative Law for expansion of the record and revision of documents, consistent with the concerns set forth in his decision. He further ordered that if the parties were unable or unwilling to reach an accord consistent with his order, the matter should proceed to hearing.

The hearing began on June 25, 2002 and, after 20 days of testimony, concluded on April 11, 2003. The record closed upon submission of reply briefs.

There are no significant legal issues in this case. All of the issues are factual. Some of the facts in this matter, however, are not contested. They are as follows.

UNDISPUTED FACTS

1. The Board of Education of the City of Asbury Park is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, *N.J.S.A.* 18A:11-1, which is entrusted with maintaining and overseeing the public schools of the Asbury Park School District.
2. Respondent is the holder of a standard Teacher of Social Studies certificate issued by the New Jersey State Board of Examiners in February 1981, as well as the

holder of a standard Teacher of the Handicapped certificate issued by the New Jersey State Board of Examiners in October 1983, and a standard Student Personnel Services (Guidance) certificate issued by the New Jersey State Board of Examiners in June 1986.

3. Respondent earned an Associates Degree in Education from Brookdale Community College, a Bachelor's degree from Rutgers University, and a Master's degree in Counseling from Trenton State College.

4. Prior to commencing his employment with the Board as a special education teacher on or about January 2, 1996, respondent had served as a guidance counselor at the North Main Street School, a public elementary school located in Pleasantville, New Jersey.

5. On or about January 2, 1998, respondent was transferred by the Board from the position of special education teacher to the position of guidance counselor for the Bradley Elementary School ("Bradley"), which is his current assignment.

6. Respondent was the only guidance counselor assigned to Bradley.

7. Respondent has acquired tenure in the District.

8. On or about July 27, 2001, Dr. Antonio N. Lewis, Superintendent of Schools, filed sworn tenure charges of unbecoming conduct and/or other just cause against respondent, together with a sworn statement of evidence in support of the charges, with Cecilia Tucker Brown, Acting Board Secretary.

9. On August 16, 2001, after considering the sworn tenure charges and sworn statement of evidence against respondent, together with the submission filed on his behalf, the Board determined to certify the charges to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:6-10 *et seq.*

10. On or about August 17, 2001, the sworn tenure charges, together with a certificate of determination and certificate of service, were filed by the Board with the Commissioner of Education, and respondent was simultaneously served with the tenure charges, statement of evidence, certificate of determination and certificate of service, pursuant to *N.J.A.C.* 6A:3-5.1 *et seq.*

11. On or about September 5, 2001, an Answer was filed on behalf of respondent, denying each of the sworn tenure charges.

12. The tenure matter was thereafter transmitted by the Commissioner of Education to the Office of Administrative Law as a contested case.

ISSUES

1. Credibility

Because the issues here are factual, a determination of the credibility of the witnesses who testified on behalf of petitioner and on behalf of respondent is vital.

I find that petitioner's witnesses were far more credible than respondent and most of his witnesses. [1]

I do so primarily because I carefully observed and listened to all of the witnesses and made notes of my impressions. For example, one of the key witnesses for petitioner was Joseph Romano, former Principal of Bradley. I noted that he was an "excellent witness: careful – articulate – sincere – fair – responsive – convincing – credible." Another important witness was Pamela Parker, employed as a secretary and parent coordinator at Bradley. I noted that she was "quiet – careful – thoughtful – responsive." A third key witness, Amanda Napolitani, saw what occurred on May 4, 2001 in the main office of Bradley; I found her to be thoroughly credible, noting that she was "sincere – responsive – alert – candid – sensitive – articulate – intelligent." I made similar observations of *all* of petitioner's witnesses.

My impressions of respondent and his witnesses, on the other hand, was quite different. For example, I noted during respondent's testimony that he rambled, was often unresponsive and argumentative, and frequently answered "I don't remember" or "I don't recall." I also noted that his answers sometimes were "almost incoherent" and that sometimes he appeared "confused." Another of respondent's witnesses was Harold Cooper, a schoolbus driver and a long-time friend of respondent, who said that on May 4, 2001, as he was driving his bus past Bradley, he witnessed a confrontation between respondent and a student (K.R.) and overheard a verbal exchange between the two of them. I was not impressed with Mr. Cooper, finding it hard to

[1] There were several witnesses called by respondent whose testimony in important respects supported *petitioner's* contentions and or contradicted respondent's claims. These included Barbara Lawrence, Leroy Hayes, Ann Monteparo, and Denise White. In my judgment, these witnesses *were* believable.

believe that *while driving his school bus* at some undisclosed distance from the scene, he actually overheard a conversation between respondent and the student.

Furthermore, petitioner was able to produce rebuttal testimony quite damaging to respondent's credibility. For example, on direct examination respondent contended that many of petitioner's key witnesses - - such teachers as Laura Duffy, Barbara Liedl, Nancy Nolan and Amanda Napolitani - - were biased against him. He declared that he had been told by another teacher, Esther Kelso, that they had circulated a petition critical of him and seeking his removal. On rebuttal, however, Mrs. Kelso flatly denied that allegation.

In sum, for the reasons just stated, I believe petitioner's version of what occurred on November 10, 1999 and on May 4, 2001 and disbelieve respondent's. Thus, my findings of fact on the critical factual disagreements are much closer to petitioner's version of what transpired than to respondent's.

2. Respondent's November 10, 1999 Presentation on Racism

1. For the 1999-2000 school year, respondent was assigned as the guidance counselor at Bradley.
2. One of respondent's responsibilities for the 1999-2000 school year was to give presentations to classes on subjects such as conflict resolution.
3. During the 1998-99 school year, as well as at the beginning of the 1999-2000 school year, several teachers complained to Mr. Romano, the Principal of Bradley, regarding respondent's presentations to their classes.
4. These teachers advised Mr. Romano that after respondent gave a presentation, they were left wondering what the presentation was supposed to have been about. They also advised Mr. Romano that they would need to spend two or three lessons answering the questions their students had regarding each of respondent's presentations.
5. On the afternoon of November 10, 1999, respondent made a presentation on the subject of racism to the third grade class of Ms. Laura Duffy.
6. Education on racism is an important topic in the Asbury Park community.

7. Ms. Duffy's third grade class was comprised of students between the ages of seven and eight years old.

8. Respondent gave Ms. Duffy little or no advance notice of his intention to make a presentation to her class on November 10, 1999.

9. Ms. Duffy was present for respondent's entire presentation, as was Mr. Romano.

10. Prior to November 10, 1999, Mr. Romano had given respondent some educational materials, including a book, about racism, in order to assist him in his in-class presentations.

11. Respondent's presentation to Ms. Duffy's third grade class was itself racist in tone and content. He said, verbatim or in effect: "If a white man had an affair with a black lady, they would have a black child. If a white man had an affair with a Spanish lady, they would have a black child." He also declared: "So the real reason we have racism is because of the white race. They don't want to be depurified."

12. Respondent then wrote comments to the above effect on the chalkboard.

13. After respondent completed his presentation to Ms. Duffy's class, he left the classroom.

14. The students in Ms. Duffy's class were left "dumbfounded" and/or confused as a result of respondent's presentation.

15. Mr. Romano documented his concerns regarding the November 10, 1999 presentation in a memorandum to respondent dated November 16, 1999.

16. Mr. Romano offered respondent a copy of the memorandum and asked respondent to sign a receipt that he had received a copy.

17. Respondent refused receipt of the memorandum, and refused to acknowledge that he had received it or that it had been offered to him.

3.

Respondent's Alleged Failure to Counsel Students on November 10, 1999

1. Respondent was the only counselor assigned to Bradley for the 1999-2000 school year.

2. His primary job responsibility for the 1999-2000 school year was to counsel students.

3. Mr. Romano was concerned about what he considered respondent's failure to counsel students during the 1998-99 and 1999-2000 school years.

4. Ordinarily, the counseling of students was supposed to take place in respondent's office.

5. Sometime in late 1998 or early 1999 respondent was instructed by Romano to submit a schedule to him on a weekly basis, setting forth the names of the students he would counsel the following week and the times of each counseling session.

6. Prior to preparing this schedule, respondent was told by Romano to meet with the classroom teachers to develop convenient times for the upcoming week's counseling sessions.

7. Prior to the week commencing November 8, 1999, respondent submitted a schedule to Romano, setting forth the names of the students he would counsel on November 8, 9, 10, 11 and 12, as well as the time each of these counseling session would occur.

8. On the morning of November 10, 1999, respondent reported for work as usual.

9. Ordinarily, if respondent did not go to the classrooms of the students and escort them to his office, the students did not go to his office on their own and would not receive counseling.

10. In light of various complaints that had been made to Romano by teaching staff members regarding respondent's failure to counsel their students, Romano decided on November 10, 1999 that he would conduct an observation of respondent's counseling sessions.

11. Mr. Romano did not advise respondent in advance that he would be conducting this observation, not did he advise respondent of the observation as it was taking place.

12. About 10 a.m. on November 10, 1999, Romano stationed himself at a desk immediately outside respondent's office and remained there until 1 p.m.

13. From where Romano was stationed, he could see whether any students entered or left respondent's office.

14. During this three-hour period, Romano had respondent's program schedule with him.

15. According to the schedule (which had been submitted by respondent to Romano) respondent was to counsel ten students in the three-hour period from 10:00 a.m. to 1:00 p.m. on November 10, 1999.

16. From 10:00 a.m. to 10:30 a.m., respondent was to counsel students D.E. and D.G.

17. From 10:30 a.m. to 11:00 a.m., respondent was to counsel students K.R. and B.D.

18. Respondent's schedule indicated that he was to take a half-hour for lunch from 11:00 a.m. to 11:30 a.m.

19. From 11:30 a.m. to 12:00 p.m., respondent was to counsel students P.C. and M.C.

20. From 12:00 p.m. to 12:30 p.m., respondent was to counsel students T.C. and M.D.

21. From 12:30 p.m. to 1:00 p.m., respondent was to counsel students S.L. and J.L.

22. Respondent did not counsel any students between the hours of 10:00 a.m. to 1:00 p.m. on November 10, 1999.

23. None of the students whom respondent was to counsel on November 10, 1999 were absent from school that day.

24. During the period from 10:00 a.m. to 1:00 p.m. on November 10, 1999, Mr. Romano made the following observations:

"10:00 A.M. I arrived for observation of counseling session for D.E. and D.G. (Ms. Vivino's 5th grade).

10:01 A.M. No students arrived. Mr. Hammary left his room.

10:30 A.M. Mr. Hammary still has not returned. Two pupils K.R. and B.D. (Ms. Tacy's Sp. Ed. class) did not arrive.

10:40 A.M. Mr. Hammary returns with no students.

10:41 A.M. Mr. Hammary leaves again.

10:45 A.M. Mr. Hammary returns with no students.

10:46 A.M. Mr. Hammary leaves – still no children have arrived. His scheduled lunch is 11:00 A.M. to 11:30 A.M.

11:30 A.M. Two children have been scheduled P.C. and M.C. (Ms. Lockley's 2nd grade). These children do not arrive.

11:51 A.M. Mr. Hammary returns.

12:00 P.M. Two children have been scheduled, T.C. and M.D. . . . These pupils do not arrive.

12:30 P.M. Two children have been scheduled, S.L. and J.L. (Mr. Hamilton's 1st grade). These pupils do not arrive."

25. During this three-hour period, Romano prepared detailed notes of respondent's activities, which were later put into the form of a typewritten memorandum to respondent.

26. At no point during this three (3) hour period did respondent explain to Romano why he was not performing his counseling duties, nor did respondent advise Romano of any emergency occurring in the school building during those hours which would have required his attention, although he had ample opportunity to do so.

27. As the Principal, Mr. Romano would very probably have been aware of any crisis situation occurring in the school building on November 10, 1999.

28. Mr. Romano was not aware of any crisis having occurred in Ms. Tacy's class on November 10, 1999.

29. Mr. Romano did not assign or direct respondent to tend to any crisis in Ms. Tacy's class on November 10, 1999.

30. Ms. Tacy's classroom, where respondent claims he was during this three (3) hour period, was located on the same floor as respondent's office, approximately 60 to 70 feet away.

31. Mr. Romano subsequently spoke to at least two of the teachers whose students were supposed to have been counseled on November 10, 1999; these teachers told him that respondent had not counseled their students on that date.

32. Respondent does not deny that he failed to counsel any students on the day in question.

4.

Respondent's Alleged Verbal and Physical Abuse of Student K.R.

1. On November 16, 2000, the Board adopted a policy prohibiting corporal punishment and governing the manner in which disruptive students, including elementary school students, were to be disciplined.
2. The Board's policy governing the discipline of disruptive students does not permit staff to use force to discipline disruptive students, except in self-defense or to prevent harm to the student or to others. "Using force" means trying to control the student without hurting him.
3. During the 2000-01 school year, K.R., a male student, attended fifth grade at Bradley Elementary School.
4. During the 2000-01 school year, K.R. was eleven (11) years old.
5. During the 2000-01 school year, the education and discipline of K.R. were governed by K.R.'s Individual Education Program ("IEP"), since K.R. is a classified student.
6. K.R.'s classification is "emotionally disturbed."
7. A student who is classified as emotionally disturbed is unable to meet his educational responsibilities in the same manner as a regular education child.
8. Prior to the 2000-01 school year, respondent served as the guidance counselor of K.R.
9. In his capacity as K.R.'s guidance counselor, respondent should have been familiar with K.R.'s disability and special needs.
10. On and before May 4, 2001, respondent had access to K.R.'s I.E.P.
11. K.R.'s I.E.P. set forth detailed procedures to be followed in disciplining him.
12. The proper methods for disciplining K.R., as set forth in his I.E.P., did not include engaging in any physical force.
13. Emotionally disturbed students should not be disciplined by being yelled at, cursed at, or physically assaulted.

14. Yelling, cursing at, and/or using physical force towards an emotionally disturbed student is improper and is likely to cause the student's misbehavior to escalate.

15. As a certificated guidance counselor and special education teacher, respondent knew, or should have known, that acting in a confrontational manner with K.R. would cause him to become upset and angry, and would serve no useful purpose.

16. On the afternoon of May 4, 2001, respondent was assigned to dismissal duty.

17. On that afternoon, at dismissal time (around 2:15 pm), K.R. left his class in the trailer which was used as a classroom for "emotionally dysfunctional" children.

18. Respondent observed student K.R. in the Bradley Elementary School yard.

19. K.R. was walking towards the alleyway behind the trailer where a commotion, apparently a fight or confrontation, between two students was taking place.

20. Respondent directed K.R. to turn around and to go home.

21. K.R. disregarded the directive of respondent and continued walking towards the alleyway.

22. Respondent then approached K.R. and attempted to black K.R.'s path with his body.

23. K.R. cursed at respondent, calling him a "black motherfucker" ("M.....F....."), and tried to run around him.

24. Respondent tried to restrain K.R., and some pushing and shoving between the two of them ensued. Particularly, respondent forcibly shoved or pushed K.R.

25. During this time, respondent angrily and loudly said to K.R.: "Who are you calling a black M.....F.....?" and other words to the same effect.

26. K.R. was frightened, and ran into the school building, proceeding through the school gymnasium, and into the main office.

27. Respondent pursued K.R., walking at a very rapid pace.

28. K.R. ran into the main office from the gym area. He was visibly upset, shaking, crying and afraid.

29. He saw his teacher, Barbara Lawrence, standing at the counter and in a trembling voice exclaimed "Mrs. Lawrence! Mrs. Lawrence!" When she asked him "what's the matter?" he replied: "I'm having a problem with Mr. Hammary. He choked me." She told him to stay next to her.

30. At that point, respondent burst into the office. He seemed upset and angry. In a loud voice he said: "you're not going to call me a M.....F..... bitch," or words to that effect.

31. Upon seeing and hearing respondent, K.R. left Mrs. Lawrence's side and ran through the swinging gates leading into the inner office behind the counter. He was apparently attempting to get to the office of Enoch Peters, the Principal of Bradley at that time.

32. Respondent pursued K.R. through the gates, loudly uttering profanities. On a "loudness" scale of one to ten (with 10 being the loudest), respondent's voice was at or close to ten.

33. Just after going through the gates, K.R. tripped and fell to the floor. Respondent leaned over him, grabbed him by the collar with both hands and pulled him off the floor.

34. When K.R. was on his feet, respondent pushed him against the fax machine and/or a wall of the inner office.

35. During this entire incident, K.R. was not resisting, kicking at respondent, or talking back to respondent, except to say "leave me alone."

36. Among those present at this time were several teachers, staff, parents, and other students. The office was "crowded" with people.

37. Two of the teachers present, Ester Kelso and Barbara Lawrence, attempted to get respondent to calm down but were at first unsuccessful. Mrs. Kelso tried to intervene by grabbing respondent's arm, but he pushed her hand away.

38. About that time, Vice-Principal Denise White, hearing a loud commotion, came out of a closed-door conference room located in the inner portion of the main office. She saw K.R. on the floor with respondent standing over

him. She remembered that respondent was angry and was speaking loudly. She and Mrs. Kelso asked respondent to calm down and to step back, which he did. Mrs. White also instructed one of the secretaries to page the Principal, Enoch Peters.

39. When Mr. Peters, who was on dismissal duty in front of the building, heard his name being called over the intercom, he hurried inside the building and proceeded toward the main office. As he approached the office, he encountered respondent. Respondent was walking with his head lowered and apparently talking to himself. Respondent looked angry. He kept repeating the phrase: "I'm not gonna be too many more M....F....."

40. Since Mr. Peters did not know what respondent was talking about, he asked respondent to come with him into his office to discuss the situation. When Peters and respondent entered the office they discovered K.R. sitting in the office with tears in his eyes. He obviously had been crying.

41. When respondent saw K.R. he yelled at him: "I told you that I'd tell Mr. Peters that I am not going to be too many more M.....F...ers," or words to that effect.

42. K.R. replied: "You choked me."

43. At that point, Peters asked respondent to leave the office, which he did, and Peters spoke with K.R. about what had happened.

44. Subsequently, Peters reported the incident to Dr. Antonio Lewis, Superintendent of Schools, and to the Institutional Abuse Unit of the Division of Youth and Family Services.

45. An investigator for the Division of Youth and Family Services conducted a thorough examination of the May 4, 2001 incident and concluded that respondent *had* physically abused K.R. on that date.

RESPONDENT'S CONTENTIONS

In essence, respondent contended that Mr. Romano was biased against him and imposed onerous and unreasonable demands on him. At first he said that he did not remember whether he counseled any students on November 10, 1999; later in his testimony, he admitted that he had

not, but he said that the reason was because he had been asked to be on security detail, particularly to breakup fights, in the classroom of one of the teachers (Ms. Tacy).

With respect to the racism lecture, respondent first seemed to deny having given a talk to Ms. Duffy's class on November 10, 1999, but then claimed that at the request of Mr. Romano, he had done so. He admitted making reference to affairs between white women and Hispanic, Asian, and black men but said he did so in response to a comment by a child ("grandma said that racism is because of the white race") and, further, denied saying anything to the effect that racism is the fault of the white race. He said he did not intend to put down anyone's race or to humiliate anyone. He denied writing anything on the chalkboard. And he maintained that the children understood what he was saying and "clapped" at the end of his presentation.

With respect to the incident of May 4, 2001, respondent testified that in addition to his other duties, he was a member of the "A Team," the security detail at Bradley. Around 2:15 p.m. on May 4, he was on duty in the schoolyard outside the main building during dismissal time. He saw a group of about ten children standing around and watching two girls hollering at each other. Respondent tried to disburse them, shouting "let's go! let's go!" He then saw K.R. - - who had a reputation for being a bully, using profanity, fighting, and resisting authority - - chasing a younger child. He told K.R. to go home. K.R. began to walk away but then reversed himself and came towards respondent. He pushed respondent hard with his shoulder and then "bumrushed" him. Respondent denied pushing K.R., knocking him down, or even putting his hands on him. However, K.R. fell down and called respondent a "M.....F....." He got up walked past respondent, called him a "bald M.....F....." and ran into the school. Respondent pursued him, walking rapidly. As he approached the office respondent saw K.R. inside, standing near some teachers. Respondent entered the office and looked around for K.R. He saw him on the floor of the inner office. He walked over to K.R., who began kicking him. At that point respondent shouted: "Now call me a 'M.....F.....'" About that time, Mr. Peters arrived and asked what had happened. Respondent said that K.R. had called him a "black M.....F....."

5. Penalty

The law in tenure proceedings is well-settled. Tenured teaching staff members 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. Further, this section of the statute provides that a tenured teaching staff member cannot be dismissed unless tenure charges are filed against the staff member by the local board of education and a hearing on the charges is conducted by the Commissioner of Education. The local board of education has the burden of proving tenure charges by a preponderance of the credible evidence. *In re Polk License Revocation,* 90 *N.J.* 550, 560 (1982) and *I/M/O Tenure Hearing of Marrero,* 97 *N.J.A.R.*2D (EDU) 104, *aff'd* State Bd. Of Education, 97 *N.J.A.R.* 2d (EDU) 319.

Having found for petitioner on the three substantive charges, the only remaining issue is that of penalty. On this issue also, established case law leaves little, if any doubt, that dismissal is the only appropriate sanction under the circumstances here.

See, e.g., in the Matter of the Tenure Hearing of Campbell 93 *N.J.A.R.*2d (EDU) 196, *adopted* Comm'r, 93 *N.J.A.R.*2d (EDU) 604, *aff'd* App. Div., 95 *N.J.A.R.*2d (EDU) 211, *cert. denied,* 142 *N.J.* 518 (1995), wherein the Appellate Division upheld the determinations of the State Board of Education, Commissioner of Education and Administrative Law Judge that *Campbell* should be removed from his tenured teaching position, in part based on racist comments made by him to seventh and eighth grade students. *I/M/O Tenure Hearing of Campbell,* 93 *N.J.A.R.*2d (EDU) 196, *adopted* Comm'r, 93 *N.J.A.R.*2d (EDU) 604, *aff'd* App. Div., 95 *N.J.A.R.*2d (EDU) 211, 212, *cert. denied*, 142 *N.J.* 518 (1995). In this case, the Administrative Law Judge properly pointed out:

> "Respondent's offensive remarks were made in a public school classroom setting, at a time when positive self-attitudes are to be nurtured in pupils regardless of race, creed, color or sex . . . . [The students] were individually and collectively subjected to stereo typical, race-based remarks by respondent which resulted in feelings of hopelessness, anxiety, frustration and anger by the

> pupils. This is hardly the nature of positive self-attitudes to be nurtured in a public school classroom." [*Ibid.*]

In affirming, *per curiam*, the Appellate Division stated that classroom speech denigrating a particular race "need not be tolerated by a school which, to the extent it fails to restrict such speech, is thereby allied with it." *Id.* at 212.

The Commissioner of Education has consistently held that inappropriate touching of a student by a teacher constitutes unbecoming conduct requiring dismissal. Teachers must not grab, push, choke or shove their pupils for any reason. *I/M/O of the Tenure Hearing of Campbell, supra. See* also *I/M/O the Tenure Hearing of Harrell,* 93 *N.J.A.R.*2d. (EDU) 387, 405, *adopted*, Comm'r. 93 *N.J.A.R.*2d at 405, *aff'd*, App. Div. 95 *N.J.A.R.*2d (EDU) 137 [affirming dismissal of tenured gym teacher who had been physically aggressive (grabbing, striking, and kicking) with his students]. The Administrative Law Judge properly observed: "In a society which is becoming ever more violent, it is essential that teachers be exemplars of problem solving that does not resort to physical aggression."

To the same effect, *see,* among many other cases, *I/M/O the Tenure Hearing of Kendle* , EDU 54-02, Initial Decision, (September 27, 2002), *adopted*, Comm'r. (November 6, 2002); *In re Tenure Hearing of Tiefenbacher, East Orange,* App. Div. *remand* to St. Bd., 83 *S.L.D.* 1648, St. Bd. decision on remand, 84 *S.L.D.* 2043, *aff'd* App. Div. A-594-84T6 (December 30,1985) (teacher pushed fifth grade student against a cabinet or blackboard and against a metal desk); *I/M/O Tenure Hearing of Juanita Zielenski*, 1977 *S.L.D.* 786, 794, (use of profanity by teacher toward student constitutes unbecoming conduct requiring dismissal, even if not coupled with violence towards the student); and *I/M/O Tenure Hearing of Catherine Cooper*, EDU 6550-00, Initial Decision, (February 2,2001), *adopted*, Comm'r. (March 22, 2001) (teacher's conduct demonstrated her insensitivity toward her emotionally disturbed students, thus warranting dismissal).

As the Commissioner properly noted in *I/M/O Tenure Hearing of Anthony Ashley*, EDU 1916-02, Initial Decision, (September 20, 2002), *adopted*, Comm'r. (December 6, 2002), *aff'd*, St. Bd. Educ. (May 13, 2003):

> "While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he *cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance . . . . Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience.*" [*Ibid.* (emphasis supplied)]

Moreover, petitioner's behavior with respect to K.R. violated the prohibition set forth in *N.J.S.A.* 18A:6-1: "No person employed or engaged in a school or educational institution . . . shall inflict or caused to be inflicted corporal punishment upon a pupil . . . ." The exceptions contained in that statute, such as self-defense and protection of persons and property, are not applicable in this case.

In sum, the conduct of respondent respecting the two incidents on November 10, 1999 and the incident of May 4, 2001 have, in my opinion, demonstrated his unfitness to be a teacher.

CONCLUSION AND ORDER

For the reasons expressed above, I **CONCLUDE** that petitioner has proven its charges against respondent of unbecoming conduct and that its decision to terminate his employment with the Board of Education should be **AFFIRMED.** 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 24, 2003
DATE

ROBERT S. MILLER, ALJ

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

September 24, 2003
DATE

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 26 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

/tmp

APPENDIX

WITNESSES

For petitioner:

K.R.

Douglas Cobb

Nancy L. Nolan

Barbara Ellen Liedl

Enoch Peters

Joseph Romano

Laura Duffy

Elizabeth Waters-Amato

Amanda Napolitani

William J. Shana

Esther Kelso

For respondent:

Barbara Lawrence

Leroy Hayes

Denise White

Torren Jordan

Cynthia Denise Brooks-Clauser

Mary Morita Monteparo

Barry R. Baity

Milton Lewis

Doris Kelly

Barbara Lynn Cohen

Ruth E. Johnson

Harold Cooper

Edna Hunter

Donald Hammary

EXHIBITS

For petitioner:

P-1 Memorandum from Enoch Peters to Dr. Lewis re: investigation of allegation of physical abuse, dated 5/8/01

P-2 DYFS Referral Response Report, dated 5/11/01

P-3 Letter from Elizabeth Waters to Donald Hammary, dated 8/2/01

P-4 Letter from Elizabeth Waters to Donald Hammary, dated 8/10/01

P-5 DYFS Finding Report, dated 10/2/01

P-7 Letter from DYFS to Dr. Lewis, dated 10/11/01

P-8 Letter from DYFS to Mr. Hammary, dated 10/11/01

P-9 Letter from DYFS to Ms. Wanda Ricks, dated 10/11/01

P-10 Letter from DYFS to Michael Dowling, dated 10/11/01

P-11 Evaluation of Donald Hammary, dated 6/8/99

P-12 Memorandum from Joseph Romano to Donald Hammary re: failure to counsel students and presentation on racism, dated November 16, 1999

P-13 Evaluation of Donald Hammary, dated 11/23/99

P-14 Memorandum from Joseph Romano to Donald Hammary re: job duties, dated 2/11/00

P-15 Board Policy #3217 re: use of corporal punishment

P-16 Board Policy #5560 re: disruptive pupils

P-17 Board Policy #2260 re: affirmative action dated November 16, 2000

P-18 Board Policy #5750 re: equal educational opportunity

P-19 Board Policy #2260 re: affirmative action dated July 21, 1994

P-20 Memo dated 1/12/98 from Joseph V. Romano to Donald Hammary

For respondent:

R-1 Diagram of Main Office of Bradley School (drawn by Nancy Nolan)

R-2 Statement of Nancy Nolan dated 7/11/01

R-3 Statement of Nancy Nolan dated 5/16/01

R-4 Diagram of Main Office (drawn by Barbara Liedl)

R-5 Statement of Barbara Liedl dated 5/15/01

R-6 Statement of Barbara Liedl dated 6/22/01

R-7 Performance Appraisal for D. Hammary, 12/1/98 – 2/28/99

R-8 Memo dated 10/1/97 with attached Job Description

R-9 Performance Appraisal for Donald Hammary dated 12/15/00

R-10 Program Schedule

R-11 Appraisal of Donald Hammary dated 6/1/2000

R-12 Letter dated 7/9/99 from Supt. Of Schools Robert Mann to Donald Hammary

R-13 Letter dated 2/21/03 from Prendergest to D. Hammary

R-14 Work Schedule – Bradley School Counselor

R-15 Diagram of Main Office of Bradley School with adjacent Hallway, Entrance Doors, and Foyer drawn by Amanda Napolitani

R-16 Partial Personnel File of Donald Hammary

R-17 Summary Evaluation of Teaching Performance of Donald Hammary, School Year 1999-2000

R-18 In Class Lesson 10/5/99

R-19 Handwritten Note January 1-30 from Joseph V. Romano

R-20 Handwritten Note January 10-14 from Joseph V. Romano

R-21 Handwritten Note January 10-98 from Joseph V. Romano

R-22 Handwritten Note 5/4/98 from Joseph V. Romano

R-23 Handwritten Note 4/28/98 from Joseph V. Romano

R-24 Handwritten Note 4/23/98 from Joseph V. Romano

R-25 Handwritten Note 3/10/98 from Joseph V. Romano

R-26 Handwritten note dated 10/25 "from the desk of Mr. Smith"

R-27 Internet message entitled "AOL Anywhere"

R-28 Calendar – November 1999

R-29 Letter dated 7/31/01 from Dr. Rosenblatt to Joan York, Ph.D.

R-30 Letter (undated) from Joan York Ph.D. to Antonio Lewis

R-31 Memo dated 9/18/98 from Romano to Brooks, Jordan, Hammary, etc.

Joint:

J-1 Guidance Counselor Job Description adopted by Board of Education

J-2 Guidance Job Description

OAL DKT. NO. EDU 803-02
AGENCY DKT. NO. 327-8/01

IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD HAMMARY,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF ASBURY PARK, MONMOUTH	:	DECISION ON REMAND
COUNTY.	:	

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

Respondent's exceptions primarily challenge the Administrative Law Judge's (ALJ) credibility determinations and factual findings, along with the ALJ's recommendation that respondent be terminated from his tenured position. As the Board notes in its reply, however, respondent has neither provided the Commissioner with copies of relevant portions of the hearing transcripts nor "made any effort to cite any portion of those transcripts which support his conclusory assertions that Judge Miller's credibility determinations were flawed." (Board's Reply at 2) Furthermore, the Board contends that the ALJ, who observed the witnesses firsthand, is in the best position to make credibility determinations. (*Id.* at 3)

Upon careful and independent review of the record in this matter, which included transcripts from only two of the 20 days of hearing in this matter,[1] and based upon the credibility assessments of the ALJ, *N.J.S.A.* 52:14B-10(c), the Deputy Commissioner, to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-33, concurs that petitioner has proven its charges of unbecoming conduct against respondent. As the Board correctly observes, the ALJ's credibility determination is

[1]The transcripts were from hearings held on June 25, 2002 and July 9, 2002 and included the testimony of only four of the 25 witnesses in this matter.

entitled to the Deputy Commissioner's 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 the Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div.) *certif. denied*, 121 *N.J.* 615 [1990]." *In the Matter of the Tenure Hearing of Frank Roberts*, 96 *N.J.A.R.*2d (EDU) 549, 550. The Appellate Division 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 (App. Div. 2000), slip op. at 14.[2] Like the ALJ, the Deputy Commissioner is satisfied, therefore, that the charges and proofs established herein reflect conduct which cannot be tolerated in a school setting, warranting respondent's loss of his tenured position.

Accordingly, the Initial Decision is adopted for the reasons expressed therein. Respondent is dismissed from his position as a tenured teacher as of the date of this decision. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate, pursuant to *N.J.A.C.* 6:11-3.6.

IT IS SO ORDERED.[3]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 11/10/03

Date of Mailing: 11/10/03

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[2] The Court also noted *then* pending legislation providing that "the agency head may not reject or modify any findings of fact on the 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." (*Ibid. citing* A. 1484, 209th Leg., §10(b), later enacted as *P.L.* 2001, *c.* 5 and now codified at *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.*

625-03

WINSLOW TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

November 10, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SEVERING THE WINSLOW TOWNSHIP EDUCATION ASSOCIATION MATTER AND ACCEPTING STIPULATION OF DISMISSAL
OAL DKT. NO. EDU 114-02
AGENCY DKT. NO. 491-11/01

WINSLOW TOWNSHIP EDUCATION ASSOCATION,

Petitioner,

v.

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

Respondent.

Keith Waldman, Esq., for petitioners (Selikoff and Cohen, attorneys)

Vito A. Gagliardi, Esq. for respondents (Porzio, Bromberg & Newman, attorneys)

Record Closed: September 11, 2003 Decided: Septemberr 18, 2003

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, and 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 *Winslow Township Education*

Association vs. Board of Education of the Township of Winslow, OAL Dkt. No. EDU 114-02, Agency Dkt No. 491-11/01 and the unfair practice charge captioned *Winslow Township Association and Winslow Township Board of Education*, PERC Dkt. No. C0-2002-235, 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 *Winslow Township Education Association vs. Board of Education of the Township of Winslow,* OAL Dkt. No. EDU 114-02, Agency Dkt No. 491-11/01 and the unfair practice charge captioned *Winslow Township Association and Winslow Township Board of Education*, PERC Dkt. No. C0-2002-235 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 COMMISSIO**N which 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.

September 18, 2003
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

9-24-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 25 2003
DATE

ACTING 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,
Winslow Township Education Association

WINSLOW TOWNSHIP EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF WINSLOW TOWNSHIP, CAMDEN COUNTY,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. 114-02
AGENCY REF. NO. 491-11/01

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
Winslow Township
Education Association

BY: _____
KEITH WALDMAN

Dated: 2-29-3

PORZIO, BROMBERG & NEWMAN, P.C.
Attorneys for Respondent
Board of Education of
Winslow Township

BY: _____
VITO A. GAGLIARDI JR.

Dated: 9-10-03

OAL DKT. NO. EDU 114-02
AGENCY DKT. NO. 491-11/01 AND PERC DKT. NO. CO-2002-235

WINSLOW TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Joint Stipulation of Dismissal, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1 and *N.J.A.C.* 1:1-17.8(b), have been reviewed. Upon review, the Commissioner of Education accepts the parties' Joint Stipulation of Dismissal on those issues within the scope of his jurisdiction and the matter is hereby dismissed as to its education law claims. Pursuant to *N.J.A.C.* 1:1-17.8(b) and (c), therefore, the Initial Decision and the full record herein shall be transmitted to the Public Employment Relations Commission, which may subsequently render a final decision on any remaining issues within its statutory grant of authority.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11|10|03

Date of Mailing: 11|12|03

625-03

IN THE MATTER OF PAUL SCHAEDER, :

GOLDEN DOOR CHARTER SCHOOL, : COMMISSIONER OF EDUCATION

JERSEY CITY, HUDSON COUNTY. : DECISION

SYNOPSIS

The School Ethics Commission determined that respondent Board member violated *N.J.S.A.* 18A:12-24.1(c) and (d) by acting as a "one-member board" in terminating the Chief Academic Officer. The Commission further found that respondent violated *N.J.S.A.* 18A:12-24(b) in hiring a former Board member as technology coordinator without Board approval. The Commission recommended removal of respondent.

Upon review of the record, the Deputy Commissioner, to whom the matter was delegated pursuant to *N.J.S.A.* 18A:4-33 and whose decision was restricted by law solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation. Respondent was ordered removed as of the filing date of this decision.

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

November 10, 2003

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket #C03/C04/C06/C07/C12-03**
PAUL SCHAEDER,	:	
GOLDEN DOOR CHARTER SCHOOL	:	**DECISION**
HUDSON COUNTY	:	

PROCEDURAL HISTORY

This matter arises from five complaints filed against Mr. Paul Schaeder, Chairman of the Board of Trustees of the Golden Door Charter School, for violations of the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Specifically, they alleged that he, without the consultation of the Board, forced the Chief Academic Officer to resign and that he appointed his former fellow trustee as a consultant within a month after he resigned from the Board. The complaints also raised various allegations that he misused his position in connection with the number of trustees on the Board, that he had police called to a public meeting on January 16, 2003 and that he discriminates against African-American parents and trustees.

Mr. Schaeder answered the complaints admitting that the Chief Academic Officer had been released from her duties and that a former trustee had been hired as a consultant, but denied having committed any violation of the School Ethics Act in connection with those matters. He denied the remainder of the allegations.

The five complaints were consolidated for hearing. The School Ethics Commission advised the parties that it would discuss this matter at its meeting of May 1, 2003. The parties were advised of their right to bring counsel and witnesses. All parties appeared with counsel and witnesses. The complainants were represented by Joseph Pojanowski, Esq. The respondent was represented by Richard West, Esq. The Commission heard testimony from most of the parties and witnesses. At its public meeting on May 27, 2003, the Commission voted to find probable cause to credit the allegations that Mr. Schaeder violated N.J.S.A. 18A:12-24.1(c) and (d) of the Code of Ethics for School Board Members in connection with the dismissal of the Chief Academic Officer and N.J.S.A. 18A:12-24(b) of the School Ethics Act in connection with the hiring of the Information Technology Consultant. The Commission dismissed the remainder of the charges, so they are not addressed herein.

Mr. Schaeder was given 30 days from the date of the decision to respond to the probable cause decision. He was advised that if he disagreed with the Commission's determination that the material facts were not in dispute, he could set forth each fact that he believed was in dispute and why the fact was material to resolution of this matter. The Commission received a timely response, which it considered at its meeting of August 26, 2003. After consideration of the issues raised in the response, the Commission voted at its public meeting to find Mr. Schaeder in

violation of N.J.S.A. 18A:12-24.1(c) and (d) of the Code of Ethics for School Board Members and N.J.S.A. 18A:12-24(b) of the prohibited acts in the School Ethics Act and recommend his removal from the Board of Trustees. The Commission adopted this decision at its meeting of September 23, 2003.

FACTS

The Golden Door Charter School is located in Jersey City, New Jersey. Approximately 500 students attend the school. When it was chartered, the charter provided that the school was to have between five and eleven trustees. At all times relevant to the allegations in the complaints, the school was operating with a three-member Board of Trustees. Apparently the by-laws were changed to allow for a three-member Board, but the changes were never approved by the Commissioner of Education. At the present time, the Board consists of seven members.

I. The Termination of the Chief Academic Officer

Karen Jones was hired in January 1999 as the director of the Golden Door Charter School. Her title at all times relevant to this complaint was Chief Academic Officer. Annette Johnson has been a member of the Board since 1999 and has a child in the school. Paul Schaeder is the Chairman of the Board of Trustees. Amal Manassah is also a member of the Board, having replaced Trustee Barry Fields in October 2002.

In March 2002, due to concerns with Ms. Jones' performance, an agreement was made to give Ms. Jones a 2½ month sabbatical. Ms. Johnson was aware of that agreement. Mr. Schaeder testified that Ms. Jones did not improve after she returned. He testified that he and Mr. Fields drew up an improvement plan and discussed it with her in the summer of 2002 and then in September 2002, Ms. Jones signed off on it.

On December 19, 2002, a regular meeting of the Board of Trustees was canceled. However, the three trustees did have a meeting for the purpose of discussing Karen Jones. The testimony of Trustee Annette Johnson was undisputed regarding this matter. Ms. Johnson testified that on December 19, 2002, she came to the school for what she thought was a meeting with Ms. Jones to evaluate her performance. However, two members from Foundations, Inc., Mr. Funston and Mr. Kurtz, were present. Foundations, Inc. is the consulting company utilized by the school. Mr. Schaeder and Ms. Manassah were also present with an attorney. Ms. Johnson was given a copy of a four-page severance agreement regarding the termination of Ms. Jones. Prior to that date, Mr. Schaeder had never indicated to her that he spoke with anyone to facilitate Ms. Jones' removal. Although Ms. Johnson admitted that the Board had discussed problems with Ms. Jones' performance, she was completely surprised by the action. Even more surprised was Ms. Jones because she thought she was only going to be evaluated at the meeting. She requested time to think it over. According to Mr. Funston, Ms. Jones was told that she could sign and rescind the agreement within six or seven days. She signed the agreement later the next day.

A bill from the School attorney sets forth that the attorney drafted the severance agreement and e-mailed it to the client on November 25, 2002. In December, prior to the December 19th meeting, Mr. Schaeder informed Ms. Manassah of the pending forced resignation. Mr. Schaeder testified that only two of the three board members were notified of the decision to terminate the employment of Ms. Jones because he did not trust Ms. Johnson to keep the matter confidential. Mr. Schaeder testified that Ms. Jones was told that she had 21 days to review the agreement and respond. The following day, Ms. Jones voluntarily executed the Agreement which, among other things, provided her with a 7-day period in which to revoke her signature. Ms. Jones' submitted a letter of resignation to the Board on December 20, 2002.

At a meeting of the Board of Trustees on January 16, 2002, all three members of the Board, including Annette Johnson, voted in favor of accepting the agreement after an executive session to discuss it.

Each of the complainants and their witnesses testified that the students and parents were very emotional about Ms. Jones' removal when they found out on December 20, 2002.

Mr. Schaeder appointed an administrator in the school, Brian Stiles, to replace Ms. Jones on December 20, 2002.

II. The Hiring of a Former Board Member as Information Technology Consultant

Barry Fields became a member of the Board with Ms. Johnson in 1999. In 2000, Mr. Fields began performing information technology services for the school without charging for his services. At the October 17, 2002 meeting of the Board of Trustees, the Board appointed a new board member. The minutes indicate that, after a search from a list of ten potential candidates for board membership, Chairman Schaeder invited Amal Manassah to join the Board. The Board interviewed her in executive session, then reentered public session and voted 3-0 to invite her to join the Board. The meeting minutes go on to set forth:

> Following Ms. Manassah joining the Board, Mr. Fields resigned and presented a proposal for Information and Technology Consultant. It was agreed the work Mr. Fields was performing for the school warranted him compensation. In compliance with the law, Mr. Fields chose to resign from the Board in order to receive compensation for his services.

Ms. Johnson testified that the proposal was tabled at that time. However, in the minutes, there is no motion or vote before adjournment of the meeting. There is no mention of the proposal at the November 21, 2002 meeting. The December 19, 2002 meeting is noted as cancelled despite the meeting of the three trustees on this date. Ms. Johnson recalled that on December 20, 2002, the Board talked with Mr. Fields regarding the proposal. However, by that time, it appears that he had already entered into an agreement with Mr. Schaeder and was paid $50.00 per hour for November and December.

A representative from Foundations, Inc. certified that this is well below the market rate for such services. Foundations, Inc. certified that it would charge $750.00 per day to provide such consultant services.

The Board of Trustees never approved the hiring or appointment of Barry Fields prior to his beginning employment with the District.

ANALYSIS

The Commission determined that there was probable cause to credit the allegations that Mr. Schaeder violated N.J.S.A. 18A:12-24.1(c) and (d) in connection with the termination of Ms. Karen Jones and that he violated N.J.S.A. 18A:12-24(b) in connection with the hiring of a former board member to serve as a consultant to the District. Mr. Schaeder raised several issues in response to the finding of probable cause and argued that the complaint should be dismissed. These will be addressed in turn.

I. The Termination of the Chief Academic Officer

In response to the Commission's finding of probable cause that he violated N.J.S.A. 18A:12-24.1(c) and (d) in connection with the termination of the Chief Academic Officer, Mr. Schaeder first argues that, as a member of a charter school board of trustees, he is not subject to the Code of Ethics for School Board Members, N.J.S.A. 18A:12-24.1. He cites N.J.S.A. 18A:36A-3 of the Charter School Program Act for the proposition that a charter school, although a public school, "is operated independently of a local board of education and is managed by a board of trustees." He argues that the Code of Ethics does not state that it applies to members of a charter school board of trustees; rather, it applies to "board members" as that term is defined in N.J.S.A. 18A:12-23. Although he acknowledges that the State Board promulgated regulation N.J.A.C. 6A:11-3.1, effective October 2, 2000, which provides that the members of a board of trustees of a charter school shall be "school officials" as defined in the School Ethics Act, he argues that the Code of Ethics was enacted after that in July 2001 and no regulation was promulgated that made members of a charter school board of trustees subject to the Code of Ethics for School Board Members.

The Commission finds that Mr. Schaeder's interpretation of the Code of Ethics obliterates the intent and purpose of the Code of Ethics and ignores a crucial provision of the Charter School Program Act, which provides:

> A charter school shall operate in accordance with its charter and the provisions of law and regulation which govern other public schools; except that, upon the request of the board of trustees of a charter school, the commissioner may exempt the school from State regulations concerning public schools, except those pertaining to assessment, testing, civil rights and student health and safety, the board of trustees satisfactorily demonstrates to the commissioner that the exemption will advance the educational goals and objectives of the school. [N.J.S.A. 18A:36A-11a]

Thus, from the initiation of charter schools in 1996, the Legislature envisioned that charter schools would be subject to all of the laws that govern other public schools. Their structure and management may be different, but the laws that govern them are the same. Charter schools may only be exempt from regulations and that is by request to the Commissioner of Education. They cannot be exempt from laws. Therefore, it is clear that the State Board, in promulgating N.J.A.C. 6A:11-3.1, was not making new law, but effectuating the above provision of the Charter School Program Act. In view of N.J.S.A. 18A:36A-11, there is no need for the State Board to revisit its regulation each time that the Legislature amends the School Ethics Act in order to clarify that the amendment applies to charter school trustees. It applies, in its entirety, to members of charter school boards of trustees.

For the foregoing reasons, the Commission concludes that Paul Schaeder, as a member of a charter school board of trustees, is subject to the Code of Ethics for School Board Members and declines to dismiss the charges that he violated N.J.S.A. 18A:12-24.1(c) and (d).

Mr. Schaeder next argues in response to the finding of probable cause that he did not violate the Code of Ethics because the majority of the Board supported the decision to terminate Ms. Jones and the entire board and Ms. Jones had been aware for many months prior to this action of the issues that prompted this decision.

The Commission found probable cause that Mr. Schaeder acted without board approval in executing the termination of Ms. Jones in violation of N.J.S.A. 18A:12-24.1(c) and (d) of the Code of Ethics.

N.J.S.A. 18A:12-24.1(c) provides:

> I will confine my board action to policy making, planning and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

Mr. Schaeder argues that the Board was aware of issues concerning Ms. Jones' performance and voted to approve the severance agreement. He set forth that Ms. Jones voluntarily executed the Severance Agreement and General Release the day after it was presented to her although she was told that she had 21 days to consider it. Thereafter, she was provided with seven days to revoke her signature, but she did not revoke it. Rather, she provided a resignation letter to the Board. During its meeting of January 16, 2002, the Board, including Annette Johnson, voted in favor of accepting the agreement. Mr. Schaeder argues that Ms. Jones' letter to the Board of December 20, 2002 indicates that she had reason to know that her termination was forthcoming.

The Commission does not dispute that Mr. Schaeder had discussed with the other trustees that there were concerns about Ms. Jones' performance prior to her termination. However, the Commission notes that Ms. Manassah became a trustee in October 2002, just before this action took place. The Commission does not dispute Mr. Schaeder's argument that Ms. Johnson was

aware that there were issues concerning Ms. Jones' performance. However, knowing that there are concerns with an administrator's performance and firing that administrator are two different matters. Mr. Schaeder admitted that he did not include Ms. Johnson in the decision-making process on the Jones matter because he did not feel that he could trust her to keep it confidential. Under the Code of Ethics, one board member does not have the right to determine that another board member will be denied access to the same information as the other board members. Further, the evidence showed that, at a board meeting on January 16, 2003, Mr. Schaeder admitted that he initiated the paperwork regarding Ms. Jones' departure prior to the knowledge of any fellow board members. This was also confirmed by the bill from the board attorney dated February 21, 2003, listing the preparation of the severance agreement on November 25, 2002, well before any trustee was advised that termination was imminent. Trustee Manassah had just joined the Board in October 2002. Trustee Johnson testified that she only became aware of Ms. Jones' termination when she saw the severance agreement in December 2002. This testimony was unrefuted. Again, knowing that performance issues exist with an administrator is not the same as knowing that the administrator is going to be terminated. Ms. Johnson reasonably expected that an evaluation or review of a corrective action plan would precede presenting Ms. Jones with a severance agreement. Yet, Mr. Schaeder initiated the preparation of a severance agreement and only Mr. Schaeder and Ms. Manassah knew about its existence. Ms. Johnson was informed at the meeting with Ms. Jones that led to her termination.

The Commission finds that the termination of Ms. Jones was initiated and completed by Mr. Schaeder and he sought approval of the full board after the fact. Mr. Schaeder has not set forth any argument to change what the Commission found in its probable cause determination. The fact that Ms. Jones resigned after being terminated and all trustees eventually ratified the severance agreement is irrelevant to the suspect circumstances surrounding the termination. The circumstances defy all notions of fairness and respect owed to the Chief Academic Officer of a school. The Commission finds that Mr. Schaeder's conduct on such an important issue was in violation of N.J.S.A. 18A:12-24.1(c).

The Commission also found probable cause that Mr. Schaeder's conduct violated N.J.S.A. 18A:12-24.1(d) of the Code of Ethics. N.J.S.A. 18A:12-24.1(d) provides:

> I will carry out my responsibility, not to administer the schools, but, together with my fellow Board members, to see that they are well run.

As set forth above, Mr. Schaeder did not act in concert with his fellow Board members. He unilaterally decided that Ms. Jones should be terminated, as shown by the bill from the attorney, and admittedly kept a Board member uninformed who he believed would disagree with his decision and possibly inform Ms. Jones or her supporters. The Commission finds that, by so doing, Mr. Schaeder administered the schools instead of acting with his fellow Board members to see that the schools are well run in violation of N.J.S.A. 18A:12-24.1(d).

The Commission did not find probable cause that Mr. Schaeder's conduct violated N.J.S.A. 18A:12-22(a) and (b) because section 22 sets forth the Legislature's findings and declarations. Section 22(a) sets forth:

The Legislature finds and declares:

a. 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.

Section 22 indicates the Legislature's purpose for the Act. While the Commission has said in prior decisions that Section 22 does not set forth a prohibited act that the Commission can charge a school official with violating, In the Matter of Wesley Smith, C28-97 (April 28, 1998), the Commission has cited to section 22 to support a charge. In the present case, the Commission believes that in finding Mr. Schaeder in violation of N.J.S.A. 18A:12-24.1(c) and (d), it is ensuring that the conduct of school officials does not violate the public trust as set forth in N.J.S.A. 18A:12-22(a).

II. Mr. Schaeder hired former Board member Barry Fields to be the School's Information Technology Consultant.

The Commission found probable cause that Mr. Schaeder used his position to secure unwarranted privileges, advantages or employment for Mr. Fields under N.J.S.A. 18A:12-24(b). The Commission found that the Board was never presented with a contract for Mr. Fields, but he was paid thousands of dollars. The Commission was not provided evidence that a contract was ever approved by the Board.

The minutes from the October 17, 2002 meeting at which Mr. Schaeder, Mr. Fields and Ms. Johnson were present as board members indicate that Chairman Schaeder invited Amal Manassah to join the Board. She was approved by a vote of 3-0. Mr. Fields then resigned and presented a proposal for him to become the Information and Technology Consultant. The minutes make it clear that Mr. Fields resigned from the Board for the purpose of being able to receive compensation for his services. He began receiving compensation for those services without any motion or vote by the Board. Mr. Schaeder admitted that Mr. Fields resigned from the Board to take on the job, but says he did so because the volunteer work was becoming a full-time job.

Mr. Schaeder's responds to the Commission's finding that he cannot be held personally responsible for the hiring of Barry Fields when he was just one member of a unanimous Board. Additionally, he argues that the employment was not unwarranted because, prior to his resignation from the Board, Mr. Fields had volunteered his expertise to aid the computer/technology programs of Golden Door. He said the consultant agreement with Mr. Fields cost much less than other consultants such as Foundations, Inc., which would charge $750.00 per day to provide similar services. He adds that the outside accountant for the Charter School recommended that this action be taken and he relied on the accountant's position.

The issue before the Commission is whether Mr. Schaeder used his position to secure unwarranted privileges, advantages or employment for Mr. Fields in violation of N.J.S.A. 18A:12-24(b). The Commission does not discount Mr. Schaeder's response, but his response seems to imply that at some point there was an actual vote on the matter at a public meeting. There was none. It also assumes that there was a contract entered into before Mr. Fields started to get paid. There was not. The Commission believes that the manner in which the hiring took place was the unwarranted privilege and advantage that Mr. Fields received as a former member of the Board, not the hiring itself, which was apparently recommended. The Commission holds Mr. Schaeder responsible for the manner in which Mr. Fields was hired because he was the Board President when the action took place. Ms. Manassah had just become a trustee minutes before the decision was made to make Mr. Fields a consultant. Thus, it is disingenuous to suggest that Ms. Manassah made an informed decision as to whether he should be hired. The full board did not make the decision. It is clear from the minutes that Mr. Fields and Mr. Schaeder made that decision. Further, the outside accountant may have recommended hiring Mr. Fields, but it did not recommend a stealth hiring and payment being made without a contract. The manner in which the hiring took place did not provide the public with any notice that there was a need to hire an Information Technology Consultant. Further, it did not give the public the opportunity to determine why Mr. Fields was preferred to any other provider of the service. The Commission reiterates from its probable cause determination that the information submitted by Foundations -- that other providers charge much more, should have been part of the public discussion of the issue, not presented in a closed hearing before the Commission. Therefore, the Commission finds that Mr. Schaeder used his position to secure an unwarranted privilege and advantage for Mr. Fields in violation of N.J.S.A. 18A:12-24(b).

DECISION

For the foregoing reasons, the Commission finds that Mr. Schaeder violated N.J.S.A. 18A:12-24.1(c) and (d) in connection with the termination of Ms. Jones and violated N.J.S.A. 18A:12-24(b) in connection with the hiring of former trustee Barry Fields.

The Commission considered Mr. Schaeder's response to the finding of probable cause that argued that the matters for which he is being disciplined were decisions of the full board, but the evidence showed the opposite. Regarding Ms. Jones, the Board's approval was sought only after Ms. Jones had been presented with the severance agreement. Regarding Mr. Fields, the Board's approval was never sought. Mr. Schaeder has acted as a one-member board and in so doing has violated the Code of Ethics and the standards of conduct expected of board members in general. The Commission finds his conduct to be so egregious that only the penalty of removal would be appropriate. Therefore, the Commission recommends that Paul Schaeder be removed from the Golden Door Charter School Board of Trustees.

Paul C. Garbarini

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C03/C04/C06/C07/C12-03

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the testimony presented; and

Whereas, at its meeting of August 26, 2003, the Commission found that Paul Schaeder violated N.J.S.A. 18A:12-24.1(c) and (d) and N.J.S.A. 18A:12-24(b) of the Act and recommended that the Commissioner of Education impose a sanction of removal; and

Whereas, the Commission requested that its staff prepare a decision consistent with the aforementioned conclusion; and

Whereas, at its meeting of September 23, 2003, the Commission reviewed the draft decision 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

Paul C. Garbarini, Chairperson

I hereby certify that this Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on September 23, 2003.

Lisa James-Beavers

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 348-9/03

IN THE MATTER OF PAUL SCHAEDER, :

GOLDEN DOOR CHARTER SCHOOL, : COMMISSIONER OF EDUCATION

JERSEY CITY, HUDSON COUNTY. : DECISION

The record of this matter, and the recommendation of the School Ethics Commission (Commission) that respondent be removed as a member of the Board of Trustees of the Golden Door Charter School, have been reviewed. Respondent filed timely comments on the Commission's decision, which have been duly considered herein.

This matter comes before the Commissioner pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1 to impose a sanction upon respondent, who serves as Chairman of the Board of Trustees. The Commission's recommended sanction is based on its finding that respondent violated *N.J.S.A.* 18A:12-24.1(c) and (d) by unilaterally effectuating the termination of the Charter School's Chief Academic Officer and then seeking Board approval after the fact, and on its further finding that he violated *N.J.S.A.* 18A:12-24(b) by hiring, without Board motion or vote, a Board trustee who resigned from the Board expressly for the purpose of receiving compensation for his formerly voluntary technological services.

In his comments, respondent initially contends that the Commission exceeded its statutory authority by making factual findings without transmitting the matter to the Office of Administrative Law (OAL) for the full evidentiary hearing to

which respondent is entitled under the School Ethics Act and the Administrative Procedure Act; he further contends that, even assuming that the Commission *did* have the authority to hear the matter itself after determining that no material facts were in dispute, it clearly erred in doing so herein. (Respondent's Comments at 1-4)[1] Respondent next contends that the Commission erred in its factfinding, ignoring testimony and certifications and making flawed credibility determinations, and overlooked the unusual and difficult circumstances with which respondent had to deal. (*Id.* at 4-6)

With respect specifically to the Commission's recommendation of removal, respondent argues that even if the Commission's findings were accepted, they still do not support the ultimate penalty of removal from the charter school Board of Trustees. All the Commission essentially found, respondent contends, was that respondent acted like a "one-member board" in taking actions he strongly believed to be in the school's best interest; the Commission did not find that he in any way benefited personally from his decisions, nor did it find that his objectives were improper or illegal in themselves. Respondent notes that his actions were supported by the majority of the Board of Trustees, which unanimously reelected him as Chairman in 1998, 2001 and most recently on August 28, 2003, and that, at the time of his actions, the school was undergoing a period of difficulty and transition requiring strong, decisive leadership. Respondent thus avers that removal from the Board of Trustees would be unfair to him—who at most did not understand the parameters of his authority and who has had no previous instances of Ethics Act violations—and contrary to the best interests of a charter

[1] Respondent submits, under cover of separate letter to the Commissioner, an example of the type of evidence he would bring to a full OAL hearing. However, in that applicable rules make no provision for the Commissioner to consider information outside the record, that submission is not considered herein.

school to which he has brought substantial improvement and stability, as well as to the will of its Board of Trustees and school community. (*Id.* at 4-9)

At the outset, the Deputy Commissioner, to whom the determination of this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, emphasizes that, in accordance with *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, only the School Ethics Commission may determine whether a violation of the School Ethics Act has occurred, and that the Commission's decision in that regard, including any underlying factfinding, discretionary procedural determinations and conclusions of law, is not reviewable herein. Rather, the Commissioner's jurisdiction is limited to review of any sanction the Commission may recommend based upon its decision that a school official has violated the Act.

Given the limitations of his review in this matter, and upon consideration of the record and respondent's arguments on exception, the Deputy Commissioner determines to accept the Commission's recommendation that respondent be removed as a member of the Golden Door Board of Trustees. In so ruling, the Deputy Commissioner is satisfied that the Commission, in recommending a penalty for the violations it found, considered both the nature of respondent's offense and his arguments as to why no penalty should be imposed, and he finds nothing in respondent's exceptions that would warrant disturbance of the Commission's judgment in concluding that respondent should be removed as a Trustee. Additionally, respondent's contention that the Commission lacked authority to hear this matter itself rather than refer it to the OAL is, in essence, a challenge to the facial validity of the Commission's procedural regulations (*N.J.A.C.* 6A:28-1.12), a challenge which is within the sole purview of the Appellate Division or

the Supreme Court. R. 2:2-3(a); s*ee, also, Pascucci v. Vagott,* 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Furthermore, the Commission's finding, also protested by respondent, that no material facts were in dispute is a discretionary Commission determination authorized by *N.J.A.C.* 6A:28-1.12 and, as such, is not reviewable herein, but, rather, on appeal to the State Board of Education. Finally, although it is true that the Commission did not find respondent's actions illegal in themselves, the fact remains that it *could* not have made such a finding, since its authority is expressly limited to determination of School Ethics Act violations.[2]

Accordingly, IT IS hereby ORDERED that Paul Schaeder be removed from the Board of Trustees of the Golden Door Charter School, effective on the filing date of this decision, as a school official found to have violated the School Ethics Act.[3]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 11/10/03

Date of Mailing: 11/10/03

[2] For example, the Commission would lack authority to determine whether the hiring of a former Trustee was in violation of *N.J.S.A.* 18A:12-1.1, as raised during preliminary proceedings in this matter.

[3] This decision, as the Commissioner's final determination regarding penalty in this matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq., N.J.S.A.* 18A:12-29(d) 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.

625-03

SEARCH DAY PROGRAM, INC.,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning nonprofit private school for the handicapped challenged the Department's disallowing of certain costs totaling $122,077.52, that had been included in tuition calculations for its students.

The ALJ found that the Department's decision to disallow lump sum payments to the staff was correct, since these are prohibited by rule. In addition, the ALJ found that the Department's decision to disallow the salary paid to an uncertified speech instructor was correct, since it would be contrary to public policy to permit an uncertified teacher to instruct children in the State's schools. The ALJ ordered the Department's decisions affirmed.

The Commissioner concurred with the ALJ's Initial Decision. The petition was dismissed.

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

November 12, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2446-00

AGENCY DKT. NO. 24-1/00

SEARCH DAY PROGRAM, INC.,

Petitioner,

v.

NEW JERSEY STATE DEPARTEMENT

OF EDUCATION, OFFICE OF COMPLIANCE

Respondent.

Michael J. Gross, Esq., and **Joann L. Lynch**, Esq., for petitioner (Kenney, Gross, Kovats, Campbell & Pruchnik, attorneys)

Allison Colsey Eck, Esq., for respondent (Peter C. Harvey, Attorney General of New Jersey)

Record Closed: August 22, 2003 Decided: September 30, 2003

BEFORE **ROBERT S. MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is a hearing on the appeal of Search Day Program, Inc. ("petitioner" or "Search Day") from a decision of the Office of Compliance of the New Jersey State Department of Education ("respondent" or "the Department") disallowing certain costs totaling $122,077.52 that had been included in its calculations of tuition charges for its students.

On April 4, 2000, the instant matter was filed in the Office of Administrative Law for determination as a contested case pursuant to the New Jersey Administrative Procedure Act. An in-person prehearing and settlement conference was held on June 5, 2001. A stipulation of facts was filed on January 14, 2002. The case was scheduled for hearing on April 23, 2002, but I converted the hearing date into a case management conference and requested that counsel obtain and provide a substantial amount of additional information and data, details of which are set forth in a letter dated September 10, 2002 from Joann L. Lynch, Esq. to me. The hearing was held on October 22, 2002 and a videotaped deposition of the Department's expert witness (Roger Bell) was conducted on May 19, 2003. The record closed upon my receipt of the deposition transcript on August 22, 2003.

The essential facts in this case and not in dispute, having been stipulated by counsel prior to the hearing, and having been further established by the testimony of two witnesses (Lillian Hobson for petitioner and Roger Bell for respondent), as well as by the admission into evidence of financial records, contracts, certifications, and other documents.

Accordingly, I make the following

FINDINGS OF FACT

A. Background

1. Search Day, located in the Township of Ocean, County of Monmouth, was established in 1971 as a not-for-profit school that provides services for early elementary, middle elementary, and transitional children suffering from autism.
2. In addition to providing school for children with autism, Search Day provides an adult activity center and a group home for adult males with autism.
3. Search Day's school year runs from July 1 to June 30 of the following year.
4. During the six month from October 1997 until March 1998, Search Day experienced unusual turnover of administrative staff. In particular: (a) in October 1997 Nancy Radich resigned as business manager. She was replaced that same

month by Nellie Brumbaugh, C.P.A.; (b) in December 1997 Nellie Brumbaugh resigned as business manager; (c) in January 1998, Kenneth Appenzeller, Executive Director, tendered his resignation to become effective June 30, 1998; and (d) on or about March 1998, Lillian Hobson was hired as business manager.

5. During the period from December 1997 to March 6, 1998, routine financial transactions were handled by Search Day's bookkeeper, Jean Veltri.

6. On or about May 18, 1998, Katherine Solana was appointed to replace Kenneth Appenzeller as Executive Director.

B. The Lump Sum Payment

1. During the 1997-1998 school year and the school years preceding that year, Search Day had no salary schedule or guidelines in effect for its employees.

2. In June 1998, all full time employees of Search Day having an annual salary base received a lump sum payment equal to 9.28% of their annual salary. Part-time employees and others not having an annual salary base received a payment of $1.18 per hour multiplied by the number of hours worked during the fiscal year 1997-1998, also representing an increase in wages of about 9.28%. The total amount of money required for that payment was $113,536.96 (including payroll taxes).

3. The rationale for this lump sum payment was that Search Day's employees were underpaid compared to the other schools, public and private, in the county providing similar educational services, and that its employees had not received the increase in salary that had been "promised" to them in the Fall of 1997.

4. On or about December 7, 1998, the Department began an audit of Search Day's books and records. Among the "non-allowable" costs submitted by Search Day were (1) a $104,021.03 payment made to Search Day's employees in June 1998, and (2) the sum of $8,538.58 in salary and benefits paid to employee Lauren Nemeroff during the period from January 1998 through April 1998.

5. Except for newly hired employees, none of Search Day's staff had a written employment contract for the 1997-1998 school year. This situation was consistent

with the established practice at Search Day at that time, to wit, when a new employee was hired he/she received an employment contract which was not formally renewed in subsequent years, even though the employee continued to work for Search Day.

6. Search Day had no salary step guides, merit payment system or "contingent pay" system in place during the 1997-1998 school year.

7. A salary step guide for Search Day's employees was not established, approved and promulgated until February 1999.

8. In accordance with its usual practice, Search Day's employees had received an approximately 4% salary increase for the 1997-1998 school year.

9. The base salaries of Search Day's employees did not change immediately after the lump sum payment totaling $113,538.96 made to those employees in June 1998; rather, the base salaries of those employees remained the same until at least September 1998.

10. In or about September 1998 Search Day granted its employees a 4.5% (approximately) salary increase.

11. If Search Day had not made the $113,538.96 lump sum payment in June 1998, it would have had a surplus of $82,601.39 at the end of that month, which surplus it would have had to refund to those school districts which had sent its handicapped children to Search Day during the 1997-1998 school year.

12. Prior to the grant of the June 1998 lump sum payment, Search Day's Board of Directors neither passed a resolution nor took any other official action approving that payment.

C. Lauren Nemeroff

1. On or about January 8, 1998 Search Day hired one Lauren Nemeroff as a member of its teaching staff.

2. Ms. Nemeroff's title at the time of hire was "Speech Instructor." This is not a title or position recognized by the New Jersey State Department of Education.

3. Although Ms. Nemeroff held the requisite number of credits to qualify as a "Speech and Language Specialist," she had not received state certification for that position at the time she was hired.
4. Ms. Nemeroff's salary was $403.85 per week.
5. During the period from January to April 1998 Ms. Nemeroff was on probationary status.
6. Upon completion of her probationary status, on May 8, 1998 Search Day forwarded her credentials to the Office of the County Superintendent for permanent certification.
7. Shortly after May 8, 1998 certification was granted by the County Superintendent.
8. According to Lillian Hobson: "Had Nemeroff chosen to return for the 1998-1999 school year, she would have been promoted to the position of 'Speech and Language Specialist.'"[1] However, Nemeroff chose not to return for the 1998-1999 school year and was not employed by Search Day at the time of the Department audit.

ISSUES AND ANALYSIS

There are two basic issues in this case:

1. Did the Department correctly determine that the one-time payment in the amount of $113,538.96 made to Search Day's employees in June 1998 was a non-allowable cost, constituting "a payment or benefit in lieu of salary (bonus)," disallowable under former *N.J.A.C.* 6:20-4.4(a)35?

2. Was the salary of Lauren Nemeroff for the four-month period (January 1998-April 1998) properly disallowed because she did not posses the required certification at the time she was hired?

[1] "Speech and Language Specialist" is a title recognized by the Department of Education.

For the reasons to be expressed hereafter, I am of the opinion that both of these questions should be answered in the affirmative.

1. The Lump Sum Payment

Although the facts in the case of *Y.A.L.E. School, Inc. v. State of New Jersey, Department of Education,* App. Div., Dkt. # A-2607-92T2 (decided July 8, 1994) are not identical to those of the instant case, the legal principles enunciated in that case are applicable here. In *Y.A.L.E.*, the Appellate Division upheld the disallowance of the payments to teachers and administrators during the school year 1987-1988, which were made in the form of a "merit pay salary adjustment." The court declared:

> ". . . the payments are properly characterized as a bonus because they were 'in addition to the usual or expected.' They were not part of the salary guide, were determined after the end of the school year, and were subject to the total discretion of the administration. Contrary to petitioner's argument, these payments were less in the nature of a legal expectancy and more in the nature of a mere gratuity, to be bestowed upon such objects of the donor's bounty as the donor or his trustees may select." (citations omitted)

In his initial decision (OAL Dkt. No. EDU 3912-90) (decided July 31, 1992), Judge Reback declared:

> "In my judgment regardless of the application given to the payments made by Y.A.L.E. to its staff members in 1986-87 and 1987-88, those payments indeed constituted a bonus. The monies which were paid were not obligatory; that is, notwithstanding that a Y.A.L.E. official may have announced an intention to pay monies in the future, it was entirely discretionary. It need not have been given and even if it were, its distribution was dependent upon the exercise of the discretion of the school. Clearly, in addition, no employee had an entitlement to the receipt of the merit pay or was

> in possession of a legal contractual right to those monies should it have been withheld.

Judge Reback further stated: ". . . notwithstanding what might be described as the good faith intentions of Y.A.L.E. to reward its employees, Y.A.L.E.'s motivation cannot validate what is otherwise a patently invalid payment scheme . . . ."

I agree with the analysis of Deputy Attorney General Eck. In her Brief, she pointed out:

> "Petitioner's one-time payment to its employees in June of 1998 was a payment in lieu of salary, since it was made at the end of the school year, there was no contractual requirement to provide its employees with such a payment, there was no set amount promised to the employees, the employees' base salaries did not change after the payment, and in fact never incorporated a 9.28% increase in the succeeding year, and the payment was made at a time when the school had a surplus which it would otherwise be required to refund to the sending school districts."

Petitioner argues that the lump sum payment in June 1998 should be viewed as a retroactive salary adjustment, pursuant to the typical labor union negotiations for a new contract, *i.e.*, comparable to "any salary increase that is not paid immediately but delayed due to extended negotiations beyond the beginning of the work year. The employee receives a lump sum check which represents the entire increase retroactively to the beginning of the work year."

In my opinion, this argument is specious. Unlike negotiations in the typical labor-management arena, the Legislature has established a highly regulated system for the provision of services and facilities by private schools to handicapped children and for the amount of tuition that can be charged to sending districts. *See, N.J.S.A.* 18A:46-1 to *N.J.S.A.* 18A:46-46, in particular, *N.J.S.A.* 18A:46-21, which states: ". . . in no case shall the tuition rate exceed the actual cost per pupil as determined under rules prescribed by the Commissioner and approved by the State Board of Education." The Department has promulgated a detailed and complex set of regulations pursuant thereto. *See, N.J.A.C.* 6A:23-4.1 to *N.J.A.C.* 6A:23-4.15. Both under the

current regulations and the predecessor regulations (*N.J.A.C.* 6:20-4.1 to –4.11), if at the end of the school year there exists a "surplus," *i.e.*, an excess of income over costs and expenses, that surplus must be refunded to the sending school districts. It cannot be used for other purposes, such as granting a retroactive salary increase to school staff or administrators.

Search Day's counsel also argue that the *Y.A.L.E.* decision is inapposite because the court stressed the fact that "merit" increases in varying amounts were given to some employees but not to others and that this could be considered arbitrary, whereas in the instant case, the increase was given across the board to all employees. However, as earlier noted, the *Y.A.L.E.* court had other compelling reasons for its decision, all of which *are* applicable to the instant case.

2. Lauren Nemeroff

As I have earlier found, when hired, Ms. Nemeroff was given the title of "Speech Instructor." Ostensibly, she performed duties corresponding to that of a Speech and Language Specialist. Indeed, she was listed on at least one student's Individual Educational Plan as a Speech and Language Instructor.

However, "Speech Instructor" is a title not recognized by the Department. To act as a Speech and Language teacher, she needed a standard teaching certificate with the appropriate endorsement for speech. *N.J.A.C.* 6:11-5.2 and –6.2. During the first four months of her employment she did not possess that certificate.

Certification requirements establish a threshold for teaching staff members employed in the public (and private) school systems of New Jersey. As noted by the State Board of Education, the certification process is critical to assuring the provision of a thorough and efficient education. *Guttenberg Ed. Ass'n. v. Leo F. Klagholz, Comm'r of Educ.*, SB 11-98, State Bd. Decision (March 3, 1999). <http://www.state.nj.us/njded//legal/sboe/1999/ma/sb11-98.pdf.>

In my opinion it would be contrary to public policy to permit an uncertified teacher to instruct children in the State's schools.

Petitioner contends that despite her title, Ms. Nemeroff really performed the duties of an aide, in particular, as an assistant to Lillian Sarason, a properly certificated teacher in the school, and that she was always under the direct supervision of Ms. Sarason. This argument is not convincing. Neither Ms. Nemeroff nor Ms. Sarason testified at the hearing or even submitted a statement to this effect. The only evidence to support Search Day's position came from Lillian Hobson, who admitted that she rarely had occasion to personally observe the relationship, if any, between Nemeroff and Sarason, together with the undisputed fact that Nemeroff worked with the children in a small (approximately 8' x 15') room immediately adjacent to where Ms. Sarason usually taught. All other evidence pertaining to Ms. Nemeroff's actual duties is hearsay. In my opinion this is not enough to satisfy the residuum rule, *i.e.,* the requirement that some legally competent evidence must exist to support each ultimate finding of fact. *N.J.A.C.*1:1-15.8.

CONCLUSION AND ORDER

For the reasons stated above I **CONCLUDE** that the decision of the Department to disallow the lump sum payment made to Search Day's staff in June 1998 and the salary paid to Lauren Nemeroff during the months of January to April 1998 was correct and should be **AFFIRMED.** 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 30, 2003
DATE

ROBERT S. MILLER, ALJ

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

September 30, 2003
DATE

Mailed to Parties:

OCT 6 2003
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/tmp

APPENDIX

WITNESSES

For petitioner:

Lillian Hobson

For respondent:

Roger Bell

EXHIBITS

For petitioner:

P-1 Id. Certification of Lillian Hobson, dated 1/10/02

P-2 Id. Certification of Lillian Hobson, dated 10/10/02

P-3 Chart Showing Salary Increase for Hypothetical Teacher

P-4 Id. Photograph showing right side viewing from the doorway looking in of Speech Department room

P-5 Id. Photograph showing left side viewing from the doorway looking in of Speech Department room

For respondent:

R-1 Id Contract dated 7/20/95 for Margie Odom

R-2 Id. Contract dated 7/17/95 for Jean Veltri

R-3 Id. Contract dated 7.17.95 for Theresa Dolan

R-4 Id. Contract dated 7/21/95 fro Jill Bader

R-5 Id. Minutes of meeting of Board of Trustees of 5/18/98

R-6 Id. Payroll Register

R-7 Id. Finance Committee Report dated 2/8/99

R-8 Id. Search Day Program – Base Pay – June-Sept. 1998

R-9 Id. Consolidated Statement of Tuition Rate Computation Year Ending 6/30/98

Joint:

J-1 Stipulation of Facts (#1 - #34)

OAL DKT. NO. EDU 2446-00
AGENCY DKT. NO. 24-1/00

SEARCH DAY PROGRAM, INC.,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

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 that the Department of Education was correct in disallowing, in petitioner's calculation of tuition for its public school students, the cost of lump sum payments to staff and the salary of an uncertified teacher.

Accordingly, the Initial Decision of the OAL recommending dismissal of the Petition of Appeal is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11|12|03

Date of Mailing: 11|13|03

* 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.*

628-03

628-03

M.E., on behalf of minor child, A.V.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning aunt challenged the Board's residency determination that her nephew, A.V., was not entitled to a free public education in the District.

The ALJ concluded that undisputed evidence showed that A.V. was not domiciled in the District. Twice, petitioner failed to appear at hearing. Thus, the ALJ granted the District's request to dismiss the appeal for petitioner's failure to appear and granted the District's request for reimbursement of past tuition in the amount of $7,092.40.

The Commissioner adopted the Initial Decision and directed petitioner to remit to the Board the tuition due.

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.

November 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09386-02
AGENCY DKT. NO. 297-9/02

M.E. ON BEHALF OF MINOR CHILD, A.V.,
Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,
Respondent.

M.E., *pro* se

Anthony V. D'Elia, Esq. representing Respondent
(Chasan, Leyner, Bariso & Lamparello, attorneys)

Record Closed: September 23, 2003 **Decided**: October 3, 2003

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appealed the determination by respondent Board of Education of the City of Clifton (District) that her minor nephew A.V. was not entitled to a free public education in the District. Petitioner claimed that the minor child was entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(a) because the child was domiciled

within the District. Respondent answered that the minor child did not meet the requirements of domicile in the District and filed a counterclaim for payment of tuition.

On September 20, 2002, petitioner submitted an appeal of the District's residency determination. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on November 1, 2002. The OAL scheduled a prehearing conference for January 3, 2003. As the petitioner did not make herself available, the prehearing conference could not be held. The hearing was scheduled for March 12, 2003 and again the petitioner failed to appear. The hearing was scheduled again for July 31, 2003 and petitioner did not appear. Phone calls were made to Petitioner's home by the OAL secretary and Petitioner's daughter said Petitioner was on her way. Counsel for the District waited 1-1/2 hours for Petitioner's arrival. She did not appear. The OAL opened the record to entertain the District's motion to dismiss Petitioner's appeal and to accept evidence on the District's counterclaim for back tuition. The record was held open until September 23, 2003, for the submission of an affidavit concerning the per diem tuition rate. To date the petitioner has not phoned or mailed an explanation or any other writing regarding her failure to appear.

FACTS

The following facts are undisputed and I **FIND** them to be **FACTS** in the case.

On or about September 12, 2002, Petitioner received notice from the Superintendent of Schools that the application for school admission submitted for Petitioner's nephew had no sworn statement from the parent/guardian stating an inability to support or care for the student.

The District through its business administrator reviewed the business records and determined that A.V. was enrolled in the Clifton public school on September 19, 2002 and continued to the present. The cost of educating A.V. in the District amounted to $7,092.40 per year for the 2002-03 school year with the per diem rate of $41.72.

Thus, the amount of tuition owed by petitioner for the period of ineligible attendance in 2002-03 amounted to $7,092.40 (170 school days x $41.72). (Exhibit R-1)

LEGAL DISCUSSION

Public education must be provided free to persons over five and under twenty years of age who are domiciled within the school district. *N.J.S.A*: 18A:38-1(a). The converse is also true that a person is not entitled to a free public education if they are not domiciled within the District. I **FIND** that the undisputed evidence showed that petitioner's minor child was living with his Aunt in Clifton. Hence, I **CONCLUDE** that A.V. was not domiciled in Clifton and was not entitled to receive a free public education from that District. I further **CONCLUDE** that at the per diem rate of $41.72, petitioner owes the District tuition for one hundred and seventy school days in the 2002-03 year amounting to $7,092.40.

ORDER

Based on the foregoing it **ORDERED** that the District's request to dismiss petitioner's appeal for failure to appear is **GRANTED.** It is further **ORDERED** that the District's request for reimbursement of past tuition in the amount of $7,092.40 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.

October 3, 20032
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Receipt Acknowledged:

October 7 2003
DATE

M. Kathleen Drurean (Ca)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 14 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

Anthony V. D'Elia, Esq.

LIST OF EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Affidavit of Karen Perkins, Business Administrator and Board Secretary BOE, City of Clifton, NJ

OAL DKT. NO. EDU 09386-02
AGENCY DKT. NO. 297-9/02

M.E., on behalf of minor child, A.V.,	:	
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, and accepting the factual findings of the Administrative Law Judge, the Commissioner concludes that petitioner, the minor child's aunt, twice failed to appear for the hearings scheduled in this matter, and, therefore, has not demonstrated that A.V. is entitled to a free public education in respondent's District pursuant to *N.J.S.A.* 18A:38-1(b)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 tuition for the 2002-03 school year in the amount of $7,092.40.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11|17|03
Date of Mailing: 11|17|03

* 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.*

629-03

S.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY, AND JOHN KAZMARK, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning parent challenged the Honors Physics grading policy for the 2001-02 school year, claiming the flawed policy would result in the wrong persons being selected as Valedictorian and Salutatorian. In June 2003, the Commissioner denied emergent relief in this matter and the matter was transmitted to the Office of Administrative Law for hearing.

The Board moved to dismiss this matter on three grounds: 1) petitioner did not have standing; 2) petitioner's claims were moot; and 3) the petition was untimely filed. The ALJ concluded that the petition must be dismissed for said reasons.

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.

November 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7081-03

AGENCY DKT. NO. 159-5/03

S.J.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY AND JOHN KAZMARK, SUPERINTENDENT,

Respondent.

S.J., appearing *pro se*

Vito Gagliardi, Jr., Esq., appearing for respondent
(Porzio, Bromberg & Newman, attorneys)

Record Closed: September 15, 2003 Decided: October 7, 2003

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

STATE OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenged the Honors Physics grading policy for the 2001-02 school year.

By emergency petition filed May 20, 2003, petitioner requested emergent relief on the grounds that the allegedly flawed grading policy might result in the wrong persons being selected as Valedictorian and Salutatorian. The Commissioner denied the application for emergent relief on June 16, 2003. In his opinion Commissioner Librera specifically declined to entertain either petitioner's request for summary decision or the Board's motion to dismiss.

The Department of Education transmitted the matter to the Office of Administrative Law (OAL) for a hearing as a contested case on July 16, 2003. When the matter was transmitted the transmittal noted that the threshold issues were the timeliness of the petition and whether petitioner has standing to bring this action. On August 26, 2003, the OAL held a prehearing conference at which the schedule for the pending motion to dismiss was set. Petitioner filed her opposition to the pending motion on September 3, 2003. The district filed its reply on September 15, 2003.

FACTS

For purposes of this motion, the following **FACTS** are undisputed.

Petitioner is the mother of C.J., who graduated Mountain Lakes High School in June 2003 and is now attending Johns Hopkins University. During the 2001-02 school year, C.J., a junior at the time, received a "C" as his final grade in Honors Physics. C.J. felt he deserved a higher grade and met with his teacher about it but to no avail.

In September 2002, petitioner met with the Honors Physics teacher, Mr. Polashenski, and Mr. Ludwig, Principal of the high school, about the calculation of her son's grade. Petitioner also spoke to the Superintendent about her concerns. Petitioner also requested the Board to consider the grading practice used to determine the 2001-02 grades for Honors Physics. In late October 2002 the Board denied her request.

C.J. was not in contention to be named either Valedictorian or Salutatorian of the high school 2003 graduating class. The high school does not provide the ranking of its students, although it does provide the grade point average. Any change in the grade distribution of the 2001-02 Honors Physics class could not affect the ranking of any member of the class of 2003.

LEGAL ANALYSIS AND CONCLUSION

The Board moved to dismiss this action on three grounds. The first basis was that petitioner does not have standing to bring this claim. The Board also contended that petitioner's claims are moot. Lastly, the Board argued that the petitioner's claim was not filed within 90 days of the Board's refusal to provide a hearing and thus was untimely. The petitioner argued that the motion was timely because unless the discriminatory process and faulty procedures are addressed the students will continue to suffer from these improper procedures. The petitioner claimed an interest in the subject matter because if the Valedictorian or Salutatorian filed suit for damages, petitioner as a taxpayer would be harmed. Further, such an unfair grading situation might in the future happen to her minor child currently in the high school. Petitioner argued she should also be allowed to bring this action because the school cannot provide adequate representation to protect the students' interest.

The Standing Issue

In order to bring a claim a litigant must have sufficient interest in the subject matter of the litigation; this concept is known as standing. See *U.K. and G.K. o/b/o D.K. v. Clifton Bd. of Educ.*, 93 *N.J.A.R.* 2d (EDU) 71 (1992). Generally, in order to have standing a petitioner must demonstrate a sufficient stake in the outcome of the proceedings and his/her position must be truly adverse to that of respondents. *K.S.R. and E.D.R. o/b/o E.D.R., Jr. v. Montague Bd. of Educ.*, OAL Dkt. No. EDU 5300-03, 201 *AGEN LEXIS* 583, (Oct. 3, 2001) citing *Home Builders League of So. Jersey, Inc. v. Berlin Tp.*, 81 *N.J.* 127, 123 (1979). It is necessary to demonstrate standing by showing some measurable amount of detrimental impact on the complaining party's personal

rights. *Salorio v. Glaser*, 82 *N.J.* 482, 491 (1998). The courts refused to entertain proceedings by parties who are mere intermeddlers, interlopers, or strangers to a dispute. *Cresent Park Tenants Ass'n v. Realty Equities Corp.,* 58 *N.J.* 98, 107 (1971).

Additionally in order to bring a complaint to hear a controversy or dispute arising under the school laws, a person must be an interested party. *N.J.A.C.* 6A:3-1.2 defines interested persons as those who will be substantially, specifically and directly effected by the outcome of the controversy before the Commissioner. The dismissal of cases brought by litigants who will not be effected by the outcome in a direct and meaningful way is required by this regulation. *E.D.R. v. Montague* at 15.

The district argued that the petitioner has not shown that she is directly effected by the outcome in a direct and meaningful way. Petitioner has admitted that she is not contesting this grade on account of her son as he is not going to become Valedictorian or Salutatorian. Her claim that the Valedictorian or Salutatorian may sue the district therefore costing her as a taxpayer extra money was previously rejected by the Commissioner as too speculative. She now claims that her other son is in the high school and if he takes Physics and if he has the same teacher and if the teacher continues to mark in the same way as he did in 2001-02 school year her son will be subjected to the same unfairness. Plainly, I **FIND** that the requisite demonstration of direct and meaningful involvement is not shown by these contingencies: if the family continues to live in the district, if the child continue going to the school, if the child takes the Physics, if the teacher is still there, if the teacher uses the same computer program and the same text books. These mere speculative effects are not the measurable amount of detrimental impact required to demonstrate a sufficient interest in the subject matter to provide standing. Hence on the undisputed facts I **CONCLUDE** that the petitioner does not have standing under *N.J.A.C.* 6A:3-1.2 as she is not an interested person who will be substantially, specifically and directly effected by the outcome of this controversy.

The Issue of Mootness

The Board also contends that petitioner's claim should not be considered as the matter is moot. An action is considered moot where it no longer presents a justiciable controversy because the issues have become academic. When a determination is sought on the matter which when rendered cannot have practical effect on the existing controversy, the matter is moot. *S.G. v. Fairlawn Bd. of Educ.*, 2000 *N.J. AGEN LEXIS* 552. The purpose of the doctrine of mootness is to refrain from unnecessary decision where an issue is hypothetical, judgment cannot grant effective relief or the parties do not have concrete adversity of interest. *Fox v. Tp. of East Brunswick Bd. of Educ.,* OAL Dkt. No. EDU 10067-98, 1999 *N.J. AGEN LEXIS* 140 (March 19, 1999).

In a landmark case the Supreme Court considered a case where students were disciplined for violation of a regulation. By the time the matter reached the Appellate Division the students challenging the regulation had graduated from the high school. Under the circumstances the Supreme Court declined to review the educational authority's actions. *Oxfeld v. N.J. Bd. of Educ., 68 N.J.* 301, 304 (1995). Similarly, in a recent case where a student was disciplined under a zero tolerance policy, the State Board of Education was asked to consider uniform guidelines for the discipline of students and the constitutionality of zero tolerance policies. The State Board refused to consider the policy issues as any dispute regarding H.R.'s ability to attend school in the district had been resolved, meaning that the questions being raised by petitioner were academic at that point. *L.H. and L.H. o/b/o H.R. v. Bd. of Educ. of Rahway*, OAL Dkt. No. EDU 5449-01, State Board of Education decision April 2, 2003. In the instant case, the Valedictorian and Salutatorian have graduated and petitioner's son has also graduated. Hence, I **CONCLUDE** that the issues raised concerning the 2002-2003 Honors Physics grades have become academic, rendering them moot.

The Timeliness Issue

Claims brought before the Commissioner must be brought in a timely manner in order to provide "a measure of repose, an essential element in the proper and efficient

administration of the school laws." *Kaprow v. Bd. of Educ. of Berkeley*, 131 *N.J.* 572, 582 (1993). Specifically, *N.J.A.C.* 6A:3-1.3(d) provides 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." The 90-day rule can only be relaxed if strict adherence to the rule would be inappropriate, unnecessary, injustice or if there exist substantial constitutional issue or other issue of fundamental public interest beyond the parties themselves. *DeMaio v. New Providence Bd. of Educ.*, 96 *N.J.A.R.* 2d (EDU) 449, 453.

Here petitioner does not deny the fact stated by the Board that her request for a hearing in front of the Board was rejected in late October 2002. Although petitioner did not cease her inquiry and went to other agencies and continued her investigation, she knew in late October that the Board had refused to hold a hearing on the matter. Accordingly, the petition filed in May 2003 was about four months later than the 90-day time limitation required. Moreover petitioner has not demonstrated the necessary elements required to relax the rule. Therefore, I **CONCLUDE** that the petition must be dismissed because petitioner did not adhere to the 90-day deadline required in *N.J.A.C.* 6A:3-1.3(d).

In sum, I **CONCLUDE** that the petition must be dismissed because the matter is moot, the petitioner has no standing, and the petition was filed untimely.

ORDER

For the foregoing reasons it is hereby **ORDERED** that the petitioner's request for an examination of the grades of the 2001-02 Honors Physics 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.

Oct 7, 2003
DATE

MARGARET M. HAYDEN, ALJ

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

October 7, 2003
DATE

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OCT - 8 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 7081-03
AGENCY DKT. NO. 159-5/03

S.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY, AND JOHN KAZMARK, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

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 of this matter, the Commissioner concurs that the Board's Motion for Summary Decision is properly granted for the reasons set forth in the Initial Decision. The Commissioner additionally finds that there is nothing in this matter which justifies relaxation of the filing requirement set forth at *N.J.A.C.* 6A:3-1.3(d).

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11|17|03
Date of Mailing: 11|17|03

* 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.*

673-03

673-03SEC

IN THE MATTER OF LARRY HAZZARD,:

NEWARK BOARD OF EDUCATION, :

ESSEX COUNTY. :

:

COMMISSIONER OF EDUCATION

DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D12-03**
LARRY HAZZARD **NEWARK BOARD OF EDUC.** **ESSEX 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. Larry Hazzard is a member of the Newark 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 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 failed to reply to 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 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 suspension from his Board, but removal if he does not file within 30 days of the date of the Commissioner's decision on penalty, 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 Larry Hazzard 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 suspension from his Board, but removal if he does not file within 30 days of the effective date of the Commissioner's decision.

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. 408-11/03

IN THE MATTER OF LARRY HAZZARD,:
NEWARK BOARD OF EDUCATION, :
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 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 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 failed to reply to the Order to Show Cause; 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 suspension of the above-named school official until he files the necessary disclosure statement, and his automatic removal from the board if he fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 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 removal; and

Whereas, neither the above-named school official nor anyone on his 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

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until he files the necessary disclosure statement, and automatically removed from the Board if he fails to file within 30 days. IT IS additionally ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, he shall nevertheless be reprimanded for his failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/24/03

* 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.

630-03

630-03 R

PAMELA JUSTINIANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

November 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2713-03
AGENCY DKT. NO. 134-5/98

PAMELA JUSTINIANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,
Respondent.

Barbara E. Riefberg, Esq., for petitioner (Baron & Riefberg, P.A., attorneys)

Eric Martin Bernstein, Esq., for respondent (Eric M. Bernstein & Associates, attorneys)

Record Closed: October 3, 2003 Decided: October 7, 2003

BEFORE **EDGAR R. HOLMES**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 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.

The parties have agreed to a settlement and have prepared a Settlement Agreement and General 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.

10-7-03
DATE

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

October 9, 2003
DATE

M. Kathleen Duncan (Ca
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 14 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE,

DATE

OFFICE OF ADMINISTRATIVE LAW

sd

ATLANTIC CITY BOARD OF EDUCATION
Office of the Secretary

Administration Building
1809 Pacific Avenue
Atlantic City, NJ 08401

Lisa Mooney
Business Administrator / Board Secretary
(609) 343-7200 ext. 5038 - Fax (609) 347-1549

September 24, 2003

At the regular meeting of the Atlantic City Board of Education, held on Tuesday, September 23, 2003, the following resolution was approved:

Resolution No. 03 9B 57: Resolved by the Atlantic City Board of Education to approve the Settlement Agreement and General Release in regards to Pamela Justiniano and the Atlantic City Board of Education and to further authorize Business Administrator/Board Secretary Lisa Mooney and Board President James Herzog to execute the agreement, per **Exhibit M.**

Respectfully,

Lisa Mooney

Lisa Mooney AB
Business Administrator / Board Secretary

CONFIDENTIAL

SETTLEMENT AGREEMENT AND GENERAL RELEASE

IT IS HEREBY AGREED by and between **PAMELA JUSTINIANO** ("Justiniano") and the **ATLANTIC CITY BOARD OF EDUCATION** ("Board"), for the good and sufficient consideration set forth below, as follows:

1. The Board, as used herein, shall at all times mean the Atlantic City 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, designees, 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; and,

2. Justiniano, as used herein, shall mean Pamela Justiniano, her heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest; and,

3. Within thirty (30) working days of the Board's receipt of this Settlement Agreement and General Release, executed by Justiniano before a Notary Public, the Board shall pay to Justiniano an amount equal to ONE THOUSAND FIVE HUNDRED DOLLARS AND NO CENTS ($1,500.00). Justiniano and the Board acknowledge and agree that the payment mentioned above is in settlement of any and all claims that had been asserted, were asserted or may have been asserted or could be asserted by Justiniano for compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental anguish, medical expenses, punitive damages, interests, attorneys fees, costs of suit, loss of sick time, loss of vacation time, loss of benefits, consequential damage, reputation damage, breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage which arose out of Justiniano's employment with the Board, as well as deriving from

the incidents related to the matter known as Pamela Justiniano v. Atlantic City Board of Education, Docket No. EDUOA-04650-98S, for, but not limited to, violation of her civil rights, privileges and immunities secured by the Civil Rights Act of 1871, 1964 and 1991, 42 U.S.C. §§1981, 1983, 1985, 1986 and 1988, the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et. seq., the Fifth and Fourteenth Amendments to the United States Constitution, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et. seq., the Tenure Protection Act, N.J.S.A. 18A:17-4 and any and all other federal, state and local constitutional, statutory, regulatory or administrative laws, ordinances or common law duties. Justiniano and the Board expressly understand and agree that said payment includes any and all amounts that may be, could be or will be claimed by Justiniano or on her behalf, or by her attorneys, heirs, successors or assigns, against the Board. The payment mentioned above is in complete and full settlement of all amounts that Justiniano is or could be owed by the Board and Justiniano agrees that she will not seek any future compensation or benefits from the Board except what is stated explicitly herein. Further, Justiniano and the Board agree that this Settlement Agreement and General Release is contingent on and subject to approval and ratification by the Board; and,

4. (a) This settlement is intended as a resolution for any and all possible claims, actual or implicit, and Justiniano hereby waives any and all claims for lost wages, income or future earnings and any other benefits potentially available arising out of the matter known as Pamela Justiniano v. Atlantic City Board of Education, Docket No. EDUOA-04650-98S. Justiniano also understands and agrees that any adjustments to her withholding or any estimated tax payments are her responsibility; and,

(b) In any action commenced by either party against the other to enforce the provisions of this paragraph, the Board or Justiniano, if it/she is the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

5. Neither this Settlement Agreement and General Release, nor anything contained herein, shall be construed as an admission by the Board or Justiniano of any liability or unlawful conduct whatsoever. Justiniano and the Board further acknowledge that the parties enter into this Settlement Agreement and General Release solely to avoid further expensive, burdensome and protracted litigation. This Settlement Agreement and General Release is not intended to be used and shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the compromise between Justiniano and the Board as set forth herein or to enforce the terms of this Settlement Agreement and General Release; and,

6. Justiniano releases, acquits, gives up and forever discharges any and all claims and rights which she may have against the Board up to the time of the execution of this Settlement Agreement and General Release. Justiniano specifically releases the following claims:

Any and all damages, whether known or unknown at this date, arising from or in any way relating to the matter known as Pamela Justiniano v. Atlantic City Board of Education, Docket No. EDUOA-04650-98S or arising from Justiniano's employment with the Board, including, but not limited to, attorney fees pursuant to 42 U.S.C. §1983 and/or 42 U.S.C. §1988 and/or N.J.S.A. 10:5-1 et seq.

More specifically, in consideration of the payment specified in Paragraph 3 above and the entry into this Settlement Agreement and General Release by the Board, Justiniano hereby releases, acquits and forever discharges the Board of 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 Justiniano ever had, now has, or may have, as of the date of this Settlement Agreement and General Release, as set forth more particularly in Paragraph 3.

7. Justiniano agrees not only to release, acquit and forever discharge the Board from any and all claims which arose from Justiniano's employment with the Board that Justiniano could make on her own behalf, but also those which have been or may be made against the Board by any other person or organization on her behalf. Justiniano specifically waives any right to become, and promises not to become, a member of any class in any case in which any claim is asserted against the Board, involving any event that has occurred on or before the date of this Settlement Agreement and General Release; and,

8. The Board affirms that, as of the date of execution of this Settlement Agreement and General Release, they have no knowledge of any pending class action against it to which Justiniano could be a potential class member, and,

9. Justiniano specifically acknowledges that the arrangement referred to in Paragraph 3 hereof constitutes additional consideration not otherwise owed to her but for this Settlement Agreement and General Release; and,

10. Unless directed to do so by court order or lawfully issued subpoena with notification to the Board at the time the lawfully issued subpoena was issued, Justiniano agrees that she will not give testimony or evidence against the Board in any proceeding with respect to any incidents related to any incidents/events involving Justiniano's employment with the Board; and,

11 This Settlement Agreement and General Release contains the full agreement of Justiniano and the Board and may not be modified, altered, changed or terminated except upon the express prior written consent of Justiniano and the Board, which consent must be signed by Justiniano and the Board or their duly authorized agents; and,

12. The waiver by Justiniano and the Board 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; and,

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; and,

14. Justiniano hereby acknowledges and agrees that she further expressly waives and assumes the risk of any and all claims or damages which exist as of this date for which Justiniano does not know of or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise and which, if known, would materially effect her decision to enter into this Settlement Agreement and General Release; and,

15. Justiniano represents and warrants that no other person or entity has or has had any interest in the claims, demands, obligations, or causes of action referred to in this Settlement Agreement and General Release; that Justiniano has not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action referred to in her verbal complaint(s) and/or in this Settlement Agreement and General Release; and,

16. This Settlement Agreement and General Release shall be construed and interpreted in accordance with the laws of the State of New Jersey; and,

17. Justiniano and the Board agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to get full force and effect of the basic terms and interest of this Settlement Agreement and General Release; and,

18. This Settlement Agreement and General Release shall not be executed in counterparts and shall be enforceable only if executed by Justiniano and the Board; and,

19. This Settlement Agreement and General Release shall become effective immediately following execution by Justiniano and the Board and approval by all applicable Board officials, except as noted herein; and,

20. Justiniano and the Board shall bear all costs and expenses arising from the actions of their own counsel in connection with the Settlement Agreement and General Release. As set forth in Paragraph 3, the Board has agreed to only pay the amounts herein mentioned to Justiniano. As further consideration for this Settlement Agreement and General Release, Justiniano and her attorney agree that this sum represents all of the monies which the Board has agreed to pay to Justiniano and her attorney and that any additional attorney's fees which may arise from the actions of Justiniano' attorney in connection with any matter arising from Justiniano' employment with the Board are to be borne by Justiniano; and,

21. This Settlement Agreement and General Release contains the entire agreement between Justiniano 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, attorneys, representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs, successors and assigns of each, and all other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties; and,

22. In entering into this Settlement Agreement and General Release, Justiniano has relied upon the legal advice of her attorney, who is the attorney of her own choice, as to the terms of this Settlement Agreement and General Release which have been completely read and explained by her attorneys and those terms are fully understood and voluntarily accepted; and,

23. All notices, demands and requests which are required and desired to be given shall be in writing and shall be sent regular mail and pre-paid, registered or certified mail, return receipt requested, addressed as follows:

For **PAMELA JUSTINIANO**:

Barbara Reifberg, Esq.
BARON, RIEFBERG & WARD
1307 White Horse Road
Vorhees, New Jersey 08043

For the **ATLANTIC CITY BOARD OF EDUCATION**:

Eric Martin Bernstein, Esq.
ERIC M. BERNSTEIN & ASSOCIATES, L.L.C.
Two North Road
P.O. Box 4922
Warren, New Jersey 07059

IN WITNESS WHEREOF, Justiniano and the Board have hereunto set their hands.

Barbara Reifberg, Esq.

PAMELA JUSTINIANO

By: _____
Pamela Justiniano

Lisa Mooney, Business Administrator/
Board Secretary

ATLANTIC CITY BOARD OF EDUCATION

By: _____
James Herzog, Board President

N:\Clients\ACBOE (1752)\1009 justiniano settlement agreement revise 8-20-03.doc

STATE OF NEW JERSEY)
) ss.
COUNTY OF Atlantic)

I, Angelique Brown, a Notary Public, do hereby certify that Pamela Justiniano, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledges that he signed and delivered the said instrument as his free and voluntary act, for the uses and purposes set forth therein.

Given under my hand and official seal this 8th day of September, 2003

Angelique Brown
Notary Public

ANGELIQUE BROWN
NOTARY PUBLIC
STATE OF NEW JERSEY
MY COMMISSION EXPIRES AUGUST 29, 2007

OAL DKT. NOS. EDU 2713-03 AND EDU 4650-98 (ON REMAND)
AGENCY DKT. NO. 134-5/98

PAMELA JUSTINIANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record, Settlement Agreement 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, 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|20|03

Date of Mailing: 11|20|03

638-03

A.J., on behalf of minor child, C.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTHAMPTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

November 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4881-03
AGENCY DKT. NO. 184-6/03

A.J. O/B/O C.F.,
Petitioner,
v.
SOUTHAMPTON TOWNSHIP BOARD OF EDUCATION,
Respondent.

A.J., parent, *pro se*

David M. Serlin, Esq., for respondent

Record Closed: October 6, 2003 Decided: October 7, 2003

BEFORE **DOUGLAS H. HURD,** ALJ:

This matter was transmitted to the Office of Administrative Law on July 25, 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 an Order Approving 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.

October 7, 2003
DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

October 10, 2003
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

OCT 14 2003

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

2003 OCT -6 P 3:10

DAVID M. SERLIN, ESQUIRE
34 West Broad Street
P.O. Box 7
Burlington, NJ 08016
(609) 387-9220
Attorney for the Southampton Township Board of Education

	: OFFICE OF ADMINISTRATIVE LAW
A.J., o/b/o MINOR CHILD, C.F.	:
Plaintiff,	**: OAL DOCKET NO.: EDUOS 04881-2003S**
vs.	**: AGENCY REF. NO.: 184-6/03**
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTHAMPTON	:
	: ORDER APPROVING SETTLEMENT
Defendant(s).	:

THIS MATTER having been brought by Amadu A. Jollah by filing a pro se residency appeal on behalf of his minor child, C.F., against the Southampton Township Board of Education, wherein on June 12, 2003 he alleged that he was in the process of purchasing a home in Southampton Township.

Amadu A. Jollah now admitting that he has been domiciled in the Township of Mount Laurel since January 2003 while C.F. attended schools in Southampton Township and his efforts to purchase homes within the Southampton Township have been unsuccessful, although it is his intention to become domiciled within Southampton Township by December 31, 2003, and it is his desire to pay tuition so that C.F. can continue to be educated in the Southampton Township school district.

IT IS ORDERED that the parties comply with the terms of the settlement set forth hereinafter and these proceedings be and hereby are concluded.

C.F. shall be permitted to remain a pupil in the Southampton Township school district upon Amadu A. Jollah paying tuition of $9,303.30 by cash or certified check. By September 26, 2003 he shall pay $2,000.00 and the balance by October 27, 2003. Failure to make either payment on time shall result in C.F. not being permitted to attend school in the Southampton Township unless at such time Amadu A. Jollah is domiciled in the Township of Southampton. If Amadu A. Jollah makes the required tuition payments but is not a domiciliary of Southampton Township by December 31, 2003, C.F. shall not be permitted to attend school in Southampton Township beyond that date. Tuition for January to June 2003 semester is $5,365.80. Tuition for the September to December 2003 semester is $3,937.50. If Amadu A. Jollah is domiciled in Southampton Township before December 31, 2003 he shall receive a credit of $52.52 for each day he is domiciled within the municipality for which tuition was charged.

Date: 10/7/2003

DOUGLAS H. HURD, ALJ

I hereby consent to the terms
and contents of the ORDER.

AMADU A. JOLLAH, Pro Se

I hereby consent to the terms
and contents of the ORDER.

DAVID M. SERLIN, ESQUIRE
Southampton Township Board
of Education Attorney

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OAL DKT. NO. EDU 4881-03
AGENCY DKT. NO. 184-6/03

A.J., on behalf of minor child, C.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTHAMPTON, BURLINGTON 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: 11/20/03

Date of Mailing: 11/20/03

639-03

659-03

T.L.S., on behalf of minor child, J.L.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged the Board's residency determination that petitioner and her child, J.L.S., were not domiciled in the District. The Board counterclaimed for tuition and costs.

In light of the record and the testimony of witnesses, the ALJ found that petitioner did not prove by a preponderance of evidence that J.L.S. was eligible for a free education based on domicile within the District. Thus, the ALJ dismissed the petition and granted the Board's counterclaim for tuition and costs. The ALJ ordered petitioner to pay $7,175 in tuition and $378.69 in sanctions to the Board.

The Commissioner concurred with the dismissal of the petition and the grant of tuition to the Board. The Commissioner, however, did not reach to the order for sanctions, since final agency review of such orders is within the sole purview of the Director of 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.

November 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2714-03

AGENCY DKT. NO. 115-4/03

T.L.S., on behalf of minor child,

J.L.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

BOROUGH OF DUNELLEN,

MIDDLESEX COUNTY,

Respondent.

No appearance by or on behalf of the petitioner

Joan M. Damora, Esq., for the respondent (Schwartz Simon Edelstein Celso & Kessler, attorneys)

Record Closed: September 6, 2003 Decided: October 7, 2003

BEFORE **JOHN SCHUSTER III**, ALJ:

STATEMENT OF THE CASE

Pursuant to *N.J.S.A.* 18A:38-1, respondent, Board of Education of the Borough of Dunellen (hereinafter BOE or respondent), held a hearing and determined that J.L.S., the child of

T.L.S., was not domiciled within the BOE school district, although she continued to attend school within the BOE district. Consequently, the respondent decided that the child should be removed from the school and that T.L.S. should pay tuition for the child. According to the papers filed, T.L.S. alleges that she and her child, J.L.S., are domiciled within the district and claim that the BOE was and is required to provide her child with a free public education. The BOE submits that T.L.S. has not met her burden of proof and counterclaims for an order requiring T.L.S. to pay tuition.

In addition, the BOE has requested that petitioner pay a sanction as a result of her failure to answer interrogatories or otherwise provide discovery causing a postponement of a hearing.

PROCEDURAL HISTORY

On March 18, 2003, a hearing was held by the BOE, which the petitioner attended, for the purpose of giving the petitioner the right to appeal the determination of the respondent that J.L.S., the daughter of petitioner, does not reside within the Dunellen school district (R-3). On March 20, 2003, the respondent notified the petitioner that the BOE affirmed its initial determination and directed the petitioner to remove the child from the Dunellen schools. That notice (R-5) also advised the petitioner that she could file an appeal with the Commissioner of Education. On April 3, 2003, petitioner filed a *pro se* residency appeal with the Commissioner of Education. On April 23, 2003, the respondent filed an answer to the aforesaid petition. The Department of Education then transmitted the matter to the Office of Administrative Law (OAL) on May 12, 2003, where it was received and filed as a contested case pursuant to *N.J.S.A.* 52:14B-2(b). Respondent made a discovery demand on petitioner on June 4, 2003. The original hearing was scheduled for June 16, 2003, but an adjournment was granted at the request of the petitioner because she advised the court she was out-of-state because of a severe illness in her family. By way of a telephone conference call with the parties on June 11, 2003, I ordered that all discovery requests had to be answered no later than July 18, 2003. The matter was rescheduled for August 1, 2003, at which time the parties appeared. Respondent made a motion to strike petitioner's pleadings at that time and declare her in default for failure to respond to interrogatories and a request for a production of documents, which had been duly served upon her. At the August 1 hearing, the petitioner admitted that she did not answer the discovery

requests previously served upon her. On August 7, 2003, I entered a Letter Order, by which I directed the petitioner to answer all discovery requests no later than August 20, 2003. In addition, I ordered that if petitioner did not do so, I would reconsider respondent's request to strike petitioner's pleadings and conduct a proof hearing at 4:00 p.m. on September 2, 2003, regarding the BOE's claim for tuition and for payment of monetary sanctions for failure to comply with my discovery order of June 11, 2003. On August 13, I received a Certification of Expenses from the respondent and a request that I consider them as a sanction against petitioner pertaining to the postponed August 1 hearing. On August 18, 2003, I wrote to petitioner and advised her she had until September 6, 2003 to respond to respondent's request. Petitioner did not provide discovery responses by August 20, 2003, and a proof hearing was held on September 2, 2003. Petitioner did not attend the September 2, 2003 hearing, nor did she ever respond to the Certification of Expenses submitted by attorney Damora. At the September 2 hearing, respondent appeared and at that time testimony was taken pertaining to J.L.S.'s domicile and the cost of her education provided by the Dunellen Board of Education.

FINDINGS OF FACT

Dr. Joyce Baynes testified on behalf of the respondent. She is the superintendent of schools for that district. She testified that J.L.S. was enrolled for a full-day kindergarten at the John P. Faber School. She further testified that the BOE has an excellent academic program for its kindergarten students and is one of the few districts in the area that has a full-day kindergarten program. This program is very attractive because it eliminates any childcare costs that would be incurred by working parents if it was only a part-time program. Dr. Baynes testified that she questioned the residency of this student because she discovered that the school's emergency notification card listed the student's home telephone number as being a land-based telephone exchange for Branchburg, New Jersey and not Dunellen (R-1). When residency was questioned, Dr. Baynes testified that the petitioner supplied a 2001 preliminary tax bill for property known as 212 North Washington Avenue, Dunellen, New Jersey, listed in her name (R-2). The mailing address for the tax bill indicates 212 North Washington Avenue, Dunellen, New Jersey, however; it appears to have been altered. She further testified that at one point, the petitioner told a school official that she did not live in Dunellen, but later changed her story to indicate that she misspoke and that her husband was the one that did not live in the Borough of Dunellen. In addition, the

witness testified that the petitioner advised her that she was going through a divorce, that her husband lived in Branchburg, New Jersey and that she lived in Dunellen with a newborn child fathered by an individual other than her husband. Dr. Baynes testified that the issue of domicile was first brought to the surface because on October 25, 2002 one of the school's secretaries called the phone number of the emergency record card and the petitioner answered the phone and admitted that she was at the Branchburg residence. Upon further investigation of this matter, Dr. Baynes testified that the 2001 tax records from the Borough of Dunellen indicate that the tax bills for the property owned by the petitioner on North Washington Avenue gets sent to a Neshanic Station (Branchburg), New Jersey address (R-7). This is a further indication that the tax bill supplied by the petitioner as proof of her residence (R-2) was altered.

The next person to testify was the child's kindergarten teacher, Ms. Laurie Mann. She testified that J.L.S. was a student of her's in the 2002-2003 school year. She further testified that the child always told her that she lived in Branchburg, and she had observed the child's father dropping her off from school consistently and the mother picking her up on a regular basis, instead of using school bus transportation. She also observed that on many occasions the father had a newborn child with him, even thought the petitioner said that the parties were going through a divorce, that the child resided with her in Dunellen and not with the father in Branchburg and that the newborn child was fathered by a man other than J.L.S.'s father. In addition, Ms. Mann testified that another child, a friend of J.L.S., told her that she visited J.L.S. at her home in Branchburg.

The next witness to testify was Frank Patullo, who was the supervisor of the respondent's buildings and grounds department. He testified that in the early part of March, 2003, the petitioner picked up J.L.S. from school and he followed her in his vehicle to 173 Brandon Court in Branchburg, the address listed on the Borough of Dunellen's tax records. He further testified that in early April, he observed J.L.S.'s father pick her up from school and likewise he followed him to the home in Branchburg with the child. He further testified that he observed the house at 212 North Washington Avenue, at least ten times from 7:30 a.m. He did not see the petitioners or their cars at that location. Over a period of time, he observed that property at least 50 times at various times of the day and he never saw the petitioner's car at that location. He did however candidly record that on one instance he spoke to a neighbor who was very reluctant when

questioned on the issue of residency, but she did say that the petitioner resided at the Washington Avenue address. Mr. Patullo believed that from his observations that she was a tenant of the petitioner. Therefore, I **FIND**, based on the inconsistencies in petitioner's statements to the witnesses, the statements of the child, the observations of the respondent's employees and the documentary evidence presented, that J.L.S. is not domiciled within the Borough of Dunellen and, in fact, resides at 173 Brandon Court, Neshanic Station (Branchburg), New Jersey.

LEGAL ANALYSIS

N.J.S.A. 18A:38-1(b)(2) states that when the superintendent of a school district determines that a person is attending a district school but is not domiciled within the district, the parent may present proofs at a hearing to show by a preponderance of the evidence that the child is eligible for a free education based on domicile within the district. If the parent or guardian does not meet that burden, then they may be assessed for the child's tuition prorated on a per diem basis. Based on the unrefuted testimony at the hearing, it is clear that T.L.S. and J.L.S. do not reside or are domiciled in the Borough of Dunellen, but, in fact, are domiciled and reside at 173 Brandon Court, Neshanic Station (Branchburg), New Jersey, a location not within the district of the BOE. The respondent has made an application pursuant to that statute for tuition reimbursement, which I **FIND** it is entitled to pursuant to *N.J.S.A.* 18A:38-1(b)(2). I also **FIND** that the allowable tuition for reimbursement purposes has been fixed at $7,175 for the 2002-2003 school year. I further **FIND** that J.L.S. attended the John P. Faber School in Dunellen for the entire 2002-2003 school year.

As a result of my Letter Order of August 7, 2003, the respondent was to submit a certification of expenses to be considered as a sanction for the postponement of the August 1 hearing, which was a direct result of the petitioner's failure to comply with my prior discovery order. The respondent has submitted a certification indicating that counsel fees for that date are $641.25 based on 4 ¾ hours at the district's rate of $135 per hour. The work involved making up that 4 ¾ hours is for the appearance in court, a prehearing meeting with the witnesses to review their testimony and prepare for the hearing scheduled on the August 1 date. In addition, there is a request that the district expended $108.69 for mileage and substitute coverage for the witnesses that attended the August 1 hearing. I **FIND** the expenses incurred by the district of $108.69 to be

fair and reasonable. I also **FIND** that the hourly rate charged by counsel to be reasonable. I do not **FIND** however the time spent of 4 ¾ hours to be appropriate since it included prehearing meetings with the witnesses, which is necessary for all hearings and not just the August 1 hearing, which was adjourned. Consequently, I am ordering the appropriate counsel fee to be two hours at the rate of $135 or $270 and a reimbursement of expenses in the amount of $108.69 for a total of $378.69.

ORDER

Based on the above, and for good cause shown, I **ORDER** that the petition in this matter be and is hereby **DISMISSED WITH PREJUDICE**. I further **ORDER** that the BOE's counterclaim for tuition is **GRANTED** and I **ORDER** T.L.S. to pay $7,175. I further **ORDER** that because J.L.S. is not domiciled within the district, she may be removed from the educational program offered by the BOE. I further **ORDER** T.L.S. to pay the sanction previously ordered in the amount of $378.69.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 7, 2003
DATE

JOHN SCHUSTER III, ALJ

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

10-10-03
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 16 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

jh

WITNESSES

For the petitioner:

None

For the respondent:

Dr. Joyce Baynes

Laurie Mann

Frank Patullo

EXHIBITS

For the petitioner:

None

For the respondent:

R-1 Emergency notification card

R-2 2001 preliminary tax bill

R-3 Notes of residency hearing of March 18, 2003

R-4 Secretary notes

R-5 Letter of March 20, 2003, respondent to petitioner

R-6 Tuition statement, 2002-2003 year

R-7 2001 Borough of Dunellen tax duplicate

R-8 2003 preliminary tax bill

OAL DKT. NO. EDU 2714-03
AGENCY DKT. NO. 115-4/03

T.L.S., on behalf of minor child, J.L.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX 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 (ALJ) that J.L.S. is not domiciled in the respondent's school district and that the Board of Education is entitled to collect tuition from T.L.S. in the amount of $7,175 for the period of J.L.S.'s ineligible attendance. The Commissioner does not, however, reach to the ALJ's recommended order for sanctions, since final agency review of such orders is within the sole purview of the Director of the OAL pursuant to *N.J.A.C.* 1:1-3.2(c)4.

Accordingly, the Initial Decision of the OAL, recommending dismissal of the Petition of Appeal and granting the Board's counterclaim for tuition, is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11/20/03

Date of Mailing: 11/20/03

* 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.*

645-03

BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY, ON ITS OWN BEHALF AND ON BEHALF OF GREGORY RAIFORD,

PETITIONER,

V.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board sought reversal of the NJSIAA's decision not to allow Gregory Raiford, a 19-year-old educationally disabled student in his senior year, to participate in interscholastic competition in contact sports, *i.e.*, football and basketball, for the 2003-04 school year. He was denied a waiver of the "Age Rule," Article V, Section 4.C of the NJSIAA Bylaws.

Noting that it conducted the individualized review contemplated by the NJSIAA's Constitution, Bylaws, Rules and Regulations in its consideration of this matter, the NJSIAA denied the waiver, alleging that the student would have an unfair advantage over the other participants because of his size and experience and that the nature of the competition would be altered.

The Commissioner found that the student was provided the due process to which he was entitled; that the NJSIAA made every effort to provide a full, fair and timely hearing by the Eligibility Appeals Committee; and that NJSIAA's rule was not applied in an inconsistent manner. The Commissioner found that the NJSIAA's decision to deny the request for waiver of the provisions of Article V, Section 4.C of the NJSIAA Bylaws was not arbitrary, capricious or unreasonable. Also, the student was granted a "limited" waiver allowing him to travel or "suit up" with the football and basketball teams, or to participate in other team activities such as practices and scrimmages. The Commissioner upheld the NJSIAA's decision. 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.

December 5, 2003

AGENCY DKT. NO. 298-8/03

BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY, ON ITS OWN BEHALF AND ON BEHALF OF GREGORY RAIFORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

For Petitioner, Edison Township Board of Education, Elizabeth Farley Murphy, Esq. (Wilentz, Goldman & Spitzer, P.A.)

For Respondent, Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter came before the Commissioner of Education on August 25, 2003 through the filing of a Petition of Appeal by the Board of Education of Edison Township (petitioner), on its own behalf and that of student Gregory Raiford. Petitioner sought an order reversing the determination of the Eligibility Appeals Committee (EAC) of the New Jersey State Interscholastic Athletic Association (NJSIAA), wherein Gregory Raiford, a 19-year-old educationally disabled student, was denied a waiver of the "Age Rule," Article V, Section 4.C of the NJSIAA Bylaws, thereby precluding him from participation in interscholastic competition in contact sports, *i.e.,* football and basketball, for the 2003-04 school year. Petitioner's submission also included a Motion for Emergent Relief and to Supplement the Record. Respondent's Answer to the Petition and the motions were filed on September 2, 2003, together with a complete record of the proceedings before the NJSIAA's EAC. Upon consideration of the

parties' submissions with respect to the Motion for Emergent Relief and to Supplement the Record, such motions were denied by the Commissioner by decision dated September 10, 2003, and a briefing schedule for the matter on its merits was established. On September 22, 2003, petitioner submitted a brief in support of its position, and NJSIAA filed its reply brief on October 2, 2003, whereupon the record in this matter was closed.

Gregory Raiford is a senior in this 2003-04 school year. On November 21, 2002, the principal of John P. Stevens High School, in the Edison Township Public School District, requested the NJSIAA to review the eligibility of Gregory, who turned 19 years of age on June 10, 2003 and would, therefore, be ineligible to participate in sports, specifically basketball, during the 2003-04 school year pursuant to the "Age Rule," Article V, Section 4.C of the NJSIAA Bylaws.[1] [2] On February 13, 2003, petitioner's request for a waiver of the Age Rule was considered by the NJSIAA's Eligibility Committee, which denied the request by a vote of 7-0. On June 4, 2003, an appeal hearing was conducted by NJSIAA's EAC. After considering the evidence, the EAC, by unanimous decision, declined to waive the Age Rule to permit Gregory to compete interscholastically in contact sports. The EAC did, however, grant a waiver to allow him to be a member of, travel with or "suit up" with the football and basketball teams, or to participate in other team activities, as long as he did not compete interscholastically in those sports. The granted waiver also permitted Gregory to *compete* in any non-contact sport during

[1] This rule, in pertinent part, specifies "An athlete becomes ineligible for high school athletics if he/she attains the age of nineteen prior to September 1.***" (*NJSIAA Handbook*, 2002-2003, at 45) Rationale for this rule is provided by the *NJSIAA Interpretive Guidelines For Student-Athlete Eligibility* which state: "This rule is not only aimed at preventing 'red-shirting' but is also aimed at encouraging students to satisfactorily complete their academic studies starting with the elementary school level. It is also a safety measure to assure that 13-and 14-year-old students are not expected to compete against adults who are six or more years older, with substantially greater physical size, strength and skills." (*NJSIAA Handbook*at 70)

[2] It is noted that although the within Petition of Appeal seeks a waiver of the Age Rule to permit participation in both basketball and football, the record indicates that the Eligibility Waiver Request made to the NJSIAA by the District on November 21, 2002, the issue before both the NJSIAA Eligibility Committee and the NJSIAA Eligibility Appeals Committee (EAC), and the subject of the EAC's final decision, all dealt with an application to allow Gregory Raiford to play *basketball* in his senior year of high school.

his senior year. The EAC issued a written decision to this effect on June 9, 2003, explaining its rationale for granting only a limited waiver thusly:

> The Committee was extraordinarily sympathetic to the plight of this young man. However, it was noted at the hearing that special provisions had been made for this type of student several years ago when the NJSIAA amended its eligibility rules to permit eighth graders to play on a high school team so as to allow such students four years of competition in any sport. These provisions are set forth in Article V, Section 4.1 of the NJSIAA Bylaws and the clarifications to that section in the *NJSIAA Handbook*. (*See NJSIAA Handbook*, pp. 51, 53.) This legislation was designed in recognition that the Association does not grant waivers of the Age Rule for contact sports, since that Age Rule, imbedded in Article V, Section 4.C. of the NJSIAA Bylaws, is predicated on health and safety considerations. The facts in this case show that the student did not participate in the eighth grade and therefore his eligibility has been limited to three years based on the Age Rule. Accordingly, the Committee must respectfully decline waiving the Age Rule to permit this student to participate in any contact sports in interscholastic competition during his senior year, including basketball.
> (Statement of Items Comprising the Record on Appeal, Exhibit H, at 1, 2)

The record evidences the following facts: Gregory was born and raised in Plainfield. His father was a victim of homicide in 1993 and his mother is HIV positive and has not been a positive influence in his life. Gregory was retained three times in elementary school in Plainfield because of excessive absenteeism. In approximately February 1997, guardianship of Gregory was transferred to his paternal aunt, Laura Grayer, and he entered Edison Township Public Schools in September 1997 as a 6th grader. He was classified in October 1998, with a disability category of specific learning disability. Gregory participated in football as a freshman and in basketball, at JV Varsity level as a freshman and Varsity level as a sophomore and junior.

PETITIONER'S POSITION

Petitioner contends that the NJSIAA's decision was arbitrary, capricious and unreasonable as it failed to conduct an individualized review as to the appropriateness of applying the Age Rule to Gregory, thereby violating its own Constitution, Bylaws, Rules and Regulations and Gregory's rights pursuant to Federal law. Specifically, petitioner alleges that in reaching its determination the NJSIAA failed to consider whether the granting of a waiver under the particular circumstances here was a "reasonable and necessary" accommodation, in violation of Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and the Civil Rights Act. (Petition of Appeal at 6) Further, petitioner charges "[t]he decision also neglected to 'take into account the size, agility and skills of the student in question and the degree to which these issues will not fundamentally alter the competition' as required by NJSIAA's own interpretive guidelines." (*Ibid.*)

In this connection, petitioner points out that, as a classified student, Gregory is entitled to the protections of Section 504 of the Rehabilitation Act of 1973, which provides:

> [n]o otherwise qualified individual with a disability ***shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance***. 29 *U.S.C.* Section 794(a).

Pursuant to 34 *C.F.R.* Section 104.3(j)(1), (j)(2)(ii), it argues, a disabled individual is defined as one "who 'has a physical or mental impairment which substantially limits one or more major life activities,' such as 'learning.'" (Petitioner's Brief in Support of Appeal at 5) Moreover, it contends, 34 *C.F.R.* Section 104.4(b)(1)(i), specifies that "[a] recipient of federal funds may not deny an otherwise qualified disabled person the opportunity to participate in or benefit from an aid, benefit or service." (*Id.* at 6)

Petitioner, additionally, argues that Title II of The Americans with Disabilities Act, 42 *U.S.C.* 12101 *et seq.* (ADA) and a recent Supreme Court case interpreting this provision further supports Gregory's entitlement to a waiver here. Specifically, petitioner observes that Title II of the ADA specifies:

> [s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. (42 *U.S.C.* Section 12132)

The ADA defines a "qualified individual with a disability" as:

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, ***meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. (42 *U.S.C.* Section 12131(2)
> (Petitioner's Brief in Support of Appeal at 6)

Petitioner argues that, pursuant to the dictates of the ADA, the NJSIAA is required to make "reasonable and necessary" modifications to meet Gregory's disability, *i.e.*, a waiver of the Age Rule, "provided the requested modification would not fundamentally alter the nature of the service." (*Ibid.*)

In support of its position here, petitioner cites to the Supreme Court's decision in *PGA Tour, Inc. v. Martin*, 532 *U.S.* 661 (2001). In this case, a golfer suffering from a degenerative condition, which caused his leg to atrophy causing him significant pain when walking, was denied permission to use a golf cart by the PGA which determined that his use of a cart would fundamentally alter the nature of the competition because he would not be subject to the fatigue experienced by other players walking the course during the tournament. The Court disagreed stating:

> Petitioner's refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA. As previously stated, the ADA was enacted to eliminate discrimination against "individuals" with disabilities, 42 *U.S.C.* Section 12101(b)(1), and to that end Title III of the Act requires without exception that any "policies, practices, or procedures" of a public accommodation be reasonably modified for disabled "individuals" as necessary to afford access unless doing so would fundamentally alter what is offered, Section 12182(b)(2)(A)(ii). *To comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration. Martin, supra,* at 688 (emphasis added)
> (Petitioner's Brief in Support of Appeal at 7)

Additionally, petitioner cites to *Cruz v. Pennsylvania Interscholastic Ass'n., Inc.*, 157 *F.Supp. 2d* 485 (E.D. Pa. 2001), a case which it contends is "very similar" to the instant matter, as further evidence of its entitlement to a waiver. In this case the petitioner charged that the Association violated the ADA by refusing the school district's request for a waiver of the Age Rule for a 19-year-old classified student. The *Cruz* court observed that *Martin, supra,* clarified that a fundamental requirement of the ADA is that a disabled person must be evaluated on an individual basis. It posits that *Cruz, supra,* further found that, pursuant to *Martin*, three inquiries are relevant in such an individualized evaluation: "(1) whether the requested modification is reasonable; (2) whether it is necessary for the disabled individual; and (3) whether it would fundamentally alter the nature of the competition." *Cruz* at 498-99. (Petitioner's Brief in Support of Appeal at 8)

Finally, in this regard, petitioner argues that the NJSIAA's Interpretive Guidelines with respect to the Age Rule, in pertinent part, provide:

> In contact sports, the rule may be waived if the student can't comply due to circumstances beyond the student's control. A determination will take into account the size, agility and skills of

> the student in question and the degree to which these issues will not fundamentally alter the competition. (NJSIAA Interpretive Guidelines at 70) (Petitioner's Brief in Support of Appeal at 3-4)

Notwithstanding the clear mandates of federal law, the courts, and even the NJSIAA's own rules with regard to the necessity of an "individualized assessment" in making a determination regarding a waiver of the rule for a "disabled" student, the June 9, 2003 determination of the NJSIAA was completely devoid of such an examination and analysis, rendering this decision arbitrary, capricious and unreasonable, requiring its reversal. (Petitioner's Brief in Support of Appeal at 8)

In conclusion, petitioner contends that the NJSIAA's assertion that its Constitution, Bylaws and Rules and Regulations have undertaken to accommodate disabled students "generally" is of no import here, as such general provisions do not serve to "diminish its obligation to provide reasonable accommodations for disabled students on a case-by-case basis." (*Id.* at 9) Petitioner further argues that the record does not sustain a finding that school officials should have encouraged Gregory to play contact sports in 7th and 8th grade or "that this was a practical solution in Gregory's case." (*Ibid.*)

NJSIAA'S POSITION

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, the NJSIAA, initially, points out that the Commissioner's scope of review in NJSIAA determinations is an appellate one; thus, where due process has been granted and the record substantiates that there is an adequate basis for the decision reached below, the Commissioner may not overturn an eligibility decision of the NJSIAA. (Respondent's Letter Brief at 2)

The NJSIAA next underscores that the purpose of the Age Rule, as set forth in the *NJSIAA Handbook* is as "a safety measure to assure that 13 and 14-year-old students are not expected to compete against students who are six or more years older, with substantially greater physical size, strength and skills. **In view of this paramount safety factor, waivers of this rule will be granted only in truly extraordinary circumstances.**" (*NJSIAA Handbook,* p. 70) (Respondent's Letter Brief at 5) (emphasis in text) Recognizing that the education of students who are classified or disabled may be extended beyond the customary 12-year period and, therefore, they may turn 19 years of age before their senior year of high school, the NJSIAA rules make provision for accommodation of such students by allowing them to compete in interscholastic sports in 7th or 8th grade, thus providing for a full eight semesters of competition. (*NJSIAA Handbook*, p. 70) (*Ibid.*) At the time he attended middle school in Edison Township, Gregory was 15 years of age and was eligible to participate in high school sports pursuant to Article V, Section 41.1 of the NJSIAA's Bylaws. (*Id.* at 10)[3]

The NJSIAA next avows that petitioner has cited no facts in support of its contention that the EAC's decision was arbitrary, capricious or unreasonable or that this body failed to conduct an "individualized" review of this case. As specified in its rules, the NJSIAA avers, "[w]aivers for contact sports are only granted in situations that were beyond the student's control; and such **a waiver will take into account the student's size, skill, agility and the degree to which these factors will not fundamentally alter the competition.** (*NJSIAA Handbook*, p. 70) (Respondent's Letter Brief at 5-6) (emphasis in text) It observes that the EAC hearing was attended by Gregory Raiford's guardian, along with the Principal and the Athletic Director of J.P. Stevens High School. Although Gregory received a specific invitation from the

[3] The NJSIAA points out that petitioner presented no circumstances beyond Gregory's control which would have prevented him from participating in contact sports during 7th or 8th grade. (Respondent's Letter Brief at 6)

NJSIAA to attend, he did not do so.[4] As a result of Gregory's failure to attend the EAC hearing, the Committee was required to rely on the information provided by Principal Riccio and Athletic Director Capraro which, although limited, established that:

> [Gregory Raiford] as described by his principal is a tall, well built student; he is six foot two inches tall and weighs 170 pounds. What is more, the record reflects that [he] has been a member of the varsity basketball team for three years, and therefore must possess significant skill. (Respondent's Letter Brief at 12)

In light of the information in the record and that adduced at hearing, the NJSIAA argues that "[a]llowing [Gregory] to participate in football and basketball, would result in giving him an unfair advantage over the other participants and would fundamentally alter the nature of the competition." (*Ibid.*) NJSIAA further argues that there are additional factors in the record which also support denial of the waiver:

> Petitioner would be a starter on the Stevens' basketball team. Allowing him to participate would displace another student, who has not had an opportunity to play for four years, from that starting position. It would also be unfair to opposing teams whose athletes have met the eligibility standards. It would also set the very unwise precedent of permitting a member school to ignore the ability to allow a student to participate in the eighth grade, which would allow four years of participation, to serve as an excuse for waiving eligibility rules. Indeed, it would encourage "red shirting" by allowing student-athletes to play when they are older, stronger and more skilled than their opponents. (*Id.* at 12, 13)

Consequently, notwithstanding petitioner's contention to the contrary, it is evident that the EAC conducted the individualized review contemplated by the NJSIAA's Constitution, Bylaws, Rules and Regulations in its consideration of this matter.

Finally, the NJSIAA maintains that the Age Rule, or its application here, does not violate Section 504 of the Rehabilitation Act or the ADA. In this regard, it avers that petitioner's

[4] The NJSIAA proffers that one of the purposes of urging students seeking a waiver of the Age Rule to attend the EAC hearing is to provide the Committee members an opportunity to personally assess the size and athletic skills of the student. (Respondent's Letter Brief at 11)

reliance on *Martin, supra*, dealing with a disabled individual who wished to use a golf cart while participating in the PGA tour, is misplaced. In that decision

> [t]he Court found that Martin should be permitted to use the cart because such a use did not fundamentally alter the character of the competition. The purpose of the rule against the use of golf carts was to inject fatigue into the game which would [affect] a [player's] shot-making ability. The Court found that allowing Martin to use the golf cart would not alter an essential element of the game which was essentially shot-making. Allowing Martin to use a cart would only have a peripheral impact on the game, and would not give Martin an advantage over the other players. The Court found that even if Martin was permitted to use a golf cart, he would still be required to walk at least 25% of the course, equal to approximately 1¼ miles from the golf cart to the course. Additionally, Martin's disability caused him to fatigue much faster tha[n] other competitors, that he [w]as in significant pain when he walked; and with each step there was a danger of fracturing his leg and hemorrhaging. Permitting Martin to use a golf cart during the tournament in no way gave him an advantage over the other participants, and did not fundamentally alter the nature of the competition. (citations omitted) (Respondent's Letter Brief at 7, 8)

In *Martin*, the NJSIAA argues, it is fully evident that the individual's disability precluded his compliance with the PGA rule. Here, on the other hand, Gregory did not repeat three grades in elementary school as a consequence of any disability but, rather, because of excessive absenteeism. The causal connection between *Martin's* inability to comply with the rule was evident in that case, such is not the case in this matter. "Instead, it was demonstrated that the student could have participated for four years and that the School District did not avail itself of that accommodation. NJSIAA properly found that the granting a waiver of the age requirement in this situation would fundamentally alter the nature of the competition as contrary to the rules." (*Id.* at 13) The NJSIAA finds support for its position in *Baisden v. West Virginia Secondary School Activities Commission*, 568 *S.E.2d* 32 (W.V. 2002), wherein the Supreme Court of Appeals, West Virginia, reversed a lower court determination granting a waiver of the age

requirement for a 19-year-old student to play football. The court held that an individualized approach to granting waivers was preferable and "waivers should be granted where a student's disabilities have delayed his progression through the education process and it is shown that a waiver will not materially alter the quality of the interscholastic sports competition involved." (citations omitted) (Respondent's Letter Brief at 9) Notwithstanding, the court in this matter found a waiver inappropriate as the student's size and ability would compromise the safety of the other players. (*Ibid.*)

Petitioner's claim that *Cruz, supra,* supports its position, the NJSIAA charges, is in error. In that case the court ruled that the association was required to consider applications for waiver of its Age Rule and to review each such application on a case-by-case basis. The NJSIAA points out that the *Cruz* court required nothing additional to that which is already provided by the NJSIAA. Applications for waivers of the age requirement are accepted from anyone who wishes to apply and each of these is reviewed and considered on a case-by-case basis pursuant to the factors articulated in *Martin, supra.*

The NJSIAA emphasizes that its decision in this matter is fully sustainable pursuant to *Martin.* Its enacted standards for modifying the Age Rule are reasonable; its rules allow for exceptions to the age requirement; students who will reach age 19 prior to having eight semesters of interscholastic ability are permitted to play in 7th or 8th grade; and the rules allow for waivers of the age requirement under certain circumstances. A waiver in this matter, it contends, would fundamentally alter the nature of the competition and, therefore, pursuant to *Martin*, was appropriately denied. (*Id.* at 9, 10)

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:[5]

> 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

[5] *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 denying a waiver of the Age Rule for Gregory Raiford, with respect to competing interscholastically in contact sports, 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. Two separate committees convened to consider petitioner's request for a waiver of the NJSIAA's Age Rule. The EAC hearing was

attended by the school principal, the athletic director and Gregory Raiford's guardian, each giving sworn, recorded testimony which was considered by that body. The Commissioner finds that the EAC rendered its decision based on the record before it and the evidence presented by petitioner.

Next, while not unmindful of the value of athletic competition to Gregory, the Commissioner recognizes the legitimate interest of the NJSIAA in upholding its regulations, based on health and safety considerations, designed to protect younger, less skilled students from having to compete against more skilled adult athletes. He further notes that, notwithstanding Gregory's inability to compete interscholastically in contact sports, the EAC, after considering the circumstances in his case, granted him a "limited" waiver. As such, he is not precluded from being a member of, traveling with, or "suiting up" with the football and basketball teams, or participating in other team activities such as practices and scrimmages. Thus, the Commissioner concludes that Gregory is not prevented from taking advantage of many of the beneficial aspects of the football and basketball programs even though he is ineligible to participate in interscholastic competition in these sports. Moreover, the Commissioner is also cognizant that Gregory was granted a full waiver with respect to non-contact sports, allowing him to participate competitively in any of these activities.

Accordingly, petitioner having failed to sustain its burden of establishing that denial of a waiver for Gregory Raiford to compete interscholastically in contact sports was

arbitrary, capricious, unreasonable or violative of law, the Commissioner upholds the NJIAA's decision and dismisses the Petition of Appeal.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 12/5/03

Date of Mailing: 12/5/03

[6] 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.

ERNEST L. HARPER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

December 8, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 649-03
ON REMAND EDU-2321-95
AGENCY DKT. NO. 6-1/95

ERNEST L. HARPER,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY
Respondent.

James P. Swift, III, Esq., for petitioner

Eric Martin Bernstein, Esq., for respondent (Eric M. Bernstein & Associates, attorneys)

Record Closed: October 15, 2003 Decided: October 17, 2003

BEFORE **LILLARD E. LAW**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 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 and General 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.

10-17-03
DATE

Lillard E Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

10-22-03
DATE

M. Kathleen Duncan/eh
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 23 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sd

SETTLEMENT AGREEMENT AND GENERAL RELEASE

FILED

Oct 15 12 51 AM '03

STATE OF NEW JERSEY

CONFIDENTIAL

This Release, dated September 30, 2003, is given

BY: The releasor(s): ERNEST HARPER

TO: ATLANTIC CITY BOARD OF EDUCATION, ITS SUBSIDIARIES, AFFILIATES, PREDESESSORS, SUCCESSORS AND ASSIGNS OF ANY AND ALL OF THEM, THEIR PRESENT AND FORMER DIRECTOR, 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 ENTITIY CONNECTED THEREWITH.

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. All parties mentioned above release and give up any and all claims and rights which they may have against each other. This release applies to claims resulting from anything which has happened up to now. I specifically release all claims relating to or arising out of Mr. Harper's employment with the Board Of Education deriving from the incidents related to the matter known as Ernest Harper V. Atlantic City Board Of Education, Docket No: EDUOA-02321-95S. Harper and the Board expressly understand and agree that said payments include any and all amounts that may be claimed by Harper or on his behalf, or by his Attorney's, Heirs, Successors or Assigns, against the Board. The payment mentioned above is in complete and full settlement of any and all claims that Harper has or could be owed by the Board in connection with anything that happened in reference to the above referenced matter. Further, Harper and the Board agree that the Settlement Agreement and General Release is contingent on and subject to approval and ratification by the Board.

   The $9,000.00 (Nine Thousand Dollars) agreed upon settlement figure was inadvertently already paid to Ernest Harper prior to the approval by the commissioner of the Board of Education.

2. Payment. This Settlement is intended as a resolution for any and all possible claims, actual or implicit and Harper hereby waives any and all claims for lost wages, income or future earnings and any other benefits potentially available arising out of the matter known as Ernest Harper V. Atlantic City Board Of Education, Docket NO: EDUOA-02321-95S. Harper also understands and agrees that any adjustments to his withholding or any estimated tax payments are his responsibilities.

3. Who is Bound. This Settlement Agreement and General Release shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the compromise between Harper and the Board as set forth herein or to enforce the terms of the Settlement Agreement and General Release.

4. Signatures. Harper releases, acquits, gives up, forever discharges any and all claims and rights which he may have had against the Board for anything that happened arising from or in

any way relating to the matter known as Ernest Harper V. Atlantic City Board Of Education EDUOA-02321-95S. The Board releases, acquits, gives up and forever discharges any and all claims and rights which the Board may have had against Harper.

5. This settlement and general release contains the full agreement of Harper and the Board and may not be modified, altered, changed or terminated except upon the express prior written consent of Harper and the Board, which consent must be signed by Harper and the Board or their duly authorized agents.

6. Harper represents and warrants that no other person or entity have any interest in the claims, demands, obligations, or causative action referred to in this settlement agreement and general release; that Harper is not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands. Obligations or causative action referred to in the verbal complaint and / or in this settlement agreement and general release.

7. This settlement agreement and general release shall be construed and interpreted in accordance with the laws of the State of New Jersey.

8. Harper and the Board shall bear all costs and expenses arising from the actions of their own counsel in connection with the settlement agreement and general release. As further consideration for the settlement agreement and general release, Harper and his attorney agree that this sum represents all the money the Board has agreed to pay Mr. Harper and his attorney and any additional fees which may arise from the actions of Harper's attorney in connection with any matter arising from Harper's employment with the Board are to be born by Harper.

This settlement agreement and general release contains the entire agreement between Harper and the Board with regard to the matter set forth in Ernest Harper V. Atlantic City Board of Education, Docket No: EDUOA-02321-95S.

9. In entering into the settlement agreement and general release, Harper has relied upon the legal advice of his attorney who is the attorney of his own choice, as to the terms of the settlement agreement and general release which have been completely read and explained by his attorney and has been fully understood and voluntarily accepted.

IN WITNESS WHEREOF, Harper and the Board have hereunto set their hands

JAMES P. SWIFT, ESQUIRE

ERNEST HARPER

ERIC M. BERNSTEIN, ESQUIRE
for Atlantic City Board of Education

OAL DKT. NOS. EDU 649-03 AND EDU 2321-95 (ON REMAND)
AGENCY DKT. NO. 6-1/95

ERNEST L. HARPER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, Settlement Agreement 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, 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: 12/8/03

Date of Mailing: 12/8/03

650-03

650-03R

K.W. AND W.B., on behalf of minor child, L.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLSTONE, SOMERSET COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

December 11, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6697-03
(ON REMAND EDU 4177-02)
AGENCY DKT. NO. 138-5/02

K.W. AND W.B. O/B/O
L.B.,
Petitioners,
v.
BOARD OF EDUCATION
OF THE BOROUGH OF MILLSTONE,
Respondent.

Angela White Dalton, Esq., for petitioners (Foss, Bowe & San Filippo, attorneys)

Bruce W. Padula, Esq., for respondent (Scarni & Hollenback attorneys)

Record Closed: October 27, 2003 Decided: October 27, 2003

BEFORE **ANTHONY T. BRUNO**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 29, 2003, as a remand of OAL Dkt. No. EDU 4117-02, per the Commissioner's decision of September 11, 2003.

The parties have agreed to a settlement and have prepared a Stipulation of Dismissal and 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.

October 27, 2003
DATE

Anthony T. Bruno
ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

October 30, 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 31 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lam

SCARINCI & HOLLENBECK, LLC
1100 Valley Brook Avenue
P.O. Box 790
Lyndhurst, New Jersey 07071
Tel: 201-392-8900
Attorneys for Millstone Board of Education

K.W. and W.B on behalf of the minor L.B., Petitioners, vs. MILLSTONE BOROUGH BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET No.: EDU-4177-02 Agency Docket No.: 138-5/02 **STIPULATION OF DISMISSAL AND SETTLEMENT AGREEMENT**

WHEREAS, on or about May 9, 2002, Petitioners filed a Petition of Appeal with the Commissioner of Education regarding Petitioners' residency qualifications for a free public education in the Respondent's district; and

WHEREAS, on June 3, 2002, Respondent filed its Answer and Counterclaim with the Commissioner; and

WHEREAS, the parties have agreed to amicably resolve this matter upon the following terms and conditions.

NOW THEREFORE, the parties stipulate and agree as follows:

1. Petitioners stipulate and agree that this matter shall be dismissed with prejudice and without costs or attorneys fees;

2. Respondent stipulates and agrees that its counterclaim for tuition costs shall be dismissed with prejudice and without costs or attorneys fees; and

3. Petitioners agree to withdraw L.B. from the schools operated by Millstone Borough Board of Education, and further agree not to seek re-admittance thereto.

DATED: 7/18/03

Angela White Dalton, Esq.
Attorney for Petitioners

Frank Gchilson 7/18/03

Frank G. Chilson, Business Administrator
Millstone Borough Board of Education

{00120454.DOC}

OAL DKT. NOS. EDU 6697-03 AND EDU 4177-02 (ON REMAND)
AGENCY DKT. NO. 138-5/02

K.W. AND W.B., on behalf of minor child, L.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLSTONE, SOMERSET COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, Stipulation of Dismissal and Settlement Agreement, and Initial Decision issued on remand 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. In so doing, the Commissioner notes that the record on remand includes a copy of the minutes from the Millstone Borough Board of Education's meeting on October 17, 2002 wherein the Board approved the settlement of this matter in accordance with *N.J.A.C.* 6A:3-1.13(d).

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/11/03

Date of Mailing: 12/15/03

642-03

J.B. AND D.B., on behalf of minor child, A.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning parents alleged the Board's selection process for the National Honor Society (NHS) was arbitrary and capricious.

The ALJ found that the Board reasonably assessed A.B.'s candidacy for the NHS in the 2002-03 school year. Local chapters of the NHS enjoy a "measure of latitude" in forming policy within broad guidelines as long as the process is fair and fairly applied. The ALJ found this was the case herein and ordered the petition dismissed.

Having considered the record and the ALJ's assessment of the testimony of the witnesses (no transcripts were submitted), The Commissioner adopted the findings and determination of the ALJ 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.

December 1, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4399-03

AGENCY DKT. NO. /03

J.B. AND D.B. ON BEHALF OF
MINOR CHILD, A.B.,

Petitioners,

v.

BOARD OF EDUCATION OF THE
BOROUGH OF PINE HILL,
CAMDEN COUNTY,

Respondent.

J.B. and D.B., parents of A.B., *pro se*

Anthony Padovani, Esq., for the respondent (Sahli & Padovani, attorneys)

Record Closed: September 29, 2003 Decided: October 17, 2003

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a petition filed with the Commissioner of Education, pursuant to *N.J.S.A.* 18A:6-9, alleging irregularities in the selection of students for membership in the National Honor Society (NHS) and seeking instatement for A.B. The matter was referred to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14B-1 through -15. A

hearing was conducted on September 5, 2003 and the record closed on September 29, 2003, with receipt of the last post-hearing memorandum.

The basic facts are undisputed. The NHS is a national organization dedicated to the promotion of scholarship, leadership, service and character in secondary school students. Within the respondent district, Overbrook High School has constituted a local NHS chapter. The chapter is governed by a five-member faculty council, which among other things votes on the admission of student candidates. The faculty council is served by an advisor, who acts as a sixth, non-voting member of the council and is responsible for the day-to-day work of the chapter. A.B. was a candidate for admission to the chapter in 2002/03 while a junior at the High School and was not offered admission.

During the 2002/03 school year the first threshold requirement for student eligibility was a grade point average (GPA) of 3.5. All students with that average, including A.B., entered a second stage of competition, in which questionnaires were sent to the entire faculty seeking evaluations in the areas of interest to the NHS (R-1). A rating scale of 1 to 4 was used and the questionnaires were returned to Jane Windle, the faculty council advisor, who tabulated the results and provided a summary to the council for each student. A.B. received a score of 3.268, which was rounded up to the next 100^{th} of a point, or 3.27 (R-3). A weighted average rating of 3.3 was required to continue in the competition. Of 38 students with qualifying GPA's 29 were admitted to the chapter (R-8).

Petitioners subpoenaed Barbara Ashe as a witness. She is a guidance counselor at Overbrook High School and has been a member of the faculty council for about ten years. Ms. Ashe testified that the faculty council voted a few years ago to use 3.5 as the GPA requirement and 3.3 as the faculty response threshold. Ms. Windle organizes and summarizes the information upon which the council votes. Typically she does not see the questionnaires provided by the faculty, but these raw scores can be made available should any council member have a question. The students who achieved the 3.3 level on questionnaire responses were invited to a final step in the competition, which requires them to substantiate extra-curricular activity information. Those that fell below 3.3 were eliminated from further consideration by a vote of the council.

Ms. Ashe testified that she was disappointed that A.B. was not invited to join the NHS, however, the process of the faculty council was serious and deliberate. There were a few other students who missed the second threshold by even closer margins than A.B.

A.B. testified in his own behalf. He feels that he was eliminated unfairly partly because he was given no idea of the qualification requirements. He was a member of the NHS in his junior high school and he recalled that at that time there was a form to complete that allowed him to discuss his accomplishments. Under the system used in the senior high school his teachers did not have the benefit of this type of information. A.B. testified that Ms. Windle was his math teacher last year and that she discussed the NHS with him. She told him that if he had a sport, or a club he would probably be fine. Ms. Ashe gave him similar advice and this was inadequate. A.B. testified that Ms. Ashe told him that there was no vote to utilize 3.3 as a minimum score.

Respondent also presented witnesses. Jane Windle has been employed in the district for thirty-seven years as a math teacher and has been the NHS advisor for twenty-five years. As the faculty advisor she chairs the meetings of the council and oversees student service projects. Ms. Windle testified that she forwarded student questionnaires to the faculty on or about March 10 2003 and these were completed and returned to her on or about March 14, 2003. She then eliminated the highest and lowest scores to protect students from any one adverse responder and rounded to the nearest 100^{th} to determine whether the standard had been met. This procedure has been in place since the 1998 school year (R-2, R-6). Before then there was no 3.3 cut-off and the faculty council felt that the system was overly subjective. Rounding is done to the nearest 100^{th} because that is also the standard for calculating a GPA.

Ms. Windle testified that the faculty council reviews the summary data she provides and then votes on each student. After the vote she talks to students who have been rejected and tries to explain what they might do as seniors to compensate. It is not always clear what is missing, but she can sometimes glean the areas of perceived weakness from the faculty assessments. The low scores for A.B. fell in the areas of leadership and service (R-3). Ms. Windle testified that she spoke to A.B. generally as a junior about how he might gain admission to the NHS and she did mention clubs and sports because often this is where students falter. Ms. Windle testified

that there were students who missed the 3.3 cut, who were closer to this threshold than A.B. The final stage of the competition requires students to complete an activity advisory form and have their list of extra-curricular activities verified.

Ms. Windle testified that Mr. and Mrs. B. visited her after A.B.'s rejection and they sought to probe into the workings of the faculty council and the raw scores provided by the general faculty. This was delicate because the deliberations of the faculty council are intended to be confidential and faculty members are assured that their questionnaire responses will not be divulged. Ms. Windle testified that most faculty councils that she is aware of do not retain the faculty questionnaires and she destroyed this material soon after tabulating the scores. Petitioners formally requested these responses by letter of March 27, 2003, but they were no longer available (P-3).

Paul J. Harmelin has been the principal of Overbrook High School for nineteen years. He testified that he annually appoints Ms. Windle as the NHS advisor and that he is not involved in the faculty council deliberations. He maintains this distance so that he can review questions that may arise after a student is rejected. He was asked to review this matter and could find no basis for disagreeing with the vote of the council.

Mr. Harmelin conceded that information about the NHS was not published in the student handbook last year and he explained that this was an error due to reorganization. He testified, however, that all of the candidates were assessed in exactly the same way and he saw no prejudice in this omission. He has made certain that information about the NHS is in the current handbook. This is the substance of the record.

School districts enjoy wide policy-making discretion and their actions may not be disturbed unless arbitrary and capricious, *Thomas v. Morris Bd. Of Educ.*, 89 N.J. Super. 327 (App. Div. 1965); *Kopera v. West Orange Bd. Of Educ.*, 60 N.J. Super. 288(App. Div. 1960). To satisfy this burden petitioners were obliged to show that District practices for admission to the local NHS chapter varied significantly from core NHS requirements. This has not been done. Petitioners have carefully scrutinized the NHS rules in search of deviations by respondent, but it may be useful to note that NHS is not the forum for this controversy and we do not know clearly

the measure it uses to evaluate chapter conformity. The arbitrary and capricious standard imposes obligations well short of the exacting compliance sought by petitioners.

It appears from the NHS documentation in the record that local chapters enjoy a measure of latitude in forming policy within broad guidelines. Thus, for example the NHS does not mandate general faculty involvement in the selection process and creates no point system for evaluation. Nonetheless, local chapters are authorized to utilize both. The NHS is also cognizant of the fact that local law may govern in some jurisdictions and instructs local chapters to make appropriate adjustments. The primary concern throughout the NHS records is that the process be fair and fairly applied. R-4.

Respondent generally follows the NHS guidelines. Ms. Windle, Ms. Ashe [1] and Principal Harmelin were credible witnesses. They testified that the district uses a five-person faculty council to vote on policy and that in 1998 this council adopted the thresholds at issue here. The faculty assessments are the primary rub in this matter. Ms. Windle gathers these and then tabulates the results for each student. The faculty council reviews her summaries and is free to see the raw scores. The raw scores are then discarded. Petitioners characterized this procedure pejoratively as destruction of evidence. Yet, the NHS actually counsels that this be done to preserve confidentiality; Ms. Windle related that this is how many chapters operate. Although no one from the NHS testified the documentation suggests that the national office is aware that some parents will want to interrogate teachers and faculty council members regarding their deliberative processes, a practice it discourages (R-4).

Petitioners argued that under these circumstances they have only Ms. Windle's assurance that her summary accurately calculated faculty responses. That is true, but in this context it is not the shortcoming they make it out to be. Ms. Windle has been performing this service for twenty-five years and she was A.B.'s math teacher last year. There is no hint that she harbored a bias in the matter. A.B. was among a group of students who missed this second tier measurement, some by a smaller margin than him. Petitioners would prefer a system that affords them open access to

[1] Petitioners advanced the theory that the faculty council was not truly independent and that Ms. Windle essentially controlled decision-making. Although NHS documents recommend that faculty council members not be drawn into disputes, petitioners represented that Ms. Ashe was a critical insider who would support their understanding. They were permitted to call her over the District's protest, however, her testimony did not appreciably help petitioners.

the teachers who provided the low evaluations and to the members of the faculty council. Typically, discovery encourages liberal information gathering. Yet, there are various policy balances that sometimes militate against this. It is not hard to see in our circumstances that the prospect of annual involvement in litigation might dampen faculty enthusiasm for this enterprise, which runs contrary to NHS and District interests. This is not to say that greater openness would be wrong, but rather, that current policy is rationally based and well within an acceptable spectrum.

Mr. Harmelin conceded that a paragraph about the NHS was not contained in the 2002/03 student handbook, but I do not see how A.B. was prejudiced by this. None of the competing students had this information and they all ran the same gauntlet.

Membership in the NHS is a tribute and is coveted particularly by students seeking admission to highly selective colleges. Rejection has clearly been a bitter pill for A.B. and for his parents. Based on this record it appears the process was fair, though it is inherently subjective. Other faculty responders might have evaluated the matter differently and this result is not the measure of A.B. He is an excellent student with bright prospects. A.B. and his family ought to understand this moment for what it is and know that in the long run this event will have no greater importance than they give it.

Based on the foregoing, I **CONCLUDE** that respondent reasonably assessed A.B.'s candidacy for the NHS in the 2002/03 school year and it is **ORDERED** that this petition be dismissed.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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.

10/17/03
DATE

SOLOMON A. METZGER, ALJ

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

10/17/03
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 23 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

/cad

WITNESSES

For Petitioner:

Barbara Ashe

A.B.

For Respondent:

Jane Windle

Paul J. Harmelin

EXHIBITS

For Petitioner:

P-1 NHS Constitution

P-2a Prior District selection procedure for NHS, undated

P-2b Current District Selection Procedure for NHS, undated

P-3 Letter to Mr. Hamlin from Joanne Bilarczyk, dated March 27, 2003

P-4 Board minutes dated April 29, 2003

For Respondent:

R-1 Memo to Staff from Jane Windle, dated March 10, 2003

R-2 Memo to Paul Harmelin from Dennis Grimmett, dated January 9, 1998

R-3 Summary of A.B. evaluations

R-4 NHS Constitution and related documents

R-5 Overbrook High School certificate of NHS affiliation

R-6 Chapter by-laws

R-7 Letter to A.B. and parents, dated April 9, 2003

R-8 Letter to Sahli & Padovani from Paul J. Harmelin, dated August 18, 2003

J.B. AND D.B., on behalf of minor child, A.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	

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 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, the Commissioner finds no cause to disturb the findings of fact and conclusions of law contained in the Initial Decision. Although he acknowledges that petitioners raise exceptions regarding facts determined by the Administrative Law Judge (ALJ) based on testimony of the witnesses and the credence and weight ascribed to such testimony by the ALJ, the Commissioner notes that the record before him does not include transcripts from the hearing conducted at the OAL in this matter. Challenges to the factual findings predicated upon credibility determinations made by an ALJ require that the challenging party supply the Commissioner with the relevant and necessary portion of the transcripts. *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987). In the absence of such transcripts, due regard must be given to the person who heard the live testimony

and assessed the witnesses' behavior at the hearing. *Close v. Kordulak Bros.*, 44 *N.J.* 589, 599 (1965); *N.J.S.A.* 52:14B-10(c).

Accordingly, the Initial Decision is adopted for the reasons expressed therein. The Petition of Appeal is dismissed.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 12/1/03

Date of Mailing: 12/2/03

* 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.*

#646-03

647-03

KATHLEEN DONVITO,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	COMMISSIONER OF EDUCATION
	:	EDUCATION
RESPONDENT,	:	
AND	:	
LOUISE RYAN,	:	
INTERVENOR.	:	

SYNOPSIS

Petitioning Home Instructor/ HSPT/SRA Tutor alleged the Board violated her tenure and seniority rights in deciding not to reemploy her for the 2002-03 school year.

In light of *Hyman, Spiewak* and *N.J.S.A.* 18A:16-1.1, the ALJ concluded that petitioner failed to attain tenure through any of the positions that she held within the District. The ALJ found that home instructors are akin to substitutes for purposes of tenure and, thus, the temporary employee exception to tenure acquisition applies herein. Moreover, the ALJ determined that petitioner's tutor position fell into the category of an extra-classroom assignment that was not subject to tenure. The ALJ ordered that the Board's and Intervenor's Motion for Summary Decision be granted.

Citing Spiewak, and the subsequent court decisions in *Sayreville* and *Lammers,* the Commissioner concluded that the only applicable exception to the Tenure Act relating to tenure accrual by teachers, *N.J.S.A.* 18A:16-1.1, does not apply to teachers serving in the position of home instructors since they are not serving in the place of absent employees who are expected to return. Also, the Commissioner lacks the authority to create exceptions to the tenure law; therefore, petitioner's years of service as a home instructor are found to be tenure eligible. In addition, petitioner's assignment as an HSPT/SRA Tutor was an instructional assignment necessitated by the regulations dealing with graduation requirements and, thus, akin to an assignment as a remedial teacher, basic skills teacher or supplemental teacher. In that petitioner held valid certificates and endorsements issued by the State Board of Examiners and served in positions requiring certification during the entire period of employment at issue, the Commissioner set aside the order of the ALJ and granted summary decision to petitioner. The Commissioner ordered petitioner's reinstatement to a full-time position held by any nontenured teacher within petitioner's area of certification of the Board's choice, with full back salary and benefits, less mitigating income.

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.

December 4, 2003

STATE OF NEW JERSERY
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 5877-02
AGENCY DKT. NO. 162-5/02

KATHLEEN DONVITO,

Petitioner

v.

BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL,

Respondent

Louis P. Bucceri, Esq. For petitioner

Cherie L. Adams, Esq. (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross) for respondent

Alfred F. Maurice, Esq. (Springstead & Maurice) for the intervener, Louise Ryan

Record Closed: June 26, 2003 Decided: July 22, 2003

BEFORE **CAROL I. COHEN**, ALJ:

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Petitioner, Kathleen Donvito, filed a Verified Petition on or about May 31,

2002 alleging that the Respondent, Northern Valley Regional High School Board of Education (Board), violated her tenure and/or seniority rights in deciding not to re-employ her for the 2002-2003 school year. The Board filed its Answer denying the petition on or about June 19, 2002. The matter was forwarded for filing at the Office of Administrative Law (OAL) on July 18, 2002. A pre-hearing telephone conference was held on November 18, 2002. At the time the petitioner was instructed to notify, by January 30, 2002, twenty-two non-tenured teaching staff members of their right to intervene in the litigation. Louise Ryan elected to intervene.

On March 10, 2003, the parties participated in a telephone conference call with the Court. The hearing dates of April 7 & 8, 2003 were adjourned at the parties' request. A schedule was prepared for Cross-Motions for Summary Decision. Initial Briefs were submitted on April 8 and reply briefs were submitted on May 9, 2003. On June 12, 2003 I sent a letter to all parties stating that one issue had not been fully briefed. I asked to be informed, whether the petitioner resigned her position when she accepted the out of district position in September 1999 and what impact her resignation would have on the issue before the court. Petitioner responded by letter brief on June 25 and Respondent on June 26, 2003.

STIPULATION OF FACTS

1. The petitioner, Kathleen Donvito (hereinafter referred to as the "petitioner") was employed by the Northern Valley High School District (hereinafter referred to as "respondent") to perform the following services during the time period indicated.

a) Per diem substitute teacher on occasion through the 1995-96 school year.

b) Home Instructor – Home Instructors are paid on an hourly wage basis, without contract and without benefits. Duties included providing instruction for those students who were

unable to attend classes in school because of physical illness or other reasons. Home Instructors taught course content based upon the program requirements for graduation. Home instructors work at times that varies depending upon the number of students needing services. Since a student's absence is usually unpredictable home instruction assignments are usually made with minimal advance notice. John Salisbury, Director of Guidance for Northern Valley Regional High School, was Petitioner's Supervisor in her role as a home instructor. Petitioner provided such services during the following school year as indicated by the time sheets and other documents referenced:

i) 1995-96
ii) 1996-97
iii) 1997-98
iv) 1998-99
v) 1999-2000
vi) 2000-01
vii) 200-02

c) HSPT/SRA Tutor –Duties included tutoring for the High School Proficiency Test ("HSPT") and tutoring students for the Special Review Assessment ("SRA"). SRA and HSPT tutoring provides remediation for students to assist in preparation for testing and is conducted for a limited time period per pupil. Jim McDonnell, Supervisor of World Languages, ESL, and SRA Coordinator supervised Petitioner in this role. Petitioner provided such services as needed during the following school years as indicated by the time sheets and other documents referenced:

i) 1998-99
ii) 1999-2000

d) Perkins Grant Counselor – Performing testing of students for high schools participating in Region III of the Bergen County Special Services District. Respondent obtained the grant to perform this service in its role as LEA for Region III. John McKeon, Director of Region III Special Education, supervised Petitioner in her role as a Perkins Grant Counselor. These services were performed by petitioner as follows:

i) March 11, 1998 into June 1998

ii) March 1999 into June 1999

e) Special Education Teacher, two-fifths (2/5) contract from February 18, 2000 through June 30, 2000.

f) Special Education Teacher, full-time contract from September 1, 2000 through June 30, 2001.

g) Special Education Teacher, four-fifths (4/5) contract from September 1, 2001 through June 30, 2002.

2. Petitioner holds the following educational certificates and endorsements issued by the New Jersey Department of Education:

a) Elementary School Teacher (issued 2/75)
b) Teacher of English (issued 2/75)
c) Nursery School (issued 4/75)
d) Learning Disabilities Teacher Consultant (issued 8/80)
e) Teacher of the Handicapped (issued 6/99)

3. Petitioner's contract with Respondent expired on June 30, 2002 and Petitioner's employment was not renewed for the following school year.

4. Respondent did employ full-time non-tenured teachers in petitioner's area of certification and endorsement for the 2002-3003 school year. Intervener Louise Ryan is one of those non-tenured teachers.

5. During calendar year 1997, petitioner earned gross wages of $26,112.50 from employment with respondent.

6. During calendar year 1998, petitioner earned gross wages of $15,091.75 from employment with respondent.

7. During calendar year 1999, petitioner earned gross wages of $20,738.42 from employment with respondent.

8. Petitioner was employed and performed the duties of a full-time Learning Disabilities Teacher Consultant in the Park Ridge School District from September 1, 1999 until mid-October 1999. She continued to be paid on 60 days notice by Park Ridge until approximately mid-December, 1999. She did not continue in that position thereafter. She resumed home instruction assignments for Northern Valley as of September 15, 1999.

9. For the 2001-2002 school year petitioner was paid a salary of $50,282.40 on a 4/5 contract based on Salary Guide September 06, Scale 04. She also received the normal benefits due to a teaching staff member.

10. As of January 28, 2003, petitioner secured alternative full-time employment in another school district under contract through June 30, 2003 at a prorated salary based on an annual salary of $65,955.00. She is also receiving full health insurance coverage.

11. All of the students assigned to petitioner for home instruction during the time period from June 1, 1999 to February 18, 2000 were classified as handicapped.

12. From June 1997 through January 2000, the only hiring resolutions by the respondent Board as to petitioner were resolutions placing her on its substitute list.

13. Petitioner's payment as a Home Instructor, based on her hourly time sheets, was duly authorized through the procedures in effect in the district during that time period.

14. As a Home Instructor, petitioner was instructing students who were absent from school due to illness or other reason. If those students were not absent,

they would be taught by classroom teachers who were present, willing and able to teach these absent students if they were able to return to school.

15. During the period of her service as a Home Instructor, Ms. Donvito was not working in a position that was previously held by a teacher who left it on a leave of absence or by a teacher who was otherwise absent from the position but expected to return.

LEGAL ISSUES

1. The first issue raised is whether this matter can be decided on Summary Motion. While the parties dispute who should be granted Summary Decision, they agree that, as a matter of law, there is no genuine issue of material fact with respect to the controversies involved in this matter.
2. The second issue is whether, under a series of scenarios, the Petitioner has gained tenure.
3. The third issue is whether the petitioner resigned from her position when she accepted a full-time position out of District in September 1999.
4. If the petitioner has gained tenure, is she entitled to the relief sought in the petition.

ARGUMENTS OF THE PARTIES

The petitioner argues that, according to *N.J.S.A.* 18A:28-5, an individual appointed to a position requiring a teaching certificate gains tenure, if they teach for the time required under the statute. The time required is three consecutive calendar (12 month) years, three consecutive academic years, together with employment at the beginning of the next succeeding academic year, or the equivalent of more that three academic years within four consecutive academic

years. See *N.J.S.A.* 18A:28-5(a)-(c). The only exception to the statute is the "temporary employment" exception, which, according to *N.J.S.A.* 18A:16-1.1, is limited to employees hired to take the place of an absent teacher. See Spiewak v. Rutherford Bd. Of Ed., 90 *N.J.* 63 (1982) quoting Point Pleasant Beach Teachers' Association v. Callam, 173 *N.J. Super.* 11, certif. den., 84 *N.J.* 469 (1980). Since Spiewak, supra, the only statutory exception relating to tenure accrual by teachers is *N.J.S.A.* 18A:16-1.1, which allows a district to designate some person to act in the place of any absent employee, but that person would not acquire tenure in that office. Thus, according to Sayreville Education Association v. Board of Education of the Borough of Sayreville, 193 *N.J. Super.* 425 (*App. Div.* 1984), *N.J.S.A.* 18A:16-1.1 applies when a substitute teacher is required, because of the absence of the regular teacher, whose return to duty is contemplated. The petitioner further asserts that the fact that an employee is part-time or that there is no formal appointment to the position by the board does not bar the accrual of tenure.

The petitioner then goes on to outline a number of scenarios that could be constructed to prove that she gained tenure by service for the equivalent of more than three academic years within four consecutive academic years. In one scenario, accrual of tenure is based on service during the 1996-97 through the1999-2000 school year. The time consists of a combination of Home Instructor, HSPT/SRA tutor and 2/5 Contract Teacher for a total of 33.5 months. The second scenario covers the period of service from 1997-98 through the 2000-01 school year. The service consists of 10 months as a full-time Contract Teacher, approximately four months as a 2/5 Contract Teacher and the balance of the time as a Home Instructor and HSPT/SRA tutor for a total of 38.5 months. The third scenario is based on service during the 1998-99 through the 2001-2002 school year. Here 19.5 months were accrued as a Home Instructor and 20 months as a full-time Contract teacher and a 4/5 Contract teacher for a total of 39.5 months. The fourth possibility attains tenure based on service as a Home Instructor and 2/5 Contract teacher for the years 1996-2000 for a total of 31.5

months. Finally, the petitioner argues that tenure can be based on service as an HSPT/SRA tutor and Contract Teacher for the period 9/98-6/02 for a total of 31.5 months[1]. The petitioner also posited that the petitioner's service testing students from 3/1/98-6/98 and 3/12/99 to 6/18/99 could be included in the calculations, since certification is required and the source of funding is irrelevant.

The petitioner then goes on to take exception with the decision in *Hyman, et al. v. Bd. Of Ed., Teaneck,* 1983. 1983 S.L.D. 699 (*Comm. Of Ed.*), reversed in part 1985 S.L.D. 1940 (*St. Bd. Of Ed.*) aff'd. in part, remanded in part, *Superior Court Appellate Division, Dkt. No.* A-3508-84T7. In that decision the Administrative Law Judge found that service as a Home Instructor did not count toward tenure. This opinion was adopted by the Commissioner of Education. The petitioner submitted that the *Hyman* decision was wrong as a matter of law and fact. This position was based on the fact that the ALJ referred to home instruction as intermittent, temporary and unscheduled. The petitioner argued that her service as a Home Instructor was virtually continuous from January 1997-June 2000. Therefore, it did not fall into the category of intermittent or temporary. Further, the petitioner earned substantial income from the District during that period of time. In addition, contrary to the conclusion of *Hyman*, Home Instruction does not constitute the work of a substitute, because it is not work done in place of an absent teacher. Since no other statutory exception applies, tenure must be found to accrue based on the Home Instruction service. Therefore, the Petitioner has the right to claim existing full-time positions held by non-tenured employees, whether or not she was last employed as a part-time teacher.

As to the issue of resignation, the petitioner first asserts that there was no formal resignation by Ms. Donvito, when she took a full time position out of district in September 1999. In addition, an employee is permitted to decline part-

[1] This is the position outlined in the reply brief. In the initial brief the last scenario consisted of 7 months as an HSPT/SRA Tutor, 5.5 months as an SRA Home Instructor and 2/5 Contract Teacher, 10 months as a Full-time Contract Teacher and 10 months as a 4/5 Contract teacher.

time employment and still retain their tenure rights to a full time position. Boquszewski v. Board of Ed., Demarest, 1979 S.L.D. 232 (*Comm. Of Ed.*). The petitioner also pointed out that she continued to work for the District in September 1999 as a home instructor and, therefore, there was no break in service. Further, an employee cannot be found to waive the accrual of tenure absent a clear and express agreement to do so. See Carney v. Bd. Of Ed., Summit, 1980 S.L.D. 1110 (*Comm. of Ed.*). In addition, since accrual of tenure prior to the 1999-2000 school year was not possible, the petitioner's working for another district in 1999 had no impact on her tenure rights.

On their part the School District asserts that, time spent working as a home instructor, does not count toward tenure. Their position is that the reasoning in Hyman is applicable to this case as well. Ms. Hyman worked as a home instruction teacher and she possessed a teaching certificate, as required by law. Her schedule varied greatly as to the number of hours she worked per day and the number of days and weeks she worked in a particular month. She was paid hourly and at times performed home instruction, while serving in other tenure eligible positions. This was similar to the present matter. Ms. Hyman claimed that her home instruction assignments should be credited toward tenure. The Board cited the Commissioner's opinion in the Hyman case that home instruction is "intermittent, temporary, and unscheduled employment" and that " it was akin to substitute teachers, who also do not earn tenure, except that the home instruction is necessitated by the student's inability to attend class at school, as opposed to the teachers' absence." *Id.* at 709. The Board asserted that, as in Hyman, the Petitioner was the equivalent of a substitute based on the intermittent and unscheduled nature of her work. They assert that petitioner's service was anything but "virtually continuous", stating that she worked anywhere from one to seven hours per day and "on some days, weeks, and even months she did not work at all." In fact, the Petitioner's hiring resolutions placed her on a substitute list. Thus, the Board argues that Hyman is right on point. Based on this opinion, Petitioner first started to accrue tenure on February 18, 2000, when

she was appointed to a position as a special education teacher on a two-fifths basis. Therefore, her total tenure time is slightly more than two years and four months over three academic years. Louise Ryan, the Intervener in this matter, agreed with the position of the Board, that Ms. Donvito could not gain tenure based on her service as a Home Instructor.

The Respondent also took exception to the Petitioner's scenario, that time spent as a HSPT/SRA tutor counted toward tenure. The Board asserted that the tutor position was essentially an unrecognized, auxiliary assignment that did not count toward the accrual of tenure. See *Boney v. Pleasantville Bd. Of Education,* 71 *S.L.D.*579. In addition, the time sheets demonstrate that the Petitioner performed this work in a sporadic manner, working random hours and days. In addition, the petitioner listed her hours on her Home Instruction work sheet. The Board also argued that the petitioner's decision to decline the District's offer of employment and accept employment in another district precluded the achievement of tenure. Citing *Solomon v. Princeton Bd. Of Education,* 77 S.L.D. 650, aff'd 77 S.L.D. 657 and *Kimless v. Woodbridge Twp. Bd. Of Ed.,* 78 S.L.D. 651, they argue that an employee who resigns and leaves a district, no matter what the length of time between resignation and re-employment, relinquishes her tenure rights and must commence the tenure probationary period anew. The break in service from September-October 1999, when she accepted a position in another district, represented a resignation and a relinquishment of her tenure rights.

The District further argued that, while there was no formal resignation, the petitioner effectively resigned her position by refusing the Board's offer of Employment in September 1999 and extinguished any tenure rights that may have accrued. The Respondent cited *Riemann v. Edison Bd. Of Education,* 80 *S.L.D.* 636 for the position that a staff member who resigns forfeits all tenure and seniority rights, that accrued prior to resignation. The petitioner's refusal to accept the Board's offer in June 1999 of a two-fifths position for September 1999,

and her decision to teach full-time in another district was essentially a resignation, which voided any tenure rights petitioner may have had. The Respondent cited a number of cases including *Ralph v. Highland Park Bd. Of Education,* 91 *S.L.D.* 2476, *Hagens v. Princeton Board of Education, Commissioner of Education* #25-82 (January 26, 1982) and *Bartz and Burke v. Green Brook Bd. Of Education*, 87 *S.L.D.* 2520 to support its position.

DISCUSSION

1. STANDARD FOR SUMMARY DECISION

The rules governing practice in the Office of Administrative Law provide that a motion for summary decision may be granted, if there is no genuine issue of material fact and the moving party is entitle 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 American,* 142 *N.J.* 520, 523 (1995), set the standard to be applied when deciding a Motion for Summary Judgment.

> 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... they are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

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. *Suppl.* 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.

2. WHETHER, UNDER ANY OF THE SCENARIOS PRESENTED, THE PETITIONER HAS ACQUIRED 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 Ed. 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:26-5. 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, -6.2. An educator may possess multiple endorsements under a single certificate, qualifying him or her to fill any position covered by the respective endorsements. *N.J.A.C.* 6:11-6.2(a)(2), (a)(8).

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.]

Our Supreme Court has held that "teachers who provide remedial and supplemental instruction to educationally handicapped children may acquire tenure... if they meet the qualifications in the statute." *Spiewak, supra,* 90 *N.J.* at 66. The Court also held, "[b]y the express terms of the these statutes [*N.J.S.A.* 18A:1-1 and 18A:28-5], an employee of a board of education 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." *Id.* at 73-74.

The only applicable exception to the Tenure Act was addressed in *Spiewak.* There the court, citing *N.J.S.A.* 18A:16-1.1, provided:

> ... [a] 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... [However,] no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.
>
> Although, this statute denies tenure to temporary employees, it extends only to those who "act in place of" another employee who is absent or disabled.
>
> ********
>
> However, that exception is limited to employees hired to take the place of an absent teacher. The courts are not free to expand that exception by judicial fiat. *Id* at 74, 77.

B. CAN SERVICE AS A HOME INSTRUCTOR BE COUNTED TOWARD TENURE

Home instruction is the provision of one-to-one instruction in the student's home or other appropriate setting for reasons of discipline, safety, disability, or medical condition. *N.J.A.C.* 6A:16-1.3; *N.J.A.C.* 6A:16-4.8. Home instruction is generally requested when a student cannot attend regular classes due to temporary illness or injury, or if the student is disabled and receives home instruction pursuant to an Individual Education Plan. See *N.J.A.C.* 6A:16-4.8. The minimum number of hours required may vary based on the needs of the student, but in no case shall such instruction be completed in less than 3 days per week. *N.J.A.C.* 6A:14-4.8; -4.9.

There are no statutes, regulations or cases defining substitute teachers, except as noted above when discussing "temporary employees". The dictionary defines a substitute as "to put in place of"; "a person or thing that takes the place or function of another"; "to put or use in the place of another"; or "serving in lieu of another". Webster's Ninth New Collegiate Dictionary 1177 (1988); Barron's Law Dictionary 494 (4th ed. 1996). Pennsylvania Public School Code of 1949 specifically defines a substitute as:

> "any individual who has been employed to perform the duties of a regular professional employe[e] during such period of time as the regular professional employe[e] is absent, on sabbatical leave, or for other legal cause authorized and approved by the board of school directors or to perform the duties of a temporary professional employe[e] is absent."
>
> [*Richland Educ. Assoc. v. Richland School Dist.*, 418 A.2d 787, 789 (Pa. Commw. Ct. 1980).]

All parties argue the use of *Hyman, et al. v. Teaneck BOE,* 1983 S.L.D. 699, adopted in part, modified in part, Commissioner 1983 S.L.D. 722, modified St. Bd. 1985 S.L.D. 1940, aff'd in part, remanded in part, App. Div., No. A-3508-84 (Feb. 26, 1986). In *Hyman*, ALJ Dower-LaBastille concluded "home instructors are not teaching staff members pursuant to *N.J.S.A.* 18A:28-5 and their time is not tenurable ... Home instructors have no specific expectation of employment duration; they have full knowledge of the variability of the assignments and hourly rate of pay." *Id.* at 709 (citations omitted). In her findings of fact, which were adopted by the Commissioner, the ALJ made the following determinations:

> Since home instructors do not know from day to day and week to week whether or not or for how long they will be scheduled for such assignments and how many hours a month may be required, their work bears even less similarity to that of a

> regular teaching staff member than that of a substitute teacher.
>
> A home instructor is a substitute for a regular classroom teacher where substitution is necessitated by inability of the student to attend class at school.
>
> Home instruction is intermittent, temporary, and unscheduled employment.

Ibid.

In making her decision, the ALJ made reference to cases that were decided prior to *Spiewak*, *supra*, but she clearly had a full understanding of *Spiewak*, as it was discussed, where appropriate, in her decision. For other reasons, the State Board modified the Commissioner's decision. However, neither the State Board of Education nor the Appellate Division considered the "home instruction" issue, as the parties did not raise it in those appeals. Thus, the ALJ's determination that home instructors are akin to substitutes for purposes of tenure, which the Commissioner specifically adopted, stands. See *Id*. at 724. This definition of substitute, along with those noted earlier, S*upra*, is well within the scope of the temporary employee exception to tenure acquisition in *N.J.S.A*. 18A:16-1.1 and discussed in *Spiewak*, supra. I **FIND** the reasoning of the ALJ in *Hyman* to be persuasive on the issue of the tenure accrual of Home Instructors. Therefore, I **FIND** that the time that Ms. Donvito served as a Home Instructor cannot be used toward the accrual of tenure.

B. CAN TENURE STATUS ACCRUE FROM SERVICE AS A HSPT/SRA TUTOR

The petitioner puts forward the argument that, even if the service as a home instructor does not count toward the accrual of tenure, her position as a HSPT/Tutor for seven months should be counted toward her tenure time. It appears that the Petitioner takes this position based on the fact that HSPT/Tutor

does not fall into the substitute teacher exception and there are no other allowable exceptions according to *Spiewak*, *Supra* at 77. Based on this reasoning, the petitioner is entitled to tenure for her combined time as an HSPT/Tutor and her three contract positions. The Respondent school board relies on the decision in *Boney v. Pleasantville BOE,* 1971 S.L.D. 579 to counter this position. Boney involved a claim by a physical education teacher, who had been appointed as chairman of the physical education department. Mr. Boney claimed that he had acquired tenure in that position, after being appointed chairman for five years. The Commissioner of Education ruled that no tenure status accrues to extra-classroom assignments such as that performed by petitioner, and they are renewed or discontinued at the discretion of the Board, *Id.* at 585.

While the *Spiewak* case dealt with special education teachers, some of whom were funded through federal grants, they all performed their duties on a regular basis for a set number of hours per week. They were only distinguishable from other teachers based on the children they taught and the source of funding. In the case of the HSPT/SRA tutor, the position more closely resembles the Hyman home instruction model than the Spiewak situation. The petitioner, in fact, clocked her hours on the home instruction time sheet. While the name given to a position is not necessarily determinative, the title "Tutor" points to an auxiliary assignment as outlined in *Boney*. In addition, taking the reasoning of the petitioner to its natural conclusion, a tutor could work one hour per week for seven months and be entitled to count those seven months as tenure eligible time. It does not appear logical that a tutor, working sporadic hours in an auxiliary type position, would be entitled to tenure. It is my conclusion that the tutor position falls into the category of an extra-classroom assignment that is not subject to tenure.

3. WHETHER THE PETITIONER RESIGNED WHEN SHE ACCEPTED A FULL TIME POSITION OUT OF DISTRICT IN SEPTEMBER 1999.

Since I have previously found that the petitioner did not acquire tenure under any of the scenarios presented, it is unnecessary to reach a conclusion as to whether Ms. Donvito resigned, when she accepted the out of district position in September 1999. I will note that all parties agreed that there was no formal resignation. If we reached the issue of constructive resignation, the petitioner's position that she could not give up tenure rights that she had not yet acquired is a reasonable argument. In addition, the cases cited by the Respondent, dealing with resignation, all involve matters in which the petitioners were offered full time employment that they declined. This is not the case with Ms. Donvito. However, as previously stated, I will not reach a conclusion on this issue, since it does not affect the outcome of this matter.

4. WHETHER THE PETITIONER IS ENTITLED TO THE RELIEF SOUGHT.

Since I have found that the petitioner did not gain tenure, she is not entitled to the relief sought.

CONCLUSION

Based on the arguments presented by the parties and the exhibits produced, I **CONCLUDE** that the district and the intervener are entitled to Summary Decision. The petitioner has failed to prove that she attained tenure through any of the positions that she held within the District.

ORDER

It is hereby **ORDERED** that the Respondent and Intervener's Motion for Summary Decision be **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.

7/22/03
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

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

7/22/03
DATE

7/24/03
M. Kathleen Duncan (La)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 25 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

KATHLEEN DONVITO,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT,	:	
AND	:	
LOUISE RYAN,	:	
INTERVENOR.	:	

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.

In her exceptions, petitioner objects to the analysis in the Initial Decision which applied both *Hyman, supra,* and *N.J.S.A.* 18A:16-1.1 to the instant matter, submitting that "both instances represent a clear violation of the holding of the Supreme Court in *Spiewak et al. v. Rutherford Bd. of Ed.,* 90 *N.J.* 63 (1982)." (Petitioner's Exceptions at 2) Petitioner avers that, in *Hyman* the issue of tenure accrual for Home Instruction Teachers was not raised on appeal of the Commissioner's decision. (*Id.* at 1) Petitioner further argues that the fact that "substitute" employment is not defined in statute or regulation is not important because the only issue is

whether *N.J.S.A.* 18A:16-1.1 applies so as to prohibit home instruction teachers from achieving tenure. (*Id.* at 2)

Pointing to *Spiewak, supra* at 77, petitioner posits that the Supreme Court expressly interpreted *N.J.S.A.* 18A:16-1.1 to apply only to those taking the place of an absent teacher and clearly held that no court or agency can create exceptions to the tenure law. (*Ibid.*) Thus, petitioner asserts, there is no authority for the creation of a Home Instructor or HSPT/SRA Tutor exception. (*Ibid.*) Petitioner further asserts that the fact that home instructors do not know how much work they will be doing is no more relevant in this matter than it was in *Point Pleasant Beach, supra,* which was rejected in *Spiewak, supra.* (*Id.* at 3) Petitioner submits that the fact that a home instructor will not know how many students she or he will have does nothing to affect the accrual of tenure. In the instant matter, petitioner avers, the facts demonstrate that petitioner was continuously working as a home instructor from January 1997 through her years as a contracted classroom teacher until her termination in June 2002. (*Ibid.*) The time must count toward tenure, petitioner argues, because it is service requiring certification, is not temporary and does not fit within the exception set forth in *N.J.S.A.* 18A:16-1.1, and, therefore, no statutory exception applies pursuant to *Spiewak, supra.* (*Ibid.*)

Additionally, petitioner advances the argument that the ALJ's reliance on *Boney, supra,* as a basis for denying the tenurable nature of the work of an HSPT/SRA Tutor is in error because *Boney,* rendered eleven years prior to *Spiewak*, involved an assignment to a position which had no certification requirement. (*Ibid.*) In this instance, petitioner submits, preparing students for the HSPT/SRA was instructional work mandated by regulations dealing with graduation requirements. (*Ibid.*) Finally, petitioner points to *Lichtman v. Ridgewood Bd. of Ed.*, 93 *N.J.* 362 (1983), in averring that part-time service in a position requiring certification is tenure eligible. (*Ibid.*)

In its reply, the Board relies on *Hyman, supra,* at 709 in asserting that petitioner's claim that she earned tenure based, in part, on her service as a home instructor should be rejected because, as the ALJ in *Hyman* determined, and the Commissioner affirmed, "home instruction is 'intermittent, temporary, and unscheduled employment' akin to the work of a substitute." (Board's Reply at 2) Accordingly to *Hyman*, therefore, the Board asserts, petitioner is excluded from the acquisition of tenure pursuant to *N.J.S.A.* 18A:16-1.1. (*Id.* at 3) Therefore, in reaching her conclusions in the instant matter, the Board argues, the ALJ properly followed the sound reasoning underlying and supporting the conclusions in the *Hyman* decision. (*Id.* at 3)

Moreover, the Board asserts that petitioner's reliance on *Spiewak, supra,* is misplaced because the Court in *Spiewak* determined: 1) that remedial and supplemental teachers who were required to hold certificates and who provided instruction to educationally disabled children were entitled to tenure if they met the criteria set forth in *N.J.S.A.* 18A:28-5, and 2) that temporary employees and substitutes are not entitled to tenure. (*Id.* at 4, *citing Spiewak, supra,* at 84 and 74) The Board points out that the ALJ and the Commissioner in *Hyman, supra,* were aware of the *Spiewak* decision and recognized that, unlike supplemental instruction, home instruction is temporary, intermittent and unscheduled and, as such, the position of home instructor is "akin to that of a substitute, a non-tenure-eligible position." (*Ibid.*) The Board also avers that it would be impossible to calculate tenure rights for a home instructor given the unfixed and constantly changing schedule, as in this case, where petitioner worked from one to seven hours a day for certain days and weeks and sometimes did not work at all. (*Ibid.*)

Finally, the Board argues that petitioner's service as an HSPT/SRA tutor was an unrecognized, auxiliary assignment, was a part of her home instruction work, and was performed in a sporadic manner on random hours on various days. (*Id.* at 5) Thus, the Board concludes, petitioner's HSPT/SRA assignment would not count towards tenure. (*Ibid.*)

Upon careful and independent review of the record, the Initial Decision, the exceptions and the reply thereto filed in this matter, the Commissioner has determined to reject the ALJ's recommended decision in this matter and to grant summary decision to petitioner for the reasons set forth below.

Initially, the Commissioner notes that, 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 the instant matter, the parties filed cross-motions for summary decision, submitted joint exhibits, and a joint stipulation of facts.[1] Based on a review of the stipulated facts, the joint exhibits, and the motion papers and briefs submitted by the parties, the Commissioner finds that a grant of summary decision is appropriate in this instance in that there is no genuine issue of material fact and petitioner is entitled to prevail as a matter of law.

The Education Tenure Act, *N.J.S.A.* 18A:28-1 to -18, grants tenure to teaching staff members who meet precise statutory conditions. *N.J.S.A.* 18A:28-5 provides, in pertinent part, that:

> The services of all teaching staff members employed in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services, school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of

[1] To the Joint Stipulation of Facts, the parties attached a "Statement of Disputed Factual Issue," stating that, although there is a dispute as to whether petitioner was offered and rejected a two-fifths (2/5) teaching position to commence in September 1999, "[t]he parties agree that for purposes of this motion for summary judgment, the Judge may assume that such a position was offered and declined as proffered by respondent. In the event that the Judge determines that such an offer would be the basis for denying petitioner's claim, the parties request that judgment be reserved pending a hearing limited to the facts surrounding the alleged job offer." (Exhibit J-1, in evidence)

> examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect and school business administrators shared by two or more school districts, 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.

In *Spiewak, supra,* at 81, the Supreme Court 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."

The Court in *Spiewak* also addressed the only applicable exception to the Tenure Act relating to tenure accrual by teachers, *N.J.S.A.* 18A:16-1.1,[2] finding that, "although this statute denies tenure to temporary employees, it extends only to those who 'act in place of' another employee who is absent or disabled." *Id.* at 74. The Court further concludes that "[t]he courts are not free to expand that exception by judicial fiat." *Id.* at 77.

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[2] *N.J.S.A.* 18A:16-1.1 provides:

> 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 legally 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.

The ALJ in *Hyman, supra,* found that "home instructors are not teaching staff members pursuant to *N.J.S.A.* 18A:28-5 and their time is not tenurable***. Home instructors have no specific expectation of employment duration; they have full knowledge of the variability of the assignments and hourly rate of payment." *Hyman* at 709. Although the ALJ's finding in *Hyman* that home instructors were not tenure eligible was specifically upheld by the Commissioner, the petitioners in *Hyman* were all found to be tenured based on time served as supplemental teachers and entitled to full salary and, thus, did not appeal the Commissioner's decision. The Board appealed solely on the salary issue to the State Board and prevailed and the State Board's decision was subsequently appealed to the Appellate Division. The issue of whether home instruction is tenure eligible was not addressed by either the State Board or the Appellate Division as the parties did not raise it in those appeals.

Since the 1982-83 *Spiewak, supra,* and *Hyman, supra,* decisions, however, 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. In *Sayreville Educ. Ass'n v. Board of Educ., Etc.*, 193 *N.J. Super.* 424, 428 (App. Div. 1984), the court interpreted *N.J.S.A.* 18A:16-1.1, as follows:

> We construe the authorization of this provision as applying 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. We do not construe it as authorizing the use of a substitute to fill a vacant position on a long-term basis. This interpretation, in our view, accords with the plain meaning of the statutory provision. The phrase, "to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee," clearly implies a temporary arrangement. That is, the "place" which is the intended subject of the statute is the place of another which that other will reclaim when his period of absence is over. The substitute is appointed to act for the other during that period. If that other employee has, however, terminated his employment, then the place which the appointee is filling is not the place of the other but rather a vacant place, and the statute ordinarily does not apply. This interpretation is, moreover, in accord with the observation in

> *Spiewak v. Rutherford Bd. of Ed., supra*, 90 *N.J.* at 77, that the exception to the tenure statute which *N.J.S.A.* 18A:16-1.1 constitutes "is limited to employees hired to take the place of an absent teacher." Again the implication is clear that the place for which the temporary substitute teacher was hired is not vacant but only temporarily unoccupied by its incumbent.

Moreover, the Supreme Court in *Lammers v. Bd. of Educ.*, 134 *N.J.* 264, *citing Sayreville, supra*, noted that: "[t]he implication drawn by the Appellate Division in Sayreville between a vacancy and an absence is unmistakable. An absence exists when the missing teacher is scheduled ultimately to return to the position. A vacancy exists when the teacher leaves the position permanently, as in the case of a resignation or a retirement." *Id.* at 268.

The decisions in *Sayreville* and *Lammers* issued subsequent to *Spiewak and Hyman,* thus clarify that the statutory exception to tenure accrual set forth in *N.J.S.A.* 18A:16-1.1 is limited to situations where a person is serving in the place of an *absent employee* who is expected to return to work. That is not the case herein where the classroom teachers were present and teaching any students in attendance. As specifically stipulated by the parties, petitioner "was not working in a position that was previously held by a teacher who left it on a leave of absence or by a teacher who was otherwise absent from the position but expected to return.," (Exhibit J-1, #14, in evidence), but, instead, was serving in the individual position of a home instructor. Accordingly, the Commissioner rejects the argument that petitioner's position of home instructor is akin to that of a substitute in that petitioner is not serving in the place of an *absent employee* who is expected to return and, thus, cannot be excluded from tenure accrual under the exception set forth in *N.J.S.A.* 18A:16-1.1.

Moreover, as expressly found in *Spiewak, supra,* at 80, the courts, and by extension the OAL and the Commissioner, cannot create exceptions to the tenure law:

> To summarize, neither *Schulz* [*Schulz v. State Bd. of Ed.,* 132 *N.J.L.* 345 (E. & A. 1945)] nor *Biancardi* [*Biancardi v. Waldwick Bd. of Ed.*, 139 *N.J. Super.* 175 (App. Div. 1976), *aff'd o.b.*, 73 *N.J.* 37 (1977)] nor *Capella* [*Capella v. Bd. of Ed. of*

> *Camden County Voc. Tech. Sch.*, 145 *N.J. Super.* 209 (App. Div. 1976)] holds that courts may themselves define exceptions to *N.J.S.A.* 18A:28-5. To the extent those decisions imply that the right to tenure derives from contract rather than statute, they are wrong. To the extent they suggest that courts may create exceptions to the clear language of *N.J.S.A.* 18A:28-5 based on policy considerations, they are disapproved."

In that the Commissioner concludes, in light of *Spiewak* and the subsequent court decisions in *Sayreville* and *Lammers,* that the only applicable exception to the Tenure Act relating to tenure accrual by teachers, *N.J.S.A.* 18A:16-1.1, does not apply to teachers serving in the position of home instructor, and in that the Commissioner lacks the authority to create exceptions to the tenure law, petitioner's years of service as a home instructor are found to be tenure eligible. Moreover, the Commissioner agrees with petitioner that *Boney, supra,* does not apply so as to exclude petitioner's service as an HSPT/SRA Tutor from tenure eligibility, as, unlike the *Boney* decision, which dealt with the assignment to a job which had no certification requirement, petitioner's assignment herein as an HSPT/SRA Tutor was an instructional assignment necessitated by the regulations dealing with graduation requirements set forth in *N.J.A.C.* 6A:8-1.1 *et seq.*, and thus akin to an assignment as a remedial teacher, basic skills teacher or supplemental teacher.

During the period at issue, petitioner was a teaching staff member in the Northern Valley Regional High School District, pursuant to *N.J.A.C.* 18A:1-1,[3] and tenure eligible, pursuant to *N.J.S.A.* 18A:28-5, holding valid certificates and endorsements issued by the State Board of Examiners as an Elementary School Teacher, Teacher of English, Nursery School Teacher, Learning Disabilities Teacher Consultant, and Teacher of the Handicapped and assigned to teaching positions requiring valid certification, *i.e.*, home instructor (*see*

[3] *N.J.A.C.* 18A:1-1 defines a "teaching staff member" as "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 to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners and includes a school nurse and a school athletic trainer."

N.J.A.C. 6A:16-9.2(b)2; *N.J.A.C.* 6A:14-4.8(a)(4); *N.J.A.C.* 6A:14-4.9(a)(4); and J-3, in evidence), a Special Education Teacher, and an HSPT/SRA Tutor. Although petitioner served in part-time teaching positions during this time period, it is well-established that a part-time position requiring certification is tenure eligible. *See Lichtman, supra*, and *Dudzinski v. Borough of Franklin*, 97 *N.J.A.R.* 2d (EDU) 531.

Moreover, the parties stipulated that petitioner was assigned the following teaching responsibilities and provided such service during the 1996-1997 through 1999-2000 school years:

School Year	Service Dates	Position	Academic Months
1996-1997	1/13/97-6/18/97 (J-3)	Home Instructor[4]	5
1997-1998	9/18/97-6/26/98 (J-4)	Home Instructor[5]	9
1998-1999	10/21/98-6/30/99 (J-5) 9/4/98-4/5/99 (J-9)	Home Instructor[6] HSPT/SRA Tutor	10
1999-2000	9/15/99-6/19/00 (J-6) 2/18/00-6/30/00 (J-13) 1/14/00-3/10/00 (J-10)	Home Instructor[7] 2/5 Special Ed. Teacher SRA Tutor	9.5
TOTAL			33.5 months

[4] Petitioner earned $19,150 during her five months as Home Instructor. (Exhibit J-3, in evidence)

[5] Petitioner earned $13,987.50 during her nine months as Home Instructor. (Exhibit J-4, in evidence)

[6] Petitioner earned $12,700 as a Home Instructor and $3,825 as an HSPT/SRA Tutor during her ten months of service. (Exhibits J-5 and J-9, in evidence)

[7] Petitioner earned $26,250 as a Home Instructor, $23,103.60 as a 2/5 Special Education Teacher and $1,650 as an SRA Tutor during her 9½ months of service. (Exhibits J-6, J-13 and J-10, in evidence) Notwithstanding the Board's claim that petitioner resigned her position when she was offered and rejected a 2/5 teaching position to commence in September 1999 and petitioner's denial that such position was offered to begin in September 1999, as noted above, the parties have stipulated that, for purposes of the summary decision motions, that such a position was offered and declined by respondent. Even assuming, *arguendo*, that a 2/5 teaching September 1999 teaching position was offered to petitioner and she declined the offer, the Commissioner cannot conclude that petitioner resigned from her position with the Board as the record reflects that petitioner continued to be employed as a home instructor for the Board, earning $14,450 in the period from 9/15/99 through 2/18/00 when she accepted a 2/5 teaching position.

Thus, petitioner achieved tenure, pursuant to *N.J.S.A.* 18A:28-5(c), by her service as a teacher in the District for the equivalent of more than three academic years (30 months) within four consecutive academic years. The Commissioner also observes that petitioner worked for the Board as a full-time Special Education Teacher in the 2000-2001 school year[8] and as a 4/5 Special Education Teacher in the 2001-2002 school year.[9] The Board did not renew petitioner's contract for the 2002-2003 school year. In the 2002-2003 school year, the Board employed 22 nontenured teaching staff members within the areas of petitioner's certification.[10] (Initial Decision at 2) The Commissioner, therefore, finds that the Board violated petitioner's tenure rights in deciding not to appoint petitioner to one of the positions held by nontenured individuals.

Accordingly, for the reasons set forth above, the Commissioner grants summary decision to petitioner and orders petitioner's reinstatement to a full-time position held by any nontenured or less senior teacher within petitioner's area of certification of the Board's choice, with full back salary and benefits, less mitigating income.

IT IS SO ORDERED.[11]



COMMISSIONER OF EDUCATION

Date of Decision: **12/04/03**

Date of Mailing: **12/05/03**

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[8] Petitioner earned $58,914 as a full-time Special Education Instructor. (Exhibit, J-14, in evidence)

[9] Petitioner earned $50,282.40 as a 4/5 Special Education Instructor. (Exhibit J-1, #10, in evidence)

[10] These staff members were advised of their right to intervene, but only Louise Ryan chose to do so.

[11] 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.*

647-03

EMILYANN GARDINER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 8, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 06174-02S

AGENCY DKT. NO. 253-8/02

EMILYANN GARDINER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,

Respondent.

Steven B. Hunter, Esq., for petitioner (Klausner and Hunter, attorneys)

J. Peter Sokol, Esq., for respondent (McOmber and McOmber, attorneys)

Record Closed: October 21, 2003 Decided: October 21, 2003

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

This matter arises from the filing of a Petition of Appeal by the Emilyann Gardiner ("petitioner"), to the Commissioner of Education challenging a determination of the Board of Education of the City of Long Branch, Monmouth County, ("respondent") to withhold her employment and adjustment increments for the 2002-2003 school year. The case was transmitted to the Office of Administrative Law ("OAL") from the Department of Education on September 5, 2002, 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. Also attached is an October 14, 2003, letter from counsel for the respondent indicating that the respondent approved the settlement as written in the minutes from their regular meeting of July 23, 2003, attached to his letter.

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.

October 24, 2003
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

10-23-03
DATE

M. Kathleen Duncan/CR
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 27 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

Attachments

mjm

A PROFESSIONAL CORPORATION

McOmber & McOmber

COUNSELLORS AT LAW

54 SHREWSBURY AVENUE
RED BANK, NEW JERSEY 07701

RICHARD D. McOMBER
ADRIENNE HAROUTUNIAN McOMBER
THOMAS J. WARREN
J. PETER SOKOL

R. ARMEN McOMBER

TELEPHONE
(732) 842-6500

FACSIMILE
(732) 530-8545

October 14, 2003

Hon. Jeff S. Masin, Acting Director
and Chief Administrative Law Judge
Office of Administrative Law
9 Quakerbridge Plaza
P. O. Box 049
Trenton, NJ 08625-0049

RECEIVED
2003 OCT 21 A 8:50
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

RE: Emilyann Gardiner v. Board of Education of the
City of Long Branch, County of Monmouth
OAL Docket No. EDU 06174-02S
Our File No. 8481

My dear Judge Masin:

As you know, this office represents the Board of Education of the City of Long Branch in the above captioned matter.

As per your letter dated September 24, 2003, enclosed please find a copy of the minutes from the Board of Education's regular board meeting dated July 23, 2003, wherein at #13, settlement was approved between Emilyann Gardiner and the Board of Education

Should you need any further information, please do not hesitate to contact me.

Respectfully yours,

J. PETER SOKOL

JPS:dcg
Enclosure
cc: Klausner & Hunter
Attn: Stephen B. Hunter, Esquire (w/enclosure)
Long Branch Board of Education
Attn: Archie Greenwood, Assistant Superintendent (w/enclosure)

3a

ACTION ITEMS (continued)

11. SUCCESS FOR ALL SUMMER TRANSPORTATION 2003 (continued)

The following quotes were received for route SFA3 to transport pre-school bilingual students to the Joseph M. Ferraina Early Childhood Learning Center. Effective July 14, 2003 – August 15, 2003 (25 possible days).

Coast Answering	No quote
DMC	No quote
J&M Keelen	$249.99 per diem
Seman-Tov	$152.00 per diem

That the Board approve the lowest bid of $152.00 per diem from **Seman-Tov, Inc.** Total Cost - $3,800.00 (pro-rated 25 days).

The following quotes were received for routes SFG1 and SFG2 to transport Gregory School students to/from the Long Branch Middle School. Effective July 16,2003 – August 15, 2003 (23 possible days):

J&M Keelen	No quote
Laidlaw	No quote
Murphy Transportation	No quote
Seman-Tov	$172.00 per diem/per bus

That the Board approve the only quote of **Seman Tov** for $172.00 per diem/per bus. Total Cost - $7,912.00 (pro-rated 23 days).

12. APPROVAL OF TRANSPORTATION ROUTES WITH MOESC

That the Board approve special education routes with Monmouth-Ocean Educational Services Commission for the summer of 2003 at a cost of $86,822.52.

13. SETTLEMENT AGREEMENT - GARDINER

That the Board ratify the attached agreement between Emilyann Gardiner and the Long Branch Board of Education.

14. SETTLEMENT AGREEMENT – WHEELER

That the Board ratify the attached agreement between Judith Wheeler and the Long Branch Board of Education.

15. STUDENT EXIT - CLASS ACADEMY PROGRAM

That the Board approve the exit of the following student from the Monmouth County Vocational School District Class Academy Program for the 2002-2003 school year (tuition: $4,750 per student): ID#06001121.

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
RECEIVED
2003 JUL 22 P 3:35

SETTLEMENT AGREEMENT

This Agreement, made this _____ day of April, 2003, by and between the Board of Education of the City of Long Branch, County of Monmouth ("Board") and Emilyann Gardiner ("Ms. Gardiner").

RECITALS:

A. The Board employs Ms. Gardiner as a tenured SFA reading teacher/tutor.

B. During the 2001-2002 school year, the principal of the Gregory School observed that Ms. Gardiner's performance required improvement in time management, curriculum implementation, fulfilling job responsibilities and quality of instruction.

C. Based on these observations, the principal recommended to the Board to withhold her employment and adjustment increments for the 2002-2003 school year.

D. The Board voted to withhold Ms. Gardiner's increments and the reasons were provided pursuant to *N.J.S.A.* 18A:29-14.

E. Ms. Gardiner then filed a Petition, asserting that the Board's actions in this regard were arbitrary, capricious and unreasonable, which the Board disputed in its Answer.

F. During the pendency of the Petition, Ms. Gardiner offered to resign for retirement purposes effective October 31, 2003, subject to certain terms and conditions.

G. The Office of the Superintendent of Schools entered into negotiations with Ms. Gardiner regarding her offer.

H. The Board has considered Ms. Gardiner's offer and has approved the settlement by resolution.

I. Ms. Gardiner has been advised that the Commissioner of Education is required to approve settlements of administrative proceedings.

THEREFORE, IN CONSIDERATION OF THE MUTUAL COVENANTS HEREIN CONTAINED, the Board and Ms. Gardiner agree as follows:

1. Ms. Gardiner shall immediately offer her irrevocable letter of resignation for retirement purposes to the Board, effective as of October 31, 2003.

2. Upon receipt, the Board shall immediately accept Ms. Gardiner's offered resignation for retirement purposes.

3. Upon acceptance of Ms. Gardiner's offered resignation for retirement purposes, the Board agrees to retroactively restore one-half of Ms. Gardiner's increments for the 2002-2003 school year by beginning their restoration on February 1, 2003.

4. Ms. Gardiner shall receive her employment and adjustment increments for the 2003-2004 school year until the date of her resignation for retirement purposes.

5. Ms. Gardiner will complete the 2002-2003 school year by actively teaching and improving her performance to the extent required by the principal and shall, during the months of September and October, 2003, be employed as a teacher with duties to act as a substitute at the discretion of the Office of the Superintendent, when required, but will not be assigned regular classroom duties.

6. Upon execution of this Agreement, the Petition filed by Ms. Gardiner shall be withdrawn with prejudice.

7. The Board and Ms. Gardiner shall exchange general releases, with the only exception to those general releases being the terms and conditions of this Settlement Agreement.

8. The terms and conditions of the settlement are contingent upon the approval of the Commissioner of Education. If approval is not given, then the increment withholding petition shall proceed to a hearing.

Attest:

MICHAEL PETRILLO
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires July 30, 2004

EMILYANN GARDINER

Attest:

BOARD OF EDUCATION OF THE
CITY OF LONG BRANCH, IN THE
COUNTY OF MONMOUTH

Secretary
PETER E. GENOVESE, III

By: President
ARMAND R. ZAMBRANO, JR.

OAL DKT. NO. EDU 06174-02
AGENCY DKT. NO. 253-8/02

EMILYANN GARDINER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, 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: 12/8/03

Date of Mailing: 12/8/03

651-03

IN THE MATTER OF THE TENURE :

HEARING OF ROSA SARDUY, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE CITY OF : DECISION

PASSAIC, PASSAIC COUNTY. :

SYNOPSIS

The Board certified tenure charges of unbecoming conduct and insubordination against respondent assistant principal who had been employed in the District since 1974 in a variety of positions, both teaching and administrative. The charges involved failure to perform certain assigned duties, failure to call in absences, refusal to perform duties even after receiving directives from the Superintendent and other unprofessional actions.

Following six days of hearing, the ALJ determined that the Board had established that Charges 1, 2, 4 and the first paragraph of Charge 7 had been sustained by a preponderance of the credible evidence and warranted respondent's removal from her position. The ALJ ordered respondent dismissed from her employment as a tenured assistant principal.

The Commissioner concurred with the ALJ and ordered respondent dismissed from her position as of the date of this decision and directed that a copy of this decision be transmitted to the State Board of Examiners for action as that body deems appropriate.

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.

December 11, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5474-02

AGENCY DKT. NO. 154-5/02

IN THE MATTER OF THE TENURE HEARING OF ROSA SARDUY, SCHOOL DISTRICT OF THE CITY OF PASSAIC, PASSAIC COUNTY

Cherie L. Adams, Esq., for petitioner, School District of the City of Passaic (Sills Cummis Radin Tischman Epstein & Gross, attorneys)

Robert F. Varady, Esq., for respondent Rosa Sarduy (La Corte, Bundy, Varady & Kinsella, attorneys)

Record Closed: August 25, 2003 Decided: October 31, 2003

BEFORE **STEPHEN G. WEISS**, ALJ:

PROCEDURAL HISTORY

In this case the School District of the City of Passaic ("District") has certified a variety of unbecoming conduct and insubordination charges against the respondent, Rosa Sarduy, a tenured assistant principal who has been employed by the District since September 1974 in a variety of positions, teaching and administrative, including bilingual teacher, guidance counselor, Director of Guidance, and Vice (or Assistant) Principal.

Following the District's certification of the charges to the Commissioner of Education the matter was transmitted to the Office of Administrative Law (OAL) on June 18, 2002, for determination as a contested case. Hearings commenced before the undersigned administrative law judge in December 2002 and continued intermittently until their conclusion on June 8, 2003. Delays in moving the case forward more quickly were occasioned by a variety of circumstances, including illness, efforts to settle and counsels' trial conflicts. Following the conclusion of the testimony a schedule was established for the filing of posthearing proposed findings of fact and conclusions of law. The time for issuing my initial decision was extended by order to November 24, 2003.

A total of eight witnesses testified at the hearing, seven on behalf of the District and respondent Sarduy. Since seven separate charges of unbecoming conduct and/or insubordination had been certified to the Commissioner, each charge and the relevant testimony and other evidence in support of, and in defense against, the charges will be discussed, *infra*.

THE TENURE CHARGES

Charge One alleged that during 1999-2000, Sarduy failed to perform certain assigned duties after having been directed by her building principal at School No. 8 to perform those duties. Charge Two alleged that in January 2002, Sarduy was directed by the Principal at School No. 6, where she had been reassigned in 2000-2001, to supervise a lunch period when the teacher so assigned was absent, but that she failed to do so for the entire period.

Charge Three alleged that in 1999-2000, while at School No. 8, Sarduy refused to assist in the implementation of certain aspects of "Whole School Reform" unless the Superintendent of Schools, not just the building principal, required her to do so. Charge Four maintained that during the 1999-2000 school year Sarduy informed the Superintendent that she would no longer perform observations of staff members at School No. 8, and then continued to refuse to do so even after having been directed by the Superintendent to perform them. Charge Five alleged that on some occasions in 2000-2001, while assigned to School No. 6, Sarduy failed to call to advise that she would be absent.

Charge Six alleged that on one occasion, after Sarduy took a child to his home after school since no one had come on time to do so, she addressed a person at the child's home in an abrasive and unprofessional manner. Charge Seven alleged that with respect to special education matters Sarduy had acted in an inappropriate and unprofessional manner in a variety of ways. First, that she rudely interrupted a meeting between a child study team member and a parent at School No. 6 and complained that the member did not act appropriately concerning another student's placement. She then threatened to call the Department of Education and the newspapers if the placement was not quickly resolved. In addition, the charge alleged that in 1999-2000, while assigned to School No. 8, Sarduy interrupted a CST team meeting to which she had not been invited, and that and other behavior that day towards faculty and parents was unprofessional and insulting.

TESTIMONY FOR THE DISTRICT

The first witness for the district was John Scozzaro who presently is the principal of School No. 11. During the 1999-2000 school year he was acting principal at School No. 8 where Sarduy was employed as his assistant principal. Scozzaro was new to School No. 8 that year and first met respondent when classes began in September 1999. He understood Sarduy had been serving there as "acting principal" for a short period of time in 19998-1999 since the principal was out ill.

Scozzaro met with Sarduy early in the 1999-2000 school year, described her expected role and told her to follow the prescribed job description for her position. However, soon thereafter Sarduy, referring to a, " ... long existing animosity created toward me by a few staff members of School No. 8", asked Scozzaro for specific directions as to her duties and responsibilities (Ex. P-18). He replied that Sarduy simply should follow her job description and if any specific directions were necessary he would inform her of the same (Ex. P-19). Subsequently, a problem did arise with respect to that very subject.

Specifically, it is alleged in Charge Four that Sarduy failed to perform required observations of teaching staff members at School No. 8. Scozzaro explained that he and Sarduy each were to observe one-half the staff members. However, when one of

the teachers on her list objected to her doing so because of a problem in the past (Sarduy gave her a poor rating), Scozzaro decided he would evaluate that teacher instead. Sarduy then wrote to the Superintendent concerning the removal and described it as having stemmed from a prior disagreement between the teacher and herself over an observation Sarduy had performed (Ex. P-34). Since all the teachers at School No. 8 were aware of the incident (removal from her list), Sarduy then declared she no longer would conduct any observations. The Superintendent directed Sarduy to meet to discuss the situation and in a memorandum he dispatched to her on March 1, 2000, advised that she remained responsible, as directed, to perform observations and evaluations and any disagreements she might have with the principal's decision should be discussed with him (Ex. P-40). Nevertheless, subsequent to receiving that memorandum from the Superintendent, respondent only belatedly began to conduct observations, and even then did so in a deliberately inappropriate manner by uniformly rating all the teachers she observed as "extremely excellent".

With respect to Charge Three concerning respondent's reluctance to assist in "Whole School Reform", Scozzaro identified the concept as the particular model chosen to be implemented at School No. 8. It centers on teaching practices developed at Yale University and a team composed of teaching and administrative staff members at School No. 8 was to develop strategies in all areas. Although Sarduy was expected to be involved in the process as well, when she appeared to deliberately present obstacles interfering with the work of the team he then was obliged to contact Yale to have a consultant sent to the school to discuss the matter (Ex. P-26).

With respect to respondent's alleged interference with child study team meetings at School No. 8, Scozzaro explained that because of the need to schedule meetings to include parental participation, a great deal of flexibility was required. Thus, a notice was posted giving meeting schedules in advance. An incident occurred, he said, in January 2000 when respondent learned that a meeting which was to include child study team members, the regular teacher and the parents of the child would proceed even though the regular teacher was absent from school that day. Since Scozzaro was out of the building at the time, one of the members asked Sarduy if another teacher could be made available to attend in her place. Respondent allegedly responded that she

would not make a teacher available without prior notice of at least one day even though the parents had come to school to attend the meeting.

Nevertheless, the meeting was convened after a speech therapist, who knew the student, was enlisted to attend in the regular teacher's place. Toward the end of the meeting, however, Sarduy entered the room, began to take notes and then questioned the participants about what had gone on. She angrily expressed concern about not having been given prior notice and the illegality of holding a meeting without the regular teacher present. After she left, she then attempted to cancel a meeting with another parent who had been waiting there, refusing to permit that meeting to go forward until she first obtained the Superintendent's approval.

These incidents prompted several memoranda describing what had happened and, according to Scozzaro, were demonstrative of the kind of insensitive behavior Sarduy too often displayed in the presence of staff and parents. (*See,* Exs. P-28,P-29, P-30, P-31).

Scozzaro next identified an evaluation form he had prepared with respect to respondent's performance during 1999-2000 (Ex. P-47), in which he rated her to be "below standards" in several categories, including requirements that she: (a) exercise educational leadership by serving as a positive role model; and (b) respect and adhere to the "chain of command". As Scozzaro described it, Sarduy's conduct actually "obstructed the flow of the educational process" and often he had to do her work because of her performance deficiencies and the low morale among staff members which she had created.

On cross-examination, Scozzaro conceded the evaluation form made no mention of any deficiencies he said she had with respect to Whole School Reform, and that she had a right to disagree with the way it had been implemented.

The next witness for the Board, Celinda Barreto, has been principal of School No. 6 for eight years. Like Sarduy, she has been employed by the District since 1974, both as a teacher (for twelve years) and as an administrator. Respondent was assigned to School No. 6 as her assistant principal for the 2000-2001 school year, but

she did not report to the building until September 11, 2000 when she told Barreto she had not come earlier because she had been ill. Barreto discussed what she expected Sarduy's role to be as the assistant principal and gave her a memorandum which set forth duties and responsibilities (Ex. P-52). School No. 6, she explained, contains grades kindergarten through six with approximately 800 students. Rather than using the "Whole School Reform" model, her school chose the "Success for All" model. When she so informed Sarduy, the respondent told Barreto she was not familiar with it since she had transferred from a school which used a different model.

According to Barreto, from the very outset Sarduy's attendance during the 2000-2001 school year was not "up to par." By the beginning of October 2000 she had been absent eight school days – 31 percent of the school days to that point (Ex. P-71p). Barreto understood that some absences are unavoidable, but the total number, and the percentage of sick days taken by respondent were "excessive". This poor attendance, she observed, set a poor example for staff and negatively impacted on the operation of the school since she and Sarduy were the only two senior administrators there.

According to Barreto, Sarduy's attendance did not improve very much, and when respondent failed to report for work for the first four school days immediately following the Christmas recess in January 2001, Barreto sent a memorandum in which she observed that on one of those four school days Sarduy had not called her absence in to the answering service as required (Ex. P-71(q)). Although a handwritten reply note at the bottom on the memorandum by Sarduy insisted that she did in fact call each day, Barreto could find no record of that call. During the rest of January 2001, Sarduy continued to be absent from time to time and told Barreto she was having health issues. As Barreto put it, respondent then was "in and out" until early April 2001, after which she remained out sick every day for the entire balance of that school year.

Sarduy returned to work when school opened in September 2001, and was given what Barreto described as "a whole litany" of duties she was expected to perform, one of which was to supervise third and fourth periods in the lunch room and to be available at such other times as might be required. If, for example, the regularly assigned teacher was absent, Sarduy might have to provide coverage herself.

Among other duties Barreto assigned to Sarduy in 2001-2002 was the obligation to make sure there were adequate supplies available, but according to the witness respondent failed properly to carry out that function as well. In particular, she untimely distributed supplies, not just "start up" items, leaving some classrooms short.

Then, on January 3, 2002, without prior notice to or discussion with Barreto, Sarduy dispatched a memorandum to staff members regarding, among other things, "plan books and monthly supply requisitions". In it she stated that since there were insufficient supplies for all teachers, when they filled out their monthly request forms she would permit them to come to the supply room, and " . . . take whatever items you need from what we have". Sarduy also expressed to staff her concerns about plan books and her need for "clarification" from Barreto concerning them. Thus, Sarduy declared that since," ... I have not received any response [from Barreto], I will not check your plan book until further notice" (Ex. P-71a).

When Barreto saw the memorandum that day it was, she said, the first time she was even aware of respondent's intent to refuse to review plan books, one of the major duties Sarduy was expected to carry out (Ex. P-52). As Barreto put it, she was "very surprised". As a result, the principal immediately dispatched her own memorandum to Sarduy reiterating that respondent was obliged to review plan books and was also expected to handle discipline referrals (which she had also refused henceforth to do). Whether or not Sarduy agreed with these duties was, in the principal's words, " ... irrelevant to your job responsibility" (Ex. P-71b). With respect to supplies, Barreto directed respondent to continue to distribute them to staff and, "... not allow them to take whatever they wish from the closet." She concluded the memorandum with the observation that Sarduy's failure to abide by her directives would be considered, "... as "dereliction of duty and insubordination."

In order to be sure that Sarduy received her memorandum, Barreto put one copy in a sealed envelope and personally took it to Sarduy's office where she put it on respondent's desk. She placed another copy in a sealed envelope in respondent's mailbox. Later that day, Barreto found one of the unopened envelopes on her desk with the notation "refused" written on it and the initials "RS". Also written on the outside

of the envelope was a handwritten directive to Barreto's secretary to give it to the principal, initialed by Sarduy (P 71c).

Because of the return of Barreto's memorandum in an unopened envelope on which Sarduy had marked "refused", Barreto then took yet another copy to Sarduy's office and hand delivered it to her. Later that day, Barreto received a ripped-up envelope (Ex. P 71d) inside another envelope which had Sarduy's handwriting on it stating, " ... the enclosed was left in my mailbox" (Ex. P 71e). *See also*, Ex. P-71.

As noted earlier, among other duties Sarduy was directed to carry out as assistant principal was the need to assure coverage in the cafeteria if the regularly assigned teacher would not be able to be there. On January 8, 2002, a teacher unexpectedly could not attend to her cafeteria obligation that day, having left work complaining of feeling ill. Sarduy was instructed to cover for her and went to the lunch area to do so. However, at some point during that period, Sarduy left the lunch room and went to Barreto's office where she told the principal she would not continue to undertake the coverage since she had received such late notice. The principal immediately directed Sarduy to return to her post since now it was left unsupervised. Later, before the lunch period ended, Sarduy returned to Barreto's office a second time and left a message which Barreto's secretary wrote down to the effect that she would not cover the cafeteria any further and Barreto, " ... can write [an] insubordination letter if you want" (Ex. P-71f). *See also*, Ex. P-71.

Charge Six involved the incident alleging rude and unprofessional conduct by Sarduy when the young student had not been picked up timely from school. Although Barreto was not present, she requested a written report concerning the incident from another teacher, Ms. Tavarez, who was there (Ex. P 71o). Tavarez (who later testified) wrote that on January 4, 2002, a family member who was supposed to pick up the child failed to arrive by 5:00 p.m. after everyone was gone. Tavarez could not contact the family because she did not have a telephone number to call. At that point, respondent happened to be driving past in her car and stopped to find out if there was a problem. When Tavarez explained the situation Sarduy contacted the local police who apparently told her it was not within their jurisdiction. Sarduy then decided that she would drive the child home herself and followed Tavarez who knew where he lived. When Tavarez,

Sarduy and the young boy arrived at the home, a person who Tavarez believed was the child's aunt met them at the door. According to Tavarez's memorandum to Barreto, Sarduy, "... gave her [the aunt] a piece of her mind. She demanded that the child learned [*sic*] his telephone number and address. She also demanded that the child's parent report to her office on the next school day, Monday 1/7/02."

Further according to Tavarez's memorandum, no parent reported to school on January 7. On the following day, Sarduy told Tavarez to bring the child to her office where Sarduy told him that if his parent did not come in with him the next day he would not be allowed to return to school. Tavarez then went to the main office at Sarduy's direction and obtained a "stay-home" letter which the boy had to take home with him. Barreto later spoke to an adult relative of the pupil who complained that Sarduy had been "rude" when she brought the boy home and had "screamed" at the person there. (Ex. P-71).

Another allegation against Sarduy had to do with her unauthorized attendance at a conference. In order to attend, a staff member had to submit a request for approval to the principal. In mid-November 2000, Barreto rejected a request by Sarduy to attend a conference on November 16, 2000 (Ex. P 71i). Apparently, Sarduy sent another request to Barreto asking permission to attend the same conference which contained a handwritten notation along the margin that Barreto should be aware it was respondent's intention to attend in any case. As a result, Barreto wrote to the Superintendent, attached the request form, and indicated it was for the same conference that had been rejected the first time. Barreto explained that the rejection was due to the fact that Sarduy already was approved to attend a more appropriate conference the following month. Barreto later learned that Sarduy spoke to the Superintendent and claimed there had been some mistake, *i.e.*, that the second request was for a different conference for which she had Barreto's approval. That was not true. The entire set of circumstances was, in the Barreto's view, insubordinate behavior.

Another charge discussed by Barreto was respondent's alleged non-compliance with the procedure for calling in expected absences in advance (Charge Five). Barreto explained that if a staff member expected to be absent, he or she was to call an answering service to provide all necessary information. Persons were to call as early

as possible, but no later than 6:00 a.m. The answering service then provided a list of those who called to the school so steps could be taken to obtain substitutes. According to Barreto, on some occasions Sarduy never called and, as a result, Barreto had to dispatch memoranda to her complaining about that neglect. Barreto was particularly concerned since she and Sarduy were the only senior administrators in the building.

Yet another area of concern about which Barreto testified had to do with implementation of the "Success for All" model at School No. 6. According to Barreto, it essentially was a reading program and at the start of each day students in grades 1-3 spent 90 minutes receiving instruction in reading. A student who reported twenty minutes or more late to school would be required either to wait in the office or be sent home and told to return with a parent. Sarduy told Barreto she disagreed with the policy of not allowing students to go into the classroom, even if late, and Barreto suggested that Sarduy could see to it that the student was occupied with other work (Ex. P-62). Respondent, she said, refused to do so unless specifically instructed to do so by the Superintendent of Schools (Ex. P-71j).

With respect to that part of Charge Seven surrounding Sarduy's conduct at School No. 6, Barreto related that in early January 2002, she learned of an incident wherein Sarduy essentially "barged in" to a meeting being held by a child study team member with a classified student's parent and another staff member (Ex. P-71h). Sarduy, in their presence, had demanded to know why no placement of <u>another</u> student (who Sarduy brought with her) had not yet been made and his evaluation not yet completed. Although Barreto was not an eyewitness to the event, the child study team staff member directly involved, Robert Mendez, later testified and his testimony will be discussed *infra*.

In summary, Barreto related that Sarduy's overall conduct as her assistant principal, rather than "assisting", actually interfered with and obstructed the principal's ability properly to administer the school building - - her primary responsibility. As Barreto put it, Sarduy chronically was "undermining my authority" and was "insubordinate".

Another incident descriptive of this untoward behavior occurred on January 23, 2002, which Barreto memorialized in a critical memorandum to Sarduy a few days later (Ex. P-72). In that incident, the guardian of a student who had been suspended came to the main office to look at the student's folder. A paraprofessional was assigned to copy materials from that folder. When Barreto saw Sarduy in the hallway she saw that respondent had the original folder in her possession and she told Sarduy it should not have been removed from her office. Sarduy then began to yell at Barreto, complaining that the principal was preventing her from doing her job and was wasting time having copies made instead of observing teachers. In her memorandum, Barreto noted that Sarduy continued to shout at her in the presence of secretaries, the attendance officer, a paraprofessional and three parents in the office, all of which conduct was described as "unprofessional and most inappropriate."

On cross-examination, Barreto explained that she first learned Sarduy would be assigned to School No. 6 as her assistant about one week before respondent actually reported for work. Although Barreto heard that Sarduy had experienced "some difficulties" with individuals in other schools, Barreto did not want to dwell in the past and hoped to "start fresh." She recalled giving Sarduy a list of her duties (Ex. P-52) but did not remember exactly how long they spent discussing the items on it. She specifically mentioned to Sarduy that she would be trained in the "Success for All" model and told her there was an educational session which Sarduy was approved to attend in December. Although Sarduy wanted to attend an earlier training session, Barreto believed it to be "inappropriate" since it was on an advanced level and Sarduy first needed basic foundation knowledge.

With respect again, to the distressing incident involving the destruction of her reply memorandum to respondent on January 3, 2002, (Ex. P-71b), Barreto repeated that after the unopened envelope addressed to respondent was returned and left on her desk, she brought Sarduy a second copy which she believed was the ripped up copy later returned as well.

Concerning the 90-minute reading period that Barreto described as an essential part of the "Success for All" program, it was designed to begin at about 9:00 a.m. and a child who arrived after 9:15 a.m. or 9:20 a.m. would be directed to remain in the office

or go home and return with a parent or guardian. Barreto agreed Sarduy took the position that a child should be receiving instruction from a teacher in class and not be made to stay in the office, but she had suggested ways that Sarduy could provide instruction to the late students in that situation. According to Barreto, the reason for the policy was to prevent children from coming to class late and disrupting the group.

Further with regard to lunchroom coverage, Barreto reiterated that if the assigned certified staff member could not be there it was imperative that proper coverage be provided since there are approximately 200 students present at the same time in need of supervision. It was, she said, Sarduy's absolute obligation to provide coverage if needed and she had no right to refuse to do so, whatever her reason. Although Sarduy did, at first, return to the cafeteria when told to do so by Barreto, apparently she stayed there for only a very short period and returned to Barreto's office before the period ended to announce she would not stay.

The next witness for the District was Josefa Tavarez, the teacher who accompanied Sarduy to the home of the child who had not been picked up when school ended. Tavarez waited with him outside school that day and Sarduy drove by in her car. After the assistant principal stopped to ask about the situation, she then went into the building to see if she could find a home telephone number. When she could not do so, she called the Passaic police, who apparently were unwilling or unable to provide help. As a result, Sarduy and Tavarez, in separate cars, drove to the boy's home where a woman who Tavarez believed identified herself as the child's "aunt" answered the door bell. Sarduy insisted that someone in charge of the boy come to school the next school day, using a tone of voice which Tavarez described as "a little high." The "aunt" seemed upset by the conversation and told Sarduy someone had gone to school to find him.

On the following Monday, when no parent or guardian came to school despite Sarduy's insistence, Tavarez was told by Sarduy to have a letter sent to the home directing that the child not return to school unless accompanied by a responsible adult. Tavarez was present when Sarduy told the boy he could not come back to school unless accompanied by a parent.

The next day (Tuesday) the boy's brother came to school to see Sarduy and Tavarez was called to the meeting. The brother was very upset because the "aunt" did not believe she had been spoken to properly by respondent. *See, also*, Ex. P-71(o).

The District's next witness, Roberto Mendez, is a school social worker who was in his first year of employment at School No. 6 during the 2001- 2002 school year. In January 2002, while meeting in his office with a classified student and a parent, Sarduy opened his door unannounced and interrupted the meeting. He recalled she had another student with her and expressed concern about that student - demanding to know why no out-of district placement had yet been secured for the student. Also, she threatened to take the matter to the Department and the newspapers if it was not resolved by "the following Monday."

Mendez insisted respondent came into the room unannounced and uninvited, accompanied by the other child. Although Mendez had been working on the student's case, Sarduy immediately demanded answers concerning the length of time the process was taking. He was very distressed that Sarduy would so freely discuss the particulars of another student's situation in front of other persons and was "shocked" and "taken aback by the whole experience". Even though only a first year employee, Mendez considered Sarduy's behavior to be so unprofessional that he personally apologized to the parent of the child with whom he was meeting.

The next witness, Lydia Agosto, is Barreto's secretary at School No. 6 and has been employed there for about 20 years. With respect to lunch duty coverage, it is Agosto's obligation to advise the principal if a teacher is not available so Barreto immediately could assign a certified person to provide the needed coverage.

One day in January 2002, a teacher who was assigned to cover one of the lunch periods became ill at work, which left a need for a substitute. Barreto told Agosto to page Sarduy and tell her to provide that coverage. Although Sarduy did go to the cafeteria in response to Barreto's directive, Sarduy shortly came to the office and told Agosto she would not remain on duty there because she was tired of being called so late. Agosto, at respondent's direction, wrote down Sarduy's exact words on a phone

message slip (Exhibit P-71f). In the message, Sarduy told Agosto to tell Barreto that she would not provide coverage and Barreto could cite her for insubordination.

Agosto also observed the incident involving the student folder. When respondent insisted she wanted the original folder and Barreto said she could not release the original to her (suggesting she make copies), Sarduy become quite upset.

The next District witness was Linda Kowalski who is a school social worker employed for the past six years. She worked about twice a week at School No. 8 where Sarduy was employed in 1999-2000. On January 7, 2000, Kowalski had a meeting scheduled with a parent to discuss an initial evaluation but was not aware until that day that the regular classroom teacher would not be able to attend. Rather than cancel the meeting (both parents were there), she determined a replacement teacher could attend the meeting to provide input. When Kowalski asked Sarduy to assign someone to undertake that function, she was told by respondent that no one was available because there were too many people out that day and there should be no meeting without the regular classroom teacher in attendance.

Nevertheless, since the parents had taken the trouble to come to school for a meeting, Kowalski was intent upon going forward and enlisted the child's speech teacher (Mrs. Kurland) to come with her to the meeting. Toward the end of the session Sarduy came into the room and, as the parents were ready to leave, Sarduy asked them to sit down and inquired if they had received a copy of a parental rights booklet, which they had. After some further discussion, the parents left.

On the same day, Kowalski had another meeting scheduled with a parent which had been rescheduled for her from the previous day. Sarduy told Kowalski not to meet with the parent until she spoke to the Superintendent. Ultimately, respondent told Kowalski she could hold the meeting. Kowalski felt that Sarduy's actions that day were unnecessarily "confrontational" and her behavior was, in Kowalski's view, inappropriate. It was wrong, she said, to heighten tension when the purpose of the meetings was to ease fears. Kowalski also identified a memorandum she prepared describing the two incidents (Exhibit P-29).

The final District witness, Susan Kurland, is a speech specialist also employed at School No. 8 for the last six years. On January 7, 2000, she was approached by Kowalski who advised her that she needed a replacement to attend a meeting with two parents since the regular teacher was not there that day. Since Kurland had the student for speech therapy, and also had special education certification, she arranged to attend the meeting too. At some point before the meeting began, Sarduy approached both Kurland and Kowalski and, "in a loud manner," told them to cancel the meeting because she, Sarduy, had not been informed about it. Kowalski and Kurland held the meeting anyway since the parents had come to school and wanted this to take place. Sarduy came into the room toward the end of the meeting and began making comments in a "loud and demeaning" manner about how she "knew the law". At that point, a secretary called to inform Kowalski that a parent had arrived for a second meeting. Kurland planned to be there as well since it also involved a child to whom she had been giving speech instruction. Sarduy then stood up, pointed her finger at Kurland and declared, "no one is to leave the room". This was done in front of the two parents and was very upsetting. Sarduy told the two of them not to have the next meeting until she spoke to the Superintendent. Later, Sarduy reported she had in fact reached an Assistant Superintendent who said the meeting could take place after all. Kurland, like Kowalski, prepared a memorandum detailing the events (Exhibit P-30).

TETIMONY FOR RESPONDENT

Sarduy then testified on her own behalf. She obtained a degree from a college in her native Cuba in 1961 and came to the United States in 1969. She attended Montclair State College (now Montclair State University) where she obtained both Bachelor's and Master's degrees. She has several teaching and supervisory certifications, including Student Personnel Services, Assistant Superintendent and English as a Second Language. She also received one week of training at Yale University in the Comer methodology of Whole School Reform and had training in "Success for All" at Johns Hopkins University as well.

After coming to the United States and obtaining her degrees, respondent first taught at St. Joseph's High School in Paterson. She began teaching in Passaic in 1974. In 1977, she became a guidance counselor at Passaic High School and served

in that capacity until 1993. Between 1993 and 1999, she held a variety of supervisory positions including Director of Guidance, Supervisor and Assistant Principal, first at School No. 10 in 1995-96. She was transferred to School No. 8 and in September 2000 received her assignment to School No. 6.

Sarduy reported to work at School No. 6 on September 11, 2000. She said she did not receive training nor special advice from Barreto concerning her responsibilities, although she did recall having a meeting, which lasted less than five minutes, at which Barreto merely handed her a list of duties and advised that the school was a "Success for All" school. Sarduy said she had no notice she was going to be assigned to School No. 6 until after school started in early September - no one had advised her before then – and she had no training or experience with "Success for All".

Respondent also explained that she has suffered from a variety of physical ailments, including fibromyalgia and depression, which cause her trouble in sleeping and to always function effectively. That is why she would be absent from time to time. She knew the call-in procedure if she was going to be absent and always did so. However, due to her varying illnesses, she would not always know far in advance how she would be feeling.

With respect to her January 3, 2002 memorandum to staff concerning supplies, plan books and discipline (P-71a), she explained that all three subjects were important to her. With regard to discipline, she was concerned that students referred to her likely were also in need of evaluation for behavioral problems and were being sent to her without consideration of their real needs.

With regard to inadequacy of supplies, prior to here assignment to School No. 6 Sarduy had never been involved with ordering supplies. When she arrived she found that there was not enough and she invited teachers to come and see for themselves. She insisted she never told the staff to take as many items as they wanted. Finally, with regard to her refusal to continue plan book review, she said she previously had questioned Barreto why lesson objectives were not required to be included, but since she never received any response she felt she could not properly continue to perform that duty.

Sarduy also explained that although she did find the reply memorandum from Barreto in her mailbox, she decided to return it unopened so that Barreto could tell her whatever she wanted to in person. In the past when she tried to have discussions with Barreto, the principal avoided meeting with her. Thus, by returning the envelope unopened it provided an opportunity for such a meeting. Only after she received a second envelope did she read the memo. She denied returning a ripped copy to Barreto's office.

With regard to the lunch period incident on January 8, 2002, on the day in question respondent only found out about the need for her to cover for an absent teacher at the last moment. Usually, she would receive a phone call from the office in advance. Thus, on this day, the request was "a big inconvenience" since she had to stop what she was doing, send the students with whom she was dealing back to their class, and then walk into the middle of a lunch period where it could be difficult to exercise control.

Specifically, Sarduy was about half-way through dealing with three students when she was advised to leave to go to the lunchroom. On her way there she was delayed when she had to stop in order to prevent some children from misconducting themselves. She then went to the cafeteria where she found only an aide in charge. Nevertheless, Sarduy shortly left to go to the principal's office to demand to know why only an aide was there. Although she conceded she was not comfortable about leaving the aide alone, she wanted felt so frustrated that she had to pursue the situation immediately with Barreto. When Barreto told her to return to the cafeteria, she did so. Sarduy estimated that she was gone for only two or so minutes.

With respect to the allegation that she refused to cooperate in preventing students who came late to school from going to reading class, she felt this rule was not educationally proper and had expressed concerns to Barreto about it. Sarduy felt it was unfair to penalize students who came late to school when, in many instances, it might have been their parents' fault. When Barreto ultimately did offer suggestions, including Sarduy having to provide instruction to the latecomers, respondent believed this now involved a "contractual thing" and wanted first to discuss the issue with the Superintendent.

Concerning Charge Four, respondent's alleged failure to perform observations of staff members at School No. 8 in 1999-2000, she said she told the Superintendent she could not continue to do them since one of the teachers given a bad rating by her in 1998-99 had succeeded in having herself removed from her list. The teacher, it seems, had complained that Sarduy was not truthful with respect to the observation and she (Sarduy) was asked to make changes on the observation. Thus, when the particular teacher was removed by Scozzaro, respondent considered this action to be detrimental to the integrity of the evaluation system; *i.e.*, she would not be allowed to observe people who previously she had criticized. Sarduy insisted, however, that after being directed to do so by the Superintendent, she again began to perform the observations.

With respect to Charge Five, failing to call in some of her absences, Sarduy again denied she had ever failed to do so.

Concerning Charge Six – respondent's alleged rudeness when the young student was not timely picked up at school, respondent corroborated much of what Tavarez testified had occurred. When Sarduy was told by the person at the home that she was not in charge of the boy, Sarduy told her to have the parent call the school to provide an address and also that she wanted to see the parents personally to make them aware of the seriousness of the situation She conceded she might have been "firm" in her approach, but she was extremely disturbed by the incident and had tried to prevent it from recurring. Sarduy denied she was rude or abusive, and at no time was she ever upbraided or disciplined by Barreto for her conduct.

Insofar as Charge Seven involving her allegedly interrupting the meeting conducted by Mendez is concerned, Sarduy explained it as follows. A student she had counseled had been referred for classification and she believed the process was taking much too long. One day, when she again saw the student sitting idly outside the office, she decided she had to take matters into her own hands and took him with her to see Mendez. Respondent said that she first knocked on the door and asked if she could interrupt and Mendez told her that she could enter the room. Although there was a parent there, she asked him if he understood English, and when he said "no" she spoke to Mendez only in English and urged prompt action be taken with regard to the student. She agreed she told Mendez that if the problem was not solved by the following

Monday, she would call the newspapers. However, Sarduy was very upset over the process taking so long. She fully understands she cannot barge into a meeting and denied that ever occurred.

Taking umbrage over the circumstances of her belated transfer to School No. 6 at the beginning of the 2000 – 2001 school year, Sarduy explained that in 1999-2000, after the principal at School No. 8 had become ill, and would not return, she and others had applied for the position. It was not until August 30, 2000, that she received a call from a secretary who told her Scozzaro, not she, would be selected. Respondent was particularly upset because even though she was the assistant principal at School No. 8 she had not even been interviewed. Although Sarduy received a letter from the Superintendent advising that administrators were to report on August 30, 2000, he had agreed that she would not have to report until September 2. When she did not report on that date either, the Superintendent wrote her to express his concern and he closed his letter with a request that she inform him of her intent regarding her assignment for the 2000-2001 school year (Exh. P-14). To that end, she identified another letter from the Superintendent, dated August 31, 2000, which directed her to meet with him on September 5, to discuss the assignment (Exh. P-50), which she did. Then, in a letter he sent to her on that date, the Superintendent confirmed their discussion and reiterated she would be transferred as an assistant principal to School No. 6 and should report there on September 7. In that letter the Superintendent explained that her transfer was necessitated by the Department of Education's denial of a District request to continue to fund her position at School No. 8 (Exh. P-51). Overall, Sarduy was miffed over her treatment and felt she was unfairly victimized by the late notice of her reassignment.

With respect, again, to the memorandum she sent to staff at School No. 6 on January 3, 2002 declining to review plan books, etc., Sarduy agreed she did not inform Barreto of that intent in advance, and never grieved it either. However, she felt she was placed in an awkward position regarding plan book review because Barreto told her one way to do it, and the central office told her another. Thus, she concluded it was in her best interest to refrain from doing it at all until the Superintendent cleared the matter up.

With regard to distribution of supplies, she again explained that her memorandum meant only that teachers should follow procedures and take what they need from her. As for her refusal to be involved in discipline referrals any further, Sarduy explained she took this position because students were being sent to her again and again who clearly needed screening for possible classification and should really not be treated as "discipline" problems at all. Thus, requiring her to discipline those students, whose needs were different, delayed the delivery of appropriate services to them and it was her intention to have superior authorities take notice of her concern.

Further with respect to the lunch duty coverage incident (Charge Two) Sarduy explained that she received Agosto's call in the middle of the period telling her to proceed to the lunchroom, which she did as soon as she could. When she arrived and found only an aide there, Sarduy felt she had to go to Barreto's office rather than wait until later since she was very upset over a situation which she described as "emergent." She agreed that in retrospect leaving the lunchroom was not the preferable course of action, but at the time felt she had no real choice. After she found Barreto and complained about having been called late yet again, she immediately returned as directed where, she said, the students were already in the process of leaving. She went back to tell Agosto that she was returning to her regular duties, but did tell Agosto to write down that Barreto could cite her for insubordination if she wished. Again, Sarduy was frustrated and upset at having been called to assist in the cafeteria in the middle of the period that day, which then required her to arrange coverage for three other students.

Concerning her alleged refusal to carry out teacher observations in 1999 – 2000 at School No. 8, Sarduy reiterated this occurred only after Scozzaro removed a teacher who had requested that she not be observed by respondent. According to Sarduy, it was unethical for Scozzaro to have acquiesced in that request and she told him what a poor precedent it would set and the untenable position in which she was placed. While Sarduy was aware that nontenured teaching staff members must be observed at least three times per year, she claimed she was not even requested by Scozzaro to do them in time to complete all three by April 15th. She was only able to start her observations in early March because, she said, she had not timely heard from the Superintendent

about her complaint over the removal of the teacher from her list. Ultimately, the Superintendent told her to begin the observations (Exh. P-40).

With regard, again, to that part of Charge Seven involving her allegedly interrupting Mendez while he was involved with another student and a parent, Sarduy reiterated she was extremely concerned about the student she brought with her since she had never received a status report concerning what was being done to place him. At times, she would see the boy sitting in the office for hours at a time, doing nothing, and she felt she had an obligation to step in to speed up the process. Respondent insisted she did not "discuss" the student's case in the other parent's presence, she simply asked Mendez to see to it that the student received classroom instruction while waiting for a placement rather than being given nothing to do for hours at a time. When Mendez told her he had no idea when the placement would occur, she did tell him that she would call the newspapers if nothing was done by the following Monday and she conceded that Mendez possibly could have been intimidated by her demeanor.

DISCUSSION

As noted, seven tenure charges were certified to the Commissioner with respect to respondent's alleged unbecoming conduct and insubordination. They will be discussed in order.

Charge One alleged that during the 2001-2002 school year Sarduy engaged in conduct unbecoming a tenured teaching staff member by failing to perform her assigned duties. In particular, the charge related to the January 3, 2002 missive which Sarduy dispatched to School No. 6 staff members respecting three separate topics: (a) inadequacy of available supplies and their distribution; (b) review of teacher plan books; and (c) discipline cases referred to her (Ex. P-71a). This memorandum was sent by her without any meaningful prior discussion with the principal concerning the topics. Nor did Sarduy alert the principal in advance that she intended to send that memorandum.

At the outset, Sarduy advised staff members that since the school did not have enough supplies, when they filled out monthly request forms for supplies she intended

to let them come on their own to the supply room and, "take what you need . . . ." In her second paragraph Sarduy specifically advised staff members that since September she had "some concerns about the plan books which I have asked on several occasions to be clarified by Ms. Barreto," and since Barreto had not given her a response she declared, "I will not check your plan book until further notice." Finally, Sarduy stated that, "I will not receive any discipline cases that you refer to me" and, further, that "My discipline records are not looked at and/or my opinion, suggestions or recommendations are not taken into consideration or asked at all."

At the very least, sending such a defiant memorandum to staff, especially without first discussing the topics in a meaningful way with Barreto, no less failing to alert her in advance that the memorandum was intended to be sent, was highly unprofessional. All three subjects were responsibilities which had been given to Sarduy, as Barreto noted in her reply memorandum (Ex. P-71b). As Barreto aptly pointed out in that memorandum, whether or not the two agreed on the issues, "is irrelevant to your job responsibility".

I totally agree with that observation. As Barreto noted, distribution of supplies in an orderly fashion was expected - it was not within Sarduy's province simply to allow teachers to come to the supply closet and take whatever they wished. So too, review of plan books and handling disciplinary referrals were vital matters which fell within the ambit of Sarduy's critical responsibilities as assistant principal. As Barreto explained, Sarduy's refusal to perform those duties, "must be viewed as a dereliction of duty and insubordination." Again, I agree. Decisions with respect to distribution of supplies, review of plan books and handling discipline cases referred to her were not to be made unilaterally by Sarduy, especially in a way that failed to accommodate her responsibilities as the assistant principal. To blatantly challenge her principal in this way was deliberately confrontational and bordered upon the appalling. With respect to her refusals vis-à-vis plan books and discipline, at least, Sarduy's behavior was palpably insubordinate.

As if sending the defiant memorandum to staff was not bad enough, when Barreto sent her reply memorandum to Sarduy concerning her expectations that respondent would continue to carry out her assigned duties, Sarduy's return of one of

the opened envelopes to Barreto's secretary, upon which she had written "refused", was petulant and unprofessional. Worse yet, another copy of the memorandum delivered to respondent by Barreto was ripped into pieces and placed back on Barreto's desk (Ex. P-71d.) Although Sarduy denied that action (she admitted she ripped up a copy but said she disposed of it in the trash can), her testimony is not credible. Who else would do that? By her actions on this occasion respondent demonstrated inexcusable rage against Barreto and clearly conducted herself in a highly unbecoming manner. I believe it was Sarduy who saw to it that the ripped copy was returned to Barreto's office. Indeed, yet a third copy of the memorandum was ripped up (likely by Sarduy as well) and placed back in Barreto's mailbox (Ex. P-71e). Such juvenile conduct is inexplicable.

This entire unfortunate chain of events concerning the above incident clearly constituted unacceptable behavior by Sarduy. As assistant principal, she was obliged to carry out her assigned responsibilities in a civilized fashion. If she disagreed with either the substance of the responsibilities, or the process by which they were assigned, it was her obligation as a senior professional staff member with 25 plus years' experience to bring her concerns in a proper fashion to the principal so they could be calmly discussed. Sarduy's conduct went well beyond the range of acceptable responses and easily rose to the level of unbecoming and/or insubordinate conduct. Sarduy knew better than to behave in that childish fashion, and her inability to control herself, followed by her unacceptable behavior in ripping up copies of the memorandum, cannot be tolerated.

With respect to Charge Two concerning the cafeteria coverage incident on January 8, 2002, I believe that Sarduy's behavior in that regard was particularly inappropriate and also constituted conduct both insubordinate and unbecoming a professional teaching staff member. Regardless of her disgruntlement concerning "late" notice to her, once she arrived at the cafeteria and found there was no certified staff member present it was her primary duty to remain there to provide proper supervision. Leaving the scene and proceeding to Barreto's office to complain was unacceptable conduct under any circumstances. To abandon her post in order to make a point concerning late notice and/or inadequate coverage was an extremely poor exercise of judgment. To make matters worse, even after Barreto directed respondent

immediately to return to the lunchroom, Sarduy again abandoned her post prior to the end of the period, returned to the principal's office, told Agosto she would not remain at the cafeteria and that she (Barreto), "can write insubordination letter if you want" (Ex. P-71f).

Particularly troubling about Sarduy's conduct on this occasion was the fact that even she acknowledged the real potential for danger that leaving 200 children in an unsupervised lunch area creates. As Sarduy herself observed, ". . . I was very afraid the student will have a fight, these are big, big boys - - sometimes they bring knives to the school and teacher, me and the students will see themselves and the whole cafeteria on the problem. I was very, very concerned about that." (Tr., June 5, 2003, p. 53-22 to -24.) For that very reason, Sarduy's leaving to go to Barreto's office to complain was extremely disturbing. That Sarduy, herself, knew her conduct was unacceptable (her comment to Agosto to write down "insubordination") reinforces my determination with respect to the unbecoming conduct committed by respondent as alleged in Charge Two. She abandoned her post not once, but twice, during the lunch period when obviously she could and should have remained to provide the coverage which even she agreed was necessary to prevent problems. Whether or not only an aide had been left to supervise the lunchroom in the past was not a justification or an excuse permitting Sarduy to act in the way she did.

Charge Three alleged that when Barreto asked respondent to assist in the implementation of certain aspects of Whole School Reform she responded that she would not do so unless specifically directed by the Superintendent. Testimony was received not only from Barreto with regard to School No. 6, but also from Scozzaro concerning conduct by Sarduy when she was his assistant at School No. 8. Because the testimony concerning the School No. 8 activities was too vague with respect to respondent's role, I will reject findings of culpability as it relates to her conduct in 1999-2000. On balance, while Sarduy may have been unfamiliar with some of the Whole School Reform requirements and/or unsure about the directives she was given pertaining to them, none of her conduct rises to the "unbecoming" level. While she might have been better advised to attempt to discuss the expectations concerning her participation in a more professionally apt fashion, her failure to do so is not a colorable offense.

Charge Four alleges that during the 1999-2000 school year, while serving as assistant principal at School No. 8 under the direction of Scozzaro, Sarduy unilaterally determined that she would no longer perform observations of teaching staff members. The charge continues that even after being directed by the Superintendent to perform those observations, and despite meetings with him as well as communications between them on the subject, respondent continued to refuse to carry out the assigned duty in timely fashion, if at all.

It is not entirely clear precisely when Scozzaro first instructed Sarduy to begin performing her observations with respect to half of the teaching staff members. However, since observations of non-tenured persons must be completed by April of any given school year, clearly the directions were given to her some months in advance. At some point, perhaps in December 1999 or January 2000, Sarduy expressed concern that one of the teaching staff members who she originally was assigned to observe had protested (because of a prior year's observation) and asked that her responsibilities with respect to observing that staff member be removed. When Scozzaro acquiesced in the teaching member's request not to be observed by Sarduy, respondent was disturbed over the propriety and the ethics of that determination and she decided in light of what she believed to be improper conduct by Scozzaro respecting the efficacy of the evaluation process not to carry out the observations (Ex. P-34).

Not unexpectedly, because she had declared she would not do any observations at all, the Superintendent directed Sarduy to meet with him on February 9, 2000 because he had, "serious concerns over several issues that are taking place". The meeting confirmed that Sarduy had determined not to conduct further evaluations.

Apparently, Sarduy nonetheless continued in her contumacious course of conduct not to observe, and in a letter from the Superintendent on March 1, 2000 (Ex. P-40) he pointed out to her that he believed the subject had adequately been addressed during their meeting in February and her obligation as assistant principal required her to perform observations as directed by Scozzaro. He concluded with the observation that, "I trust that I will not have to discuss this matter further".

Yet, even then, Sarduy either did not begin to conduct observations or stated that she would not since, just five days later, on March 6, 2000, the Superintendent sent her yet another letter pointing out her obligations to observe and requesting she meet with him on March 14, 2000 (Ex. P-41). At some point, thereafter, Sarduy apparently did begin to perform observations but, by then, there was inadequate time to do enough of them by April 15. While, technically, she may have performed the duty for a brief time, it was in an extremely limited, ineffective fashion and undertaken only after having been directed on more than one occasion to do so, not only by her immediate superior, Scozzaro, but by the Superintendent himself. Such conduct is both insubordinate and "unbecoming". Sarduy's role as assistant principal was to assist Scozzaro in the evaluation process, not create obstacles. While she may have had a valid complaint with regard to the propriety of removing a teacher from her list at the teacher's request, the self-help action she then took (refusing to conduct further observations at all) was not a tolerable alternative. It was her duty to perform as directed by her superior and she knowingly refused to do so. Placing her own needs ahead of the District's requirements was not an option.

Charge Five alleges that on "several occasions" respondent failed to give notice that she would be absent as required by District policy. While Barreto testified to some absences, the specific nature of the charge is limited to the procedure whereby staff members who expect to be absent must place a telephone call as early as reasonably possible to alert the central office or the school itself to the situation so that there will be time to obtain substitute coverage. The exhibits pertaining to this charge (Exhibit P-56, P-71K) relate to instances whereby Sarduy allegedly failed to provide that telephone notice (January 5, 2001 and September 12, 2001). It appears, as well, that a call she did make on January 4 regarding her absence was not made until shortly after 8:00 a.m.

For her part, Sarduy denied that she ever neglected to make phone calls to advise of her intended absences. On balance, given the relatively minor nature of the infractions (even if they occurred), I do not believe they rise to a level serious enough for me to determine that a tenure charge can be sustained. Thus, Charge Five should be dismissed.

Charge Six alleged that Sarduy performed in an unbecoming manner on the occasion when she had to take a child to his home because no one had picked him up after school on time and that she addressed an adult relative of the child in an "abrasive and unprofessional manner".

In my view, this charge cannot be sustained. First, respondent acted in an entirely appropriate fashion by stepping into a situation whereby a young child presumably was left "stranded" at school. She made proper inquiry to find out where he lived and whether he had a telephone so that a call could be made (apparently he did not), and she then attempted to enlist the aid of the local police, also to no avail. In order to safeguard the young boy, she and Tavarez accompanied him to his home and safely delivered him there. The only testimony with regard to the conversation Sarduy had on that occasion with the boy's "aunt" was offered by Tavarez and Sarduy. While Tavarez felt that Sarduy addressed the aunt in a "firm" manner, there is no direct evidence that she was rude, abusive or otherwise inappropriate in her remarks. Neither the "aunt" nor any other person testified concerning the conversation.

With regard to Sarduy's subsequent conduct in advising the boy he could not come to school unless he was accompanied by a parent or guardian, etc., this apparently was consistent with policy. While, on this occasion, as with many others, Sarduy could have acted in a less confrontational manner, her performance in respect to the entire incident does not rise to the level of unbecoming conduct. Thus, Charge Six should also be dismissed.

The last charge, Charge Seven, relates to Sarduy's conduct concerning child study team meetings. Although there was some general testimony on the subject by Scozzaro, Charge Seven does not relate to that testimony. Rather, it involves specific incidents which took place at School No. 8 during the 1999-2000 school year, and at School No. 6 in 2001-2002.

The first paragraph of Charge Seven relates to the incident at School No. 6 on January 4, 2002 whereby Sarduy, accompanied by a male student, interrupted a meeting conducted by Mendez with the parent of another child and began making demands concerning the status of the child who accompanied her. Whether or not

Sarduy "barged in" to the meeting unannounced (which I suspect she did), or first knocked and asked permission to enter, is not that important. While she may have entertained legitimate concerns with respect to the lack of progress she believed had been made in finding a proper placement for a student, she had no business marching him down to Mendez's office, intruding upon another meeting with a parent, and in the presence of others demand that steps immediately be taken or she would complain to the press. As in several other instances, Sarduy let her emotions get the better of her judgment, and without thinking the matter through in a reasonable fashion, as she was expected to do, taking it upon herself to engage in publicly improper behavior which was inimical to the best interests of the school system.

Simply put, respondent had no business discussing another student's situation in the presence of other persons. Her explanation that she spoke in English and that the parent in the room with Mendez did not understand that language was woefully unacceptable. Making threats in front of the student, a teaching staff member and a parent having no connection with the case she wanted to discuss is beyond the pale of acceptable behavior – it clearly was "unbecoming conduct" within the meaning of the tenure statutes. Sarduy should have known better than to comport herself in such an outrageous fashion. As Mendez aptly observed, even as a first year employee new to the profession it was obvious that what he observed in respect to Sarduy's actions was highly unprofessional. As he testified, "I was very taken aback. . . . . Again, I - - that was my first year. . . . I just - - I was just very taken aback by the whole experience. You know, - - you know I just question the professionalism. And I - - you know, I kinda of - - I was just taken aback. I was just very in shock, I guess." (Tr., April 7, 2003, p. 10-13 to –18.) In fact, Sarduy's conduct was so disturbing that Mendez had to apologize to the parent for the outburst.

The second paragraph of Charge Seven relates to the events which took place at School No. 8 on January 7, 2000 when Sarduy attempted to cancel child study team meetings because she felt the absence of the regular classroom teacher was unacceptable. Testimony was received from Sarduy, of course, and also from the two staff members directly involved, Kowalski and Kurland. Without again going into detail concerning the events which took place, suffice it to say I do not believe that Sarduy's conduct on those occasions rose to a level justifying tenure charges for unbecoming

conduct. While her activities generated a host of memoranda (see, e.g., Exs. P-29,P-30,P-31) the actual events only demonstrated that, at times, Sarduy could be abrasive, insensitive, and disagreeable. While clearly she may have exceeded tolerable limits on occasion, she did not do so with respect to the two meetings she attempted either to delay or cancel. Fortunately, neither meeting was cancelled and no untoward consequences occurred as a result of her actions. Thus, so much of Charge Seven as relates to the incidents at School No. 8 in January should he dismissed.

In reviewing the evidence related to the seven tenure charges, I have chosen not to discuss a variety of other incidents which were testified to during the hearings. I have attempted, instead, to relate my discussion directly to the specific allegations of the charges against which Sarduy was given a fair opportunity to defend. A broad series of minor incidents may, of course, provide a basis to prefer tenure charges. However, they must be more specific than appears in the charges in this case and, therefore, I have determined not to address them or to make any findings concerning them.

In summary, then, I have determined that the allegations against Sarduy contained in Charges One, Two and Four, and the first paragraph of Charge Seven have been sustained by a preponderance of the credible evidence. I have determined to recommend dismissal of the allegations contained in Charges Three, Five, Six and the second paragraph of Charge Seven.

PENALTY

Accordingly, there remains for consideration what penalty is appropriate for the findings of culpability that I have made in this case. Rosa Sarduy emigrated to the United States from her native Cuba after having been educated in that country in preparation for a teaching career. She obtained two degrees here, became employed in Passaic in 1974 and then served in a variety of responsible positions for over twenty-six years. In recent years she seems to have suffered from disabilities which may explain some of the problems which ultimately led to the instant proceedings. Nevertheless, she must account for the clearly unbecoming and persistent insubordinate conduct which I have found to exist in this case.

It is difficult to imagine what prompted someone with Sarduy's experience to behave the way she did on the occasions which led to these tenure charges. To dispatch a memorandum to staff members advising that henceforth she will not carry out her assigned duties, without even first discussing with Barreto both the substance of the communication and the fact that she was going to send it, is unfathomable. Unilaterally declining to review plan books or to engage in the student discipline process is particularly egregious conduct. At times Sarduy seemed intent upon exhalting her own interests over that of the District, and while her assignment to School No. 6 in 2000 was made in a manner which she felt to be precipitous, her disgruntlement with the process did not justify what she did thereafter. Assistant principals do not, as she did, decline to perform the responsibilities assigned to her by the principal, particularly where the two of them are the only administrators in an elementary school responsible for 800 students in kindergarten through sixth grade. Cooperation should be the hallmark of that relationship, not the defiance and confrontation which Sarduy seemed incapable of avoiding. It was not respondent's right to make up her own rules concerning distribution of supplies, and she had no business self-determining not to review teacher plan books or not to involve herself in disciplinary matters. Those were not her choices unilaterally to make. Although she claimed she attempted to discuss the matters with Barreto without success, the record is woefully inadequate in terms of what those efforts might have been. Even if respondent obtained less than satisfactory responses from Barreto, her proper course of action would have been to appeal to higher authority (as she seemed quite capable of doing on other occasions). Her memorandum of January 3, 2002 to the staff members at School No. 6 was not only unbecoming, it consisted, as well, of publicly insubordinate behavior which is not tolerable in any tenured teaching staff member, no less an assistant principal with over twenty-five years experience. Then, to make matters much worse, she deliberately and contumaciously ripped up memoranda delivered to her by Barreto concerning her misconduct. That infantile and petulant behavior was unbecoming and insubordinate in the extreme.

Of equally high concern was the behavior displayed by Sarduy with regard to the cafeteria coverage incident. She, herself, described the potential dangers which can arise when an experienced, certified teaching staff member is not present during a lunch period where 200 or more students are congregated in an informal setting like

that. Despite her admitted awareness of the pitfalls, she left the cafeteria unsupervised by a certified person not once, but twice, in order to complain to the principal about being notified "late" (which could have waited) and/or about the lack of coverage by a certified person which she, herself, was creating. I cannot conceive of any justification for that unbecoming conduct, and the abandonment of her post a second time was insubordinate as well.

Another highly disturbing event was the occasion involving Sarduy's interrupting the meeting conducted by Mendez. Clearly, Sarduy had no business taking a student to a meeting while the parent of another child was there to discuss his own child's situation and berating Mendez for the alleged lack of action in connection with the child who accompanied her. Even if I assume that her dismay was justified (and the testimony in that regard is not at all clear), and even if the parent meeting with Mendez did not understand English, how a senior administrator with respondent's special education certification and employment experience can behave in that way almost defies description, no less comprehension. Even a first year employee like Mendez knew her behavior was shockingly unprofessional, and to his credit he apologized to the parent for what had taken place.

These several incidents, alone, under normal circumstances could justify the removal of a tenured teaching staff member. When, added to them, are the additional findings I have made with regard to some of the other behaviors exhibited by respondent, that outcome appears to be inevitable. No school district need tolerate the arrogant behavior displayed by Sarduy toward Scozzaro (if not the Superintendent as well) by refusing to carry out observations even though directed to do so, or towards Barreto (defying her instructions, dispatching critical memoranda to staff without first discussing them with the principal and defying Barreto to cite her for insubordination). Dismissal of tenured teaching staff members has been found appropriate in situations involving much less untoward conduct than that.

In determining what an appropriate penalty recommendation to the Commissioner should be, it is difficult to ignore the service Sarduy has given to Passaic for many years in a variety of senior positions. Recommending the removal of any tenured teaching staff member is a regrettable action under any circumstances.

Nevertheless, Sarduy's service to the District and the parents, students and taxpayers it represents, clearly was so severely compromised by her unbecoming conduct and insubordinate behavior as to justify that her employment relationship be severed.

Even accounting for Sarduy's passionate beliefs and her concerns for students, sadly her deficient and largely self-interested behavior provides an ample basis for her removal. Indeed, it was as if respondent had embarked upon an almost deliberate course of career self-destruction. No staff member, particularly an assistant principal, can act in the manner Sarduy did and logically expect to be retained in his or her employment. No tenured teaching staff member, no less an assistant principal, can so militantly defy lawful directives from a superior, by ripping corrective memorandum and return them in that condition to the superior, leaving a busy lunchroom unattended by a certified staff person to challenge her superior to cite her for insubordination, and by intruding into meetings involving child study team members and parents where she has no business to be and comporting herself there in an entirely unacceptable fashion. As an assistant principal with her years of experience, Sarduy knew better than to embark upon the stridently negative path she seems to have chosen. Teaching staff members, including assistant principals, are required to be role models for students and staff. They are not permitted to be so confrontational, deliberately obstreperous and fiercely insubordinate as she was. Many staff members with whom Sarduy came in contact were negatively impacted by her - teaching staff, clerical workers, principals, child study team members, and even the Superintendent of Schools himself. As noted by the District, tenured teaching staff members (be they teachers or administrators) are expected, not just requested, to exhibit self-restraint and controlled behavior and not act in such a way as to so consistently impact upon the morale or the efficiency of the department or school in which they serve in such counterproductive ways. The high standards expected of someone in Sarduy's position, beginning in 1999-2000 and continuing into 2000-2001 and 2001-2002 were not met by her and the inexorable consequence, given the proven charges, is her removal from her tenured position.

Accordingly, in light of the circumstances described herein, I **ORDER** that the respondent, Rosa Sarduy, be **DISMISSED** from her employment as a tenured assistant principal.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 31, 2003
DATE

STEPHEN G. WEISS, ALJ

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

10/31/03
DATE

Mailed to Parties:

NOV 0 3 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

Md/mvh

APPENDIX

WITNESSES:

For School District of the City of Passaic

John Scozzaro
Celinda Barreto
Josefa Tavarez
Robert Mendez
Lydia Agosto
Linda Kowalski
Susan Kurland

For Respondent:
Rosa Sarduy

EXHIBITS

P-1 (For identification) Evaluation form, 6/13/97
P-2 (For identification) Letter from Rosa Sarduy to Dr. Robert Holster, 7/10/97
P-3 (For identification) Letter from Dr. Robert Holster to Rosa Sarduy, 9/24/97
P-4 (For identification) Letter from Dr. Robert Holster to Rosa Sarduy, 9/25/97
P-5 Job Description for Assistant Principal, 1/25/99
P-6 (For identification) Memo from Dr. Robert Holster to Rosa Sarduy, 5/24/99
P-7 (For identification) Letter from Rosa Sarduy to Education Association re Grievances, 6/8/99
P-8 (For identification) Letter from Rosa Sarduy to Dr. Robert Holster, 6/9/99
P-9 (For identification) Letter from Dr. Robert Holster to Rosa Sarduy, 6/10/99
P-10 (For identification) Memo from Dr. Robert Holster to Rosa Sarduy, 6/11/99
P-11 (For identification) Memo from Pamela Russell to Trena Araujo, 7/8/99
P-12 (For identification) Letter from Derlys Gutierrez, Esq., to Rosa Sarduy, 7/14/99

P-13 (For identification) Memo recommending John Scozzaro for Acting Principal of School No. 8, undated

P-14 Letter from Dr. Robert Holster to Rosa Sarduy, 9/3/99

P-15 (For identification) Letter from Dr. Robert Holster to Rosa Sarduy, 9/7/99

P-16 (For identification) Letter from Dr. Robert Holster to staff member of School No. 8, 9/7/99

P-17 (For identification) Letter from Rosa Sarduy to Dr. Robert Holster, 9/13/99

P-18 Letter from Rosa Sarduy to John Scozzaro, 9/14/99

P-19 Memo from John Scozzaro to Rosa Sarduy, 9/15/99

P-20 (For identification) Letter from Dr. Robert Holster to Rosa Sarduy, 9/21/99

P-21 (For identification) Letter from Dr. Robert Holster to Rosa Sarduy, 10/8/99

P-22 (For identification) Letter from Rosa Sarduy to Dr. Robert Holster, 11/8/99

P-23 (For identification) Letter from Dr. Robert Holster to Rosa Sarduy, 11/5/99

P-24 (For identification) Letter from John Scozzaro to Derlys Gutierrez, Esq., 11/30/99

P-25 (For identification) Memo from Rosa Sarduy to Derlys Gutierrez, Esq. and attached grievance, 12/3/99

P-26 Memo from John Scozzaro to Rosa Sarduy, 12/16/99

P-27 (For identification) Memo from Rosa Sarduy to John Scozzaro, 1/14/00

P-28 Memo from Violet Vazquez to Dr. Frank D'Ambra, 1/12/00

P-29 Memo from Linda Kowalskit re incident of 1/7/00 at School No. 8, undated

P-30 Memo from Susan Kurland re incident of 1/7/00 at School No. 8, undated

P-31 Memo from Carolyn Friedman to Dr. Frank D'Ambria re incident of 1/7/00, undated

P-32 (For identification) Two notes from Rosa Sarduy, undated

P-33 Memo from Rosa Sarduy to R. Holster, J. Scozzaro and F. D'Ambra, 2/3/00

P-34 Letter from Rosa Sarduy to Dr. Robert Holster, 2/3/00

P-35 (For identification) Memo from Dr. Robert Holster to Rosa Sarduy, 2/4/00

P-36 (For identification) Handwritten note by Rosa Sarduy to D'Ambra, 2/14/00

P-37 (For identification) Memo from D'Ambra to Rosa Sarduy, 2/15/00

P-38 (For identification) Notes from meeting with Rosa Sarduy, 2/10/00

P-39 (For identification) Memo from D'Ambra to Rosa Sarduy, 2/28/00

P-40 Letter from Dr. Robert Holster to Rosa Sarduy, 3/1/00

P-41 (For identification) Letter from Dr. Robert Holster to Rosa Sarduy, 3/6/00

P-42 (For identification) Letter from Rosa Sarduy to Dr. Robert Holster, 3/7/00

P-43 (For identification) Memo from Rosa Sarduy, 4/6/00

P-44 (For identification) Letter from Orlando Castro and Scott Henry to John Scozzaro, 4/10/00

P-45 (For identification) Memo from John Scozzaro to Rosa Sarduy, 4/20/00
P-46 (For identification) Letter from Dr. Robert Holster to David Ben-Asher, Esq., 5/1/00
P-47 Evaluation Form, 6/12/00
P-48 (For identification) Letter from Rosa Sarduy to Dr. Robert Holster, 7/30/00
P-49 (For identification) Attendance Record for Rosa Sarduy, 2000-2001
P-50 Letter from Dr. Robert Holster to Rosa Sarduy, 8/31/00
P-51 Letter from Dr. Robert Holster to Rosa Sarduy w/attachments, 9/5/00
P-52 (For identification) Memo from Celinda Barreto to Rosa Sarduy, 9/6/00
P-53 (For identification) Memo from Dr. Robert Holster to Rosa Sarduy, 10/30/00
P-54 (For identification) Letter from Celinda Barreto to Dr. Robert Holster, 11/16/00
P-55 (For identification) Memorandum from Dr. Robert Holster to Rosa Sarduy, 12/13/00
P-56 (For identification) Memo from Celinda Barreto to Rosa Sarduy, 1/5/01
P-57 (For identification) Memo from Celinda Barreto to Rosa Sarduy, 1/12/01
P-58 (For identification) Letter from Celinda Barreto to Dr. Robert Holster, B. Stein, J. Scozzaro and G. Henderson, 1/23/01
P-59 (For identification) Memo from Celinda Barreto to Rosa Sarduy, 2/28/01
P-60 (For identification) Evaluation Form for Administrators, undated
P-61 (For identification) Memo from Rosa Sarduy to Holster and Gutierrez, 10/5/01
P-62 Memo from Celinda Barreto to Rosa Sarduy, 10/12/01
P-63 (For identification) Memo from Rosa Sarduy to Steve Bondales & attached grievance, 10/19/01
P-64 (For identification) Memo from Rosa Sarduy to Steve Bondales & attached grievance, 10/19/01
P-65 (For identification) Memo from Rosa Sarduy to Steve Bondales & attached grievance, 10/19/01
P-66 (For identification) Letter from Rosa Sarduy to Dr. Robert Holster, 10/23/01
P-67 (For identification) Memo from Rosa Sarduy to Steve Bondales & attached grievance 5/1/02, 10/31/01
P-68 (For identification) Memo from Rosa Sarduy to Steve Bondales and attached grievance, 11/19/01
P-69 (For identification) Memo, Rosa Sarduy to Boudalis, etc., November 19, 2001

P-70 (For identification) Letter, Dr. Robert H. Holster to Regina DeLaCruz, Esq., January 7, 2002

P-71 Memorandum from Celinda Barreto to Rosa Sarduy w/encl.

P-71(a) Memorandum from Rosa Sarduy to staff members, January 3, 2002

P-71(b) Memorandum from Celinda Barreto to Rosa Sarduy, January 3, 2002

P-71 (c) Copy of sealed envelope containing notes from Rosa Sarduy

P-71 (d) Torn pieces of reply memorandum from Celinda Barreto to Rosa Sarduy

P-71(e) Torn pieces of Celinda Barreto memorandum to Rosa Sarduy

P-71(f) Copy of telephone message dictated to Agosto by Rosa Sarduy, January 8, 2002

P-71(g) Memorandum from H. Sullivan to Celinda Barreto, January 10, 2002

P-71(h) Memorandum from Dr. Frank D'Ambra to Rosa Sarduy, January 7, 2002

P-71(i) Request for attendance at training conference, November 9, 2000

P-71(j) Memorandum from Celinda Barreto to Rosa Sarduy, October 12, 2001

P-71(j) Memorandum from Celinda Barreto to Rosa Sarduy, October 12, 2001

P-71(k) Memorandum from Celinda Barreto to Rosa Sarduy, September 12, 2001

P-71(l) Copy of purchase order

P-71(m) Copies of plan book schedules

P-71(n) List of supplies and attached photographs

P-71(n)(a) (For Identification) Copies of photographs

P-71(o) Memorandum from Josefa Tavares to Celinda Barreto, January 14, 2002

P-71(p) Memorandum from Barreto to Rosa Sarduy, October 12, 2000

P-71(q) Memorandum from Celinda Barreto to Rosa Sarduy, January 5, 2001

P-71(r) (For identification) Log book

P-71(s)(For identification) Memorandum from Celinda Barreto to Rosa Sarduy, January 12, 2001

P-71(t) (For identification) Letter from Celinda Barreto to Dr. Robert H. Holster, January 23, 2001

P-72 Memorandum from Celinda Barreto to Rosa Sarduy, January 28, 2002

OAL DKT. NO. EDU 5474-02
AGENCY DKT NO. 154-5/02

IN THE MATTER OF THE TENURE	:	
HEARING OF ROSA SARDUY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
PASSAIC, PASSAIC COUNTY.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the District's reply thereto were filed in accordance with *N.J.A.C.* 1:1-18.4 and were fully considered by the Commissioner in his determination herein.

Upon his full independent review of the record in this matter, which included transcripts of the hearing at the OAL,[1] the Commissioner concurs with the Administrative Law Judge (ALJ) that Charges 1, 2, 4 and the first paragraph of Charge 7 have been sustained by a preponderance of the credible evidence.[2] The Commissioner further concurs with the ALJ, for the reasons fully and fairly presented on pages 29-32 of his decision, that the proven charges against respondent warrant termination from her tenured position.

Accordingly, the Initial Decision of the OAL is adopted for the reasons articulated therein. The Commissioner hereby directs that Rosa Sarduy be dismissed from her employment as a tenured assistant principal with the School District of Passaic as of the date of this decision.

[1] Hearing in this matter was conducted on December 3, 2002, January 22, 2003, March 7, 2003, April 7, 2003, May 28, 2003 and June 5, 2003.

[2] The Commissioner agrees, for the reasons aptly stated by the ALJ, that Charges 3, 5, 6 and the second paragraph of Charge 7 are appropriately dismissed.

A copy of this decision shall be transmitted to the State Board of Examiners for action as that body deems appropriate.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 12/11/03

Date of Mailing: 12/16/03

[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.*

652-05

652-03SEC

IN THE MATTER OF DR. JONATHAN HODGES, BOARD OF EDUCATION OF THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

The School Ethics Commission determined that respondent Board member violated *N.J.S.A.* 18A:12-24(a) of the School Ethics Act due to conflict of interest. A fellow Board member alleged that respondent had interest in a preschool that had a contract with the District and that he voted to approve payments to the preschool.

After considering the nature of the charges, and the fact that the preschool no longer was under contract to the District, the Commission recommended the penalty of reprimand. The Commission found that even though respondent sold his shares in the preschool, he held the note for the sale of his shares and had received at least one payment drawn on the preschool's general business account.

Upon review of the record, the Deputy 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.

December 15, 2003

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C13-03**
DR. JONATHAN HODGES	:	
PATERSON BOARD OF EDUCATION	:	**DECISION**
PASSAIC COUNTY	:	
	:	

03 OCT 31 PM 4:30

PROCEDURAL HISTORY

The above matter arises from a complaint filed by Paterson Board of Education (Board) member Juan Santiago on March 7, 2003, alleging that fellow Board member Jonathan Hodges, M.D., violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Specifically, the complainant alleges that Dr. Hodges had interest in a preschool that has a contract with the District and that he voted to approve payments to the preschool in violation of N.J.S.A. 18A:12-24(a) and (b).

Dr. Hodges filed an answer to the complaint on April 3, 2003 and filed an amendment to his answer on April 24, 2003. He admitted that he voted to pass resolutions during the Board meetings of September 18, 2002 and January 8, 2003, but was not specific as to the content of those resolutions. Dr. Hodges asserted that prior to his election to the Board, in April of 2002, he had a financial interest in the Kidz Pre-school Academy ("Academy"), but sold his interest in the Academy upon his election to the Board. He responded that he has had no role in the Academy's management, since that time. Dr. Hodges denies that he violated the Act.

The Commission invited the parties to attend its June 24, 2003, meeting to present witnesses and testimony to aid in the Commission's investigation. Mr. Santiago appeared represented by John D. Lynch, Esquire. The Commission also heard testimony from his witness, Toni Scholing, an internal auditor with the Board. Dr. Hodges appeared represented by Joel M. Miklacki, Esquire. Joseph Atallo, a member of the Board, was also present, as witness for Dr. Hodges. After hearing testimony, the Commission tabled the matter.

At its public meeting on July 22, 2003, the Commission found probable cause that Dr. Hodges' conduct was in violation of the Act, N.J.S.A. 18A:12-24(a) and (b) of the Act. The Commission asked Dr. Hodges to file a written submission in response to the finding of probable cause. He was also asked to comment on the appropriate penalty should the Commission determine that he violated the Act. Dr. Hodges filed a timely response. After consideration of Dr. Hodges' response to its probable cause decision, the Commission found, at its meeting of September 23, 2003, that Dr. Hodges violated N.J.S.A. 18A:12-24(a), but that he did not violate N.J.S.A. 18A:12-24(b) and dismissed this charge against him.

FACTS

The Commission find the following facts to be undisputed.

Dr. Jonathan Hodges was elected to serve on the Paterson Board of Education in April 2002. He and Malikah Abdulla incorporated Kidz Academy in the State of New Jersey in 1996 to provide daycare and after school care for children. Dr. Hodges and Ms. Abdulla were the two sole shareholders. The Paterson School District became an "Abbott" District in 1989 and, therefore, became entitled to receive State funding. In 1999, 2000 and 2001 the Academy contracted with the Paterson School District to provide pre-school services. The Academy was allotted a total of $354,000 in State funding for the 2001-2002 school year. Dr. Hodges was designated a salary of $30,000 for the same year, as the Academy's Chief Financial Officer.

In April 2002, Dr. Hodges was elected to the Board. On April 23, 2002, Dr. Hodges executed an agreement to sell his 500 shares in the Academy to Ms. Abdullah, who was the executive director of the Academy at that time. The agreement stipulated that the purchase price for the 500 shares was $500,000 to be paid in installments of $2,777.78 per month, with interest, commencing June 1, 2002 and concluding June 1, 2017.

In January 2003, the District prepared an audit of Kidz Academy which revealed that Dr. Hodges received a check from the Academy in the amount of $2,500, dated September 6, 2002. The memo at the bottom of the check notes it as a "mortgage payment." In his certification, Dr. Hodges indicated that Ms. Abdullah has other businesses that she runs in addition to the Academy that have no connection with the Board. He asserted that for business purposes, Ms. Abdullah channeled the proceeds of these businesses into the Academy's general business account.

Dr. Hodges testified that he advised the Board that for one year he would not vote on matters regarding early childhood education in an effort to avoid the appearance of conflict. At the Board's September 18, 2002 meeting, Dr. Hodges voted to pass a resolution to pay vendors' bills, including the payment of $52,115.40 to the Academy. Dr. Hodges also voted to approve the payment of $52,115.40 to the Academy at the Board's January 8, 2003 meeting.

The Board did not renew its contract with Kidz Academy for the 2003-2004 school year.

ANALYSIS

The Commission found probable cause that Dr. Hodges violated N.J.S.A. 18A:12-24(a) and (b) of the Act. Section (a) provides:

> No school official or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest.

The Commission noted in its decision on probable cause that under N.J.S.A. 18A:12-23, "interest" is defined as the ownership or control of more than 10% of the profits, assets, or stock of a business. While Dr. Hodges agreed to sell his 500 shares in the Academy to Ms. Abdullah for $500,000, the agreement stipulated that the payments were to be made in installments of $2,777.78 per month for a period of 15 years. As a result, Dr. Hodges holds the note for the sale of his shares. The Commission also recognized that Ms. Abdullah has only been paying on the note for one year. The Commission found that the note is an asset. Therefore, in its probable cause decision, the Commission found that Dr. Hodges held an interest in the assets of the Academy, due to the agreement, which is in substantial conflict with the proper discharge of his duties in the public interest.

In his response to the Commission's probable cause decision, Dr. Hodges argues that he divested all of his interest in Kidz Academy. He indicates that in exchange for the relinquishment of his interest and control of the business, he received an unsecured Promissory note from Malikah Abdullah. Dr. Hodges argues that the note does not provide for the return of stock or control of Kidz Academy upon default, is not collateralized with any security against the business and is not contingent upon Kidz Academy continuing to do business with the Board.

The Commission acknowledges the agreement binding Ms. Abdullah and not the Academy. However, the Commission recognizes that upon the default of the agreement, Dr. Hodges would have a legal claim to Ms. Abdullah's assets, which include the Academy. The Commission recognizes that Dr. Hodges does not currently hold interest in the Academy. However, it is undisputed that Dr. Hodges received at least one check from Ms. Abdullah that was drawn on the general business account of the Academy. The Commission finds that this one transaction was in substantial conflict with the proper discharge of Dr. Hodges' duties in the public interest, since the Academy receives funding from the District. The Commission, therefore, finds that Dr. Hodges violated N.J.S.A. 18A:12-24(a).

The Commission also found probable cause to credit the allegation that Dr. Hodges voted to approve the payment of $52,115.40 to the Academy in violation of N.J.S.A. 18A:12-24(b), which 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.

The Commission reasoned that there was sufficient evidence that Dr. Hodges used his official position to ensure that by voting on the payments, Ms. Abdullah could

continue to pay him. In his response to the Commission's probable cause decision, Dr. Hodges asserts that the vote to pay the Academy "was not a preferential vote, but was one of hundreds of vendor bills approved for payment." Dr. Hodges argues that he did not use or attempt to use his position to secure unwarranted advantages or privileges.

The Commission is persuaded by Dr. Hodges' argument and finds that there is insufficient information to demonstrate that he cast the aforementioned vote to use or attempt to use his official position to secure an unwarranted advantage for himself or others. Therefore, the Commission finds that Dr. Hodges did not violate N.J.S.A. 18A:12-24(b).

DECISION

For the foregoing reasons, the Commission finds that Dr. Hodges violated N.J.S.A. 18A:12-24(a). The Commission, however, finds that Dr. Hodges did not violate N.J.S.A. 18A:12-24(b) and dismisses this charge against him.

PENALTY

Based on the findings set forth above that Dr. Hodges received funds drawn on the general account of the Academy, which was a vendor of the District, the Commission found that Dr. Hodges violated N.J.S.A. 18A:12-24(a), and should receive a reprimand. This penalty is warranted in that Dr. Hodges must be admonished that his action was wrong and that the Commission will not tolerate such action from him or others. The Commission does not recommend a higher penalty in this instance because it is mindful that Dr. Hodges initially took precautions to try to comply with the law. The fact that the Board no longer contracts with the Academy should preclude future conflicts. Therefore, the Commission recommends that the Commissioner of Education impose a penalty of a reprimand in this matter.

This decision, having been adopted by the Commission, 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 thirteen (13) days from the date on which the Commission's decision was mailed to the parties, the respondent 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 – C13-03

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof; and the testimony, and,

Whereas, the Commission found that Dr. Jonathan Hodges violated N.J.S.A. 18A:12-24(a) of the School Ethics Act, but found that he did not violate N.J.S.A. 18A:12-24(b) and dismissed the charges against him; and

Whereas, the Commission believes that the penalty of a reprimand is the appropriate sanction for Dr. Hodges;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter finding the respondent in violation of the School Ethics Act and recommends that the Commissioner of Education impose the penalty of a reprimand.

Paul C. Garbarini, Chairman

I hereby certify that the School
Ethics Commission adopted this decision
at its public meeting on October 31, 2003.

Lisa James-Beavers
Executive Director

(PG/LJB/JR/e:ethics/decisions/c13-03dec)

AGENCY DKT. NO. 401-10/03

IN THE MATTER OF DR. JONATHAN HODGES, BOARD OF EDUCATION OF THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The Deputy Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, has reviewed the decision of the School Ethics Commission (Commission) and the record of this matter. The matter comes before the Commissioner pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1 to impose a sanction upon respondent, a member of the Board of Education of the Paterson State-operated School District, based on the Commission's finding that respondent violated the School Ethics Act. Specifically, the Commission found that respondent violated *N.J.S.A.* 18A:12-24(a) by maintaining an interest, through receipt of a Promissory Note payment drawn on the general business account of the program, from the new owner of a daycare/after-school program formerly co-owned by him and performing, during the time relevant to these proceedings,[1] under a contract with the District. For that violation, the Commission recommended that respondent be reprimanded.

Respondent filed a timely comment on the Commission's decision, wherein he notes his continuing disagreement with the Commission's interpretation of "interest" as set forth in *N.J.S.A.* 18A:12-24(a), but indicates that, if the Commission's

[1] As noted by the Commission, the program in question is no longer under contract to the District.

interpretation is accepted, the recommended reprimand is a fair penalty for the violation found. (Respondent's Comment at 1)[2]

At the outset, the Deputy Commissioner emphasizes that, in accordance with *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, only the School Ethics Commission may determine whether a violation of the School Ethics Act has occurred, and that the Commission's decision in that regard, including its underlying conclusions of law, is not reviewable by the Commissioner. Rather, the Commissioner's jurisdiction is limited to review of any sanction the Commission may recommend based upon its determination that a school official has violated the Act.

Given the limitations of the Commissioner's review and upon full consideration of the record in this matter, the Deputy Commissioner finds no cause to disturb the Commission's recommended sanction, which fairly considers both the nature and the circumstances of respondent's offense.

Accordingly, for the reasons expressed in the decision of the School Ethics Commission, IT IS hereby ORDERED that Dr. Jonathan Hodges be reprimanded as a school official found to have violated the School Ethics Act.[3]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 12/15/03

Date of Mailing: 12/16/03

[2] Comments were also submitted by the Complainant in the underlying school ethics matter; however, these were not considered by the Commissioner. *In re Pannucci*, decided by the State Board of Education March 1, 2000.

[3] This decision may be appealed to the State Board of Education in accordance with *N.J.S.A.* 18A:6-27 *et seq.*, *N.J.S.A.* 18A:12-29(d) and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to the latter, Commissioner decisions are deemed filed three days after the date of mailing to the parties.

653-03

K.J., on behalf of minor child, A.J.,	:	
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 his brother, A.J., who came from the Palestinian area of Ramala, Israel, to live with him, was not entitled to a free public education under the "affidavit student" provision of *N.J.S.A.* 18A:38-1b.

The ALJ concluded that A.J., an American citizen, was entitled to a free public education in the District since he came to live with petitioner due to legitimate family or economic hardship and not solely in order to attend school in the District. Moreover, petitioner provided all of A.J.'s financial support. The ALJ granted petitioner's request that A.J. be permitted to attend school in the District without cost for the period from October 11, 2001 to April 17, 2003 and dismissed the Board's counterclaim for tuition.

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.

December 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8307-01
AGENCY DKT. NO. 404-10/01

K.J., ON BEHALF OF MINOR CHILD, A.J.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,
Respondent.

Charles Ira Epstein, Esq., for petitioner

Georgia Tarachas Shikar, Esq., for respondent (Chasan, Leyner, Bariso & Lamparello, attorneys)

Record closed: October 30, 2003 Decided: November 6, 2003

BEFORE **ROBERT J. GIORDANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, K.J., appealed the determination by respondent, Board of Education of the City of Clifton (Board/District), that his minor brother, A.J., was not entitled to a free public education in the District. Petitioner claimed that the minor child was entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(b). Respondent answered that

the application had not shown family or economic hardship or otherwise satisfied the requirements of *N.J.S.A.* 18A:38-1b(1). On September 25, 2001, the Board denied petitioner's application to have A.J. admitted to school in the District. On October 3, 2001, K.L. appealed the Board's denial pursuant to *N.J.S.A.* 18A:38-1 concerning this residency dispute. A.J.. was permitted to attend school in the District during the pendency of the appeal, commencing October 11, 2001. On November 9, 2001, the Board filed an answer denying the allegations in the petition, with a counterclaim for tuition.

On November 29, 2001, the Department of Education transmitted the matter to the Office of Administrative Law for a hearing as a contested case. A hearing was scheduled for August 8, 2002. Petitioner failed to appear on the hearing date. Counsel for respondent requested relief pursuant to the counterclaim for tuition. Respondent was to submit an affidavit in support of the application for tuition to the undersigned. No affidavit being received, the matter was rescheduled for hearing on the matter. After several adjournments, petitioner contacted the OAL and advised that he had not received notice of hearing in the matter. He had moved and no notices were received at that new address. The matter was rescheduled for hearing for July 17, 2003. At the hearing, petitioner requested additional time to retain an attorney. Since petitioner had moved from the district and the claim for tuition was fixed at the period from October 11, 2001 to April 17, 2003, an adjournment was granted. Charles Ira Epstein, Esq. entered an appearance on behalf of petitioner and the matter was rescheduled for September 16, 2003. At the conclusion of the hearing, the record remained open for the receipt of an amended affidavit regarding the *per diem* tuition charges in the District for the relevant time period. The affidavit was received on October 30, 2003. Thereafter, the record was closed.

STIPULATED FACTS

The parties agreed and stipulated that the minor student, A.J., was domiciled in Clifton and attended school in the District from October 11, 2001 to April 17, 2003.

FACTUAL DISCUSSION

Respondent called no witnesses but introduced documents in evidence. Included in the documents moved into evidence are the Affidavit of Karen Perkins, Business Administrator and Board Secretary for the Clifton Board of Education (R-1).[1] Additionally, respondent introduced the application submitted by petitioner (R-2), the letter from petitioner to the Commissioner of Education, requesting an appeal of the determination of the Clifton Board of Education (R-3), and the letter of determination by the Clifton Board of Education dated September 25, 2001 (R-4).

Testimony

T.J.

T.J., sixty years of age, is the father of petitioner, K.J., and the minor student, A.J. He is an American citizen who has resided in Ramala, Israel, since 1982. He lives there with nine family members for whom he is the sole means of support. Living with him are his wife and twelve-year-old son, B.J. Also living with them are his mother, two sisters, a sister-in-law and her three children. They live in an apartment with two bathrooms and three bedrooms. He indicated that there is little space for all of the family members. He is a teacher earning $1,200 per month. He has no other means of support or income. The household spends approximately $700 per month for food, $200 for insurance, and $300 for telephone and utilities. Often, he must borrow money from others to meet financial obligations.

The witness testified that he has three sons living in the United States. They are K.J., 26 years of age, and his brother, A.J., as well as another son, R.J., who is 27 years of age and also lives in Clifton, New Jersey. Both K.J. and R.J. came to the United States to live when they turned eighteen years of age. The minor son, A.J., came to the United States when he was fifteen years of age. None of the sons has any plans to return to Israel to live. The witness testified that he provided no financial

[1] The original affidavit marked R-1 was amended by subsequent affidavit dated October 23, 2003. The amended affidavit replaces the original affidavit and is also marked R-1 in evidence.

support for A.J. and that A.J. is supported solely by his brother, K.J. In fact, K.J. had to pay for the father's trip to the United States.

K.J.

The witness testified that he is the brother of the minor, A.J. He is employed as a salesman and is the sole support for A.J. He has been the sole support for his brother since he came to the United States to live. He testified that he would continue to support his brother beyond school years. In fact, his brother left school without graduating in April 2003 and K.J. has continued to support him. The witness testified that he receives no financial help in supporting his brother.

He further testified that his brother could not stay in Israel because of the situation there. The country is confronted with what was described by the witness as war. A.J. will have a better life in the United States.

K.J. himself came to the United States in 1994. His older brother had previously moved to the United States when he turned eighteen years of age. They each graduated from high school in Israel before coming to the United States. Only the younger brother, A.J., had not yet graduated before coming here.

FINDINGS OF FACT

Based on the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess their credibility, I make the following **FINDINGS** of **FACT**:

1. The minor child, A.J., was born on February 3, 1986.

2. His father, T.J., is an American citizen living in Israel, along with nine other family members, in a three-bedroom, two-bathroom apartment. They are his wife, son, mother, two sisters, a sister-in-law and her three children.

3. T.J. is a teacher in Israel, earning $1,200 per month. He is the sole support for the family members living together in Israel.

4. The family has monthly expenses of approximately $700 for food, $200 for insurance, and $300 for telephone and utilities. T.J. has difficulty supporting his family in Israel.

5. T.J. has three sons living in the United States. R.J. is 27 years old and living in Clifton, New Jersey.

6. K.J. is 26 years old and is also living in Clifton, New Jersey.

7. Both R.J. and K.J. came to the United States at the 18 years of age after graduating high school in Israel.

8. A.J. came to the United States when he was 15 years old, not yet having graduated from high school. He went to live with his brother, K.J., who has supported him since that time.

9. K.J. receives no remuneration for caring for A.J. and provides support and care for him *gratis*.

10. A.J. has no plans to return to Israel to live.

11. A.J. left high school before graduating in April 2003.

12. A.J. has continued to live with and to be supported by K.J. since that time.

13. A.J. attended school in the District for 157 days in the 2001-2002 school year.

14. The tuition cost for A.J. at Clifton High School for 157 days during the 2001-2002 school year was $7,264.74.

15. A.J. attended school in the District for 132 days in the 2002-2003 school year.

16. The tuition cost for A.J. at Clifton High School for 132 days during the 2002-2003 school year was $4,922.57.

LEGAL DISCUSSION

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. The applicable statute, *N.J.S.A.* 18A:38-1(b)1, reads in pertinent 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 A.J. *gratis*; (3) A.J.'s parents are not capable of supporting or caring for him due to family or economic hardship; and (4) A.J. 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 family or economic hardship.

The position of the Board is that K.J. has not established that the parents have shown that they were incapable of supporting or providing care for A.J. due to a family or economic hardship. In *J.B. v Bd. of Educ. of Tp. of Ocean*, 96 *N.J.A.R. 2d* (EDU), *rev'd, Comm'r of Educ.* (March 25, 1996), *rev'd, State Bd. of Educ.* (Oct. 2, 1996), *on remand, Comm'r of Educ.* (Feb. 11, 1997), the Commissioner found that family strife had a detrimental affect on the student suggesting that the "parents, sadly, are

incapable of meeting his emotional, social, and developmental needs." Having determined by prior decision that these unique and compelling circumstances constitute family hardship, the Commissioner clarified on remand that for the above reasons, J.B.'s parents were not capable of providing care for him at the/that time due to such family hardship pursuant to *N.J.S.A.* 18A:38-1(b)(1). *Id.*

Where no hardship exists, the law requires that the resident shall be assessed tuition prorated to the time of the student's ineligible attendance in the school district. The statute, *N.J.S.A.* 18A:38-1(b)1, further reads in pertinent part:

> 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.

CONCLUSIONS

In the instant matter, the Board maintained that no family hardship was shown. The undisputed facts indicate that the situation is to the contrary. The family hardship here is that the parents were unable to provide sufficiently for A.J. to the extent that he came to a foreign country to live with a brother so that he would have a decent place to live. There is no evidence that A.J. moved for the sole purpose of attending school in the District. Indeed, A.J. moved to Clifton primarily because the brother lived there, not to avoid attending school in another district in the State. Moreover, there was no other district in the State where A.J. was eligible to attend school at the time, under *N.J.S.A.* 18A:38-1. I **CONCLUDE** that the compelling circumstances in this case rise to a level of family and economic hardship that meets the standard of the statute. "To hold otherwise harms a party the Legislature never meant to penalize ... and overlooks the substantial state interest in ensuring the education of all its children ... ." *Gundersen v Bd of Educ of the City of Brigantine*, 95 *N.J.A.R. 2d* (EDU) 39, 42. In *Gundersen*, in finding hardship in a child's reaction to marital conflict, the Commissioner quoted his previous decision with approval. "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. Moreover, the meaning of a statute is to be gathered from the mischief sought to be eliminated as well as the proposed remedy."

The amendments to *N.J.S.A.* 18A:38-1

> 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 ... . 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 ... .
>
> [*R.H. v Ocean Co Bd of Educ.*, 96 *N.J.A.R. 2d* (EDU) 628, *citing Gundersen, supra.*]

The undisputed evidence showed that petitioner has taken A.J. into his home indefinitely to provide him with the necessities of life that the A.J.'s parents were not able to provide him in Israel. Hence, there was no goal of the family to move from one school district in New Jersey to another, which was a major reason for the stringent amendments to the law. *See N.J.S.A.* 18A:38-1, Legislative Statement. There was no evidence that this arrangement was entered into fraudulently for the purposes of obtaining a free public education in the District. Finally, A.J. is an American citizen, imbued with the same right to a free public education as any other citizen.

Based on the above, I **CONCLUDE** that petitioner has satisfied the requirements of *N.J.S.A.* 18A:38-1(b) in that petitioner was domiciled within the District; was supporting A.J. *gratis*; the parents were incapable of supporting A.J. in their own country due to economic hardship, and A.J. was not residing with petitioner solely for the purposes of receiving a free public education in the District. Therefore, I **CONCLUDE** that A.J. met the requirements of an affidavit student pursuant to *N.J.S.A.* 18A:38-1(b) and was therefore entitled to a free public education in the District during the 2001-2002 and 2002-2003 school years.

ORDER

For all of the foregoing reasons, it is hereby **ORDERED** that the determination of the Board of Education of the City of Clifton is and shall be **REVERSED**. Petitioner's

request to allow A.J. to attend school in the respondent District without cost for the period from October 11, 2001 to April 17, 2003 is **GRANTED**. Respondent's counterclaim for tuition 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.

11/6/03
DATE

ROBERT J. GIORDANO, ALJ

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

11/7/03
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 10 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

WITNESSES

T.J.

K.J.

EXHIBITS

R-1 Affidavit of Karen Perkins

R-2 Application by Clifton Resident, September 21, 2001

R-3 Appeal letter, October 3, 2001

R-4 Denial letter, September 25, 2001

OAL DKT. NO. EDU 8307-01
AGENCY DKT. NO. 404-10/01

K.J., on behalf of minor child, A.J.,	:	
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,[1] the Commissioner concurs that petitioner has demonstrated that: 1) he is supporting his brother, A.J., *gratis*; 2) A.J.'s parents are incapable of supporting A.J. and caring for him in their own country due to economic and family hardship; and 3) A.J. is not residing with petitioner solely for the purpose of receiving a free public education in the District. A.J. was, therefore, entitled to attend school in the Board's District, free of charge, pursuant to *N.J.S.A.* 18A:38-1 *et seq.*, during the period from October 11, 2001 to April 17, 2003.

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: 12/17/03

Date of Mailing: 12/17/03

[1] The parties stipulated that, during the time period at issue, *i.e.*, October 11, 2001 to April 17, 2003, petitioner and his brother, A.J., were domiciled within the Clifton School District. (Initial Decision at 2)

[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.*

654-03

IN THE MATTER OF THE TENURE	:	
HEARING OF ANNE MC ALARY,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
JERSEY CITY, HUDSON COUNTY.	:	DECISION
	:	

December 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3400-03
AGENCY DKT. NO. 94-3/03

IN THE MATTER OF THE TENURE HEARING OF
ANNE MCCARLARY,
STATE OPERATED SCHOOL SYSTEM OF JERSEY CITY

Charlotte Kitler, General Counsel, for petitioner

Louis P. Bucceri, Esq., for respondent

Record Closed: October 29, 2003 Decided: November 3, 2003

BEFORE **STEPHEN G. WEISS**, ALJ:

STATEMENT OF THE CASE

This tenure matter was transmitted by the Department of Education to the Office of Administrative Law on April 3, 2003, following the certification of tenure charges by petitioner Board of Education of the School District of the City of Jersey City versus respondent, Anne McAlary, a tenured teaching staff member. A plenary hearing was scheduled to be commenced before the undersigned administrative law judge in August 2003 but was adjourned in advance of that date in light of the pendency of an application by respondent for an ordinary disability retirement.

Subsequently, a Stipulation of Settlement containing the terms and conditions of an agreement between the parties to resolve the dispute was submitted to me for review.

I have reviewed the attached Stipulated of Settlement submitted by the parties and find that it fully disposes of all issues in controversy and is consistent with law. In particular, respondent acknowledges that by entering into this settlement she understand that the Commissioner must approve and that he could refer the matter to the State Board of Examiners for possible revocation of her certificate. Also, the stipulation sets forth that the school district believes that the withdrawal of the tenure charges and resolution of the matter without the need for hearing would serve the public interest in light of the background circumstances involved.

The parties voluntarily have agreed to the terms of the settlement as is evidenced by the signatures appearing thereon.

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 3, 2003
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

November 6, 2003
DATE

M. Kathleen Duncan (GJ)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 06 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

\mvh

CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231
Attorney for Petitioner

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2003 OCT 29 P 3:03

IN THE MATTER OF THE TENURE HEARING OF	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
	:	OAL Dkt. No. EDUTH 03400-03N
ANNE McALARY	:	Agency Ref. No. 94-3/03
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY	:	STIPULATION OF SETTLEMENT

WHEREAS, Anne McAlary has been employed as a school nurse by the Jersey City School District since September 1, 1986; and

WHEREAS, the District filed charges with the Commissioner of Education on March 19, 2003, to terminate the employment of Ms. McAlary for excessive absenteeism and unbecoming conduct; and

WHEREAS, the Board of Trustees of the Teachers' Pension and Annuity Fund acted on September 4, 2003, to approve Ms. McAlary's application for retirement on ordinary disability, effective retroactively to March 1, 2003; and

WHEREAS, Ms. McAlary's retirement from the District's employment renders the charge of excessive absenteeism moot, *Barshatsky v. Freehold Reg'l High School Dist.*, 95 N.J.A.R.2d (EDU) 71, 73; and

WHEREAS, the charge of unbecoming conduct was based upon (1) an alteration in the beginning date of a medical leave of absence for Ms. McAlary in November 2001;

(2) two appointments for Ms. McAlary with Board physicians which were not kept; and (3) absence without approved leave; and

WHEREAS, Ms. McAlary has explained, in her certified answers to interrogatories, that (1) the date on the medical leave of absence submitted in September, 2001 was changed by her personal physician as a correction of dates; (2) she was unable to keep one of the two appointments with Board physicians because she received only two days' notice and was concerned with the terminal illness of her brother, and she was unable to keep the second appointment because of her own illness at the time; and (3) the applications for medical leave which she submitted were denied, and hence she was considered absent without leave, only because of her missed medical appointments and because of the change in date on the November 2001 submission; and

WHEREAS, Ms. McAlary's certified answers to interrogatories provide satisfactory explanations sufficient to negate the charge of unbecoming conduct; and

WHEREAS, the public interest would be best served by a withdrawal of the tenure charges and resolution of the matter without further adjudicatory proceedings; and

WHEREAS, Ms. McAlary acknowledges that she clearly understands the terms of this settlement agreement, that she entered into the settlement agreement voluntarily, that she was advised and understood that the Commissioner of Education had to approve the settlement agreement and that she was also advised and understood that the Commissioner could refer the matter to the State Board of Examiners for possible revocation of her certificate;

NOW, THEREFORE, the parties have agreed to the following terms of settlement:

1. The respondent Anne McAlary resigns from employment with the Jersey City School District on retirement, effective March 1, 2003.

2. The petitioner Jersey City School District agrees to accept Ms. McAlary's resignation, and agrees to withdraw the tenure charges bearing the OAL Docket Number EDUTH-03400-03N and the Agency Reference Number 94-3/03.

ANNE McALARY

Charlotte Kitler, General Counsel,
State-Operated School District of
Jersey City

DATED: 10/28/03

Bucceri & Pincus
Attorneys for Respondent Anne McAlary

DATED: 10/24/03

Mailing Address:
PO Box 295
Trenton, NJ 08625-0295
Location:
50 West State Street
Trenton, New Jersey

JAMES E. McGREEVEY
Governor

STATE OF NEW JERSEY
DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
(609) 292-7524 TDD (609) 292-7718
www.state.nj.us/treasury/pensions

JOHN E. McCORMAC, CPA
State Treasurer

FREDERICK J. BEAVER
Director

TO: ANNE MCALARY
33 SMITHFIELD VILLAGE
EAST STROUDSBURG, PA 18301-0000

FROM: Board and Trustee Administration

RE: TPAF 399478

DATE: September 4, 2003

SUBJECT: APPROVAL OF DISABILITY RETIREMENT APPLICATION

The Teacher's Pension and Annuity Fund Board of Trustees at its meeting onSeptember 4, 2003, approved your application for Ordinary Disability Retirement effective March 1, 2003, under Maximum. You have the right to withdraw, cancel, or change your retirement application provided you notify the Division of Pensions and Benefits within 30 days of the date of the Board's approval or your retirement date, whichever is later; otherwise, the retirement will stand as approved and cannot be changed for any reason.

If you continue to receive a salary beyond the effective date of retirement, no retirement benefits shall be paid for the period where you received salary and no salary or service credit shall be provided for the service rendered after the approved effective date of retirement. In addition, your employer shall be required to complete an updated Certification of Service and Final Salary.

Your retirement allowance as a disability retirant is subject to adjustment if your earnings from employment after retirement exceed the difference between the pension portion of your retirement allowance and the salary attributable to your former position.

The statute permits the Board of Trustees to require a disability retirant to undergo annual medical examinations to determine if she/he continues to be totally and permanently disabled and therefore eligible for continued receipt of his/her disability retirement allowance.

If you were required to purchase service credit in order to qualify for your retirement, you must complete the purchase transaction before your retirement benefit can be paid.

The Board has waived the 30-day waiting period for all Retirements with an effective date of March 1, 2003, and earlier. However, the processing of your retirement allowance will take approximately 2 to 4 weeks.

Your file is being transferred to the Retirement Bureau to implement the Board's decision.

c: JERSEY CITY PUBLIC SCHOOLS
346 CLAREMONT AVE
7TH FLOOR PAYROLL OFFICE
JERSEY CITY, NJ 07305-0000

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OAL DKT. NO. EDU 3400-03
AGENCY DKT. NO. 94-3/03

IN THE MATTER OF THE TENURE	:	
HEARING OF ANNE MC ALARY,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
JERSEY CITY, HUDSON 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. 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: 12/17/03

Date of Mailing: 12/18/03

* It is noted that the Initial Decision misspelled respondent's last name.

655-03

FRANK PIETROWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9200-00

AGENCY DKT. NO. 277-8/00

FRANK PIETROWSKI,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,

Respondent.

Sanford Oxfeld, Esq., for petitioner
(Oxfeld Cohen, P.C., attorneys)

Vittorio S. LaPira, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: October 16, 2003 Decided: November 6, 2003

BEFORE **IRENE JONES**, ALJ:

On October 6, 2000 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 but

adjourned pending the outcome of petitioner's Worker's Compensation case. On June 24, 2003 the Worker's Compensation case was settled and as a result of that settlement, petitioner agreed to withdraw any collateral action against the respondent. A signed Stipulation of Dismissal was filed in the OAL on October 16, 2003 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.

11/06/03
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

November 10, 2003
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 12 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

OFFICE OF ADMIN LAW
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FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, NJ 07410
(201) 791-3340
Attorneys for Respondent
Our File No. 112

FRANK PIETROWSKI, Petitioner, v. BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY AGENCY REF. NO. 277-8/00 OAL DOCKET NO. EDUOA 09200-00N **STIPULATION OF DISMISSAL**

The matter in difference in the above entitled action having been amicably resolved by and between Petitioner, Frank Pietrowski, and Respondent, the Board of Education of the Borough of Waldwick, it is hereby stipulated and agreed that this matter is hereby dismissed with prejudice and without costs against either party.

OXFELD COHEN, P.C.
Attorneys for Petitioner

By: _____
Sanford Oxfeld, Esq.

FOGARTY & HARA, ESQS.
Attorneys for Respondent

By: _____
Vittorio S. LaPira, Esq.

State of New Jersey
Department of Labor
DIVISION OF WORKERS COMPENSATION
P.O. Box 381
Trenton, New Jersey 08625-0381

WC(DOL)-370 (R 11-99)

ORDER APPROVING SETTLEMENT WITH DISMISSAL
N.J.S.A. 34:15-20

CASE NO. 2000-12071

D.O. Mt. Arlington

PETITIONER

SOCIAL SECURITY NUMBER 154-50-1482

NAME
FRANK PIETROWSKI

ADDRESS (Including County) Sussex County
7 Woodland Trail
Sussex, NJ 07461

VS

RESPONDENT

NAME
WALDWICK BOARD OF EDUCATION

ADDRESS (Including County) Bergen County
155 Summit Avenue
Waldwick, NJ 07463

☐ FEDERAL EMPLOYER'S IDENTIFICATION NUMBER
OR
☐ NEW JERSEY REGISTRATION NUMBER

ATTORNEY FOR PETITIONER

☐ NEW JERSEY REGISTRATION #
☐ SS #
☐ FEDERAL EMPLOYER'S IDENTIFICATION # 01-0725848

NAME
OXFELD COHEN, P.C.

ADDRESS
50 Commerce Street
Newark, NJ 07102-4003

TELEPHONE (Area Code) (973) 642-0161

INSURANCE CARRIER

INSURANCE CARRIER NAME INSERVCO INS. SERVICES
Indicate If Self-Insured ☐ or If Not Covered ☐
FEIN OR N.J. REG. NO.:

ATTORNEY FOR RESPONDENT

NAME
CAPEHART & SCATCHARD

ADDRESS
8000 Midlantic Drive, Suite 300
Mt. Laurel, NJ 08054

TELEPHONE (Area Code) (856) 234-6800

This is a lump sum settlement between the parties in the amount of $ 7,500.00 (Seven Thousand Five Hundred Dollars and No Cents dollars) pursuant to N.J.S.A. 34:15-20 which has the effect of a dismissal with prejudice, being final as to all rights and benefits of the petitioner and is a complete and absolute surrender and release of all their rights arising out of this/these claim petition(s). The payment hereunder shall be recognized as payments of workers' compensation benefits for insurance rating purposes only.

☐ The parties agree that this settlement does not contemplate a complete and absolute surrender and release of any and all rights by the petitioner's dependents as defined by N.J.S.A. 34:15-13 arising out of this/these claim petition(s).

ALLOWANCES

MEDICAL FEES & COSTS	TOTAL ALLOWED	BY PETITIONER	BY RESPONDENT
Peter M. Crain, M.D.	200	200	
ATTORNEY FEES	1500	1500	
STENO FEES	85		85

Stenographic Service O Brien

Reason for Sec. 20 Questions of jurisdiction, liability and causal relationship - Daniel Zazzali - Lauri

We hereby consent to the entry of this Order and acknowledge receipt of it:

Attorney for Petitioner OXFELD COHEN, P.C. Date

Attorney for Respondent CAPEHART & SCATCHARD Date

Petitioner FRANK PIETROWSKI Date

After considering all the circumstances, I find this settlement fair and just.

Date 6-27-03 By S. Tuber
HON. STEPHEN TUBER Judge of Compensation

Others, where applicable: PETITIONER AGREES TO ABANDON ANY PENDING COLLATERAL LEGAL ACTION AGAINST RESPONDENT

DISTRIBUTION: Copy 1 - Office Copy Copy 2 - Respondent's Attorney Copy 3 - Petitioner's Attorney Copy 4 - Petitioner

10/08/03 11:00 ☎1 856 235 3102 CAPEHART & SCATC 002/002
** TOTAL PAGE.04 **

OAL DKT. NO. EDU 9200-00
AGENCY DKT. NO. 277-8/00

FRANK PIETROWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and Stipulation of Dismissal, with appended Order of the Division of Workers' Compensation Approving Settlement With Dismissal, and the Initial Decision issued by the Office of Administrative Law have been reviewed. It is noted that this matter was characterized as a Settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in her Initial Decision. Upon review of the file, the Commissioner concludes that the within matter, is more appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2, pursuant to a settlement agreement effectuated in another forum. The Commissioner approves the withdrawal and, consequently, this matter is no longer deemed to be a contested case before him and is, therefore, dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/17/03

Date of Mailing: 12/18/03

656-03

JAMES AND BARBARA BAILEY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAURICE RIVER, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents challenged the Board's decision denying their request to relocate their children's bus stop at the intersection of Carlisle Place Road and Route 47. Rather, they sought relocation closer to their home on Carlisle Place Road, an unpaved, gravel road.

Having considered the testimony of witnesses and the record, including the video tapes and exhibits presented, the ALJ determined that petitioners failed to prove that the Board's actions were improper. The ALJ found that he could not substitute his judgment for that of the Board; that the Board's judgment was based on a professional evaluation of all of the surrounding circumstances; and that said judgment was not arbitrary, capricious or unreasonable, nor was it discriminatory. Petition was dismissed.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 924-03
AGENCY DKT. 70-1/03

JAMES AND BARBARA BAILEY,

Petitioners,

v.

BOARD OF EDUCATION OF MAURICE RIVER TOWNSHIP, CUMBERLAND COUNTY,

Respondent.

Gary Wodlinger, Esq., for petitioners (Lipman, Antonelli, Batt, Dunlap, Wodlinger & Gilson, attorneys)

Frank DiDomenico, Esq., for respondent

Record Closed: October 28, 2003 Decided: November 10, 2003

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies received a request for

relief on March 6, 2003. Petitioners assert that respondent, Maurice River Township Board of Education, arbitrarily refused the relocate a school bus stop. The matter was transmitted to the Office of Administrative Law (OAL) on March 20, 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 June 24, 2003. A plenary hearing was conducted on September 4, 2003. The evidentiary hearing concluded on that date.

The matter was carried until October 3, 2003, so that petitioners could present their motion for reconsideration to the district. It was previously presented to the district in February 2003, but certain facts and pertinent engineering information was held back. It was held back under the advice of counsel due to pending litigation. During the evidentiary hearing, it was apparent the Board did not consider a letter from the Township Engineer that directly addressed a question regarding the adequacy of the road and location of the bus stop proposed by petitioners. Therefore, the district did not consider all of the information offered by petitioners at the time the motion for reconsideration was denied. Accordingly, in order to avoid any procedural issues, the motion, with all supporting documents, was re-offered to the Board for its consideration.

The Board considered the matter at its September 16, 2003, meeting. The Board voted not to alter its original decision. Post hearing briefs were submitted on September 30, 2003, (respondent) and October 27, 2003 (petitioner). Additionally, the minutes from the Board of Education meeting, as well as a video tape of the September 16, 2003, meeting, were submitted on October 28, 2003. (C-2, P-8)

SUMMARY OF RELEVANT FACTS

Petitioners, Mr. and Mrs. James Bailey, (hereinafter "petitioners or Bailey") are the parents of two children, ages 9 and 13, both whom attend the Maurice River Township Public Schools (hereinafter "respondent, Board or district"). They are currently in eighth grade and fourth grade. Petitioners live on Carlisle Place Road, Maurice River Township, New Jersey.

Carlisle Place Road is a Township dedicated roadway, which is unpaved and has a gravel surface. Petitioners are concerned for the safety of their children. They must walk approximately one mile down Carlisle Place Road to the nearest bus stop. The unpaved road is not well marked in terms of traffic safety devices. It does not have a signage for speed, guardrails, sidewalks or other similar safety devices. Carlisle Place Road is not well lighted. During rain, snow or ice the road becomes filled with potholes and the surface becomes bumpy, much like rumble strips found on the shoulder of highways. The Township has the responsibility to maintain the roadway. The testimony revealed that the Township performs a reasonable job maintaining the gravel road. Nevertheless, petitioners urge that it is not safe for their children to walk one mile to the bus stop in view of the aforementioned conditions. Petitioners's explored other options, but were unable implement any other alternative. For instance, petitioners both work in the morning and therefore they cannot oversee the bus pick up. Presently, the children's grandmother must drive them to petitioner's sister's house where they are picked up by a school bus. They also explored a developing a bus turn-a-round in front of the home, unsuccessfully.

During August 2002, petitioners appeared before the Maurice River Township Board of Education requesting a change of the school bus stop. The Bailey children's bus stop was and is located at the intersection of Carlisle Place Road and Route 47 (Delsea Drive). Carlisle Place Road extends approximately two miles between Route 47 and Route 347. Route 347 is recognized as a high fatality road; therefore, the Board does not schedule any bus stops on Route 347. The Baileys appeared before the Board on several additional occasions between September and December 2002, with regards to the bus stop issue. They urge that Carlisle Place Road is safe for a school bus.

Petitioners regularly drive this road and are familiar with its conditions. Contrary to the Board's opinion, petitioners suggest the road is more dangerous to walk than for a bus to transverse. Petitioner's offered several pictures depicting the conditions they regularly observe. (P-1, 2 & 7). Petitioners argue that the pictures and video reflect a smooth well-maintained road that is safe for bus travel. Additionally, they support their conclusion by reference to the Township Engineer's letter. The Engineer concludes, "It is my professional opinion that this

section of Carlisle Place Road is serviceable as a local street, and as such is sufficient for use by school busses." (P-4, 8).

In December 2002, the Board, during its public meeting, voted not to change the scheduled bus stop. The Board minutes reflect the following:

> Take from table Resolution #02/03-34.
>
> (#02/03-34 - Approve bus stop at Carlisle Place Road with the stipulation that a 60' by 90' turnaround be placed at the location.
> (Tabled at August 27, 2002 Board Retreat Meeting).
>
> Motion made by Mr. Chard, seconded by Mr. Ciaurelli to withdraw resolution #02/03-34. Motion passed by roll call vote with Mrs. Hess abstaining.
>
> Mr. Baumgarten noted that the condition of the dirt road at issue (Carlisle Place Road) is such that sometimes you can drive down it at 40 mph and at other times only 5 mph and it feels like the front end of your car will fall off. After a rain, the road is a mess. He is not sure what the Township can do or cannot do but suggests that Mr. & Mrs. Bailey go to the Township and request that the road be paved. He believes in its current condition, the road is unsafe for a bus of children to travel.
>
> Mrs. Costello stated that she believes the bus stop change request of the Baileys has been reviewed extensively by the board. She stated that the current location of the bus stop at Route 47 and Carlisle Place Road is in accordance with policy, regulation and law.
>
> Motion made by Mrs. Costello, seconded by Mr. Chard that the current location of the bus stop remain at Route 47 and Carlisle Place Road. Motion carried by roll call vote with Mrs. Hess leaving the room, and therefore being absent for the vote.
>
> (R-6)

The Board's written policy is that it will not require the bus driver to leave the main highway for pupils residing within one and one-half miles of the of the bus route. (R-3). The district explained, however, that Petitioner's request was not rejected based solely upon Board policy.

Prior the making a final decision, the Board referred the matter to its transportation committee. This is reflected in the Board minutes, *supra*. The committee included Robert Chard, a Board member and Eleanor Whildin, Transportation Supervisor. Both members testified at the OAL hearing. Mr. Chard was a five-year member of the Board and a retired police officer. Ms. Whildin has thirty-seven years experience as a bus driver for the district. Both committee members personally inspected and drove Carlisle Place Road on various dates and under various conditions. They concluded that it would not be safe for a school bus, with school-aged children, to drive on this road. The basis of their conclusions was that the road was too bumpy, it lacked traffic control devices such as speed signs, middle lane dividers, guardrails and the bus could not turn around or perform a K-turn without risking getting stuck.

In February 2003, petitioners filed a motion for reconsideration. The motion was discussed, but the written materials containing a letter from the Township Engineer were not presented. The Engineer had opined that Carlisle Place Road, while gravel, was safe for school bus operation and transportation. The letter was not presented to the Board prior to its vote in December 2002, or during reconsideration motion in February 2003. During the OAL hearing, the ALJ urged the parties to re-offer the motion for reconsideration, in its entirety, to the Board. This included the presentation of the Township Engineer's letter concluding that a school bus could be operated on Carlisle Place Road. Also, in February 2003, Whildin reported to the Board as follows:

> As the Board of Education is aware, I have lived in Maurice River Township for the past 63 years. I have worked for the Maurice River Township Board of Education for 37 years in the capacity of a school bus driver, and for the past 33 years I have been the Transportation Supervisor. I am very familiar with the Township and its roads. Carlisle Place Road is a gravel road that runs between Rt. 47 and Rt. 347. When Carlisle Place Road became an issue with the Transportation Committee, at the Committee's request, I drove down the road with an empty school bus during a dry period, after it had been scraped. With the road in this condition, I was able to drive at 25 mph in spots, but other spots were rutty and I had to slow down to maneuver the road. Although I was traveling at such a slow speed, the bus shook a great deal. I also drove an empty school bus down this road after a wet spell and I could not go over 15 mph. At 15 mph, with the road in this condition, the bus was jumping around because of the ruts and potholes.

> It is the District's practice not to go down gravel roads, and if a bus stop is placed on this road, a precedent will be established that can affect other roads and routs in the District. Additionally, it is my opinion as a school bus driver that this road is unsafe during inclement weather conditions to drive a 54 passenger bus down it with students on board. A bus stop is provided for residents on this road at the corner of Carlisle Place Road and Rt. 47.
>
> Finally, for the Transportation Committee's information, there is no adequate turn around on Carlisle Place Road. If a stop is placed on the road, the bus would have to travel straight through to Rt. 347, which is a very dangerous road. Rt. 347 has had more accidents and deaths than any other road in the Township, and because of this, I have designed routs so as to travel this road minimally.
>
> (R-2)

On September 16, 2003, the Baileys, through their attorney, re-offered the motion for reconsideration to the Board. The Baileys presented testimony from Kent Schellinger, P.E., Township Engineer. The Board also reviewed and considered the report of Ken Schellinger marked as Exhibit P-4. The Board again denied the request to relocate the bus stop. (See, letter of Frank DiDomenico, September 23, 2003 marked as C-1) (See also video tape of meeting, P-8) At the Board's September 16, 2003, meeting, it fully reconsidered petitioner's prior motion for consideration as well as new evidence. Petitioners came prepared with counsel and offered live testimony from Kent Schellinger, P.E., Township Engineer. Mr. Schellinger testified, under oath, that he was familiar with Carlisle Place Road. Again he opined that the road was suitable for a 54-passenger bus to traverse. However, he indicated he had not actually driven a 54-passenger bus on this particular road. The proper maintenance of Carlisle Place Road was of particular importance to the Board members. Mr. Schellinger indicated the road is adequately maintained by the Township, but that it is not on any fixed maintenance schedule. He was also questioned as to whether the Township had asked him to make any particular recommendations concerning Carlisle Place Road. His recommendations included signage, guardrails and a speed study. (C-2, p.3) The minutes reflect the following discussions and reasons:

> Motion made by Mr. Baumgarten, seconded by Mr. Chard to reconsider the board's earlier denial of a bus stop on Carlisle Place Road. After discussion by individual board members, (as detailed in the presentation summary attached), the motion was denied by roll call vote with Mrs. Hess recusing herself, six board members voting no and zero board members voting yes. Prior to voting, Mr.

Ewan stated that after considering the reports of Kent Schellinger and Eleanor Whildin, he was voting no. Prior to voting, Mrs. Ireland stated that based upon Eleanor Whildin's report and safety issues, she was voting no.

(C-2)

LEGAL ANALYSIS

Based upon the petition and evidentiary hearing, two issues must be decided: 1) Whether the Board's bus stop policy is valid? 2) Did the petitioner meet its burden of proof the by the preponderance of credible evidence establishing that the Board's application or interpretation of its policy was unreasonable? The thrust of petitioner's argument is that the Board acted in an unreasonable and arbitrary manner when it denied petitioner's request to relocate the bus stop.

It is undisputed that a Board of Education has both the prerogative and obligation to establish bus stop locations. *N.J.S.A.* 18A:39-1 et seq. and *N.J.A.C.* 6A:27-1.1. The applicable regulations provide a minimum standard for students who live in remote locations from their school. For instance, for K-8 students transportation must be provided if they reside beyond two miles and for grades 9-12 two and one-half miles. *N.J.A.C.* 6A:27-1.1(a)1.

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 Tp.,* 109 *N.J.* 601, 610-11, 538 *A.2d* 808 (1988); *United Advertising Corp. v. Metuchen,* 42 *N.J.* 1, 8, 198 *A.2d* 447 (1964). Such determinations enjoy a distinct presumption of validity, *First Peoples Bank of N.J. v. Medford Tp.,* 126 *N.J.* 413, 418, 599 *A.2d* 1248 (1991); *Hutton Park Gardens v. West Orange Town Council,* 68 *N.J.* 543, 564, 350 *A.2d* 1 (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 Tp.,* 196 *N.J. Super.* 241, 250, 482 *A.2d* 174 (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 Ed. of Tp. of Parsippany-Troy Hills,* 188 *N.J.*

Super. 161, 167, 457 *A.2d* 15 (App.Div.), certif. denied, 94 *N.J.* 527, 468 *A.2d* 182 (1983); *Kopera v. Board of Ed. of West Orange,* 60 *N.J. Super.* 288, 294, 158 *A.2d* 842 (App.Div.1960). 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. *Quinlan v. Board of Ed. of North Bergen Tp.,* 73 *N.J. Super.* 40, 179 *A.2d* 161 (App.Div.1962); *Schinck v. Board of Education of Westwood Consol. School Dist.,* 60 *N.J. Super.* 448, 159 *A.2d* 396 (App.Div. 1960).

In the present matter, there was little dispute regarding the validity of the Board's bus stop policy. The policy provides that school buses will not leave the main route unless the student is within one and one half miles of the route for K-8 children and two miles for high school students. (R-3). The policy is presumed to be correct. I **FIND** and **CONCLUDE** that presumption was not overcome in the matter at hand. The policy is consistent with *N.J.A.C.* 6A:27-1.1(a)1. In fact, the Board's policy is more favorable to petitioner than the administrative regulations. (1.5 and 2 miles vs. 2 and 2.5 miles).

Therefore, the only issue to be addressed is whether the District acted in an arbitrary or capricious manner when it denied petitioner's request to move the bus stop. Petitioner presented safety and hardship issues. Moreover, petitioner suggested that the Board failed to appreciate or understand the issues. For instance, the Board concluded that the gravel road was unsafe for a bus with school-aged children. The bus would bounce and rattle. The District's bus driver tested the road and concluded the road was unsafe as the bus was "jumping around because of ruts and potholes." (R-2). The transportation supervisor candidly admitted that, at times, the road was safe to drive at 15-25 miles per hour. However, she was not comfortable driving the road. Issues such as ice, snow, potholes, road maintenance as well as bus mechanical maintenance were a concern for her and the Board. Several members of the Board transportation committee test-drove the road on their own or in a 54-passenger bus with the transportation supervisor. They reached the same conclusions. Parties offered numerous photographs and a VHS video into evidence. (P-7) The photographs depict the road on various dates and times that reflect conditions favorable to positions asserted by the both parties.

In the law, "arbitrary" and "capricious" means having no rational basis. *Bicknell v. United States*, 442 *F.2d* 1055, 1057 (5 Cir. 1970). The terms "arbitrary" and "capricious" embrace a concept which emerges from the due process clauses of the 5th and 14th Amendments of the United States Constitution and operate to guarantee that acts of government will be grounded on established legal principles. See *Canty v. Bd. of Education, City of New York,* 312 *F.Supp.* 254, 256 (D.C.S.D.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,* 66 *Wash.2d* 199, 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,* 254 *La.* 160, 223 *So.2d* 132, 136 (La. Sup. Ct., 1969).

This rationale has been applied to bus stop location controversies. The Commissioner of Education will not overturn a district's decision pertaining to the location of school bus stops and will not second guess such exercise of discretion unless it is arbitrary, capricious or unreasonable. *See Lemma v. Branchburg Board of Education*, EDU 8953-97 Initial Decision (July 22, 1998), adopted Commissioner (August 28, 1998) (upholding the local district's refusal to change the bus stop): *Mandaglio v. Mendham Township Board of Education* 1998 *S.L.D.* 1380, 1384 (Comm'r 1990) (upholding uniformly – applying school policy prohibiting the school buses from turning around on dead end streets); *J. O'D. v. Peapack Gladstone Board of Education*, 1989 *S.L.D.* 1303, 1313 (Comm'r March 15, 1989) (upholding appropriateness of the local district's bus stop and rejecting a proposed alternate route as patently dangerous).

Based upon the evidence, including the investigation performed by the transportation committee together with the testimony of the Board members, I **FIND** that a reasonable person could come to two different opinions. The Board struggled with the decision for several months. The original request for relief was presented to the Board in or around August 2002. The matter

was tabled for investigation. Various options were explored. This included construction of a turn-a-round in front of petitioner's home. A thorough investigation followed. The Board decided the not relocate the bus stop at its December 2002 meeting. The minutes from the meeting reflect the debatable concerns. A motion for reconsideration was filed in February 2003. The motion was not fully discussed and reviewed by the Board. A letter from the Township Engineer opining that the gravel road was safe for school bus travel was not presented or considered. The motion for reconsideration was not fully discussed because of pending litigation. Between the conclusion of the evidentiary portion of the within matter and the close of the record, the Board was directed to reconsider the motion. This was completed at the Board's September 16, 2003 meeting. The Board reaffirmed its earlier decision not to relocate the bus stop. (C-1, C-2). The import from the abovementioned history is that the Board fully, fairly and justly considered the issue. The Board made a rational decision based upon facts derived from an investigation that spanned several months. A Court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. *Bacoli v. Board of Education of Ramapo Indian Hills Regional School District*, OAL Dkt. No. EDU 1839-98 (January 22, 1999) citing, *Bayshore Sewerage Company v. The Department of Environmental Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *affirmed* 131 *N.J. Super.* 37 (App. Div. 1974). The Board's factual conclusions, while possibly debatable, were nevertheless reasonable. I so **FIND**.

Petitioner also eluded that the Board was engulfed in a small town controversy. Consequently, petitioner argues that the Board did not approach petitioner's request for relief with an open mind. The proofs offered by petitioner in this respect were mere inferences or allegations. While that may have been the impression by petitioner, I **FIND** that there were no reliable proofs offered to support this belief. Stated differently, the proofs offered on the issue were not to the degree that I can conclude the Board acted with malice, bias or unfairly.

Petitioner's presented legitimate safety concerns for their children. The road in question clearly poses real concern for parents of school aged children. It is dark during winter mornings, and the gravel road lacks the ordinary traffic control devices of a paved road. The area is developing and more children are using the unpaved portion of the road. Unfortunately,

petitioners are both employed and their work hours do not allow them to oversee the bus pickup. If the road were paved, the Board may consider altering the bus route. I encourage the Board and petitioners (and the Township) to revisit this matter in the future if the circumstances materially change. This includes, additional paving or temporary paving, increased students living on Carlisle Place Road or other significant changes.

CONCLUSION AND ORDER

I **CONCLUDE** that the school district's bus stop location policy is valid and its application in the present matter was reasonable. Therefore, the petition requesting a change in the bus stop at the intersection of Rt. 47 and Carlisle Place Road must be **DENIED** and the petition is **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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.

11-10-03
DATE

W. TODD MILLER, ALJ

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

11-10-03
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 17 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

sd

EXHIBITS

For Petitioner:

P-1 Photographs (1 page)

P-2 Photographs (1 page)

P-3 Letter dated November 14, 2002 from Karen Johnson (1 page)

P-4 Memo dated January 24, 2003 from Kent W. Schellinger, P.E. (1 page)

P-5 Maurice River Township Board of Education Equal Educational Opportunity (2 pages)

P-6 Letter dated February 4, 2003 from James and Barbara Bailey (6 pages)

P-7 Video Tape (9/3/03)

P-8 Video tape presented at the September 16, 2003 Board Meeting

For Respondent:

R-1 Letter dated February 19, 2003 from Donald E. Beineman, Ed.D. (1 page)

R-2 Memorandum dated February 10, 2003 from Eleanor Whildin (1 page)

R-3 Maurice River Township Board of Education Transportation Routes and Services Policy (4 pages)

R-4 Maurice River Township Board of Education Retreat Meeting Minutes dated August 27, 2002 (2 pages)

R-5 Maurice River Township Board of Education Regular Meeting Minutes dated October 15, 2002 (4 pages)

R-6 Maurice River Township Board of Education Regular Meeting Minutes dated December 17, 2002 (4 pages)

R-7 Maurice River Township Board of Education Regular Meeting Minutes dated February 18, 2003 (7 pages)

R-8 Maurice River Township Bus Stop File Information Listing as of 8/07/02 (14 pages)

R-9 EMC Student Transportation System (16 pages)

R-10 Interrogatories propounded by petitioner on respondent (5 pages)

R-11 Respondent's answers to petitioner's interrogatories (5 pages)

R-12 Photographs (4 pages)

R-13 Photographs (1 page) and 7 individual photographs

R-14 Letter dated February 3, 2003 from Frank DiDomenico, Esq. (3 pages)

For Court:

C-1 Letter dated September 23, 2003 from Frank DiDomenico, Esq. (2 pages)

C-2 Board of Education Minutes from September 16, 2003 meeting

WITNESSES

For Petitioner:

Barbara Bailey

For Respondent:

Robert Chard, Board of Education Member

Eleanor Whilden, Transportation Supervisor

Ellyn Walters, Board of Education Member

Patricia Powell, School Board Secretary

OAL DKT. NO. EDU 924-03
AGENCY DKT. NO. 70-1/03

JAMES AND BARBARA BAILEY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAURICE RIVER, CUMBERLAND 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 careful and independent review of the record, and after full consideration of all of the particular circumstances existing here, the Commissioner agrees with the conclusion of the Administrative Law Judge that petitioners have failed to sustain their burden of establishing by a preponderance of the credible evidence that the Board's refusal to change the location of their children's bus stop was arbitrary, capricious, unreasonable or discriminatory; therefore, its determination in this regard must be upheld.

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: 12/17/03

Date of Mailing: 12/18/03

* 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.*

657-03

THOMAS F. GRIGGS,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF MAGNOLIA, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

December 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER FOR IMMEDIATE REVIEW, PURSUANT TO *N.J.A.C.* 1:1-12.5(e)

OAL DKT NO. EDU 6404-02

AGENCY DKT. 242-8/02

THOMAS F. GRIGGS,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE BOROUGH OF MAGNOLIA,

Respondent.

Andrew Babiak, Esq. for petitioner (New Jersey Association of School Administrators)

George Wilgus, III, Esq. for respondent (Lenox, Socey, Wilgus, Fornidoni, Brown, Giordano & Casey, attorneys)

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies received a request for relief on August 6, 2002. Petitioner, a School Principal for the Borough of Magnolia School District contends that the non-renewal of his alleged contract was improper and unlawful. The district asserts that position was eliminated pursuant to a reduction in force (RIF). The matter was transmitted to the Office of Administrative Law (OAL) on September 11, 2002. The Director of the OAL assigned the undersigned 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 3, 2003. A settlement conference was scheduled for May 27, 2003, and hearing dates for June 11 and 12, 2003. On May 7, 2003, petitioner submitted a letter motion seeking to compel discovery of information in certain personnel files. The letter motion was preceded by a telephone conference regarding the discovery request and procedure. During the May 27, 2003, conference the plenary hearing was adjourned until October 1, 2003. Thereafter, on August 27, 2003, petitioner submitted a motion for partial summary judgment concerning the contract claims and issues. Respondent filed opposition and oral argument was heard on October 27, 2003.

Petitioner requested, in the interest of avoiding unnecessary litigation and expense, that this Order be submitted to the Commissioner of Education for immediate review as an initial decision, as it makes up the primary claims sought to be adjudicated by petitioner. *N.J.A.C.* 1:1-15.5(c).

UNDISPUTED FACTS

1. Petitioner, Thomas F. Griggs (hereinafter "Griggs" or "petitioner") is a former employee of respondent, Board of Education of the Borough of Magnolia (hereinafter "respondent" or "Board"). From July 1, 1999 to June 30, 2002, Griggs was employed by the Board as Principal of its elementary school.

2. During the 2001-2002 school year, Griggs was the Acting Principal pursuant to an unsigned contract.

3. On May 28, 2002, the seven member Board voted 6 to 1 to eliminate Griggs' position effective June 30, and to continue the position of Principal with the position of Superintendent of Schools.

4. The school budget, which had been approved on March 26, 2002 by the Board, was defeated in an election held in April 2002. Once the budget was defeated, there were legitimate concerns regarding numerous programs and services being slated for elimination from the budget due to its defeat in the April election.

5. On May 28, 2002, the Board approved the reduction of force with abolishment, for economic reasons, of the Principal's position, effective June 30, 2002.

6. In accordance with the RIF, the Superintendent's job title and description was revised to reflect the chief school administrator's duties and responsibilities. By letter dated May 29, 2002, Dr. Gibson advised Griggs that the Board of Education had met on May 28, 2002 and had abolished his position as part of a RIF procedure. Dr. Gibson informed petitioner that a letter of May 29, 2002 would serve as a 60 day notice of termination wherein he would receive compensation until July 30, 2002.

7. During the period 2001 through May 2002, Griggs and the Board, through its agents and representatives, had been actively negotiating contractual terms and provisions. On May 28, 2002, Griggs notified the Board and the Superintendent, in writing, that he accepted continued employment in the district for the 2002-2003 school year. The written notification was forwarded to the Superintendent's office via telefax and it provided as follows:

> Based on my attorney's advice, I accept the employment contract as Principal for the 2002-2003 school year. Respectfully, Thomas F. Griggs

The fax indicates that it was transmitted at approximately 2:25 p.m. on May 28, 2002.

SUMMARY OF LIMITED TESTIMONY

The present motion for partial summary judgment revolves around contract law in a school law setting. Petitioner also asserts that respondent violated the RIF provisions, but has chosen to submit the contract issues for summary decision in the interest of judicial economy and cost savings. The testimony of Superintendent Gibson and Petitioner Griggs were offered at oral argument. From their testimony the following facts were developed.

It is undisputed that, in or around June 1999, petitioner and the district entered a two-year agreement wherein petitioner would serve as the principal. This agreement was executed and its term was from July 1, 1999 to June 30, 2001. There remains a legal question as to whether it was appropriate for the district to enter into a multi-year contract for the position of principal. (Petitioner's letter dated October 6, 2003, page 2.) This agreement expired on June 30, 2001, pursuant to its terms, or on June 30, 2000, if multi-year contracts are prohibited as a matter of law.

On June 26, 2001, the Board of Education authorized the hiring of petitioner as its principal for another two years. The Board solicitor was authorized and directed to prepare the necessary contract. No contract was ever prepared by the solicitor. In or around January 2002, petitioner marked up his old 1999-2001 contract and submitted it to Superintendent Gibson. Gibson and petitioner met sometime between January 2002, and April 2002, to discuss the marked up contract. Petitioner's proposed changes were generally minor, except that he wanted to be paid at the superintendent's daily rate in situations where he temporarily served in that capacity. Petitioner was advised by Dr. Gibson that this modification "would not fly" because it was contrary to school law. Also, at this time, the district was preparing the 2002-2003 budget. Petitioner's title as principal was contained in the budget.

In or around May 2002, Gibson also marked up the draft agreement and forwarded it to the solicitor for review and comment. The district did not provide petitioner with notice on or before May 15, 2002, that it intended not to renew his agreement *N.J.S.A.* 18A:27-10. On May 28, 2002, petitioner faxed a handwritten note to Dr. Gibson stating that he accepted the employment contract for the 2001-2003 school year. On May 28, 2002 the Board voted 6 to 1 to eliminate petitioner's position pursuant to a RIF. The position was abolished as of June 28, 2002. The Board however, gave petitioner 60 days notice and, therefore, paid his salary until July 30, 2002.

ARGUMENTS OF THE PARTIES

Petitioner Griggs argues that he is entitled to all the rights and benefits that flow from the unexecuted or unsigned employment contract for the 2002-2003 school year, citing *N.J.S.A.*

18A:27-11. This includes, but is not limited to, full salary, vacation, sick time and other benefits arising from the district's failure to provide notice of termination pursuant to what petitioner argues is a valid contract. More specifically, petitioner relies upon *N.J.S.A.* 18A:27-11, which provides as follows:

> Should any Board of Education **fail** to give any non-tenured teaching staff member either an **offer of contract for employment** for the next succeeding year or **notice that such employment will not be offered,** all within the time and manner provided by this Act, then the Board of Education shall be deemed to have offered to the 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.

Petitioner's argument is that the board is required to provide him with notice by May 15, 2002, of its intention not to renew his employment contract. *N.J.S.A.* 18A:27-10. If the district failed to provide such notice of non-renewal, his contract is automatically renewed. The contract that would be renewed is the agreement that was signed back in 1999. Petitioner refers to termination provisions in the unexecuted 2001-2003 contract and places significant reliance thereupon. The termination provisions in the unexecuted contract provide as follows:

> 8. TERMINATION OF EMPLOYMENT CONTRACT.
>
> A. Mutual Agreement. This contract may be terminated by mutual agreement of the parties.
>
> B. Notice of Termination. By notice of the Principal, this contract may be terminated upon giving 60 days notice to the Board.

Petitioner argues that he cannot be terminated unless it is reached by mutual agreement as expressed in the unsigned 2001-2003 contract. Again, petitioner urges that if the Board fails to notify him by May 15th of the given calendar year, his employment contract is automatically renewed.

In the present matter, petitioner argues that he never agreed to be terminated. Petitioner also argues that, while the present matter arose pursuant to the RIF statute, the Board does not have unfettered authority to override contractual notice provisions, even if it is proceeding

pursuant to a good faith RIF action, *citing, Siegel v. Board of Education of the City of Garfield*, 93 *N.J.A.R.* 2d (EDU) 766, *aff'd,* 94 *N.J.A.R.* 2d (EDU) 319. Petitioner offers the aforementioned authority to support the theory that the district must honor the notice and termination provisions of a non-teaching staff member's employment contract.

In opposition, respondent district argues that the board of education has complete authority to determine if a RIF should be implemented for reasons of economy. *In Re Maywood Board of Education*, 168 *N.J. Super.* 45 (App. Div. 1979); *cert. denied* 81 *N.J.* 292 (1979). Furthermore, the district argues that a reduction in force is non-negotiable and non-grievable. *Jamison v. Morris School District Board of Education*, 198 *N.J. Super.* 411 (App. Div. 1985). The district suggests that each and every contract between the board of education and teaching staff member must be in writing and signed by the President and the Secretary of the Board of Education, in addition to being signed by the teaching staff member. *N.J.S.A.* 18A:27-5. The district argues that the RIF statute and provisions supercede the non-teaching staff member's contract rollover provisions contained in *N.J.S.A.* 18A:27-11. Therefore, so long as the RIF was performed in good faith and for economic reasons, a teaching staff member can be terminated.

STANDARD FOR SUMMARY DECISION

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 American*, 142 *N.J.* 520, 523 (1995), set the standard to be applied when deciding a Motion for Summary Judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party... are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

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 upon the testimony, briefs, affidavits and interrogatory answers and having considered the oral argument of the parties, I **FIND** that there are no genuine issues of material facts and the contract issues and claims can be decided by summary decision. Petitioner's claims and issues concerning the validity of the RIF action have not been submitted with this motion. They are reserved for a plenary hearing.

LEGAL ANALYSIS AND DISCUSSION

Petitioner filed a Motion seeking an Order for Partial Summary Judgment carrying forth the terms and condition of petitioner's employment contract for the 2000-01 school year to the 2001-02 school year; binding the Board by contractual notice provisions and not arbitrarily determining the length of notice to be given; granting the equivalent of one year's compensation (less mitigation); and compensation for petitioner's unused sick leave days.

Petitioner argues that his contract automatically rolls over pursuant to *N.J.S.A.* 18A:27-11. Specifically, the statute provides that if the district fails to give a nontenured teaching staff member either an offer of a contract for employment for the next succeeding year or notice that such employment will not be offered, then the board of education shall be deemed to have offered continued employment under the same terms and conditions. The only executed agreement between petitioner and the district was in June 1999. Neither the original nor a copy of that agreement could be located. The parties agreed that multi-year contracts are generally forbidden, except for the position of superintendent. *See, N.J.S.A.* 18A:17-15. Therefore, the

district was required to offer employment and prepare agreements for 2000, 2001, 2002 and 2003. The district did not comply with the applicable statutes in 2000, 2001 and 2002. It prepared multi-year agreements and therefore, skipped 2000, 2001 and 2002. It did not retain on file or cannot locate the original agreement from 1999. The solicitor was authorized to prepare the 2001-2003 employment agreement, but did not do so. Dr. Gibson summarized the contract status in her September 5, 2002, memorandum as follows:

> The original contracts were with Mr. Wade and were to be forwarded to Mr. Sahli so that renewal contracts could be prepared. Believe it or not, we tried but we were not able to get them. As a last resort, Mr. Sahli asked that I do the changes by hand and his office would re-type the re-newal contracts. As you and former board members know, **all of our contracts were up in the air for that one year and with no signatures**. We can blame the former Board, we can blame the Solicitors, the administrators, the current Board and everyone else till doomsday, but the bottom line is that **neither Mr. Griggs nor I had any legally signed contract at the time that the Board made a decision to restructure the school district and abolish the Principal's position**. I know you recognize that a Board has the authority to restructure, abolish, or cut positions as needed and I did personally call and advise the County Superintendent of their intent to re-structure in order to downsize administration and free up funds to bring back other services. The current Board has complied with getting all current administrative and association contracts completed and signed.
>
> Respondent's Brief –Exhibit 5

For purposes of employment in 2001-2002, petitioner was left to mark up and submit his old 1999 contract almost 6 months after the official Board action. This was done in January 2002. The marked up version was reviewed by Dr. Gibson and the Board and than sent to the solicitor in May 2002. This occurred substantially after the board directed the solicitor to prepare agreements in June 2001. Almost one year passed and a simple six-page employment contract was left unfinished. The administrative contracts for this title were poorly handled.

Petitioner complicated matters when he marked up the agreement in January 2002, and added a material change to the former agreement. He effectively made a new offer or a counter offer when he requested payment at the superintendent's daily rate. This proposal caused the district and its solicitor, to further mishandle petitioner's employment agreement.

In spite of all of the inappropriate handling of the employment agreement, petitioner served the district for the 2001-2002 school year pursuant to the terms of the original 1999 contract. Similarly, petitioner and the district operated pursuant to the terms in the 1999 agreement in all subsequent years even though they never signed the contract. Therefore, when the May 15, 2002, deadline passed, the district was obligated to have responded in some fashion. *N.J.S.A.* 18A:27-10 and -11. There were unequivocally ongoing contract negotiations. Superintendent Gibson sent the Board solicitor a memorandum regarding this subject on May 2, 2002. (Respondent's Brief exhibit 2.) But, by all indications, the material terms from 1999 were operational. Therefore, the Board either had to reject petitioners marked up counter offer, reject the 1999 agreement in its original form or provide notice that employment would not be offered.

The district's lack of diligence in finalizing its administrative contracts is analogous to *W.V. Pangborne & Co. v. New Jersey Dept. of Trans.,* 116 *N.J.* 543 (1989). In *Pangborne,* the Court held that government bodies must "turn square corners" when dealing with taxpayers. The "square corners" doctrine applies even where the party cannot satisfy the stricter evidentiary requirements that justify equitable estoppel. The Court, in *Pangborne,* stated:

> [W]e have insisted that in the exercise of statutory responsibilities, government must "turn square corners' rather than exploit litigational or bargaining advantages that might otherwise be available to private citizens. [Citing to *FMC Stores Co.*] ["The government's primary obligation is to comport itself with compunction and integrity, and in doing so government may have to forego the freedom of action that private citizens may employ in dealing with one another."]

Here, the district, a government body, neglected to finalize the 2001-2002 administrative contract for petitioner for almost an entire year. It did not deal fairly with petitioner in terms of preparing his employment contract. It is inexcusable that his employment contract was not reduced to writing and executed. Having done very little on or before May 15, 2002, I **FIND** and **CONCLUDE** that the 1999 original employment contract rolled over pursuant to *N.J.S.A.* 18A:27-10 and -11. The district was in the better position and is statutorily obligated to maintain executed employment contracts on file. *N.J.S.A.* 18A:27-5. It failed to fulfill its statutorily obligation for all years. The original contract cannot be located and admittedly no formal

contracts were prepared and executed in any years after 1999. The district improperly prepared multi-year contracts.

Having determined that petitioner's 1999 agreement rolled over on or after May 15, 2002, the question remains what contractual notice is petitioner entitled to a since the contract was terminated pursuant to a RIF. The actual contract terms provide that the agreement may be terminated by mutual agreement of the parties and the principal of this contract may unilaterally terminate it by giving sixty (60) days notice to the board.

Petitioner argues that, notwithstanding the RIF action, the board, only upon mutual agreement of the parties, can terminate the contract. Therefore, the RIF action does not "trump" the contract termination notice requirements. Petitioner suggests that he is entitled to one-years notice as a mutually agreeable termination date and, therefore, he is entitled to one-years salary and benefits. The district argues that its RIF action supersedes an employment contract and awarding a full years salary would, in effect, nullify the important function of the RIF statute. *Old Bridge Twp. Bd. Of Educ. v. Old Bridge Educ. Ass'n*, 98 *N.J.* 523, 531-533 (1985); *N.J.S.A* 18A:29-9. Moreover, the district contends that 60 days notice is reasonable absent mutual agreement of the parties. Sixty days notice is also consistent with other RIF actions for nontenured teaching staff members. *Old Bridge*, *supra*. Finally, the district urges that 60 days notice is reasonable because it is the same period of time petitioner proposed to give the board if he terminated the contract.

Since the parties did not reach a mutual agreement as to the length of notice before effective termination, it has been submitted to this tribunal for determination. Petitioner relies upon *Siegle v Garfield Board of Education*, 93 *N.J.A.R.* (EDU) 766, decided August 10, 1993. In *Siegle*, the boilerplate employment contract contained notice provisions that were left blank at the time the agreement was executed. The ALJ observed:

> Here, however, the contractual language is not susceptible of such interpretation. Language chosen by the Board itself plainly provides that "[I]n the absence of any provision herein for a definite number of days' notice, the contract shall run for the full term[.]" Under these unique circumstances, where the Board could have easily limited its liability by using the appropriate language in its contract, it does

not seriously interfere with managerial prerogatives to require the Board to honor the commitment that it voluntarily made.

The ALJ and Commissioner agreed that since the notice clause was left blank and the general provisions in the agreement specifically required the agreement to run for its full term, the teacher was entitled to entire years salary. The decision was an exception to the more typical 60 day notice requirement set forth in *Old Bridge*. *Siegle* also turned on the fact that the teacher was terminated in October. The teacher was unable to obtain a new teaching position because of the timing of the RIF in October.

In *Seigle* the ALJ stated:

> Had this been a non-tenured teacher, the Commissioner of Education would have looked to the standard contract of employment to find the correct resolution. 98 *N.J.* at 531. Relying on prior school law decisions, the Court elaborated:
>
> > To determine the amount of the award the State Board has drawn upon the provisions in the standard contract of employment for non-tenured teachers requiring 60 days. *Armstrong v. East Brunswick Bd. of Educ.,* 1975 *SLD* 117, *aff'd* 1976 *SLD* 1104 (App. Div. 1976) (non-tenured teacher who did not receive notice of nonrenewal until two days after statutory deadline awarded 60 days salary). Had the reduction in force occurred in mid-term to a non-tenured teacher, the Commissioner would presumably draw upon the same provisions in teachers' contracts calling for 60 days notice of termination to value the claim. *Cf. Contaldi v. Board of Educ. of Jersey City* (Commissioner of Education, January 23, 1981) (non-tenured teacher awarded 60 days pay when he was not properly notified of his dismissal until the new school year had begun and he had already taught for one school day). 98 *N.J.* at 532.
>
> While 60 days' notice of cancellation seems to have become the generally-recognized practice in the educational field, it is not enshrined in any statute or regulation. Review of the two administrative decisions cited by the Supreme Court reveals that in each instance the underlying contract or salary policy specified 60 days' notice. *Armstrong*, 1975 *S.L.D.* at 1104. *Contaldi*, slip op. at 4. *Accord, Mozier*, 450 *F.Supp.* at 748 n.4, where it was said that the presence of an express 60-day notice provision in a teacher's contract "vitiates any expectancy of year long employment." *See also, Canfield v. Pine Hill Bd. of Educ.* 97 *N.J. Super.* 483, 492 (App. Div. 1967) (Gaulkin, S.J.A.D. dissenting), rev'd for reasons expressed in the dissent, 51 *N.J.* 400 (1968), suggesting that, absent a

> cancellation clause, "the teacher would, at most, be entitled to his salary for the full term of the contract, but not to tenure."

Nothing prohibits the parties from negotiating a shorter or longer notice period. *Rahway Educ. Ass'n v. Rahway Bd. of Educ*, 1986 *S.L.D.* 1588, 1600 (wherein the Commissioner declared that any agreement which extends salary benefits to nontenured teachers beyond the 60-day termination provision included in their employment contracts is contrary to law.) Even if the cancellation clause was silent as to time, the Commissioner would be likely to impute 60 days as a "reasonable" time period. Ordinarily, if a contract contains no express terms as to its duration, it is terminable at will or after a reasonable time. *In re Miller's Estate*, 90 *N.J.* 210, 219 (1982); *West Caldwell v. Caldwell*, 26 *N.J.* 9, 27 (1958).

Here, petitioner was RIF'd before the start of the next school year (2002-2003) and compensated through July 30, 2002, while only obligated to work through June 28, 2002. Moreover, there was no specific contract clause that required the agreement to run for its full term as in *Seigle*. These facts distinguish this matter from *Siegle* and make it more analogous to *Old Bridge*. Finally, petitioner included 60 days a reasonable period to give the board notice if he terminated the agreement. Absent more specific language, 60 days is reasonable for both parties.

In sum, petitioner's original 1999 contract rolled over each year, but remained subject to a good faith RIF action. The RIF action is a statutorily sanctioned breach of the agreement. Petitioner may be entitled to the full benefit of the termination clause in his employment agreement. However, in this matter, the termination provisions were left vague and unclear. Therefore, if a contract contains no clear expressed terms as to its duration, it is terminable at will or after a reasonable time. *In re Miller's Estate, supra.* There is sufficient decisional law citing 60 days as a reasonable period for notice for termination, if the notice was given in a way the future employment opportunities were not adversely impacted. A RIF'd teacher should be given notice at or near the end of one school year so that future employment may be explored during the summer recess for the start of the next year. Petitioner was given notice of the RIF in May 2002. Accordingly, in the school law tradition, 60 days notice and compensation was reasonable. I so **FIND**.

CONCLUSION AND ORDER

For the reasons set forth above, I **CONCLUDE** that petitioner's employment contract rolled over for the years 2000, 2001 and 2002. I further **CONCLUDE** that the contract termination clause was vague and unclear and therefore, sixty (60) days notice of termination was reasonable. Accordingly, petitioner's motion for summary decision is **GRANTED,** in part and **DENIED,** in part.

Petitioner requested that this Order be submitted to the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for immediate review as if it were an initial decision. *N.J.A.C.* 1:1-12.5(e).

This order granting petitioner's motion for summary judgment in part and denying petitioner's motion for summary judgment in part is being submitted under *N.J.A.C.* 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make the 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 decision in accordance with ***N.J.S.A.*** 52:14B-10.

Within thirteen (13) days from the date on which this order 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.

11-10-03
DATE

W J Miller
W. TODD MILLER, ALJ

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

11-17-03
DATE

Mailed to Parties:

NOV 18 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sd

APPENDIX

Documents considered

For petitioner:

Motion and Brief with exhibits, August 27, 2003

Letter, September 16, 2003

Letter, October 6, 2003

For respondent:

Opposition Brief with exhibits

Letter, September 30, 2003

Letter, October 7, 2003

Witnesses

For petitioner:

Thomas Griggs, petitioner

For respondent:

Dr. Gibson, Superintendent

OAL DKT. NO. EDU 6404-02
AGENCY DKT. NO. 242-8/02

THOMAS F. GRIGGS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MAGNOLIA, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has received the Order of the Administrative Law Judge (ALJ) and the record of this matter, together with petitioner's exceptions and the Board's reply thereto. Pursuant to *N.J.A.C.* 1:1-12.5(e), however, the Commissioner determines that immediate review of the Order will not avoid unnecessary litigation, in that petitioner has not abandoned his claim, as raised in Count III of the Petition of Appeal, that "Respondent had no reasonable financial or other reason to eliminate Mr. Griggs' position as Principal," (Petition of Appeal at 4) and as such, the Board's reduction in force was in bad faith.[1]

Accordingly, the Commissioner determines that the within Order shall be reviewed at the end of the contested case, and returns this matter to the Office of Administrative Law for continued proceedings.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/17/03
Date of Mailing: 12/18/03

[1] Indeed, petitioner challenges the ALJ's recitation of undisputed facts at pages 2 and 3 of the Order, asserting that "No evidence was presented by the parties in their motion papers or during oral argument proceedings which could have led the ALJ to the conclusion that that 'there were legitimate concerns regarding numerous programs and services being slated for elimination from the budget.'" (Petitioner's Exceptions at 10)

[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.*

658-03SEC

655-03

IN THE MATTER OF KAREN	:	
JACKSON, GALLOWAY COMMUNITY	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL BOARD OF	:	DECISION
TRUSTEES, ATLANTIC COUNTY.	:	
	:	

December 18, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
KAREN JACKSON	:	
Galloway Community Charter School	:	**SEC Docket No.: T31-03**
Board of Trustees	:	
Atlantic 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:12-33 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, Karen Jackson was appointed to the Galloway Community Charter School in July 2001; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted eight training sessions between July 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order against Ms. Jackson on June 9, 2003, via regular and certified mail, directing her to Show Cause why she had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the October training sessions; and

WHEREAS, Respondent provided no response to the Order, and

WHEREAS, the Commission notified her by letter dated June 12, 2003, that the Commission would discuss this matter at its October 28, 2003 meeting, and if she did not attend training by that time, she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission found on October 28, 2003, that this failure to attend board member training from July 2001 to April 2003, well beyond the one year required by law, constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, Ms. Jackson filed a letter and doctor's note with this Commission on October 29, 2003, and a letter stating that she intended to attend the October 2003 training session but had caught influenza and suffered from a pulmonary disorder related to an asthmatic condition which prevented her from attending the October 2003 training session, but that she has registered to attend the January 2004 session; and

WHEREAS, the principal of the Galloway Community Charter School submitted a letter via facsimile on October 30, 2003, and correspondence from the NJSBA to illustrate that there has been some debate as to whether this individual was required to attend training; and

WHEREAS, the Commission reconsidered this matter based on Respondent's submissions of October 29, and October 30, 2003, at its meeting of October 31, 2003, and found suspension to be inappropriate under these circumstances, but that a penalty of removal would be appropriate if she fails to attend one of the trainings in January, 2004;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Jackson violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove her from the board if she fails to attend one of the January 2004 training sessions.

Dated: October 31, 2003

Paul C. Garbarini, Chairperson

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, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View 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.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on October 31, 2003.

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT31-03#2.doc)

IN THE MATTER OF KAREN	:	
JACKSON, GALLOWAY COMMUNITY	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL BOARD OF	:	DECISION
TRUSTEES, ATLANTIC 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 removal of 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 *N.J.A.C.* 6A:28-1.6; and

Whereas, *N.J.S.A.* 18A:12-33 requires new school 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 Galloway Community Charter School in July 2001; and

Whereas, the above-named Board member was duly apprised of the training requirement via the New Jersey School Boards Association's (NJSBA) "candidate kit," together with correspondence to her dated January 3, 2003 and February 19, 2003; and

Whereas, the NJSBA conducted eight training sessions between July 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, the last training session to fulfill the requirement was held in March 2003; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on June 9, 2003, the Commission issued an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the October 2003 training sessions; and

Whereas, the above-named Board member provided no response to the Order; and

Whereas, the Commission notified her by letter dated June 12, 2003 that it would discuss this matter at its October 28, 2003 meeting and, if she did not attend training by that time, she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

Whereas, the Commission found at its meeting on October 28, 2003 that this failure to attend board member training from July 2001 until April 2003 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, on October 29, 2003, the above-named Board member filed a letter and doctor's note with the Commission, explaining that she had intended to attend training in October but had been prevented by illness from doing so; and

Whereas, on October 30, 2003, the Charter School principal submitted a letter including correspondence from the NJSBA illustrating some confusion over whether the above-named Board member was required to attend training; and

Whereas, at a meeting on October 31, 2003, the Commission reconsidered this matter based on the aforementioned submissions and found suspension to be inappropriate under the circumstances, deciding instead to recommend removal if the above-named Board member failed to attend training by the end of January 2004, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on November 12, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no response was submitted; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission, and, while he has determined to adopt the recommendation of the Commission that the above-named Board member not be suspended pending her completion of training, he also finds that some penalty is warranted for her violation of the School Ethics Act as found by the Commission; now therefore

IT IS ORDERED that, in the event the above-named Board member fails to complete a training session during January 2004, she shall be summarily removed from office as of the date of the final session offered that month. Additionally, IT IS ORDERED that the above-named school official shall be reprimanded for her failure to abide by the requirements of the School Ethics Act, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials. [1] [2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/18/03

Date of Mailing: 12/19/03

[1] It is noted in this regard that respondent was appointed to the Board of Trustees in July 2001 and made no apparent attempt to arrange for training or clarify her status as to training requirements until after issuance of the Commission's June 2003 Show Cause Order, to which she filed no response. Additionally, she gave the Commission no indication of her intention to attend the October training session prior to the Commission's October 28, 2003 meeting, and waited until after that meeting to communicate, directly or though the charter school, with the Commission regarding the circumstances of her nonattendance.

[2] 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.

659-03

IN THE MATTER OF AFIFAH	:	
MUHAMMAD, ELYSIAN CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL BOARD OF TRUSTEES,	:	DECISION
HUDSON COUNTY.	:	
	:	

December 18, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
AFIFAH MUHAMMAD	:	
Elysian Charter School	:	**SEC Docket No.: T30-03**
Board of Trustees	:	
Hudson County	:	

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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:12-33 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, Afifah Muhammad was appointed to the Elysian Charter School in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted four training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order against Mr. Muhammad on June 9, 2003, via regular and certified mail, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the October training sessions; and

WHEREAS, Respondent provided no response to the Order; and

WHEREAS, the Commission notified him by letter dated June 12, 2003, that the Commission would discuss this matter at its October 28, 2003 meeting, and if he did not attend training by that time, he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through October; and

WHEREAS, the Commission finds that if Mr. Muhammad fails to attend by the end of **January 2004**, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Muhammad violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends, but remove him from the board if he fails to attend one of the January 2004 training sessions.

Dated: October 29, 2003

Paul C. Garbarini, Chairperson

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, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View 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.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on October 28, 2003.

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT30-03.doc)

AGENCY DKT. NO. 432-11/03

IN THE MATTER OF AFIFAH	:	
MUHAMMAD, ELYSIAN CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL BOARD OF TRUSTEES,	:	DECISION
HUDSON 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 removal of 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 *N.J.A.C.* 6A:28-1.6; and

Whereas, *N.J.S.A.* 18A:12-33 requires new school 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 Elysian Charter School in April 2002; and

Whereas, the above-named Board member was duly apprised of the training requirement via the New Jersey School Boards Association's (NJSBA) "candidate kit," together with correspondence to him dated January 3, 2003 and February 19, 2003; and

Whereas, the NJSBA conducted four training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, the last training session to fulfill the requirement was held in March 2003; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on June 9, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the October 2003 training sessions; and

Whereas, the above-named Board member provided no response to the Order; and

Whereas, the Commission notified him by letter dated June 12, 2003 that it would discuss this matter at its October 28, 2003 meeting and, if he did not attend the training session by that time, he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

Whereas, the Commission finds that this failure to attend board member training from April 2002 until April 2003 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, at its meeting on October 28, 2003, the Commission recommended that the above-named Board member be suspended from the Board until he attends a January 2004 session and removed if he fails to attend by the end of January 2004, memorializing such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on November 12, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no response was submitted; 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 suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event he fails to complete a training session during January 2004, the above-named Board member shall be summarily removed from office as of the date of the final session offered that month.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/18/03

Date of Mailing: 12/19/03

* 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.

660-03SEC

IN THE MATTER OF JOHN F.	:	
KROSCHWITZ, II AND WENDY	:	COMMISSIONER OF EDUCATION
STURGEON, BOARD OF EDUCATION	:	DECISION
OF THE TOWNSHIP OF HAMILTON,	:	
MERCER COUNTY.	:	

SYNOPSIS

The School Ethics Commission determined that respondent Board members violated *N.J.S.A.* 18A:12-24(f) of the School Ethics Act by surrendering their independent judgment concerning the District's food service contractor to a special interest group (HTEA and HTSSA) which supported their candidacy and opposed the renewal of the existing food service contract. Respondent Sturgeon also violated *N.J.S.A.* 18A:12-24.1(j) by taking her complaints directly to the media instead of first giving the administration an opportunity to address them. After considering the nature of the charges, the Commission recommended the penalty of censure.

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 respondents censured as school officials 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.

December 19, 2003

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IN THE MATTER	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	
	Docket #C29-03
JOHN F. KROSCHWITZ, II and WENDY STURGEON, Respondents,	
HAMILTON BOARD OF EDUCATION MERCER COUNTY	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaints filed against John Kroschwitz, II and Wendy Sturgeon for violations of the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Specifically, the Hamilton Township Board of Education alleges that respondent Sturgeon entered schools and took photographs of the kitchens in order to damage the reputation of food service contractor Sodexho whose contract the teachers' union opposed. Ms. Sturgeon and Mr. Kroschwitz had been endorsed by the union. The complaint also alleges that Mr. Kroschwitz and Ms. Sturgeon appeared on a television program broadcast on WZBN complaining of Sodexho's management of the kitchens.

Mr. Kroschwitz filed an answer to the complaint admitting to having been endorsed by the political action committee of the unions, but stating that the board president and two other board members were also so endorsed. He admitted to being interviewed on WZBN and expressing concerns about the sanitary conditions and management of the kitchens by Sodexho. He denied having committed any violation of the School Ethics Act. Ms. Sturgeon filed an answer to the complaint admitting that she was endorsed by the union's political action committee, but stating that because she was elected in April 2003, she was not present for the majority of meetings where the union expressed its objections to Sodexho. She stated that it was her belief that it was her duty to inspect the cafeterias prior to voting on whether to renew the contract and does not believe that she violated any provision of the School Ethics Act.

The School Ethics Commission advised the parties that it would discuss this matter at its meeting of September 23, 2003. The parties were advised of their right to bring counsel and witnesses. All parties appeared with counsel and witnesses. The complainants were represented by board attorney, Dennis DeSantis, Esq. The respondent was represented by Diane Proulx, Esq. The Commission heard testimony from the parties and complainant's witness, Robert Foster, Board President. At its public meeting on September 23, 2003, the Commission voted to find probable cause to credit the allegations that Ms. Sturgeon violated N.J.S.A. 18A:12-24.1(j) of the Code of Ethics for School Board Members of the School Ethics Act in connection with the conduct taken in opposition to Sodexho. The Commission neglected to render a decision on Mr. Kroschwitz and therefore, the matter was placed on the agenda of the October 28, 2003 meeting. The Commission adopted this decision at a special meeting of October 31, 2003 that was called to continue the agenda from its regularly scheduled meeting of October 28, 2003.

The decision concludes that Ms. Sturgeon and Mr. Kroschwitz violated N.J.S.A. 18A:12-24.1(j) of the Code of Ethics for School Board Members of the School Ethics Act and recommends a penalty of censure.

FACTS

Mr. Kroschwitz is a member of the Hamilton Township Board of Education who was elected in April 2002. Ms. Sturgeon is a member of the Hamilton Township Board of Education who was elected in April 2003. Both respondents were endorsed by the Hamilton Township Friends of Education, the political action committee formed by the Hamilton Township Education Association (HTEA) and the Hamilton Township School Secretaries' Association (HTSSA) when they ran for election to the Board. The HTEA represents all teaching staff members, educational assistants, custodians and kitchen workers. The HTSSA represents all school secretaries employed by the Complainant Board.

On June 26, 2002, the Board entered into a contract with Sodexho Management, Inc. to manage the food services in the District. Sodexho began performing these services on July 1, 2002. The agreement provided that the District would continue to maintain its current staff of kitchen workers who were members of the HTEA. However, these workers would be managed by Sodexho and any further vacancies would be filled by Sodexho and those replacement employees would no longer be employees of the complainant or members of the HTEA.

After July 1, 2002, HTEA and HTSSA representatives appeared repeatedly at monthly Board meetings objecting to the hiring of Sodexho and criticizing its performance. The Sodexho contract was scheduled to expire on June 30, 2003 and the Board agenda for May 28, 2003 set forth the consideration of the renewal of the contract for an additional one year period.

On May 8, 2003, two board members visited Nottingham High School to inspect the cafeteria. On May 9, 2003, Mr. Kroschwitz and another board member visited the school. Ms. Sturgeon was aware of the visits by these board members.

On May 13, 2003, Ms. Sturgeon made visits to Nottingham High School, Grice Middle School and Reynolds Middle School. The principals of all the middle and high schools in the District were attending a meeting at the Board office that day. Ms. Sturgeon did not notify any of the administrators in those buildings of her visit in advance nor did she ask for any administrator when she arrived. She wore her badge identifying her as a board member. She went to the main office and asked to enter the kitchen where she took photographs. She did not sign in or out and did not advise the Board's central administration of what she had done or inform them of what she had found. At Grice and Reynolds Middle Schools, she asked for a specific custodian that she had been told to request by a staff member. The custodian, who had been advised by a union representative that Ms. Sturgeon would be coming, took her through the kitchen and answered her questions.

At no time after her visits to the three schools did Respondent Sturgeon advise any administrators of the three schools or any members of the Central Office Administration that she

had visited, the reason that she did so or the result of her visits. She did not provide copies of the photographs to the administrators.

On May 19, 2003, Ms. Sturgeon went to a television station with the pictures and taped a program that was to air on May 20, 2003. Mr. Kroschwitz appeared on the program with Ms. Sturgeon. Members of the Board saw the program and were upset that neither they nor the Board had been given advance notice of her findings. On May 21, 2003, the *Trenton Times* newspaper printed an article quoting both Respondents regarding their complaints as to the sanitary conditions of the kitchens in the three schools. At the Board's agenda meeting on May 21, 2003, the Respondents advised the Board and the chief administrative officer for the first time of Ms. Sturgeon's visit to the schools and their complaints about the condition of the schools' kitchens. Officers and members of the HTEA and HTSSA publicly spoke about the cleanliness of the kitchens managed by Sodexho in opposition to the renewal of its contract.

Respondents voted not to renew the contract with Sodexho at the Board meeting on May 28, 2003. The contract with Sodexho was not renewed.

ANALYSIS

Complainants allege that Ms. Sturgeon's conduct violated N.J.S.A. 18A:12-24.1(c), (d) and (j) of the Code of Ethics for School Board members. In addition, complainants allege that both respondents violated N.J.S.A. 18A:12-24(c) and N.J.S.A. 18A:12-24.1(f) because they undertook such action after having been endorsed by the political action committee of the HTEA and the HTSSA.

N.J.S.A. 18A:12-24.1(c) provides:

> I will confine my board action to policy making, planning and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

The Commission reviewed Ms. Sturgeon's conduct in relation to N.J.S.A. 18A:12-24.1(c) and concludes that Ms. Sturgeon's conduct could arguably be viewed as "appraisal," which is permitted under the Code of Ethics. The Commission does not view the rest of this section to be particularly pertinent to the facts of this case. Ms. Sturgeon undertook an appraisal of the kitchens in order to inform her vote as to whether to renew the contract with Sodexho. She was not setting out to formulate a policy. The Commission does not view this conduct as a violation of N.J.S.A. 18A:12-24.1(c).

N.J.S.A. 18A:12-24.1(d) sets forth:

> I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

The Commission does not view Ms. Sturgeon's conduct as an attempt to administer the schools. Further, one could argue that she was attempting to see that the schools are well run although she undertook the investigation without the knowledge of the other board members.

The Commission believes that there are other sections that are more applicable to the conduct alleged and concludes that Ms. Sturgeon did not violate N.J.S.A. 18A:12-24.1(d).

N.J.S.A. 18A:12-24.1(j) provides:

> I will refer all complaints to the chief administrative officer and will act on the complaints at public meetings only after failure of an administrative solution.

Ms. Sturgeon admitted that she did not advise the chief administrative officer of her intent to visit the schools because she heard complaints of less than sanitary conditions at the schools that she visited. She further admitted that she did not take her complaints to the chief administrative officer after she visited the kitchen and took pictures of what she believed confirmed the complaints. Instead, she took her complaints to a television station and provided an interview to the local newspaper. In doing so, she gave the chief administrative officer no opportunity to solve the problem before making her complaint public. The Commission finds that her doing so was a clear violation of N.J.S.A. 18A:12-24.1(j).

Complainants next allege that both Ms. Sturgeon and Mr. Kroschwitz violated N.J.S.A. 18A:12-24(c) and N.J.S.A. 18A:12-24.1(f) in connection with the fact that both were endorsed by the political action committee of the HTEA and the HTSSA.

N.J.S.A. 18A:12-24(c) provides:

> No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds 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.

The Commission advised in Public Advisory Opinion A13-02 that board members who were endorsed by the local education association would violate N.J.S.A. 18A:12-24(c) if they were to participate in negotiations and vote on the contract in the year of the endorsement. In such a case there was a direct relationship between the union endorsement and the union contract. Therefore, the Commission concluded that a personal involvement was created by the endorsement by the association and that a benefit was created by the services attached to that endorsement and the board members endorsed in the year in which contract negotiations began had a personal involvement with the association that constituted a benefit to them. Thus, the board members' participation in negotiations and voting on the teachers' contract would violate N.J.S.A. 18A:12-24(c). In the present case, the complainants seek to broaden that opinion and rule that a board member endorsed by the teachers' union is not only prohibited from negotiating and voting on the union contract, but is also prohibited from voting on matters coming before the board where the union has advocated a certain position. The Commission declines to expand the prohibition to this extent. The Commission declines to rule that board members endorsed by the union have a personal involvement that constitutes a benefit to them in issues that impact upon

the union outside of the contract. The benefit that such board members would acquire is not clear. Also, such a ruling could conflict endorsed board members from voting on any matter before the Board that could impact the union either positively or negatively. For the foregoing reasons, the Commission finds no probable cause to credit the allegation that the Respondents' conduct violated N.J.S.A. 18A:12-24(c).

Last, complainants argue that both Respondents' conduct violated N.J.S.A. 18A:12-24.1(f), which provides:

> I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or the gain of friends.

The opposition of the HTEA and the HTSSA to the Sodexho is undisputed. While the Commission believes that both Respondents could have exercised independent judgment in voting against the renewal of Sodexho's contract, the Commission believes that the motivating factor behind Ms. Sturgeon's visits to the schools and her and Mr. Kroschwitz's appearance on television describing the poor conditions of the schools' kitchens was the opposition of the unions to Sodexho's contract with the Board. The Commission finds this to be a reasonable inference that can be drawn from the Respondents' endorsement by the HTEA and HTSSA's political action committee, the surreptitious investigation into the kitchens without the knowledge of the administration and the Respondents' choice to present the information to the media rather than the administration. This is evidence that they were more concerned about seeing that the contract was not renewed than correcting the problem. For the foregoing reasons, the Commission finds that there is ample evidence that Ms. Sturgeon and Mr. Kroschwitz surrendered their independent judgment to a special interest group in violation of N.J.S.A. 18A:12-24.1(f).

DECISION

For the foregoing reasons, the Commission finds that Ms. Sturgeon violated N.J.S.A. 18A:12-24.1(j) by not presenting her complaints to the chief administrative officer and giving him an opportunity to address them before discussing them on a television program and finds that Ms. Sturgeon and Mr. Kroschwitz violated N.J.S.A. 18A:12-24.1(f) for surrendering their independent judgment to a special interest group.

In determining the penalty to recommend, the Commission had to consider that the Respondents were addressing a potential hazard to students in the Hamilton School District. The Commission disagreed with their methods for addressing the problem and concluded that those methods were motivated by the involvement of the union in the contract issue. For this violation of the Code of Ethics, the Commission recommends that the Commissioner of Education impose a penalty of censure against both Respondents.

Paul C. Garbarini K

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C29-03

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the testimony presented; and

Whereas, at its meeting of September 23, 2003, the Commission found that Wendy Sturgeon violated N.J.S.A. 18A:12-24.1(j) and at its meeting of October 31, 2003, the Commission found that both Ms. Sturgeon and John Kroschwitz, II violated N.J.S.A. 18A:12-24.1(f) of the Act and recommended that the Commissioner of Education impose a sanction of censure for both; and

Whereas, the Commission staff prepared a decision consistent with the aforementioned conclusion; and

Whereas, at its meeting of October 31, 2003, the Commission reviewed the draft decision 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 this Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on October 31, 2003.

Lisa James-Beavers
Executive Director

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IN THE MATTER	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	
	Docket #C29-03
JOHN F. KROSCHWITZ, II and WENDY STURGEON, Respondents,	
HAMILTON BOARD OF EDUCATION MERCER COUNTY	**AMENDED DECISION**

PROCEDURAL HISTORY

This matter arises from a complaints filed against John Kroschwitz, II and Wendy Sturgeon for violations of the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Specifically, the Hamilton Township Board of Education alleges that respondent Sturgeon entered schools and took photographs of the kitchens in order to damage the reputation of food service contractor Sodexho whose contract the teachers' union opposed. Ms. Sturgeon and Mr. Kroschwitz had been endorsed by the union. The complaint also alleges that Mr. Kroschwitz and Ms. Sturgeon appeared on a television program broadcast on WZBN complaining of Sodexho's management of the kitchens.

Mr. Kroschwitz filed an answer to the complaint admitting to having been endorsed by the political action committee of the unions, but stating that the board president and two other board members were also so endorsed. He admitted to being interviewed on WZBN and expressing concerns about the sanitary conditions and management of the kitchens by Sodexho. He denied having committed any violation of the School Ethics Act. Ms. Sturgeon filed an answer to the complaint admitting that she was endorsed by the union's political action committee, but stating that because she was elected in April 2003, she was not present for the majority of meetings where the union expressed its objections to Sodexho. She stated that it was her belief that it was her duty to inspect the cafeterias prior to voting on whether to renew the contract and does not believe that she violated any provision of the School Ethics Act.

The School Ethics Commission advised the parties that it would discuss this matter at its meeting of September 23, 2003. The parties were advised of their right to bring counsel and witnesses. All parties appeared with counsel and witnesses. The complainants were represented by board attorney, Dennis DeSantis, Esq. The respondent was represented by Diane Proulx, Esq. The Commission heard testimony from the parties and complainant's witness, Robert Foster, Board President. At its public meeting on September 23, 2003, the Commission voted to find probable cause to credit the allegations that Ms. Sturgeon violated N.J.S.A. 18A:12-24.1(j) of the Code of Ethics for School Board Members of the School Ethics Act in connection with the conduct taken in opposition to Sodexho. The Commission neglected to render a decision on Mr. Kroschwitz and therefore, the matter was placed on the agenda of the October 28, 2003 meeting. The Commission adopted this decision at a special meeting of October 31, 2003 that was called to continue the agenda from its regularly scheduled meeting of October 28, 2003.

The decision concludes that Ms. Sturgeon and Mr. Kroschwitz violated N.J.S.A. 18A:12-24.1(j) of the Code of Ethics for School Board Members of the School Ethics Act and recommends a penalty of censure.

FACTS

Mr. Kroschwitz is a member of the Hamilton Township Board of Education who was elected in April 2002. Ms. Sturgeon is a member of the Hamilton Township Board of Education who was elected in April 2003. Both respondents were endorsed by the Hamilton Township Friends of Education, the political action committee formed by the Hamilton Township Education Association (HTEA) and the Hamilton Township School Secretaries' Association (HTSSA) when they ran for election to the Board. The HTEA represents all teaching staff members, educational assistants, custodians and kitchen workers. The HTSSA represents all school secretaries employed by the Complainant Board.

On June 26, 2002, the Board entered into a contract with Sodexho Management, Inc. to manage the food services in the District. Sodexho began performing these services on July 1, 2002. The agreement provided that the District would continue to maintain its current staff of kitchen workers who were members of the HTEA. However, these workers would be managed by Sodexho and any further vacancies would be filled by Sodexho and those replacement employees would no longer be employees of the complainant or members of the HTEA.

After July 1, 2002, HTEA and HTSSA representatives appeared repeatedly at monthly Board meetings objecting to the hiring of Sodexho and criticizing its performance. The Sodexho contract was scheduled to expire on June 30, 2003 and the Board agenda for May 28, 2003 set forth the consideration of the renewal of the contract for an additional one year period.

On May 8, 2003, two board members visited Nottingham High School to inspect the cafeteria. On May 9, 2003, Mr. Kroschwitz and another board member visited the school. Ms. Sturgeon was aware of the visits by these board members.

On May 13, 2003, Ms. Sturgeon made visits to Nottingham High School, Grice Middle School and Reynolds Middle School. The principals of all the middle and high schools in the District were attending a meeting at the Board office that day. Ms. Sturgeon did not notify any of the administrators in those buildings of her visit in advance nor did she ask for any administrator when she arrived. She wore her badge identifying her as a board member. She went to the main office and asked to enter the kitchen where she took photographs. She did not sign in or out and did not advise the Board's central administration of what she had done or inform them of what she had found. At Grice and Reynolds Middle Schools, she asked for a specific custodian that she had been told to request by a staff member. The custodian, who had been advised by a union representative that Ms. Sturgeon would be coming, took her through the kitchen and answered her questions.

At no time after her visits to the three schools did Respondent Sturgeon advise any administrators of the three schools or any members of the Central Office Administration that she

had visited, the reason that she did so or the result of her visits. She did not provide copies of the photographs to the administrators.

On May 19, 2003, Ms. Sturgeon went to a television station with the pictures and taped a program that was to air on May 20, 2003. Mr. Kroschwitz appeared on the program with Ms. Sturgeon. Members of the Board saw the program and were upset that neither they nor the Board had been given advance notice of her findings. On May 21, 2003, the *Trenton Times* newspaper printed an article quoting both Respondents regarding their complaints as to the sanitary conditions of the kitchens in the three schools. At the Board's agenda meeting on May 21, 2003, the Respondents advised the Board and the chief administrative officer for the first time of Ms. Sturgeon's visit to the schools and their complaints about the condition of the schools' kitchens. Officers and members of the HTEA and HTSSA publicly spoke about the cleanliness of the kitchens managed by Sodexho in opposition to the renewal of its contract.

Respondents voted not to renew the contract with Sodexho at the Board meeting on May 28, 2003. The contract with Sodexho was renewed.

ANALYSIS

Complainants allege that Ms. Sturgeon's conduct violated N.J.S.A. 18A:12-24.1(c), (d) and (j) of the Code of Ethics for School Board members. In addition, complainants allege that both respondents violated N.J.S.A. 18A:12-24(c) and N.J.S.A. 18A:12-24.1(f) because they undertook such action after having been endorsed by the political action committee of the HTEA and the HTSSA.

N.J.S.A. 18A:12-24.1(c) provides:

> I will confine my board action to policy making, planning and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

The Commission reviewed Ms. Sturgeon's conduct in relation to N.J.S.A. 18A:12-24.1(c) and concludes that Ms. Sturgeon's conduct could arguably be viewed as "appraisal," which is permitted under the Code of Ethics. The Commission does not view the rest of this section to be particularly pertinent to the facts of this case. Ms. Sturgeon undertook an appraisal of the kitchens in order to inform her vote as to whether to renew the contract with Sodexho. She was not setting out to formulate a policy. The Commission does not view this conduct as a violation of N.J.S.A. 18A:12-24.1(c).

N.J.S.A. 18A:12-24.1(d) sets forth:

> I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

The Commission does not view Ms. Sturgeon's conduct as an attempt to administer the schools. Further, one could argue that she was attempting to see that the schools are well run although she undertook the investigation without the knowledge of the other board members.

The Commission believes that there are other sections that are more applicable to the conduct alleged and concludes that Ms. Sturgeon did not violate N.J.S.A. 18A:12-24.1(d).

N.J.S.A. 18A:12-24.1(j) provides:

> I will refer all complaints to the chief administrative officer and will act on the complaints at public meetings only after failure of an administrative solution.

Ms. Sturgeon admitted that she did not advise the chief administrative officer of her intent to visit the schools because she heard complaints of less than sanitary conditions at the schools that she visited. She further admitted that she did not take her complaints to the chief administrative officer after she visited the kitchen and took pictures of what she believed confirmed the complaints. Instead, she took her complaints to a television station and provided an interview to the local newspaper. In doing so, she gave the chief administrative officer no opportunity to solve the problem before making her complaint public. The Commission finds that her doing so was a clear violation of N.J.S.A. 18A:12-24.1(j).

Complainants next allege that both Ms. Sturgeon and Mr. Kroschwitz violated N.J.S.A. 18A:12-24(c) and N.J.S.A. 18A:12-24.1(f) in connection with the fact that both were endorsed by the political action committee of the HTEA and the HTSSA.

N.J.S.A. 18A:12-24(c) provides:

> No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds 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.

The Commission advised in Public Advisory Opinion A13-02 that board members who were endorsed by the local education association would violate N.J.S.A. 18A:12-24(c) if they were to participate in negotiations and vote on the contract in the year of the endorsement. In such a case there was a direct relationship between the union endorsement and the union contract. Therefore, the Commission concluded that a personal involvement was created by the endorsement by the association and that a benefit was created by the services attached to that endorsement and the board members endorsed in the year in which contract negotiations began had a personal involvement with the association that constituted a benefit to them. Thus, the board members' participation in negotiations and voting on the teachers' contract would violate N.J.S.A. 18A:12-24(c). In the present case, the complainants seek to broaden that opinion and rule that a board member endorsed by the teachers' union is not only prohibited from negotiating and voting on the union contract, but is also prohibited from voting on matters coming before the board where the union has advocated a certain position. The Commission declines to expand the prohibition to this extent. The Commission declines to rule that board members endorsed by the union have a personal involvement that constitutes a benefit to them in issues that impact upon

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the union outside of the contract. The benefit that such board members would acquire is not clear. Also, such a ruling could conflict endorsed board members from voting on any matter before the Board that could impact the union either positively or negatively. For the foregoing reasons, the Commission finds no probable cause to credit the allegation that the Respondents' conduct violated N.J.S.A. 18A:12-24(c).

Last, complainants argue that both Respondents' conduct violated N.J.S.A. 18A:12-24.1(f), which provides:

> I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or the gain of friends.

The opposition of the HTEA and the HTSSA to the Sodexho is undisputed. While the Commission believes that both Respondents could have exercised independent judgment in voting against the renewal of Sodexho's contract, the Commission believes that the motivating factor behind Ms. Sturgeon's visits to the schools and her and Mr. Kroschwitz's appearance on television describing the poor conditions of the schools' kitchens was the opposition of the unions to Sodexho's contract with the Board. The Commission finds this to be a reasonable inference that can be drawn from the Respondents' endorsement by the HTEA and HTSSA's political action committee, the surreptitious investigation into the kitchens without the knowledge of the administration and the Respondents' choice to present the information to the media rather than the administration. This is evidence that they were more concerned about seeing that the contract was not renewed than correcting the problem. For the foregoing reasons, the Commission finds that there is ample evidence that Ms. Sturgeon and Mr. Kroschwitz surrendered their independent judgment to a special interest group in violation of N.J.S.A. 18A:12-24.1(f).

DECISION

For the foregoing reasons, the Commission finds that Ms. Sturgeon violated N.J.S.A. 18A:12-24.1(j) by not presenting her complaints to the chief administrative officer and giving him an opportunity to address them before discussing them on a television program and finds that Ms. Sturgeon and Mr. Kroschwitz violated N.J.S.A. 18A:12-24.1(f) for surrendering their independent judgment to a special interest group.

In determining the penalty to recommend, the Commission had to consider that the Respondents were addressing a potential hazard to students in the Hamilton School District. The Commission disagreed with their methods for addressing the problem and concluded that those methods were motivated by the involvement of the union in the contract issue. For this violation of the Code of Ethics, the Commission recommends that the Commissioner of Education impose a penalty of censure against both Respondents.

Paul C. Garbarini K
Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C29-03

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the testimony presented; and

Whereas, at its meeting of September 23, 2003, the Commission found that Wendy Sturgeon violated N.J.S.A. 18A:12-24.1(j) and at its meeting of October 31, 2003, the Commission found that both Ms. Sturgeon and John Kroschwitz, II violated N.J.S.A. 18A:12-24.1(f) of the Act and recommended that the Commissioner of Education impose a sanction of censure for both; and

Whereas, the Commission staff prepared a decision consistent with the aforementioned conclusion; and

Whereas, at its meeting of October 31, 2003, the Commission reviewed the draft decision and agreed with the decision;

Whereas, at its meeting of November 25, 2003, the Commission noted an error in its prior decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed amended 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 this Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on November 25, 2003.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 429-11/03

IN THE MATTER OF JOHN F.	:	
KROSCHWITZ, II AND WENDY	:	COMMISSIONER OF EDUCATION
STURGEON, BOARD OF EDUCATION	:	DECISION
OF THE TOWNSHIP OF HAMILTON,	:	
MERCER COUNTY.	:	

This matter comes before the Commissioner pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1 to impose a sanction upon respondents, members of the Hamilton Township Board of Education, based on the finding of the School Ethics Commission (Commission) that respondents violated the School Ethics Act. Specifically, the Commission found that Respondent Sturgeon violated *N.J.S.A.* 18A:12-24.1(j) by taking her complaints about the District's food service contractor directly to the media without first presenting them to the chief school administrator for resolution, and that both respondents violated *N.J.S.A.* 18A:12-24.1(f) by surrendering their independent judgment to a special interest group consisting of District employee associations which had supported respondents' candidacy for Board membership and strongly opposed renewal of the existing food service contract. For these violations, the Commission recommended that both respondents be censured.

The Commissioner has reviewed the Commission's decision and the record of this matter. Additionally, the Commissioner has reviewed respondents'

comments, jointly submitted, on the Commission's recommendation that they be censured.

In their comment, respondents urge the Commissioner to reject the Commission's recommendation, contending that:

> Contrary to the stated fact in the Decision, the Sodexho [food service] Contract was, in fact, renewed at the Meeting of the Hamilton Township Board of Education on May 28, 2003. This is public record. Although *N.J.A.C.* 6A:3-9.1 states that the findings of fact and determinations of violations are not reviewable by the Commissioner, this particular fact is not a "finding," but a matter of public record. The Commission found that both Respondents violated *N.J.S.A.* 18A:12-24.1(f) which states, "I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or the gain of friends." A finding of fact by the Commission that is contrary to the actual public record is a significant error that the Commission should address prior to recommending any sanctions in the above-mentioned Complaint. This is particularly egregious since the outcome of the vote is relevant to the alleged violation. (Respondents' Comment at 1-2)

At the outset, the Commissioner emphasizes that, in accordance with *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, and as recognized by respondents, only the School Ethics Commission may determine whether a violation of the School Ethics Act has occurred, and the Commission's decision in that regard is not reviewable by the Commissioner. Rather, the Commissioner's jurisdiction is limited to review of any sanction the Commission may recommend based upon its determination that a school official has violated the Act.

Given the nature of the Commissioner's review and upon full consideration of the record in this matter, the Commissioner finds no cause to disturb the Commission's recommended sanction. The Commissioner so holds notwithstanding the error noted by respondents, since, regardless of whether it constitutes a "finding"

reviewable by the Commissioner, it has no relation to the violation found with respect to *N.J.S.A.* 18A:12-24.1(j), failure to report complaints to the administration prior to taking public action on them, and it is immaterial to the violation found with respect to *N.J.S.A.* 18A:12-24.1(f), surrendering one's independent judgment to a special interest group. In this latter regard, the Commissioner specifically notes that, notwithstanding any action taken by the Board as a whole to renew or not renew the disputed food service contract, respondents each admitted that *they* voted *not* to renew it. (Complaint at 6, paragraph 19; Response of John F. Kruschwitz, II at 3, paragraph 19; Response of Wendy Sturgeon at 6, paragraph 19) Additionally, on November 25, 2003, the Commission acted to issue an amended decision correcting its prior factual error while still retaining its analyses, determinations of violation and recommendation for penalty.[1]

Accordingly, for the reasons expressed in the decision of the School Ethics Commission, IT IS hereby ORDERED that John F. Kroschwitz, II and Wendy Sturgeon be censured as school officials found to have violated the School Ethics Act.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/19/03

Date of Mailing: 12/19/03

[1] The October 31, 2003 decision reads, at the last sentence of the "Facts" section ending on page 3, "The contract with Sodexho was not renewed." The November 25, 2003 decision reads, at the same place, "The contract with Sodexho was renewed." In all other respects, the decisions are identical.

[2] This decision may be appealed to the State Board of Education in accordance with *N.J.S.A.* 18A:6-27 *et seq.*, *N.J.S.A.* 18A:12-29(d) and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to the latter, Commissioner decisions are deemed filed three days after the date of mailing to the parties.

661-03

661-03SEC

IN THE MATTER OF ERIC CALLADO,	:	
PERTH AMBOY BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MIDDLESEX COUNTY.	:	DECISION
	:	

December 19, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D27-03**
ERIC CALLADO **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. Eric Callado 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 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 failed to reply to 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 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 suspension from his Board, until he files the required form, but removal if he fails to file within 30 days from the date of the Commissioner's decision on penalty, 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 Eric Callado 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 suspension from his Board, but removal if he fails to file within 30 days from the effective date of the Commissioner's decision.

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. 409-11/03

IN THE MATTER OF ERIC CALLADO,	:	
PERTH AMBOY BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MIDDLESEX 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 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 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), with a cover letter

indicating that the Commission would discuss the matter at its October 28, 2003 meeting, that the named official had the right to attend, and that the Commission could, at that meeting, find a violation of the School Ethics Act and recommend a penalty up to removal; and

Whereas, the above-named school official failed to reply to the Order to Show Cause and provided no reason for his failure to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline, despite ample opportunity to do so, constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend suspension of the above-named school official, and his automatic removal from the board of education if he failed to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 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 removal; and

Whereas, no response was submitted to the Commissioner; and

Whereas, the Commissioner has carefully considered the record of this matter and the decision of the School Ethics Commission; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of the recommended suspension, would receive no penalty notwithstanding that the School Ethics

Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until he files the necessary disclosure statement, and automatically removed from the board of education if he fails to file within 30 days. IT IS additionally ORDERED that, even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, he shall nevertheless be reprimanded for his failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/19/03

Date of Mailing: 12/19/03

* 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.

#662-03SEC

IN THE MATTER OF FELIX ROIG,	:	
NEW HORIZONS CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D17-03**
FELIX ROIG **NEW HORIZON** **CHARTER SCHOOL** **ESSEX 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. Felix Roig is a member of the New Horizons 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 his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to Mr. Roig 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 failed to reply to 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 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 suspension from his Board, but removal if he does not file within 30 days of the date of the Commissioner's decision on penalty, 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 Felix Roig 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 suspension from his Board, but removal if he does not file within 30 days of the effective date of the Commissioner's decision.

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. 419-11/03

IN THE MATTER OF FELIX ROIG, :

NEW HORIZONS CHARTER SCHOOL, : 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 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 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), with a cover letter

indicating that the Commission would discuss the matter at its October 28, 2003 meeting, that the named official had the right to attend, and that the Commission could, at that meeting, find a violation of the School Ethics Act and recommend a penalty up to removal; and

Whereas, the above-named school official failed to reply to the Order to Show Cause and provided no reason for his failure to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline, despite ample opportunity to do so, constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend suspension of the above-named school official, and his automatic removal from the Board of Trustees if he failed to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 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 removal; and

Whereas, no response was submitted to the Commissioner; and

Whereas, the Commissioner has carefully considered the record of this matter and the decision of the School Ethics Commission; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of the recommended suspension, would receive no penalty notwithstanding that the School Ethics

Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until he files the necessary disclosure statement, and automatically removed from the board of education if he fails to file within 30 days. IT IS additionally ORDERED that, even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, he shall nevertheless be reprimanded for his failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/23/03

* 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.

665-02

#663-02SEC

IN THE MATTER OF MICHAEL TULLO,	:	
NEW HORIZONS CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D19-03**
MICHAEL TULLO NEW HORIZONS CHARTER SCHOOL ESSEX 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. Michael Tullo is a member of the New Horizons 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 his 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 failed to reply to 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 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 suspension from his Board, until he files the required form, but removal if he fails to file within 30 days from the date of the Commissioner's decision on penalty, 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 Michael Tullo 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 suspension from his Board, but removal if he fails to file within 30 days from the effective date of the Commissioner's decision.

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. 417-11/03

IN THE MATTER OF MICHAEL TULLO, :

NEW HORIZONS CHARTER SCHOOL, : 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 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 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), with a cover letter

indicating that the Commission would discuss the matter at its October 28, 2003 meeting, that the named official had the right to attend, and that the Commission could, at that meeting, find a violation of the School Ethics Act and recommend a penalty up to removal; and

Whereas, the above-named school official failed to reply to the Order to Show Cause and provided no reason for his failure to comply with the requirement under *N.J.S.A.* 18A: 12-25 and 26; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline, despite ample opportunity to do so, constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend suspension of the above-named school official until he files the necessary disclosure statement, and his automatic removal from the Board of Trustees if he fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 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 removal; and

Whereas, no response was submitted to the Commissioner; and

Whereas, the Commissioner has carefully considered the record of this matter and the decision of the School Ethics Commission; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of

the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until he files the necessary disclosure statement, and automatically removed from the Board of Trustees if he fails to file within 30 days. IT IS additionally ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, he shall nevertheless be reprimanded for his failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/23/03

* 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.

664-03

#664-03SEC

IN THE MATTER OF COLLEEN McCABE, CAPE MAY SPECIAL SERVICES BOARD OF EDUCATION, CAPE MAY COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D08-03**
COLLEEN McCABE **CAPE MAY SPECIAL SERVICES BOARD OF EDUCATION** **CAPE MAY 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. Colleen McCabe is a member of the Special Services 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 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 failed to reply to 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 suspension from her Board, but removal if she does not file within 30 days of the date of the Commissioner's decision on penalty, 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 Colleen McCabe 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 suspension from her Board, but removal if she does not file within 30 days of the effective date of the Commissioner's decision.

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.

IN THE MATTER OF COLLEEN McCABE, CAPE MAY SPECIAL SERVICES BOARD OF EDUCATION, CAPE MAY 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 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 failed to reply to the Order to Show Cause; 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 she 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 suspension of the above-named school official until she files the necessary disclosure statement, and her automatic removal from the board if she fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 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 removal; 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

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of

the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until she files the necessary disclosure statement, and automatically removed from the Board if she fails to file within 30 days. IT IS additionally ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, she shall nevertheless be reprimanded for her failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/23/03

* 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.

665-03

IN THE MATTER OF VERNIE YOUNG,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D16-03**
VERNIE YOUNG NEWARK BOARD OF EDUC. ESSEX 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. Vernie Young is a member of the Newark 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 her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to Ms. Young 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 Vernie Young 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.

IN THE MATTER OF VERNIE YOUNG,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX 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 sanctioning 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), with a cover letter indicating that the Commission would discuss the matter at its October 28, 2003 meeting, that the named official had the right to attend, and that the Commission could, at that meeting, find a violation of the School Ethics Act and recommend a penalty up to removal; and

Whereas, the above-named school official filed the completed disclosure statement, but not until after the Commission had issued the Order to Show Cause; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline despite ample opportunity to do so constitutes a clear violation of *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 her delay in filing, particularly in light of her failure to respond to the Commission's reminder prior to the September 15, 2003 deadline, and memorialized such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 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 filed with the Commissioner; 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 file the requisite statement in a timely manner, 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: 12/22/03

Date of Mailing: 12/23/03

* 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.

666-03

ALBERT ZIEGLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

Petitioner, former teacher of Employment Orientation, alleged the Board violated his tenure rights when it terminated his contract two months into the 1998-99 school year on the assertion that he was not certified for the new courses to which he was assigned following elimination of his previously assigned courses. The ALJ found that petitioner was entitled to be reemployed by the Board since his Employment Orientation endorsement permitted him to teach certain vocational courses which the Board was continuing to offer. The Commissioner, however, was not persuaded that the issue of petitioner's qualification to teach these courses could be summarily resolved, and he remanded the matter for further factfinding on the actual content of the courses at issue so as to determine the certification required to teach them.

On remand, the ALJ concluded that the courses to which petitioner claimed entitlement did, in fact, fall within the scope of petitioner's Employment Orientation endorsement, so that petitioner was entitled to be reemployed and assigned to them.

The Commissioner rejected the Initial Decision, finding that the classes at issue were subject area vocational courses requiring appropriate specialized certification, and were thus beyond the limited scope of the Employment Orientation endorsement. The petition was dismissed.

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

December 22, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO.: EDU 1526-00

AGENCY DKT. NO. 21-2/99

ON REMAND FROM

OAL DKT. NO. EDU 3339-99

ALBERT ZIEGLER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

Respondent.

Gregory T. Syrek, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Robert J. Merryman, Jr., Esq., for respondent
(Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: February 21, 2003 Decided: August 8, 2003

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

PROCEDURAL HISTORY

Petitioner, Albert Ziegler, was terminated from his position as a Shop Teacher by the Board of Education of the City of Bayonne on November 23, 1998. Ziegler appealed contending that his tenure rights had been violated. Cross Motions for

Summary Judgment were filed and the undersigned concluded that Ziegler was entitled to tenure and that he should be reinstated.

The Commissioner of Education agreed that Ziegler had earned tenure but was not convinced that reinstatement was an issue that could be resolved in a summary fashion. The Commissioner in his decision stated the following:

> However, in order to determine whether the Board improperly terminated petitioner on November 23, 1998 and whether petitioner is entitled to reinstatement to his tenured position of employment it is also necessary to examine what skills are required to be taught, and are actually taught, by a teacher of Shop 9, Shop 10, Maintenance and Repair and Industrial Technology.

The Commissioner goes on to say:

> This matter, therefore, is remanded to the OAL for further fact finding as necessary to determine (1) The actual duties of and skills taught by a teacher of Shop 9, Shop 10, Maintenance and Repair and Industrial Technology within the Board's Industrial Arts Program; (2) Whether petitioner's endorsement as a teacher of employment orientation permits him to teach any or all of the courses; and (3) If petitioner is entitled to teach any or all of these courses, what back pay and emoluments are now due as a result of his improper termination.

Although Ziegler does not have a Bachelor's Degree, he does have a Skilled Trade Certificate, which allows him to teach Employment Orientation.

Ziegler does not dispute the fact that he is not certified in Industrial Arts which the Board's contends encompasses Shop 9, Shop 10, Maintenance/Repair and Industrial Technology. Ziegler contends that the subject matter actually taught in these classes are in essence what he has been teaching for years and that he should not be terminated because the verbiage of his certification does not equal the verbiage of the certification requirements for Industrial Arts.

TESTIMONY

The Board's first witness was Alfred Pissciotti. He has been a teacher for 37 years and is certified as an Industrial Arts teacher and has a vocational certification for automotive technology. Mr. Pissciotti, who has taught Shop 9, described it as a course in which students would spend one marking period in different trade areas. Mr. Pissciotti focused on basic wood working for his semester. The course was not designed specifically for Special Education or Special Needs students but was in fact, from Pissciotti's testimony, taught on a very basic level. According to Pissciotti, the course was designed to reinforce other basic skills taught to students like math and science. It was not a required course, but was a prerequisite to Industrial Technology II, which was a more advanced woodworking course.

The next witness to testify was Dedicacon DeJesus was also certified to teach Industrial Arts and had been teaching at the time of the hearing for two years.

Mr. DeJesus taught Shop 9 in his first year on a rotated basis. In his second year, the rotating basis had been abandoned and Mr. DeJesus taught Shop 9 for Special Education Students. Mr. DeJesus indicated that the course focused on the basic tools for woodworking and the basic skills necessary to handle those tools. Mr. DeJesus did try to incorporate other subject matter into the course for example, basic electricity and drafting, but his flexibility was limited by the nature and capacity of his students.

Richard Roberts, who also had been employed in the district for two years at the time of the hearing, held an endorsement for Industrial Arts and Teacher of the Handicapped and had been assigned to teach Shop 9 during his tenure. In his first year, like Mr. DeJesus before him, he was involved with the rotation system and taught drafting. In his second year, he taught drafting and woodshop in the Shop 9 course. According to Roberts, the course labeled Shop 9 exposed the students to basic tools used in woodworking and drafting. In combining the drafting and woodworking, Roberts had the students plan a project and then produce it as part of the woodworking component.

Only Dedicacon DeJesus testified that he taught Shop 10. Shop 10 was a progression from Shop 9. The Shop 10 class that Mr. DeJesus was teaching in his

second year at the time of the hearing was mostly Special Ed., although not exclusively. The course was project based and students would learn how to use power tools and other machinery. Woodworking was definitely the emphasis.

Both Alfred Pissciotti and Dedicacon DeJesus taught maintenance and repair classes. The course was designed to give basic instruction in the areas of plumbing, masonry, electrical, carpentry, fluid movement and painting and decorating. It is designed to give special need students exposure to simple repairs to items that might be the subject of janitorial or general maintenance work.

Industrial Technology taught by Mr. Pissciotti and Mr. Roberts was similar in content to Shop 9 but in more detail. It ranges from the use of simple tools to the construction of basic wood joints and other more sophisticated wood skills.

In addition to the teachers delineated above, Doctor Michael Wanko, the Principle of Bayonne High School also testified.

He filled in some background by indicating that Mr. Ziegler had been assigned to Bayonne High School in 1994. Prior to that, Mr. Ziegler had been teaching at the alternative school which was a program for 6th, 7th and 8th graders who although high school age were experiencing academic difficulties. The alternative program was phased out at about the time Mr. Ziegler was transferred to Bayonne High School. According to Dr. Wanko, the alternative school had a program known as Employment Orientation, which was designed to assess students' vocational abilities. The Singer System, which was a series of carrels, utilizing filmstrips and cassette tapes to acquaint the students with various trades was used only by Ziegler.

The next witness to testify was Tom Jacobson, Supervisor for Industrial Arts in Bayonne who prepares the evaluations of all Industrial Arts and Vocational teachers. Jacobson confirmed that, at the time he made his observation of Mr. Ziegler in Shop 9 during 1998, the course was a project based wood shop in which the students, after receiving basic instruction would work on their own wood projects. Mr. Ziegler's testimony was challenged on cross-examination, which was very effectively conducted by Mr. Merryman. Mr. Ziegler's credibility was undoubtedly put into question by what

appeared to be an attempt to answer for the unanswerable. For example, Ziegler indicated that after being transferred from the alternative school to Bayonne High School, he continued to teach a vast array of subject matters, which would have given the students exposure to many more areas than are actually reflected in his observations by his supervisors. Two of his observations from 1995 and 1996 and from 1998 to 1999 indicate that his students were working on individual wood projects. However, Ziegler's credibility is simply not dispositive of the issues before the court. What is at issue was delineated by the Commissioner of Education in that it was to be determined by further fact-finding concerning what the duties of and skills taught by the teachers of Shop 9, Shop 10, Maintenance/Repair and Industrial Technology encompass and whether Ziegler's endorsement permits him to teach any of the courses.

THE LAW

Ziegler has a certificate as a Teacher of Skilled Trades. *N.J.A.C.* 6:11-6.2(a)(27) states

> Teacher of Skilled Trades: This endorsement authorizes the holder to teach skilled trade courses in the area of his or her State Approved Occupational Experience in all public schools. Presently, a list of skilled trades is incorporated into the code.

Ziegler received his Employment Orientation Endorsement in March of 1981. Apparently, this endorsement, which is no longer issued, was last issued in 1982, shortly after Ziegler received his. At the time he received his endorsement, it did not contain a list of authorize skilled trades, but there was a "fact sheet" which described employment orientation as follows:

> Employment Orientation is a significant and integral component of the school's career development sequence for special needs, handicap or disadvantage students. It is designed to assist special needs students to develop sound work habits and attitudes and basic vocational and interpersonal skills through the use of vocational evaluation, simulated work in basic vocational instruction. Because

> employment orientation offers in-school, hands-on vocational experiences, it is the major link between career, exploratory and awareness activities and specific vocational training for special needs students.

The endorsement for Industrial Arts at *N.J.A.C.* 6:11-6.2(a)(13) states as follows:

> This endorsement authorizes the holder to teach Industrial Arts in all public schools. Industrial Arts normally includes: graphic arts, drafting, woodworking, metalworking, arts and power mechanics.

As pointed out by petitioner, the regulations define the scope of Industrial Arts by the nature of its subject matter.

Petitioner argues that characterization by the Board of the courses in questions as "Industrial Arts" does not necessarily lead to the conclusion that those who teach the course must be certified as Teachers of Industrial Arts. The characterization of the course must be supported by an analysis of the duties performed. *Lipencot v. Board of Educ. Of Wachung Hills Reg. High School Dist.* 94 *N.J.A.R.2d* (EDU) 311 *aff'd St. Bd. Of Educ.* 94 *N.J.A.R.2d* (EDU) 430, *aff'd App. Div.* 95 *N.J.A.R.2d* (EDU) 304.

DISCUSSION

Skilled Trades-Employment Orientation reflected a program, which envisioned an evaluation process, a teaching and basic skill phase and an actual hands-on practice of skills.

As originally conceived, Special Needs students would be given a more broad based exposure to various skilled trades then what is presently occurring at Bayonne High School. However, petitioner argues that the "slimmed down" nature of the exposure does not preclude Ziegler under his certification from teaching the basics of woodworking and carpentry. The testimony of the teachers in this matter, confirmed that those courses, which primarily encompass Special Needs Students (that are now

all Special Needs students) taught only rudimentary skills accompanied by rather simple individual projects. The description of Employment Orientation in the fact-sheet indicates "Employment Orientation is designed to develop sound work habits and attitudes in basic vocational and interpersonal skills through the use of vocational evaluation and simulated work in basic vocational instruction."

Ziegler's endorsement as a Teacher of Employment Orientation having been discontinued in 1982 or 1983 indirectly creates the debate involved herein. The absence of the certification leads to an absence of updated requirements. Thus, in the twenty years that Ziegler has had the certification, no attention has been paid to its standards and requirements of its possession. The present duties of teachers of Shop 9, Shop 10, Maintenance and Repair and Industrial Technology are far less demanding when applied exclusively to Special Education students and come just as close to the student anticipated in the course of employment orientation in that employment orientation was in fact designed for Special Education and Special Needs students. The description by the teachers presently teaching the four courses confirms that their duties do not extend much past the rudimentary introduction to skilled trades with an emphasis on woodworking.

I **FIND** as a matter of **FACT** that the actual duties of and skills taught by the teachers of Shop 9, Shop 10, Maintenance Repair and Industrial Technology are, as presently constituted, no different than the skills Ziegler has acquired by virtue of his Employment Orientation Certification and actually teaching the courses. The skills required by an Employment Orientation Certification as issued twenty years ago encompassed the skills presently be exhibited by the teachers at Bayonne High School in that the various areas of basic skills has been narrowed but those areas still being taught at the high school are all encompassed in a Employment Orientation Certificate.

CONCLUSION

Albert Ziegler is entitled to reinstatement as a teacher with back pay. The amount of the back pay is undecided in that there was not enough evidence of salary or mitigation, if any, to allow an exact figure to be determined. It is further **ORDERED** that

no prejudgment interest will attach to the back pay since a showing of "bad faith" by a preponderance of the evidence was not sustained.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

8/08/03
DATE

JEFFREY A. GERSON, ALJ

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

August 8, 2003
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 11 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Joint Exhibits:

A Certificate from Department of Education re: Albert Ziegler, Teacher of Skilled Trades (Employment Orientation) issued 3/81 expires 7/81.

B Certificate from Department of Education re: Albert Ziegler, Teacher of Employment Orientation dated 7/82.

C Certificate from Department of Education re: Albert Ziegler, Teacher Coordinator of Cooperative Industrial Education dated 11/97.

D Letter and Contract from James H. Murphy, Superintendent, Bayonne Public Schools to Albert Ziegler re: Assignment for School Year 1984-1985 dated August 30, 1984.

E Evaluation Report re: Albert Ziegler School Year 1984/85 dated April 18, 1984

F Employment Contract re: Albert Ziegler dated April 26, 1985

G Annual Staff Evaluation re: Albert Ziegler, School Year 1985/86 dated March 26, 1986

H Employment Contract re: Albert Ziegler, dated April 1986

I Annual Staff Evaluation, School Year 1986/87, dated March 27, 1986

J Employment Contract re: Albert Ziegler, dated April 28, 1987

K Annual Staff Evaluation, School Year 1987/88, dated February 25, 1987

L. Annual Staff Evaluation, School Year 1989/90, dated March 12, 1990

M Annual Staff Evaluation, School Year 1990/91, dated June 17, 1990

N Termination Letter from James H. Murphy, Superintendent of Schools to Albert Ziegler dated April 30, 1991

O Reassignment letter from James H. Murphy, Superintendent of Schools to Albert Ziegler, dated August 28, 1991

P Annual Staff Evaluation, School Year 1991-92 re: Albert Ziegler dated March 29, 1992

Q Memo from Lois McGuire, Ed. D. , Asst. Superintendent to Albert Ziegler dated January 31, 1992

R Annual Staff Evaluation, School Year 1992/93, re: Albert Ziegler dated June 18, 1993

S Professional Improvement Plan, School Year 1993-94 re: Albert Ziegler dated March 29, 1993

T Memo to Karla McQuilla, Justine Wanko and Albert Ziegler from Joseph A. Luppino, Principal, Special Programs dated October 19, 1994

U Annual Staff Evaluation, School Year 1994-95 re: Albert Ziegler dated March 16, 1995

V Professional Observation Report, School Year 1995/96 re: Albert Ziegler dated March 7, 1996

W Employment Contract dated May 1, 1996, re: Albert Ziegler

X Letter dated June 24, 1997 to Albert Ziegler from John D. Foley, Secretary re: Meeting scheduled for June 23, 1997

Y Memo from Michael A. Wanko, re: Shop 9 and IVT Rotations dated September 10, 1997

Z Letter dated January 27, 1998 to Albert Ziegler from Clifford G. Doll, Acting Secretary

AA Annual Staff Evaluation, School Year 1997-98 re: Albert Ziegler dated March 27, 1998

BB Letter to Richard J. Malanowski, Superintendent from Robert Osak, County Superintendent dated September 29, 1998

CC Letter to Albert Ziegler from Richard J. Malanowski, Superintendent of Schools dated October 16, 1998

DD Letter to Richard J. Malanowski, Superintendent of Schools from Margaret Smith, Coordinator, Licensing Programs, Office of Licensing and Credentials dated November 9, 1998

EE Letter to Albert Ziegler from Richard J. Malanowski, Superintendent dated November 9, 1998

FF Letter to Albert Ziegler from Richard J. Malanowski, Superintendent dated November 19, 1998.

GG Letter to Albert Zeigler from Richard J. Malanowski, Superintendent dated November 24, 1998

HH Letter to Richard Malanowski, Superintendent from Robert Osak, Hudson County Superintendent of Schools dated December 3, 1998

II Letter to Richard J. Malanowski, Superintendent from Robert Osak, County Superintendent dated December 22, 1998

JJ Letter to Ida B. Graham, Director, Licensing Department of Education from Gregory T. Syrek, Esq., re: Instructional Certificate Endorsement dated January 26, 1999

KK Letter to Gregory T. Syrek, Esq. from Ida B. Graham, Licensing Department re: Albert Ziegler dated February 4, 1999

LL Letter to Ida Graham, Director of Licensing and Credentials from Richard J. Malanowski re: Description of qualifications for Teacher of Employment Orientation. Dated May 17, 1999

MM Letter to Richard J. Malanowski from Ida B. Graham dated June 2, 1999

NN Picture of Bayonne Public Schools Alternative Education building

OO Employment Orientation Program, prepared by John R. Bobner, Consultant

PP Curriculum Employment Orientation I

QQ Price List - Vocational Evaluations Systems

RR Work Activity Rating Form Engine Service

SS Employment Orientation

TT Employment Orientation Exam

UU Course Requirements Maintenance and Repair, Industrial Arts Class

VV Career Stations Worked On

WW Memo from Tim Mercier, House 5 Principal to Pre-Vocational Staff dated March 5, 1998 re: CAT and EWT Test Administration

XX Employment Orientation

YY Employment Orientation Programs for Students with Special Needs in Grades 8-10

ZZ Professional Observation Report, School Year 1997-98 dated March 13, 1998.

ALBERT ZIEGLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the Office of Administrative Law's Initial Decision on Remand have been reviewed. Pursuant to *N.J.A.C.* 1:1-18.4, the respondent Board of Education (Board) filed timely exceptions, to which petitioner duly replied.

In its exceptions, the Board argues that the Administrative Law Judge (ALJ) failed to take account of the full spectrum of evidence in assessing the courses at issue, leading to their mischaracterization as rudimentary introductions to skilled trades and to the erroneous conclusion that petitioner's Skilled Trades certificate, along with the classroom experience he has gained over the years, authorizes him to teach them. The Board contends that these courses are not introductions to skilled trades, as found by the ALJ, but rather genuine Industrial Arts offerings, clearly distinguishable from Employment Orientation courses and requiring teachers with Industrial Arts certification. By concluding that petitioner may teach them, the Board opines, the ALJ has effectively converted the limited Skilled Trades certificate into a regular instructional certificate encompassing all the industrial arts. (Board's Exceptions at 2-7, 8-14, 16-18) The Board

additionally rejects the ALJ's "conclusion" that special education students do not require a fully certified teacher (*Id.* at 7-8); his reliance, notwithstanding concerns about petitioner's credibility as raised in the Initial Decision at 4-5, on petitioner's testimony to the effect that the courses at issue are merely "slimmed down" versions of prior Employment Orientation courses (*Id.* at 15-16); his ordering of petitioner's reemployment without any consideration of whether courses within the scope of petitioner's certification and seniority rights are presently being taught in the District (*Id.* at 20); and his ordering of back pay despite insufficient information on record about petitioner's attempts (or lack thereof) to mitigate damages. (*Ibid.*)[1]

In reply, petitioner counters that the Board persists in its error of equating what is stated in curriculum guides or course descriptions with what is actually being taught in the classroom, as described by the staff members doing the teaching. In petitioner's view, Shop 9, whether the special or the non-special education section, is "a very basic, introductory level class designed to give students some information and instruction regarding tools and their uses," with "a great deal of flexibility in how the course is taught and a level of instruction somewhat less sophisticated [than] the [specified course] proficiencies appear." (Petitioner's Reply at 2) Shop 10 is "a progression from Shop 9," continuing the subject matter with "somewhat more advanced instruction," and consisting of mostly or all special education students. (*Id.* at 5-6) Maintenance and Repair is limited to special education students and provides basic instruction in the areas of plumbing, masonry, electrical, carpentry, fluid movement, and

[1] The Board also notes the Initial Decision's error in indicating that the record of this matter was closed on February 21, 2003 rather than February 25, 2002, and asks that, if the Initial Decision is otherwise adopted, back pay not be awarded for the period from April 2002 to the present, since petitioner should not receive a windfall at the expense of the Board on account of the ALJ's 16-month delay in issuing a decision. (*Id.* at 19)

painting and decorating, at a level suitable to household repair, janitorial or maintenance work. (*Id.* at 6-7) Industrial Technology covers the same subjects and skills as Shop 9, but in greater depth and with an eye toward their use in society and industry, resulting in a course that is project-based, employs hand and power tools, is taught to both special and non-special education students, and focuses primarily on woodworking with other areas covered if they happened to arise. (*Id.* at 7-8)[2]

Petitioner reiterates that his Teacher of Employment Orientation endorsement authorizes him to teach these "introductory or rudimentary Skilled Trades" courses, and that he, in fact, did so for years before the Board erroneously determined to characterize them as Industrial Arts courses. Petitioner compares the scope of the Industrial Arts endorsement, which includes graphic arts, drafting, woodworking, metal working, arts and power mechanics, with that of the Teacher of Skilled Trades endorsement, which, although in its present form does not include a specified list of trades, over the years has included aircraft mechanics, appliance repair, auto mechanics, brick and masonry, cabinet making, carpentry, custodial training, drafting, electrical construction trades, painting and decorating. According to petitioner, "each of these skilled trades is, in theory or practice, part of the courses in review in this case," a significant fact because the Employment Orientation endorsement, which petitioner holds and under which he taught basic introductory skills for years, is a subcategory of the Teacher of Skilled Trades endorsement. (Petitioner's Reply at 9-13, quotation at 11)

[2] Petitioner also rejects as baseless the Board's allegation that the Initial Decision somehow views special education/special needs students as less deserving of fully certified teachers, observing that the ALJ reached no such conclusion but merely analyzed what was actually taking place in the classroom in order to determine the certification required to teach the courses at issue. (*Id.* at 9)

Petitioner further contends that his career in the Board's District has been consistent with the scope of Employment Orientation as described in the Department of Education's 1985 Fact Sheet (Attachment to Stipulation of Facts) that remains valid as shown by its parallel to current regulation:

> Employment Orientation is a significant and integral component of the schools' career development sequence for special needs, handicapped or disadvantaged students. It is designed to assist special needs students to develop sound work habits and attitudes and basic vocational and interpersonal skills through the use of vocational evaluation, simulated work and basic vocational instruction. Because Employment Orientation offers in-school, hands-on vocational experiences, it is the major link between career exploratory and awareness activities and specific vocational training for special needs students. (*Cf., N.J.A.C.* 6A:19-1.2 and 6A:19-6.3)

Petitioner contends that throughout his employ, just as contemplated by this description, he taught basic introductory skills, either at the alternative school or the high school, to primarily special education, special needs, and disadvantaged students, in order to provide them with a variety of in-school, hands-on vocational experiences that might interest them in careers or more advanced coursework in masonry, carpentry, plumbing, home repair, welding, electrical work and the like. According to petitioner, there is "very little difference" between the instruction provided by him and that offered in the courses at issue herein; it is "simply a matter of degrees," since petitioner covered a dozen or more skills through use of the Singer work-station system, while the present classes cover fewer skills but retain the same basic instructional level and purpose. It makes no sense, petitioner reasons, to hold that he is qualified to teach a program that covers "far more vocational experiences and career opportunities" and yet is not qualified to teach "fewer skills in the current courses." (Petitioner's Reply at 13-15, quotations at 13-14)

Petitioner reiterates that, since he is qualified to teach the courses at issue and these were assigned to nontenured teachers in sufficient number to have provided him with a full-time schedule, his tenure rights were violated by his termination and he is entitled to all the relief he seeks, including reinstatement, back pay less mitigation, pre-judgment and post-judgment interest, seniority credit, pension credit and contributions, reimbursement for medical insurance and expenses, restoration of any benefits or emoluments received by comparable teaching staff members since the time of his termination, and "[r]eferral of this matter to the County Superintendent's office for oversight to ensure that the Board complies with its obligations under N.J.S.A. 18A:28-5 in the future." (Petitioner's Reply at 16-20, quotation at 20)

Upon review, however, the Commissioner cannot agree with petitioner and the ALJ that petitioner holds appropriate certification to teach the classes to which he herein claims entitlement. Even accepting, *arguendo*, petitioner's contention that the nature of these courses must be determined by teachers' testimony about what is actually taught in them rather than by paper syllabi, the Commissioner finds the courses to be beyond the scope of the limited certificate held by petitioner.

Petitioner is certified as a Teacher of Employment Orientation. As he himself notes, at a time when the Employment Orientation endorsement was more commonly in use, the Department of Education described Employment Orientation as

> ***a significant and integral component of the schools' career development sequence for special needs, handicapped or disadvantaged students***[,] designed to assist special needs students to develop sound work habits and attitudes and basic vocational and interpersonal skills through the use of vocational evaluation, simulated work and basic vocational instruction***[, and offering] in-school, hands-on vocational experiences***[so as to serve as] the major link between career

> exploratory and awareness activities and specific vocational training for special needs students. (Joint Stipulation, attached "Fact Sheet")

Consistent with this view, the Department stated that the program objectives of Employment Orientation were:

> To identify students' vocational interests, abilities, aptitudes, and employability characteristics, and develop an individualized vocational profile for each student;
>
> To modify and/or develop and reinforce appropriate work habits and attitudes in line with the world-of-work and the specific needs of the students; and
>
> To provide basic vocational training which will prepare students for entry into a vocational education program. (Joint Exhibit XX)

Elaborating on this three-prong purpose, the Department presented Employment Orientation as a pre-vocational program with three distinct phases: the vocational evaluation phase, the simulated work experience phase, and the initial vocational training and exploration phase. The evaluation phase is designed "to identify and assess each student's work habits and attitudes, as well as his or her vocational interests, abilities, and aptitudes and to establish an individual student's profile of vocational potential." Where necessary, students then participate in simulated work experience, designed to "[modify, develop and/or reinforce] desirable work habits and attitudes;" when ready, they advance to the initial vocational training/exploration phase, where each student is provided "with actual experiences that reinforce his or her potential and capabilities, and to prepare him or her for future employment or vocational training." This is most commonly accomplished through a de-centralized approach, using a shop or lab where various learning centers are set up, with each addressing one occupational area and designed as a self-contained, self-instructional unit. Successful completion of

Employment Orientation will ideally lead to a student's placement in a regular or cooperative vocational education program. (Joint Exhibit YY at 5-15)

The Department's description of Employment Orientation is entirely consistent with Bayonne's former program as taught by petitioner (Joint Exhibits I, K, L, M, P, R, S, U, V) and described by Principal Wanko, who noted in particular petitioner's use of the Singer system, "a series of carrels, utilizing filmstrips and cassette tapes to acquaint the students with various trades***." (Initial Decision at 4)

The courses petitioner now seeks to teach, however, do not differ from his former Employment Orientation classes merely in degree, as he claims, but in *kind*. Shop 9, Shop 10, Maintenance & Repair and Industrial Technology as they are presently taught at Bayonne High School may well be at the lower end of the vocational education spectrum in content level and student capacity, and may share overlapping elements with the third and culminating phase of Employment Orientation as described above. But that does not alter their fundamental nature as specific subject-area courses requiring appropriate subject-area certification,[3] rather than as broad-based introductions to the world of work covered by a generalist endorsement expressly limited in its authorization to exploring the aptitudes and interests of special needs students, enhancing their overall work-readiness, and providing them with introductory exposure to a variety of trades so as to prepare them for entry into actual vocational education programs.

[3] Shop 9, despite its rotational structure and occasional limited introduction of other elements, is taught almost entirely as a woodworking and drafting course (Initial Decision at 3, 4-5; Exceptions at 4-5); Shop 10 likewise focuses on woodworking (Initial Decision at 3-4; Exceptions at 6); Maintenance and Repair, although it covers a number of areas, is taught specifically as preparation for custodial and general maintenance work (Initial Decision at 4; Exceptions at 6); and Industrial Technology centers on woodworking at a higher level (Initial Decision at 4; Exceptions at 8).

The record in this matter is clear that, as claimed by the Board, Employment Orientation is no longer offered as a discrete program in the Bayonne School District; rather, the District has incorporated elements of Employment Orientation into its regular vocational class structure.[4] But petitioner's qualification to teach Employment Orientation does not concomitantly qualify him to teach the classes into which it has been subsumed. While petitioner may, indeed, as found by the ALJ, have acquired, "by virtue of his Employment Orientation Certification and actually teaching the courses[,]***the skills presently***exhibited by the teachers at Bayonne High School" in teaching certain of the school's vocational classes "as presently constituted" (Initial Decision at 7), the fact remains that he does not hold the subject area certifications that would authorize him to do so. As noted by the ALJ in *Deborah Ulrich v. Board of Education of the Monmouth County Vocational School District, Monmouth County,* 96 *N.J.A.R.*2d(EDU) 290, the "relevant inquiry regarding certification is not what a person *can* teach, but what a person *may* teach." (*emphasis supplied*) (at 293) Nor can the Board be compelled to restructure its program by once again segregating Employment Orientation elements, so as to accommodate petitioner's tenure rights.

Accordingly, for the reasons expressed herein, the Commissioner finds that petitioner is not appropriately certified for the assignments to which he lays claim, so that the Board did not violate his tenure rights by terminating his employment. Thus, the Initial Decision of the Office of Administrative Law is rejected and the Petition of Appeal dismissed with respect to the relief sought. However, in view of his tenure status,

[4] Such incorporation is fully consistent with the Department's discontinuance of Employment Orientation as a separate endorsement.

petitioner is to be placed on a preferred eligibility list for reemployment if and when an assignment within the scope of his certification becomes available in the District.[5]

IT IS SO ORDERED.[6]



COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03
Date of Mailing: 12/23/03

[5] In light of the decision herein, the Commissioner does not reach the ALJ's conclusions or the parties' arguments with respect to mitigation and other issues pertaining to relief.

[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.*

668-03

668-03SEC

IN THE MATTER OF FIELDS HOWARD, :

NEWARK BOARD OF EDUCATION, :

ESSEX COUNTY. :

:

COMMISSIONER OF EDUCATION

DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D13-03**
FIELDS HOWARD **NEWARK BOARD OF EDUC.** **ESSEX 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 is a member of the Newark 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 sent a reminder letter to Mr. Howard 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 failed to reply to 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 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 suspension from his Board, but removal if he does not file with the County office within 30 days of the effective date of the Commissioner's decision on penalty, 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 Fields Howard 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 suspension, but removal if he does not file within 30 days of the effective date of the Commissioner's decision.

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. 405-11/03

IN THE MATTER OF FIELDS HOWARD, :
NEWARK BOARD OF EDUCATION, :
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 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, upon being 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.* 6:3-9.3(i), the Commission issued an Order on September 24, 2003, directing this school official 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 failed to reply to the Order to Show Cause; 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 suspension of the above-named school official until he files the necessary disclosure statement, and his automatic removal from the board if he fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 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 removal; and

Whereas, neither the above-named school official nor anyone on his 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

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until he files the necessary disclosure statement, and automatically removed from the Board if he fails to file within 30 days. IT IS additionally ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, he shall nevertheless be reprimanded for his failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/24/03

* 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.

670-03SEC

6 10-05

IN THE MATTER OF RICHARD ZAPPY, :

GREATER EGG HARBOR :

BOARD OF EDUCATION, :

ATLANTIC COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D02-03**
RICHARD ZAPPY GREATER EGG HARBOR BOARD OF EDUCATION ATLANTIC 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. Zappy is a member of the Greater Egg Harbor 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 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 failed to reply to 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 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 suspension from his Board, but removal if he does not file within 30 days of the date of the Commissioner's decision on penalty, especially in light of his 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 Richard Zappy 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 suspension, but removal if he does not file within 30 days of the effective date of the Commissioner's decision.

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.

IN THE MATTER OF RICHARD ZAPPY, :	COMMISSIONER OF EDUCATION
GREATER EGG HARBOR :	
BOARD OF EDUCATION, :	DECISION
ATLANTIC 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 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 failed to reply to the Order to Show Cause; 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 suspension of the above-named school official until he files the necessary disclosure statement, and his automatic removal from the board if he fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 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 removal; and

Whereas, neither the above-named school official nor anyone on his 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

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of

the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until he files the necessary disclosure statement, and automatically removed from the Board if he fails to file within 30 days. IT IS additionally ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, he shall nevertheless be reprimanded for his failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/24/03

* 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.

671-03

IN THE MATTER OF PANIAGUA	:	
SANTIAGO, NEW HORIZONS	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, ESSEX COUNTY.	:	DECISION
_____	:	

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D18-03**
PANIAGUA SANTIAGO NEW HORIZONS CHARTER SCHOOL ESSEX 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. Paniagua Santiago is a member of New Horizons 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 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 failed to reply to 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 suspension from her Board, until she files the required form, but removal if she fails to file within 30 days from the date of the Commissioners' decision on penalty, 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 Paniagua Santiago 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 suspension from his Board, but removal if she does not file within 30 days from the effective date of the Commissioner's decision.

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. 418-11/03

IN THE MATTER OF PANIAGUA	:	
SANTIAGO, NEW HORIZONS	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, 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 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), with a cover letter

indicating that the Commission would discuss the matter at its October 28, 2003 meeting, that the named official had the right to attend, and that the Commission could, at that meeting, find a violation of the School Ethics Act and recommend a penalty up to removal; and

Whereas, the above-named school official failed to reply to the Order to Show Cause and provided no reason for her failure to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline despite ample opportunity to do so constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend suspension of the above-named school official until she files the necessary disclosure statement, and her automatic removal from the Board of Trustees if she fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 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 removal; and

Whereas, no response was submitted to the Commissioner; and

Whereas, the Commissioner has carefully considered the record of this matter and the decision of the School Ethics Commission; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of

the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until she files the necessary disclosure statement, and automatically removed from the Board of Trustees if she fails to file within 30 days. IT IS additionally ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, she shall nevertheless be reprimanded for her failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/24/03

* 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.

672-03

672-03SEC

IN THE MATTER OF LORETTA	:	
WILLIAMS, NEW HORIZONS	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, ESSEX COUNTY.	:	DECISION
_____	:	

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D20-03**
LORETTA WILLIAMS NEW HORIZONS CHARTER SCHOOL ESSEX 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. Loretta Williams is a member of the New Horizons 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 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 failed to reply to 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 suspension from her Board, until she files the required form, but removal if she fails to file within 30 days from the date of the Commissioner's decision on penalty, 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 Loretta Williams 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 suspension from her Board, but removal if she fails to file within 30 days from the effective date of the Commissioner's decision.

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. 406-11/03

IN THE MATTER OF LORETTA	:	
WILLIAMS, NEW HORIZONS	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, 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 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), with a cover letter

indicating that the Commission would discuss the matter at its October 28, 2003 meeting, that the named official had the right to attend, and that the Commission could, at that meeting, find a violation of the School Ethics Act and recommend a penalty up to removal; and

Whereas, the above-named school official failed to reply to the Order to Show Cause and provided no reason for her failure to comply with the requirement under *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission found that failure to file a disclosure statement within the designated timeline despite ample opportunity to do so constitutes a clear violation of *N.J.S.A.* 18A:12-25 and 26; and

Whereas, the Commission voted on October 28, 2003 to recommend suspension of the above-named school official until she files the necessary disclosure statement, and her automatic removal from the Board of Trustees if she fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 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 removal; and

Whereas, no response was submitted to the Commissioner; and

Whereas, the Commissioner has carefully considered the record of this matter and the decision of the School Ethics Commission; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of

the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until she files the necessary disclosure statement, and automatically removed from the Board of Trustees if she fails to file within 30 days. IT IS additionally ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, she shall nevertheless be reprimanded for her failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/24/03

* 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.

673-03

B.W., on behalf of minor child, D.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's determination that her child was not domiciled in the District and its demand for tuition from petitioner, claiming that she never changed her domicile, but became homeless.

The ALJ determined that petitioner and her child had not been domiciled or resided in the South Orange-Maplewood School District since October 2001, but, in fact, had been and continue to be domiciled in Union, New Jersey. The ALJ ordered payment of tuition to the Board at a per diem rate of $50.29 for the dates of D.P.'s ineligible attendance during the 2002-03 school year.

The Commissioner adopted the decision of the ALJ finding that D.P. was not domiciled in the South Orange-Maplewood School District so as to be entitled to a free public education in respondent's District, but modified the tuition calculation, ordering petitioner to pay the District tuition in the amount of $9,345.00 for the 2002-03 school year and $50.29 for each day of D.P.'s ineligible attendance in the 2003-04 school year. The Commissioner denied the Board's claim for pre and post-judgment interest and legal fees.

December 29, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 01837-03

AGENCY DKT. NO. 364 -11/02

B.W., ON BEHALF OF MINOR CHILD, D.P.,

Petitioner,

v.

BOAD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,

Respondent.

Beverly Williams, Petitioner, *pro se*

Joanne Butler, Esq., for Respondent (Schenck, Price, Smith and King, LLP)

Record Closed: October 20, 2003 **Decided:** November 21, 2003

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

Pursuant to *N.J.S.A.* 18A:38-1, the Board of Education of the School District South Orange Maplewood (BOE/Respondent), held a hearing and determined that D.P., the child of B.W. (Petitioner/B.W.), was not domiciled within the BOE's school district, although she continued to attend a school within the district. Consequently, the BOE decided that the child should be removed from the school and that B.W. should pay a per diem rate on the $9,345.00 tuition for 2002-2003 attendance in Respondent's district.

According to the papers filed, B.W. alleges that she and her child, D.P., remained domiciled within Respondent's district, since she never changed her domicile, but became homeless. Thus, B.W. claims that the BOE was and is required to provide her child with a free public education. The BOE submits that B.W. has not met her burden of proof and counterclaims for an order requiring B.W. to pay tuition.

PROCEDURAL HISTORY

On October 8, 2002, the BOE informed B.W. that she was required to withdraw D.P. as a student from the South Orange Maplewood School District and enroll her in the Union School District, where B.W was domiciled. On November 1, 2002, B.W. filed a residency appeal with the Commissioner of Education. On November 13, 2002, the Director of the Bureau of Controversies and Disputes, forwarded correspondence to B.W. to advise that the matter would proceed as a residency appeal. On February 3, 2003 the BOE filed an answer to the aforesaid appeal and included a counterclaim for tuition. *N.J.S.A.* 18A:6-9, *N.J.S.A.* 18A:38-1. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on March 4, 2003, where it was received and filed as a contested case pursuant to *N.J.S.A.* 52:14B-2(b). A hearing was scheduled for September 11, 2003, testimony was completed and exhibits were marked and entered on the record. As Ordered, the record was closed on October 20, 2003 upon receipt of post hearing briefs.

ISSUE

Was Petitioner domiciled in South Orange Maplewood during all or any part of the 2002-2003 school year?

TESTIMONY

Tiffani Barnes (T.B.) – has been the Registrar for the South Orange Maplewood Board of Education (BOE) since April 2002. The Registrar's duties include: registration of all new and returning students, residence checks, residency verifications, parent

letters, student withdrawals and preparation for and testimony at residency hearings before the BOE and other tribunals as required.

T.B. has known student D.P. since April 2002 and is familiar with her chronological student school history. **(Exhibit R-1).** In September 2001 T.B. commenced an inquiry of D.P.'s residency with a letter mailed to B.W. (D.P.'s mother); a copy of the letter was also hand delivered by D.P. Two weeks elapsed and B.W. did not respond to the letter, so an Officer of Residency Verification was dispatched to B.W. and D.P.'s home on Boyden Street in Maplewood. The Officer was unable to determine if the family still resided on Boyden Street. On October 8, 2001 D.P. was picked-up by the Maplewood Police because she had been standing on a corner near the Boyden Street residence for two hours, waiting for her mother. The Officer of Residency Verification was given D.P.'s File Summary Form Of Student Information to review and was again dispatched to the Maplewood residence. **(Exhibit R-2).** The Officer spoke with the first floor tenant who informed him that the family had moved from Boyden Street one week ago. The BOE mailed a letter to B.W. which required that D.P. be removed from the school district. **(Exhibit R-3).** On or about October 24, 2001 B.W. submitted a letter to the BOE which provided notice of a new address on Valley Street in Maplewood. On November 4, 2001 she submitted a "Landlord Affidavit" which noted her new address; the Affidavit was not acceptable because it did not bear a notarized signature. **(Exhibit R-4).** A note disclaiming the "Landlord Affidavit" was recorded in the school files on November 29, 2001. **(Exhibit R-5).**

In December 2001 B.W. disclosed her homelessness to the BOE. She was referred to a Help Counselor and asked to submit verification from an agency of her homelessness. When B.W. did not submit verification by January 18, 2002, a hearing on residency and education entitlement in Respondent's school district was set for February 7, 2002. A Case Summary Narrative and an Activity List was submitted to the BOE members to prepare for the hearing. **(Exhibits R-1, R-6).** After the meeting, the Superintendent mailed B.W. a summary letter with instructions for submission of additional information which was required from B.W. **(Exhibit R-7).** The Superintendent's letter was hand delivered to B.W. by her children, since a current

address had not been provided to the BOE. On February 15, 2002, B.W. submitted to the BOE a copy of a Verification Application for Work First New Jersey Temporary Assistance To Needy Families (WFNJ/TANF) AFDC/Food Stamps **(Exhibit R-8).** After B.W.'s February 15, 2002 submission was reviewed, the Superintendent of the South Orange Maplewood BOE had another letter hand delivered to B.W. which outlined the remaining outstanding items she needed to present. **(Exhibit R-9).** B.W. did not submit the additional information within the requested ten-day response period. On April 15, 2002, the BOE passed Resolution 1492 which ordered the transfer or removal B.W.'s children for Respondent's school district. **(Exhibit R-10).** A letter dated April 16, 2002 was hand delivered to B.W. to advise her of the Resolution and that she had twenty-one days to appeal the notice. **(Exhibit R-11).**

On March 7, 2002 B.W. received her denial letter for Family Care and Food Stamps addressed to her at 1867 Manor Drive in Union. **(Exhibit R-12).** There was no mention of her homelessness in the denial letters. B.W. again visited Respondent's offices and explained that admission of her children in the Union School District was denied because of inappropriate documentation. T.B said that B.W. told her that she did not want her children in the Union School District because there were too many Black People there. Donald Wright B.W.'s boyfriend, the alleged sole owner/renter of 1867 Manor Drive in Union, prepared a letter of explanation regarding B.W.'s homelessness and her temporary residence. **(Exhibit R-13).** T.B. showed Donald Wright's letter to her Superintendent and two Board Members, and based on the letter and the fact that it was late in the year, Respondent School District allowed the children to stay in the school District only for the purpose of completing the 2001-2002 school year. **(Exhibit R-14).** Resolution No. 1512 to rescind the Transfer and Removal Resolution 1492 was presented at Respondent School District's BOE meeting on May 13, 2002. **(Exhibit R-15).**

In May 2002 B.W.'s application for WFNJ/TANF benefits was denied and B.W. wrote to Governor McGreevey and Senator Corzine regarding the denial decision; both replied. **(Exhibits R-16, R-17, R-18).** By Action Letter dated November 11, 2002 B.W.

was notified that cash and food stamps benefits were granted retroactive to October 1, 2002. **(Exhibit R-33).**

Based on a July 25, 2002 residency check by the Officer of Residency Verification, B.W. was living with her boyfriend D. Wright at 1867 Manor Drive in Union, New Jersey. The Officer saw B.W. and her children's names on the mailbox and spoke with a representative in the complex management office and learned that B.W.'s children also live there and their names are listed on the Lease Agreement **(Exhibit R-19).** One month later, on or about August 22, 2002 B.W. came to T.B.'s and informed a Registrar's Agent S. Sommer, of her continued homelessness. **(Exhibit R-20).** On August 28, 2002 the BOE personnel mailed to B.W.'s Union address (regular and certified mail) a request for verification of five items. **(Exhibit R-21).** B.W. returned to Respondent's office on September 2, 2002 with documents from the Unemployment Offices which had been mailed to her at 1867 Manor Drive in Union. **(Exhibit R-22).**

On September 5, 2002 the Officer of Residency Verification submitted a note to T.B. regarding his recent observance at 1867 Manor Drive in Union and a copy of the "Mill Run Application For Residency". **(Exhibits R-23, R-24).** Copies of documentation related to B.W.'s challenge to residency was given to the Superintendent of the South Orange Maplewood School District. **(Exhibits R-24, 26).** On October 1, 2002 Respondent's Superintendent mailed a letter to B.W. requiring removal of D.P. from the South Orange Maplewood School District by October 11, 2002. **(Exhibit R-25).** On October 8, 2002, the Superintendent mailed a letter to B.W. to inform her that pursuant to *N.J.A.C.* 6A:17-2.8(a) her daughter should not be considered homeless and she should be immediately enrolled in the Union School District. **(Exhibit R-27).** On October 15, 2002 B.W. visited Respondent's office twice for the purpose of discussing her homelessness; notes were taken. **(Exhibit R-28).**

On October 18, 2002 T.B. received a copy of the entire Mill Run Residency Application. She learned that the Lease would expire on September 30, 2003 and that rent checks were signed by Petitioner and paid from her Personal Checking account. **(Exhibit R-29).** On October 30, 2002 the South Orange Maplewood District

Superintendent sent a letter to the Superintendent of the Union School District regarding D.P.'s permanent residency in Union. **(Exhibit R-30).** The Union Superintendent did not respond. The South Orange Maplewood District Superintendent also sent B.W. a letter dated October 30, 2002 to inform that D.P. is ineligible to continue school in Respondent's District. **(Exhibit R-31).**

On October 31, 2002 T.B. telephoned the Commissioner of Education to determine if an appeal had been filed; it had not. On November 1, 2002 B.W. brought her appeal documents to the BOE offices to be faxed to Trenton. On November 4, 2002 B.W. visited the BOE offices again to request that the appeal be faxed a second time. The BOE personnel declined to complete a second fax and told B.W. that the first fax was done as a courtesy and that it was strictly her responsibility to complete the transmittal of her appeal to Trenton. On November 13, 2002 the Commissioner of Education confirmed receipt of B.W.'s appeal. **(Exhibit R-32).**

The South Orange Maplewood School District established the following tuition rates:

Resolution No 11721 dated February 28, 2000 for 2000-01
Rates **(Exhibit R-34);**

Resolution No 1345C dated April 16, 2001 for 2001-02
Rates **(Exhibit R-35);**

Resolution No 1495J dated April 15, 2002 for 2002-03
Rates **(Exhibit R-36);**

Resolution No 1667L dated May 19, 2003 for 2003-04
Rates **(Exhibits R-37, R-38);**

PETITIONER'S TESTIMONY

Petitioner (B.W.) explained to the BOE that she had lost her job in August 2001 and lost her apartment in September 2001 and was homeless. She became depressed and needed medical attention and housing assistance. B.W. said she was placed on the Essex County "wait list" for housing assistance and needed to use an Essex County address for contacting purposes. She stayed with several friends in Newark until the end of 2001, but did not have letters to verify her temporary residence with them. B.W.'s boyfriend's letter regarding her residency with him in Union was submitted. **(Exhibit R-13).** B.W. said her name and her children's names had to be listed on the Mill Run Lease Agreement because the agreement required disclosure on all persons who would reside in the unit. B.W. explained to T.B. that all of her mail was received in Union, and that was the reason her name had to appear on the mailbox. In regard to the lack of reference to homelessness in the assistance applications, B.W. said that social workers told her that she could not be considered homeless if she had a roof over her head. In regard to the rent payments, B.W. said she was a Manager of Mid Range Systems for two years at Summit/Fleet Bank and still had privileges of free checks and money orders, so her checks were used and her boyfriend gave her the money. B.W. confirmed that her boyfriend stays at the Union apartment off and on. In regard to the bus stop incident, B.W. said she was still living on Boyden Street in Maplewood and there was no DYFS involvement since the landlord had called the police.

On cross-examination, B.W. confirmed that she no longer lives in Maplewood or South Orange. She said she never presented her eviction papers to the BOE because no one ever asked for them. B.W. acknowledged that her name appears on the September 10, 2001 Mill Run Application under the heading of "permanent resident"; and that her name and her children's names appear on the Lease Agreement dated October 1, 2002.

FINDINGS OF FACT

Based on the facts, applicable law, legal discussion, credible testimony and evidence, **I FIND:**

1. Petitioner was provided with many opportunities to present proofs in meetings and at a hearing to show by a preponderance of the evidence that D.P. was eligible for a free education based on domicile within Respondent School District;

2. Petitioner failed to meet the burden of production of evidence to substantiate that her residency and that of her daughter was maintained in Respondent's school district between October 2001 and the present date;

3. As per *N.J.S.A.* 18A:38-1(b)(2) the Superintendent of Respondent School District correctly determined that D.P. was attending a District School while not domiciled within the district;

4. The Superintendent, pursuant to *N.J.S.A.* 18A:38-1(b)(2) correctly assessed D.P.'s prorated tuition on a per diem basis.

5. The following is credible evidence favoring a finding of Petitioner's permanent domicile and residency in Union, New Jersey from October 2001 through the present:

    (1). Absence from the Boyden Street Maplewood, New Jersey address;
    (2). Inability to provide proof of residency for another address in Maplewood, New Jersey;
    (3). Family Name and Union, New Jersey address on all mail after October 2001 (including the Governor's letter,

Senator's letter, Unemployment, Work First New Jersey, Food Stamp, Respondent school district and other correspondence);

(4). Family name and children's names on the Application Agreement and Lease Agreement for the Union, New Jersey address;

(5). Family name and children's name on the mailbox for the Union, New Jersey address;

(6). Payment of rent at the Union, New Jersey address, using personal checking account and signing personal checks;

4. As per *N.J.S.A.* 18A:38-1(b)(2) the Superintendent of Respondent School District correctly determined that D.P. was attending a District School while not domiciled within the district;

5. The Superintendent, pursuant to *N.J.S.A.* 18A:38-1(b)(2) correctly assessed D.P.'s prorated tuition on a per diem basis.

6. Petitioner is not domiciled in the South Orange Maplewood School District.

LEGAL ANALYSIS

DOMICILE:

Domicile may be acquired in one of three ways: (1) through birth or place of origin; (2) through choice by a person legally capable of choosing his domicile; and (3) through operation of law in the case of a person who lacks capacity to acquire a new domicile by choice. *In re Gillmore's Estate*, 101 *N.J. Super.* 77, 87 (App. Div. 1968), *cert. den.*, 52 *N.J.* 175 (1968).

Domicile is the place of a person's abode where he or she, if absent, 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 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. As 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." 60 *N.J* at 264.

Traditionally, the domicile or resident 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. 1981 *SLD* 1553, *rev'd* on other grounds, *Rabinowitz v. New Jersey State Board of Education*, 550 *F. Supp.* 481 (D.N.J. 1982).

HOMELESSNESS:

The statute defines a homeless parent with a school-aged child as "an individual who temporarily lacks a fixed, regular and adequate residence." *N.J.S.A.* 18A:7B-12c. The State regulations regarding homelessness state very specific criteria supporting a determination of homelessness. *N.J.A.C.* 6A:17-1.1, *et seq. See also, Board of Education of the Borough of Woodlynne v. Board of Education of the Borough of Lindenwold,* OAL Dkt. No. EDU 8609-97 (May 4, 1999), C.D. 196-99 (June 21, 1999), in which the Commissioner of Education affirmed the Administrative Law Judge's finding that because petitioner lived in a single school district from April 1996 until June 1997, petitioner's child was not the child of a homeless family.

N.J.S.A. 18A:38-1(b)(2) states that when the superintendent of a school district determines that a person is attending a district school but is not domiciled within the

district, the parent may present proofs at a hearing to show by a preponderance of the evidence that the child is eligible for a free education based on domicile within the district. If the parent or guardian does not meet that burden, then they may be assessed for the child's tuition prorated on a *per diem* basis. Based on the unrefuted testimony at the hearing it is clear that in spite of the letters of explanation and affidavits which were submitted, B.W. and D.P. have not been domiciled or resided in the School District of South Orange-Maplewood since October 2001, but, in fact, were and continue to be domiciled and residing in Union, New Jersey at 1867 Manor Drive, a location not within the district of the BOE. The Respondent has made an application pursuant to that statue for tuition reimbursement, of which there is entitlement, pursuant to *N.J.S.A.* 18A:38-1(b)(2). The allowable tuition for reimbursement purposes shall be at the fixed per diem rate for the 2002-2003 school year.

ORDERS

Based on the above, and for good cause shown, I **ORDER** that the appeal in this matter be and is hereby **DISMISSED.** I further **ORDER** that the BOE's counterclaim for tuition is **GRANTED** and I **ORDER** B.W. to pay a $50.29 per diem rate for the dates of attendance during the 2002-2003 school year in Respondent's School District. I further **ORDER** that because D.P. is not domiciled within the district, she may be removed from the educational program offered by the BOE.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 21, 2003
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

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

NOV 21 2003
DATE

Mailed to Parties:

NOV 25 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml/al

APPENDIX

PETITIONER'S WITNESSES

Beverly Williams, Petitioner, *pro se*

RESPONDENT'S WITNESS

Tiffany Barnes, Registrar, South Orange Maplewood School District

EXHIBITS

Petitioner

None.

Respondent

R-1 Activity List

R-2 South Orange Maplewood File Summary Form, Student Information

R-3 Residency Verification letter October 24, 2001

R-4 Landlord's Affidavit November 4, 2001

R-5 Landlord's Affidavit with notes November 11,2001

R-6 Quick Summary Narrative

R-7 Letter from Superintendent to Petitioner February 11,2002

R-8 Verification and Application AFDC/FS February 2, 2002 and February 15, 2002

R-9 Letter from Superintendent to Petitioner March 5, 2002

R-10 Resolution 1492 dated April 15, 202

R-11 Letter from Superintendent to Petitioner April 16, 2002

R-12 Notice to Deny Your Food Stamp Application May 7, 2002

R-13 Letter from Donald Wright (friend of Petitioner) May 7, 2002

R-14 Letter from Director Planning & Assessment to Petitioner, May 8, 2002

R-15 Resolution 1512, May 13, 2002

R-16 Letter from Senator Corzine to Petitioner May 21, 2002

R-17 Letter from Commissioner Harris to Petitioner June 5, 2002

R-18 Letter from Union County Division of Social Services to Petitioner June 7, 2002

Appendix Continued

Page 2

R-19 File Summary Form Student Information July 18, 2002

R-20 Notes by Susan Sommer to Registrar August 22, 2002

R-21 Letter from Director of Planning and Assessment to Petitioner August 28, 2002

R-22 Unemployment Documentation from Petitioner September 2, 2002

R-23 Notes of Residency Officer

R-24 Millrun Application for Residency September 10, 2001

R-25 Letter from Superintendent to Petitioner October 1, 2002

R-26 BOE Package to Superintendent

R-27 Superintendent letter to Petitioner October 8, 2002

R-28 Notes by Registrar's personnel October 15, 2002

R-29 Mill Run Apartments Lease July 23, 2002

R-30 Letter from So. Orange/Maplewood Superintendent to Superintendent of Union Public School District, October 30, 2002

R-31 Letter from Superintendent to Petitioner October 30, 2002

R-32 Letter from Director, Bureau of Controversies and Disputes to Petitioner and BOE Secretary November 13, 2002

R-33 WFNJ Action Letter to Plaintiff November 21, 2002

R-34 Resolution 1172I Feb. 28, 2000

R-35 Resolution 1345C April 16, 2001

R-36 Resolution 1495J April 15, 2002

R-37 Resolution 1667L May 19, 2003

R-38 Per Diem Tuition Rates 2003-2004 September 10, 2003

B.W., on behalf of minor child, D.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, 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 in this matter, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that B.W. and D.P. are neither homeless nor domiciled in the South Orange-Maplewood School District so as to entitle D.P. to a free public education in respondent's district, but, in fact, are, and continue to be, domiciled in Union, New Jersey.

With respect to the Board's counterclaim for tuition, the Commissioner finds that the ALJ's conclusion in the Initial Decision that petitioner is to pay a $50.29 per diem rate to the Board solely for the dates of D.P.'s ineligible attendance during the 2002-03 school year is not supported in the record. (Initial Decision at 11) Initially, it is noted that the $50.29 per diem rate provided by the Board refers to the daily tuition rate for the *2003-04 school year*, rather than the *2002-03 school year.* (Exhibit R-38, in evidence) Moreover, in reviewing the Board's counterclaim for tuition, the Board seeks the award of tuition "for the period of ineligible attendance, as well as attorneys['] fees, pre and post-judgment interest, and costs of suit, and such further relief as deemed appropriate by the Commissioner." (Answer and Counterclaim at 5) The Board's counterclaim for tuition, therefore, is not limited to the 2002-03 school year. Accordingly, petitioner is directed to reimburse the Board $9,345.00 for the period of D.P.'s

ineligible attendance in the District's schools for the 2002-03 school year (*Id.* at 5, Number 11 and Exhibit R-36, in evidence), and $50.29 for each day of D.P.'s ineligible attendance in the 2003-04 school year (Exhibit R-38, in evidence).

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. *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, I 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).

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.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/29/03

Date of Mailing: 12/29/03

* 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.*

674-03SEC

IN THE MATTER OF ARTHUR WILSON,	:	
NEW HORIZONS CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION
	:	

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D21-03**
ARTHUR WILSON NEW HORIZONS CHARTER SCHOOL ESSEX 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. Arthur Wilson is a member of the New Horizons 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 his 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 failed to reply to 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 suspension from her Board, until he files the required form, but removal if he fails to file within 30 days from the date of the Commissioner's decision on penalty, 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 Arthur Wilson 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 suspension from his Board, but removal if he fails to file within 30 days from the effective date of the Commissioner's decision.

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.

IN THE MATTER OF ARTHUR WILSON,	:	
NEW HORIZONS CHARTER SCHOOL,	:	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 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 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 failed to reply to the Order to Show Cause; 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 suspension of the above-named school official until he files the necessary disclosure statement, and his automatic removal from the board if he fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 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 removal; and

Whereas, no comments were received from the above-named school official; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until he files the necessary disclosure statement, and automatically removed from the Board if he fails to file within 30 days. IT IS additionally

ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, he shall nevertheless be reprimanded for his failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/29/03

* 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.

675-03

675-03SEC

IN THE MATTER OF GAIL SIMMONS,	:	
GATEWAY CHARTER SCHOOL, HUDSON	:	COMMISSIONER OF EDUCATION
COUNTY.	:	DECISION
	:	

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D25-03**
GAIL SIMMONS 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, Ms. Gail Simmons 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 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 Gail Simmons 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.

IN THE MATTER OF GAIL SIMMONS,	:	
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 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.* 18A: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.* 18A: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 November 7, 2003 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 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: 12/22/03

Date of Mailing: 12/29/03

* 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.

676-03

676-03SEC

IN THE MATTER OF LYNEL DUNKINS,	:	
GATEWAY CHARTER SCHOOL, HUDSON	:	COMMISSIONER OF EDUCATION
COUNTY.	:	DECISION
	:	

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D26-03**
LYNEL DUNKINS 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, the above-referenced respondent 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 the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to this 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, the Commission issued an Order on September 24, 2003, directing this school official to Show Cause why the Commission should not find a violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official failed to reply to 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 the school official had the right to attend, and 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 the form was not filed in compliance 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 suspension from his Board, until the school official files the required form, but removal if the school official fails to file within 30 days from the date of the Commissioner's decision on penalty, 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 Lynel Dunkins 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 suspension from his Board, but removal if the school official fails to file within 30 days from the date of this resolution.

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.

IN THE MATTER OF LYNEL DUNKINS, :

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 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 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 failed to reply to the Order to Show Cause; 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 suspension of the above-named school official until he files the necessary disclosure statement, and his automatic removal from the board if he fails to file within 30 days, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated November 7, 2003 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 removal; and

Whereas, no comments were received from the above-named school official; and

Whereas, the Commissioner recognizes that, were the Commission's recommendation to be adopted without modification, school officials filing the requisite disclosure statement prior to the decision of the Commissioner, and hence, prior to imposition of the recommended suspension, would receive no penalty notwithstanding that the School Ethics Act was violated and the Commission has recommended reprimands for school officials who failed to file until after issuance of the Order to Show Cause; now therefore

IT IS ORDERED that, as recommended by the School Ethics Commission, the above-named school official be suspended until he files the necessary disclosure statement, and automatically removed from the Board if he fails to file within 30 days. IT IS additionally

ORDERED that even if the above-named school official shall have filed the necessary statement prior to the filing date of this decision, he shall nevertheless be reprimanded for his failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, thereby causing administrative and adjudicative time to be wasted by local, county and state education officials.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/29/03

* 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.

677-03

IN THE MATTER OF CHAWN CHARLTON,	:	
GATEWAY CHARTER SCHOOL, HUDSON	:	COMMISSIONER OF EDUCATION
COUNTY.	:	DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D23-03**
CHAWN CHARLTON 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, Ms. Charlton 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 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 Chawn Charlton 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.

IN THE MATTER OF CHAWN CHARLTON, :

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 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.* 18A: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.* 18A: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 November 7, 2003 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 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: 12/22/03

Date of Mailing: 12/29/03

* 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.

678-03

678-03SEC

IN THE MATTER OF JOSEPHINE CUPO,	:	
GATEWAY CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
HUDSON COUNTY.	:	DECISION
	:	

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D22-03**
JOSEPHINE CUPO **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, Josephine Cupo 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 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 Josephine Cupo 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.

IN THE MATTER OF JOSEPHINE CUPO, :

GATEWAY CHARTER SCHOOL, : COMMISSIONER OF EDUCATION

HUDSON 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 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.* 18A: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.* 18A: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 November 7, 2003 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 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: 12/22/03

Date of Mailing: 12/29/03

* 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.

679-03

679-03SEC

IN THE MATTER OF PATRICIA HUNTER, :

LEARNING CENTER CHARTER SCHOOL :

BOARD OF TRUSTEES, ATLANTIC :

COUNTY. :

:

COMMISSIONER OF EDUCATION

DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
PATRICIA HUNTER	:	
Learning Center Charter School	:	**SEC Docket No.: T38-03**
Board of Trustees	:	
Atlantic 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:12-33 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, Patricia Hunter was appointed to the Learning Center Charter School in August 2001; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted eight training sessions between August 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order against Ms. Hunter on June 9, 2003, via regular and certified mail, directing her to Show Cause why she had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the October training sessions; and

WHEREAS, Respondent provided no response to the Order, and

WHEREAS, the Commission notified her by letter dated June 12, 2003, that the Commission would discuss this matter at its October 28, 2003 meeting, and if she did not attend training by that time, she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that this failure to attend board member training from August 2001 to April 2003, well beyond the one year required by law, constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission considers suspension to be the appropriate penalty until Ms. Hunter attends training in January, 2004; and

WHEREAS, the Commission finds that if Ms. Hunter fails to attend by the end of **January 2004**, it would be appropriate for her to be removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Hunter violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove her from the board if she fails to attend one of the January 2004 training sessions.

Dated: October 28, 2003

Paul C. Garbarini, Chairperson

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, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View 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.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on October 28, 2003.

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT38-03.doc)

AGENCY DKT. NO. 433-11/03

IN THE MATTER OF PATRICIA HUNTER, :
LEARNING CENTER CHARTER SCHOOL :
BOARD OF TRUSTEES, ATLANTIC :
COUNTY. :
:

COMMISSIONER OF EDUCATION

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 removal of 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 *N.J.A.C.* 6A:28-1.6; and

Whereas, *N.J.S.A.* 18A:12-33 requires new school 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 Learning Center Charter School in August 2001; and

Whereas, the above-named Board member was duly apprised of the training requirement via the New Jersey School Boards Association's (NJSBA) "candidate kit," together with correspondence to her dated January 3, 2003 and February 19, 2003; and

Whereas, the NJSBA conducted eight training sessions between August 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, the last training session to fulfill her requirement was held in March 2003; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on June 9, 2003, the Commission issued an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the October 2003 training sessions; and

Whereas, the above-named Board member provided no response to the Order; and

Whereas, the Commission notified her by letter dated June 12, 2003 that it would discuss this matter at its October 28, 2003 meeting and, if she did not attend training by that time, she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

Whereas, the above-named Board member failed to attend the October 2003 training session; and

Whereas, the Commission finds that this failure to attend board member training from August 2001 until April 2003 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, at its meeting on October 28, 2003, the Commission recommended that the above-named Board member be suspended from the Board until she attends the January 2004 session and removed if she fails to attend the January 2004 session, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on November 12, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from 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 suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event she fails to complete the training session in January 2004, the above-named Board member shall be summarily removed from office as of that date.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/30/03

* 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.

680-03SEC

680-03

IN THE MATTER OF JOHN FROHLING, :

LEARNING COMMUNITY CHARTER :

SCHOOL BOARD OF TRUSTEES, :

HUDSON COUNTY. :

:

COMMISSIONER OF EDUCATION

DECISION

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
JOHN B.M. FROHLING	:	
Learning Community Charter School	:	**SEC Docket No.: T39-03**
Board of Trustees	:	
Hudson 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:12-33 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, John Frohling was appointed to the Learning Community Charter School in September 2001; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted eight training sessions between September 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order against Mr. Frohling June 9, 2003, via regular and certified mail, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the October training sessions; and

WHEREAS, Respondent responded to the Order by certified letter stating that he agreed to attend the next NJSBA training session, and noted as the only attorney serving on the charter school board, he has assisted, and is willing to continue to assist, in many of its legal matters without compensation; and

WHEREAS, Mr. Frohling did not attend the training in October 2003; and

WHEREAS, the Commission notified him by letter dated June 12, 2003, that the Commission would discuss this matter at its October 28, 2003 meeting, and if he did not attend training by that time, he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that this failure to attend board member training from September 2001 to April 2003, well beyond the one year allowable by law, constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through October, 2003; and

WHEREAS, the Commission finds that if Mr. Frohling fails to attend training by the end of **January 2004**, it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Frohling violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends in January, 2004, but remove him from the board of trustees without further proceedings if he fails to attend one of the January 2004 training sessions.

Dated: October 29, 2003

Paul C. Garbarini

Paul C. Garbarini, Chairperson

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, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View 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.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on October 28, 2003.

Lisa James-Beavers

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT39-03.doc)

AGENCY DKT. NO. 435-11/03

IN THE MATTER OF JOHN FROHLING, :
LEARNING COMMUNITY CHARTER :
SCHOOL BOARD OF TRUSTEES, :
HUDSON COUNTY. :
:

COMMISSIONER OF EDUCATION

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 removal of 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 *N.J.A.C.* 6A:28-1.6; and

Whereas, *N.J.S.A.* 18A:12-33 requires new school 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 Learning Community Charter School in September 2001; and

Whereas, the above-named Board member was duly apprised of the training requirement via the New Jersey School Boards Association's (NJSBA) "candidate kit," together with correspondence to him dated January 3, 2003 and February 19, 2003; and

Whereas, the NJSBA conducted eight training sessions between September 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, the last training session to fulfill his requirement was held in March, 2003; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on June 9, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the October 2003 training sessions; and

Whereas, the above-named Board member responded to the order by letter stating that he had agreed to attend the next NJSBA training session; and

Whereas, the above-named Board member did not attend the training in October 2003; and

Whereas, the Commission notified him by letter dated June 12, 2003 that it would discuss this matter at its October 28, 2003 meeting and, if he did not attend training by that time, he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

Whereas, the Commission finds that this failure to attend board member training from September 2001 through April 2003 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, at its meeting on October 28, 2003, the Commission recommended that the above-named Board member be suspended from the Board until he attends the January 2004 session and removed if he fails to attend the January 2004 session, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on November 12, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from 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 suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event he fails to complete the training session in January 2004, the above-named Board member shall be summarily removed from office as of that date.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/30/03

* 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.

681-03SEC

681-03

IN THE MATTER OF VERONICA	:	
SUTTON, JERSEY CITY COMMUNITY	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL BOARD OF TRUSTEES,	:	DECISION
HUDSON COUNTY.	:	
_____	:	

December 22, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
VERONICA SUTTON	:	
Jersey City Community Charter School Board of Trustees	:	**SEC Docket No.: T37-03**
Hudson 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:12-33 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, Veronica Sutton was appointed to the Jersey City Community Charter School in October 2000; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted ten training sessions between October 2000 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order against Ms. Sutton on June 9, 2003, via regular and certified mail, directing her to Show Cause why she had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the October training sessions; and

WHEREAS, Respondent provided no response to the Order; and

WHEREAS, the Commission notified her by letter dated June 12, 2003, that the Commission would discuss this matter at its October 28, 2003 meeting, and if she did not attend training by that time, she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that this failure to attend board member training from October 2000 to April 2003, well beyond the one year required by law, constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through October; and

WHEREAS, the Commission finds that if Ms. Sutton fails to attend by the end of **January 2004**, the Commission finds that it would be appropriate to have her removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Sutton violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend her until she attends, but remove her from the board if she fails to attend one of the January 2004 training sessions.

Dated: October 29, 2003

Paul C. Garbarini, Chairperson

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, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View 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.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on October 28, 2003.

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT37-03.doc)

AGENCY DKT. NO. 434-11/03

IN THE MATTER OF VERONICA	:	
SUTTON, JERSEY CITY COMMUNITY	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL BOARD OF TRUSTEES,	:	DECISION
HUDSON 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 removal of 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 *N.J.A.C.* 6A:28-1.6; and

Whereas, *N.J.S.A.* 18A:12-33 requires new school 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 Jersey City Community Charter School in October 2000; and

Whereas, the above-named Board member was duly apprised of the training requirement via the New Jersey School Boards Association's (NJSBA) "candidate kit," together with correspondence to her dated January 3, 2003 and February 19, 2003; and

Whereas, the NJSBA conducted ten training sessions between October 2000 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, the last training session to fulfill her requirement was held in March, 2003; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on June 9, 2003, the Commission issued an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the October 2003 training sessions; and

Whereas, the above-named Board member provided no response to the Order; and

Whereas, the Commission notified her by letter dated June 12, 2003 that it would discuss this matter at its October 28, 2003 meeting and, if she did not attend training by that time, she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

Whereas, the above-named Board member failed to attend the October 2003 training session; and

Whereas, the Commission finds that this failure to attend board member training from October 2000 until April 2003 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, at its meeting on October 28, 2003, the Commission recommended that the above-named Board member be suspended from the Board until she attends the January 2004 session and removed if she fails to attend the January 2004 session, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on November 12, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from 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 suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event she fails to complete the training session in January 2004, the above-named Board member shall be summarily removed from office as of that date.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/03

Date of Mailing: 12/30/03

* 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.

6.82-03

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning receiving district sought severance of its relationship with the respondent sending district, contending that no substantial negative impact would result from such severance. Respondent moved for dismissal of the petition on contractual grounds, but later withdrew its opposition and entered into a settlement with petitioner, agreeing to sever their relationship under the terms and conditions specified.

The ALJ recommended approval of the parties' Consent Order effectuating severance.

The Commissioner rejected the proposed order, holding that the record was insufficient for him to determine whether the criteria of *N.J.S.A.* 18A:38-13 had been met and that the parties could not, in any event, compel Commissioner-directed issuance of bonds if referenda to construct a new high school failed in the respondent district. The Commissioner declined to permit severance at this time, instead ordering further proceedings in accordance with *N.J.A.C.* 6A:3-6.1 so that the parties' now-mutual application could be properly assessed under the standard prescribed by 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.

December 23, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9211-02
AGENCY DKT. NO. 251-8/02

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,

Respondent.

Dennis A. Collins, Esq., appearing for petitioner

Nathanya Simon, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: November 5, 2003 Decided: November 6, 2003

BEFORE **STEPHEN G. WEISS,** ALJ:

In August 2002, the petitioner Board of Education of the Town of Boonton filed an appeal with the Commissioner of Education in which it sought to sever a longstanding sending-receiving relationship with respondent Board of Education of the Borough of Lincoln Park. See *N.J.S.A.* 18A:38-13. Thereafter, respondent moved to dismiss the petition in lieu of filing an

answer. See *N.J.A.C.* 6A:3-1.5(g). As a result, the matter was transmitted to the Office of Administrative Law in October 2002 and the undersigned Administrative Law Judge was designated to handle the matter.

Thereafter, as the result of discussions between counsel and the undersigned, together with consultations counsel had with their respective clients, the parties were able to agree on the terms and conditions of an amicable resolution of the dispute. Attached hereto is a Joint Stipulation of Facts setting forth the agreement reached between the parties signed by their Presidents and Board Secretaries. Also attached is a Consent Order signed by counsel with respect to the severance.

I have also attached a letter dated November 5, 2003, from counsel for the Lincoln Park Board of Education in which she clarifies certain matters contained in the Consent Order and Stipulation. Specifically, the letter sets forth that all issues relating to the severance question have been resolved by this Consent Order and Stipulation, except for one matter pending before the undersigned and scheduled for hearing in January 2004 (EDU 3066-03) concerning a paving expenditure. In addition, counsel's letter clarifies that the settlement does not effect or limit in any legal way the rights of the respondent to continue to challenge any financial decisions and expenditures which occur after the entry of this Order (and, of course, its approval by the Commissioner). Finally, the letter explains that respondent retains its right to audit the tuition rate charged to it by Boonton during the period that any Lincoln Park student continues to attend Boonton High School.

I have reviewed the file and the terms of the Consent Order and Stipulation effects and **FIND** that:

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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 6, 2003
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

November 10, 2003
DATE

M. Kathleen Duncan (ta)
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 12 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001
Attorneys for Respondent
Lincoln Park Board of Education

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2003 OCT 20 P 5:27

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY Petitioner, vs. BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW Agency Dkt. No. 251-8/02 OAL Dkt. No. EDU 9211-02 ADMINISTRATIVE ACTION **CONSENT ORDER REGARDING THE SEVERANCE OF THE PARTIES' SENDING RECEIVING RELATIONSHIP**

THIS MATTER having been opened to the Court by the Law Offices of Dennis A. Collins, Esq., attorney for the Petitioner, with the consent of Schwartz Simon Edelstein Celso & Kessler, LLP, attorneys for Respondent; and

WHEREAS, Respondent Town of Boonton Board of Education (hereinafter "Boonton") is a body corporate of the State of New Jersey organized pursuant to N.J.S.A. 18A:13-1 *et seq.* and

WHEREAS, Boonton operates a K-12 school district in Morris County; and

WHEREAS, Respondent Board of Education of the Borough of Lincoln Park (hereinafter "Lincoln Park") is a body corporate of the State of New Jersey organized pursuant to N.J.S.A. 18A:13-1 *et seq.*; and

WHEREAS, Lincoln Park operates a K-8 school district in Morris County; and

WHEREAS, Boonton and Lincoln Park have been engaged in a long-standing sending receiving relationship, pursuant to N.J.S.A. 18A:38-8 *et seq.*, whereby Lincoln Park sends its pupils in grades 9 through 12 to Boonton High School, since Lincoln Park does not have its own high school; and

WHEREAS, on or about April 14, 1999, the parties memorialized their sending-receiving relationship into a formal written agreement (hereinafter the "Agreement") which was negotiated, executed and approved by both Boards for a period of seven (7) years commencing with the 1999-00 school year and running through 2005-06 school year, with an option to be exercised by Lincoln Park for an additional five (5) years; and

WHEREAS, Boonton filed a Petition of Appeal with the Commissioner of Education on or about August 9, 2002 seeking to sever the relationship and the subject Agreement, pursuant to N.J.S.A. 18A:38-13; and

WHEREAS, Lincoln Park moved to dismiss the Petition in lieu of filing an Answer, pursuant to N.J.A.C. 6A:3-1.5(g); and

WHEREAS, the matter was assigned by the Commissioner of Education to the Honorable Stephen Weiss, A.L.J., and

WHEREAS, on or about May 12, 2003, with the Consent of the Court, Lincoln Park withdrew, without prejudice, its pending Motion to Dismiss, so that the parties could explore the voluntary severance of the sending-receiving relationship; and

WHEREAS, Lincoln Park created an Ad Hoc Exploratory High School Committee to explore severance of the sending-receiving relationship; and

WHEREAS, the Committee has fully explored the issues surrounding severance and has met with representatives of the Boonton Board to discuss same; and

WHEREAS, Lincoln Park, in consultation with the Committee, has deemed the creation of a grade kindergarten through twelve school district and the construction of its own high school to be in the best interest of the community; and

WHEREAS, the parties, wishing to amicably resolve the issue of severance hereby agree to the terms and conditions set forth herein, upon approval by the Court and the Commissioner; and

WHEREAS, and the parties having consented to the relief set forth in this Consent Order; and good cause having been shown;

It is on this 6th day of November, 2003,

ORDERED that the parties' sending-receiving relationship and Agreement, under which Lincoln Park sends its high school students to Boonton High School and pays tuition for these students to Boonton pursuant to N.J.S.A. 18A:38-8 *et seq*, shall hereafter be severed in accordance with the terms of this Agreement as follows:

1. Lincoln Park shall provide Boonton with one (1) calendar year's advance notice of the date for the actual severance and that it intends to transition its students from Boonton High School back to Lincoln Park School District; and

2. There shall be a transition period designated exclusively by Lincoln Park, for a time period not to exceed two (2) school year(s), during which time Lincoln Park's students attending Boonton's High School shall be returned to Lincoln Park. For those students remaining at Boonton after severance, Lincoln Park shall pay tuition at a rate consistent with the State formula, with Lincoln Park retaining its right to audit any tuition rate established per the procedures established in the Agreement.

3. Neither party waives its rights to continue this or any other pending legal action or to commence future litigation in order to resolve disputes between the parties concerning any and all

financial or contractual aspects of the sending/receiving relationship, this severance, or any other financial or sending/receiving dispute.

4. Providing that all necessary approvals are obtained and the property on which the prospective Lincoln Park High School identified and established, Lincoln Park shall proceed with presenting a bond referendum for the construction of its own high school to its citizenry in March of 2004 , or as soon thereafter as legally and reasonably possible. In the event this referendum fails, Lincoln Park shall proceed with presenting a second bond referendum as soon thereafter as legally and reasonably possible; and

5. In the event that the second referendum fails, the Commissioner of Education will authorize the issuance of school bonds to fund the local share to build the Lincoln Park High School providing there is no decrease in State Aid eligibility for the project. See N.J.S.A. 18A:7G-12. The Lincoln Park Board of Education expressly reserves all of its rights with regard to any other assignment of its students, as well as to maintain the right to continue in the sending-receiving relationship with Boonton, subject to the acknowledgment that the terms of the Sending/Receiving Agreement dated April 19, 1999 shall expire on June 30, 2006.

Stephen G. Weiss, A.L.J.

The undersigned consent to the form and entry of the within Order:

Nathanya G. Simon, Esq.
Schwartz, Simon, Edelstein,
Celso & Kessler, LLP
Attorneys for Respondent

Dated: 10/13/03.

Dennis A. Collins, Esq.
Attorney for Petitioner

Dated: 10/10/03



SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER LLP

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Reply to Florham Park

Lawrence S. Schwartz
Stephen J. Edelstein
Nathanyn G. Simon
Nicholas Celso, III
Donald A. Kessler ▲
Burton Ziegler ▲
Allan P. Dewilewski
Paul H. Green
Andrew B. Brown
Marc H. Ziegler ▲
Michael H. Cohen
Stefani C. Schwartz ▼
Denis G. Murphy
Matthew I. Kane ▲

Jacob Green
Alan J. Schnitman
Joan M. Damora
Kathleen Smallwood-Johnson
Ronald J. Riccio
counsel

Christopher R. Welgo
Carol R. Smelizer
Jason J. Lavery ▲
Heidi M.G. Hanley
Kathleen W. Holstette
Steven J. Baroisky ▲
Stephanie M. Kolb
Craig M. Freedman ▲
Sara J. Simberg
Loreue H. Dundas
Lenore B. Laracuente
Peter J. Vazquez, Jr. ▲
Christopher R. Kehrli
Jodyann Blagrave
Ryan M. Hellerman
Paul A. Andersen ●
Carrie A. Parks
Jacquelyn A. Laible ■
Meghan C. Goodwin

Alan J. Zakin
Glenn C. Gurtzsky ▲
Scott A. Elk ◆
Miguel A. Mata ●
of counsel

November 5, 2003

VIA FACSIMILE (973) 648-6124
& REGULAR MAIL
Honorable Stephen Weiss, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102-3011

Re: Board of Education of the Town of Boonton v.
Board of Education of the Borough of Lincoln Park
OAL Docket No. EDU 9211-02
Severance of the Sending/Receiving Relationship

Dear Judge Weiss:

I am pleased to advise that the parties have clarified the respective positions of their clients such that the proposed submitted Consent Order and Stipulation of Facts resolves all issues relating to the severance other than the related pending matter involving the paving dispute. Additionally, it has been clarified that this settlement does not affect or limit in any legal way whatsoever Lincoln Park's ability to continue to challenge financial decisions and expenditures which occur after the entry of the Consent Order. Additionally, it is clear that for the time period during which any Lincoln Park student continues to attend Boonton High School, Lincoln Park retains its right to audit the tuition rate.

Attached hereto please find a copy of correspondence issued to me from Dennis Collins which clarifies the position of Boonton to be consistent with that submitted herein on behalf of Lincoln Park. Accordingly, we would request that the Court issue its Initial Decision in this matter as soon as possible.

Ten James Street, Florham Park, New Jersey 07932 {00169305; 1}
Tel: 973 . 301 . 0001 Fax: 973 . 301 . 0203 Email: info@sseck.com Web-site: www.sseck.com

Hamilton Office:
2277 Route 33,
Suite 108,
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Tel: 609 . 890 . 436-

Florida Office:
Sanctuary Centre,
Suite 200E,
4800 N. Federal Hwy
Boca Raton, FL. 334.
Tel: 561 . 368 . 880(

◆ Also member of FL Bar
● Also member of CT Bar
▲ Also member of NY Bar
■ Also member of PA Bar
● Also member of NJ Bar
▼ Also member of FL Bar
★ Also member of MO Bar

If you have any further questions which require a response prior to issuance of the Initial Decision, please do not hesitate to contact the parties' representatives.

Thank you for your ongoing consideration in this matter.

Respectfully submitted,

Nathanya G. Simon

NGS/lp
Enclosure
cc: Dennis Collins, Esq.
James Tevis, School Business Administrator
Members of the Lincoln Park Board of Education

The Law Office of
Dennis A. Collins, Esquire
2517 Highway 35
Building E, Suite 201
Manasquan, New Jersey 08736

Phone: (732) 292-1246
Facsimile: (732) 292-1247

E-Mail: DACESQ@aol.com
Member N.J. Bar

October 28, 2003

Nathanya Simon, Esquire
Schwartz, Simon, Edelstein
Ten James Street
Florham Park, NJ 07932

VIA FAX #973-301-0203

Re: Boonton Board of Education ads. Lincoln Park Board of Education (Severance File)

Dear Ms. Simon:

As a follow-up to our recent conference with Judge Weiss, I would clarify that the position of Boonton is that the Consent Order and Stipulation of facts resolves all issues, including financial, related to the severance other than pending matters including the parking lot dispute. This should not be construed as limiting Lincoln Park's ability to challenge financial decisions on expenditures which occur after the entry of the order.

I trust this clarifies this position. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

DENNIS A. COLLINS

DAC/ao
Cc: Richard Kaplan, Superintendent

SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER LLP
Ten James Street, Florham Park, New Jersey 07932
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FAX TRANSMITTAL

DATE: November 5, 2003

TO: Honorable Stephen Weiss, A.L.J. Fax: (973) 648-6124

Cc: Dennis Collins, Esq. Fax: (732) 292-1247
James Tevis, Business Administrator Fax: (973) 696-9273
Members of the Lincoln Park Board of Education

FROM: Nathanya G. Simon, Esq.

RE: BOE of the Town of Boonton v. BOE of the Borough of Lincoln Park
OAL Docket No. EDU 9211-02
Severance of the Sending/Receiving Relationship

NUMBER OF PAGES TRANSMITTED: (INCLUDING THIS COVERSHEET) 4

MESSAGE:

Please see attached.

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Our File No. LP030

LAW OFFICE OF DENNIS A. COLLINS
2517 HIGHWAY 35
BUILDING 3 SUITE 201
MANASQUAN, NEW JERSEY 08736
ATTORNEY FOR PETITIONER,
BOARD OF EDUCATION OF THE TOWN OF BOONTON

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

2003 OCT 20 P 5:27

Board of Education of the Town of Boonton,	:	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY**
Petitioner,	:	**DOCKET NO:**
v.	:	
Lincoln Park Board of Education,	:	**STIPULATION OF FACTS**
Respondent.	:	

The parties hereby stipulate to the facts and the conclusions of law in the above-referenced matter as follows:

1. The Town of Boonton Board of Education is a body corporate of the State of New Jersey organized pursuant to N.J.S.A.18A:13-1et seq.
2. The Board of Education of the Borough of Lincoln Park is a body corporate of the State of New Jersey organized pursuant to N.J.S.A.18A:13-1et seq.
3. Boonton operates K-12 school district in Morris County New Jersey.
4. Lincoln Park operates a K-8 school district in Morris County New Jersey.
5. Boonton and Lincoln Park have been engaged in a long standing sending/receiving relationship pursuant to N.J.S.A. 18A:38-8 et seq, whereby Lincoln Park sends it's pupils in grades 9-12 to the Boonton High School.
6. Lincoln Park does not have its own High School.
7. By agreement dated April 14, 1999, Boonton and Lincoln Park

entered into a formal written agreement which was executed and approved by both Boards of Education. That agreement was for a term of 7 years beginning with the 1999-00 school year and running through the 2005-2006 school year.

8. On August 9, 2002 Boonton filed a Petition of Appeal with the Commissioner of Education seeking to sever the send/receive relationship pursuant to N.J.S.A.18A:38-13.
9. Pursuant to the requirements of the statute, appended to the Petition of Appeal was a "Feasibility Study to determine the impact of terminating the sending/receiving relationship between Boonton and Lincoln Park School District" prepared by Harry A. Galinsky, Ed.D. dated March 15, 2003. (A true and accurate of the report of Dr. Galinsky is attached hereto as Exhibit A.)
10. Lincoln Park moved to dismiss the petition in lieu of filing an answer.
11. On May 12, 2003, with the consent of the Court, Lincoln Park withdrew without prejudice that motion to dismiss.
12. The Lincoln Park Board of Education has deemed the creation of a kindergarten through twelfth grade school district and the construction of its own high school to be in the best interest of the community.
13. The format and structure of the feasibility study attached as Exhibit "A" conforms to the requirements of the May 25, 1998 New Jersey Department of Education Memo which outlines the process to be filed in a formal feasibility study of terminating sending/receiving relationship.
14. The Town of Boonton Board of Education maintains four schools. They are noted as the "School Street School" which is pre-k to grade three, the "John Hill School which is grade four through grade six, the Boonton Middle School" which is grades seven through eight and the "Boonton High School" which is grades nine

through twelve.

15. The functional capacity at Boonton High School is 605 students.
16. A full listing of the 135 general courses and 14 special education courses offered by the Boonton High School is attached to Exhibit A as table II-4.
17. The average class size fluctuates between 15.2 students and 22.13 students and accordance with table II-6 of Exhibit A.
18. The parties hereto accept the conclusion of Dr. Galinsky as to the impact on course sections and staff in major subject areas as contained in table II-16 of Exhibit A.
19. The parties agree that there will be modification in courses and staff at Boonton High School but the district will still be able to offer all programs contained in its current curriculum.
20. There will be no reduction in the quality of education at Boonton High School at the time of severance of the relationship.
21. The Boonton School District Organizational Structure provides a built in mechanism to mitigate the affect of the withdrawal of Lincoln Park students.
22. The fact that Boonton's Middle School program is part of Boonton High School creates a favorable condition for dealing with any staffing or programmatic difficulties that otherwise might a merge if the grade 9-12 population stood alone.
23. The parties accept the conclusions of Dr. Galinsky that when taking into account that sufficient time is available for good planning, staffing changes will not affect the quality of education and program offerings, that the Academy For Visual and Performing Arts is projected to grow in the next 5 years to 120 students, and that the physical location of the middle school within Boonton High School results in little consequence to Boonton High School.
24. There is no substantial negative impact on the quality of education

in the Boonton High School if a severance between Boonton and Lincoln Park occurs.

25. Lincoln Park School District operates two schools, "Lincoln Park Elementary School" which houses grades K-4 and the "Lincoln Park Middle School" which contains grades 5-8. The Borough of Lincoln Park provides a quality education on all grade levels.
26. The Lincoln Park Board of Education has determined that it is in the best interest of the community to seek voter approval for the construction of a new high school.
27. The present Lincoln Park school board and the teaching staff that exist can adequately prepare for the implementation of all appropriate high school programs of study to ensure the continuity of a quality education in a future Lincoln Park High School.
28. The modification of enrollment of students in the Boonton High School will not adversely affect the quality of education.
29. Under the current arrangements the present population of Boonton High School exceeds the functional capacity calculated in the districts long range facility plans.
30. The parties accept the enrollment projections of Dr. Galinsky and note that the termination of current sending/receiving relationship with Lincoln Park would permit the town of Boonton Board of Education to accomplish district educational goals without new construction.
31. The racial composition of the school district is noted in tables V-1 through V-7 of Exhibit A.
32. The two districts are similar racially.
33. It is projected by Dr. Galinsky that Lincoln Park's withdrawal will result in Boonton High School without Lincoln Park students to be 35.74% minorities in contrast to 23.43% if the Lincoln Park Students remained.
34. The removal of Lincoln Park students from Boonton High School

will not result in a substantial negative racial impact to either district.

35. The parties agree that there will be no substantial negative impact to the quality of education or the tax burden on local taxpayers or the racial composition of each respective school district as a result of the termination of the sending/receiving relationship, provided that the voters of Lincoln Park approve a bond referendum for the construction of its own high school, or, the Commissioner of Education orders the construction and authorizes the issuance of school bonds for the local share of the project with no decrease in the state aid eligibility for the project.(See N.J.S.A. 18A:7G-12)
36. The parties hereto stipulate to the facts and conclusions as contained herein and agree to the execution of the proposed form of Consent Order severing the parties sending/receiving relationship in accordance with the terms set forth therein.

TOWN OF BOONTON BOARD OF ED.

ATTEST

BOARD SECRETARY

PRESIDENT

LINCOLN PARK BOARD OF ED.

ATTEST

BOARD SECRETARY

PRESIDENT

OAL DKT. NO. EDU 9211-02
AGENCY DKT. NO. 251-8/02

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the Consent Order Regarding the Severance of the Parties' Sending-Receiving Relationship, the Stipulation of Facts, and the Initial Decision of the Office of Administrative Law (OAL) recommending approval of the parties' settlement effectuating severance, have been reviewed pursuant to *N.J.A.C.* 1:1-19.1(a) and (b).

Upon review, the Commissioner cannot agree with the OAL's recommended approval of the proposed Consent Order, nor can he, on the present record, approve the parties' proposed severance as consistent with *N.J.S.A.* 18A:38-13.

This matter was commenced as a contested case by the Boonton Board of Education (Boonton), through a petition seeking to sever its sending-receiving relationship with the Lincoln Park Board of Education (Lincoln Park), alleging, among other things, that no negative impact in any area of consideration prescribed by *N.J.S.A.* 18A:38-13 would result. In lieu of an answer, Lincoln Park filed, as permitted by

N.J.A.C. 6A:3-1.5(g), a Motion to Dismiss the petition, contending that Boonton could not presently seek to sever the relationship because it had entered in 1999 into a binding seven-year contract with Lincoln Park with no provision for severance prior to the contract's expiration. Subsequent to transmittal of the matter to the OAL but prior to adjudication of this motion, to which Boonton had by then duly replied, Lincoln Park withdrew its demand for dismissal because the parties had determined to engage in settlement discussions. These discussions ultimately led to the agreement herein proposed.

Because the Motion to Dismiss in Lieu of Answer was withdrawn and the parties proceeded directly to settlement, no answer to Boonton's petition was ever filed; instead, the request for severance became mutual and the parties, in their Consent Order and Joint Stipulation of Facts, attested to their agreement that no negative impact would result from severance. In effect, then, notwithstanding its initial posture and transmittal to the OAL as a contested case, Boonton's application for severance became uncontested before any record could be developed beyond Boonton's initial feasibility study and the parties' later settlement documents.[1]

As the State Board of Education has recognized in a prior matter involving the same parties, notwithstanding that member districts may agree to sever their sending-receiving relationship, pursuant to *N.J.S.A.* 18A:38-13, it is "the *Commissioner's* ultimate determination whether to grant severance" after "consideration of all relevant circumstances" so as to ensure that "no substantial negative impact will result therefrom." *Board of Education of the Borough of Lincoln Park, Morris County, v. Board of*

[1] In this regard, the Commissioner notes that Lincoln Park's Motion to Dismiss and the ensuing responsive papers were centered on contractual principles, and the Commissioner's jurisdiction over them, rather than on the criteria of *N.J.S.A.* 18A:38-13.

Education of the Town of Boonton, Morris County, decided April 5, 1995, slip opinion at 3, emphasis in text.[2] The State Board further recognized that the Commissioner could not make such determinations absent a sufficient record, and, understanding the potential for insufficiency in this regard where a request for severance is uncontested, the Board in December 1999 proposed rules, later promulgated as *N.J.A.C.* 6A:3-6.1,[3] 32 *N.J.R.* 1177,

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[2] In the referenced matter, Lincoln Park sought to enjoin Boonton from incorporating its 7th and 8th grades into the high school facility, and, as part of a proposed settlement, Boonton agreed not to oppose any request for severance filed within two years of the agreement. The State Board rejected that provision and remanded the settlement to the Commissioner, who had also rejected it, for deletion of the inappropriate provision or proceedings on the merits if the parties did not agree to such deletion. Following transmittal to the OAL on remand, the matter was withdrawn.

[3] These rules provide as follows:

6A:3-6.1 Application for termination or change in allocation or apportionment

(a) An application for change of designation of a high school (termination or severance of relationship) or of allocation or apportionment of students pursuant to N.J.S.A. 18A:38-13 shall be made by petition of appeal, accompanied by the required feasibility study, and shall proceed in accordance with the provisions of this chapter except as set forth below.

(b) Where an application for change is unanswered within the requisite filing period, or is answered by a filing or filings indicating that each respondent does not oppose the application, the Commissioner shall so notify the petitioning district board of education and each respondent district board of education. At the next public meeting of each district board of education following notice from the Commissioner, each district board shall announce that the record before the Commissioner shall remain open for a period of 20 days from the date of the announcement in order that interested persons or entities may submit written comments to the Commissioner. Such announcement shall indicate the manner in which, and the address to which, comments may be submitted to the Commissioner as set forth in N.J.A.C. 6A:3-1.2 and 6A:3-1.3 above, and shall further indicate the nature and purpose of such comments as set forth in (c) below.

1. Each district board of education shall, within 10 days of the date of the announcement, submit to the Commissioner a certification indicating the date the announcement was made and the content of the announcement.

(c) Comments submitted pursuant to (b) above shall not exceed 10 pages in length, shall be served on all parties to the case, shall include proof of such service when filed with the Commissioner, and shall specifically address the following statutory standard for the Commissioner's review of applications for change in designation, allocation or apportionment:

1. Comments shall address the question of whether the proposed change in designation, allocation or apportionment will result in a substantial negative impact in any of the affected districts in one or more of the following areas: educational and financial implications; quality of education received by students; and racial composition of the student populations.

(d) Each party to the application for change shall have 20 days to reply to any comments at the close of the designated comment period.

(e) If the Commissioner determines, upon review of the record at the close of the period established for submission of comments and replies, that further inquiry, fact-finding or exploration of legal argument is required in order to determine the matter consistent with the standard of statute, the Commissioner shall direct such further proceedings as the Commissioner deems necessary.

specifically addressing the need for

> ***development of a record where a district board of education has applied for severance or alteration of a sending-receiving relationship and the application is unopposed by the responding parties. In these situations, there are no adversarial proceedings through which to develop a record beyond the feasibility study required by law upon submission of an application to the Commissioner. The proposed rules offer a mechanism by which public comment may be brought to the record, and by which the Commissioner may direct further inquiry as needed, prior to the Commissioner's making a decision on whether the standard of N.J.S.A. 18A:38-13 for granting of a severance or alteration has been met. (31 *N.J.R.* 4173(a), Summary of Proposed Readoption and Recodification with Amendments: *N.J.A.C.* 6:24 as 6A:3, quotation at 4174)

In the present matter, not only has there been no opportunity for presentation of opposing perspectives, but the Commissioner is also not satisfied, based on the feasibility study alone, that the criteria of *N.J.S.A.* 18A:38-13 have been met. By way of example, in the area of educational impact, it is unclear how "sufficient planning" and "incremental changes" over the three-year withdrawal period posited by the feasibility study can ensure that there will be "little consequence" to the quality of education in Boonton High School; according to the study, its 9-12 student body will eventually be reduced by nearly half, from approximately 650 to 360, there will be a significant drop in the number of class sections, *e.g.*, from 32 to 21 in language arts, 31 to 20 in math, 32 to 21 in science, and 29 to 19 in social studies, and teaching staff will be reduced by a third, typically by 2 positions out of 6 in each major discipline. (Feasibility Study at 29-32, 72, 80-81, 100) The Commissioner's concern is heightened by the fact that the proposed Consent Order calls for the actual withdrawal of Lincoln Park students to occur over a period *not exceeding two years*, making the study's "three-year incremental" argument even less persuasive notwithstanding the agreement's one-year notice provision. (Consent Order at 3)

Additionally, in the area of racial impact, the feasibility study concludes that data in tables based on Fall Reports "indicate that Lincoln Park and Boonton are similar racially," with "student populations that are predominantly white with small percentages of minority students," so that "there would be no substantial negative racial impact as a result of the withdrawal of the Lincoln Park students from Boonton High School." (Feasibility Study at 82-87, 100; quotation at 83) However, the referenced tables show that Boonton's student population is 66% white as compared to Lincoln Park's 85%, and that withdrawal of Lincoln Park students will result in 12.31% decrease in white students attending Boonton High School. The Commissioner finds that the referenced statistics may not necessarily support the bare assertions drawn from them, and he notes with particular concern that, notwithstanding Boonton's feasibility study having been based in part on a review of "recent legal cases involving the terminating of sending-receiving relationships" (*Id.* at 5), the record includes no mention whatsoever of the cases reviewed or how the proposed severance is consistent with them.

Another area of concern is that the Commissioner cannot meaningfully assess the fiscal impact of severance on Lincoln Park, since the feasibility study focuses on comparative tuition rates based on sending Lincoln Park students to other districts in the area, while the proposed settlement agreement clearly contemplates the district's building of its own school. There is no discussion on record of the impact of this option, except insofar as the feasibility study notes its existence and concludes that, should it be chosen, the referendum process will include information on cost so the decision to build can be made by local citizens. (Feasibility Study at 98-99, 100) Moreover, in the proposed Consent Order, the parties have agreed that, should these same citizens twice

fail to approve building referenda, issuance of bonds will be ordered by the Commissioner pursuant to *N.J.S.A.* 18A:7G-12, with no decrease in State Aid eligibility. (Consent Order at 4) With or without a discussion of fiscal impact, this provision cannot stand, since the parties cannot compel the Commissioner to require issuance of bonds, nor can Lincoln Park make application for such issuance, or receive State Aid, except through the processes and at the levels prescribed by law. *In the Matter of the Application of the Board of Education of the Township of Clark, Union County, for an Order Directing Issuance of Bonds pursuant to N.J.S.A. 18A:7G-12*, decided by the Commissioner June 2, 2003.

In sum, while the Commissioner does not preclude the possibility of permitting Boonton and Lincoln Park to sever their long-standing sending-receiving relationship, the parties have not complied with the procedure for consideration of uncontested severance applications, and the areas discussed above are indicative of need for the fuller record contemplated by that procedure in order for the Commissioner to carry out his obligation under *N.J.S.A.* 18A:38-13. That this matter is not a simple one is demonstrated by the parties' own prior disagreement, as reported in the feasibility study, on whether an application for severance was even viable; indeed, as part of its historical introduction, the study notes that Boonton took the step of initiating the present application because Lincoln Park has long "supported a legal position that it is unable to terminate the send-relationship in light of the Commissioner's previous decisions." (Feasibility Study at 5)

Accordingly, the Commissioner rejects the Initial Decision of the Office of Administrative Law recommending approval of the settlement agreement, and, instead,

consistent with the process established by law for uncontested severance applications, the Commissioner directs that at the next public meetings of the Boonton and Lincoln Park Boards of Education, each Board shall announce that the record before the Commissioner in this matter shall remain open for a period of 20 days from the date of the announcement in order that interested persons or entities may submit written comments to the Commissioner addressing the question of whether the proposed severance will result in a substantial negative impact on either district. Such announcement, and its certification to the Commissioner, shall comply with the provisions of *N.J.A.C.* 6A:3-6.1(b) and (c), and, pursuant to *N.J.A.C.* 6A:3-6.1(d), at the close of the designated comment period, each district shall have 20 days to reply to any comments filed. If, upon review of the record at the close of the period established for submission of comments and replies, the Commissioner determines that additional inquiry, factfinding or legal argument is required in order to determine whether to grant severance consistent with the standard of statute, further proceedings will be directed as necessary pursuant to *N.J.A.C.* 6A:3-6.1(e)

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 12/23/03

Date of Mailing: 12/30/03

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[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.*

684-03

DR. WILMA J. FARMER, :

PETITIONER, :
V. :

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND ANNETTE D. KNOX, SUPERINTENDENT, :

RESPONDENT, : COMMISSIONER OF EDUCATION

AND : DECISION

PAUL STEPHENSON, :

PETITIONER, :
V. :

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND ANNETTE D. KNOX, SUPERINTENDENT, AND CHARLES HIGHSMITH, :

RESPONDENTS. :

SYNOPSIS

In consolidated matter, petitioners, two unsuccessful finalists for Assistant Superintendent position, alleged the Board unlawfully appointed Respondent Highsmith to the position. They requested the appointment be declared null and void since respondent did not possess the requisite certification prior to the March 12, 2001 application deadline. Since the filing of the positions, Respondent Highsmith resigned; Petitioner Farmer retired; and the Board significantly restructured the position.

The ALJ concluded that there were no genuine issues of material fact and that the Board was entitled to prevail as a matter of law. Moreover, the ALJ determined that the Commissioner did not have the authority to appoint either petitioner to the position nor did he have the authority to award monetary damages. The ALJ dismissed the issues as moot.

The Commissioner concurred with the ALJ and dismissed the consolidated petitions.

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.

December 23, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION – ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION

OAL DKT. NOS. EDU 6789-01
and EDU 6790-01 (Consolidated)
AGENCY DKT. NOS. 396-9/01
and 390-9/01

DR. WILMA J. FARMER,

Petitioner,

v.

BOARD OF EDUCATION CITY OF CAMDEN AND ANNETTE D. KNOX, CAMDEN COUNTY,

Respondents.

AND

PAUL STEPHENSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY AND ANNETTE D. KNOX, SUPERINTENDENT, AND CHARLES HIGHSMITH,

Respondents.

Michael A. Armstrong, Esq., for appellant Dr. Wilma J. Farmer

John T. Barbour, Esq., for appellant Paul Stephenson

Karen A. Murray, Esq., for respondents (Murray and Murray, attorneys)

James J. Breslin, III, Esq., for respondents (Lenox, Socey, Wilgus, Formidoni, Brown, Giordano & Casey, attorneys)

Record Closed: October 24, 2003 Decided: November 17, 2003

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

STATEMENT OF THE CASE

The matter docketed EDU 6790-01 involving the petitioner Paul Stephenson (hereinafter "Stephenson") results in an appeal by Mr. Stephenson alleging that an open position for which he was one of two finalists was awarded to the other individual who lacked the requisite certification. He thus seeks to have such appointment voided. The matter was transmitted to the Office of Administrative Law as a contested case on October 26, 2001, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The second matter, docketed OAL Docket No. EDU 6789-01, is an appeal by the petitioner Dr. Wilma J. Farmer (hereinafter "Farmer") who contends that the respondent, the Camden County Board of Education, violated her rights under the education laws when it hired an individual with a provisional administrator certificate to be assistant superintendent. She seeks to void that decision by the Board and has appealed the matter, which was transferred to the Office of Administrative Law as a contested case on October 26, 2001. Both matters were initially assigned to then Administrative Law Judge Kathryn A. Clark (now retired) who maintained control of the cases until her retirement several months ago. As part of Judge Clark's actions on June 13, 2002, she granted a motion to consolidate the above-entitled matters. Thereafter, Camden instituted its motion for summary decision in each matter, and no action, unfortunately, was taken by Judge Clark prior to her retirement. The matter was thereafter referred to my chambers by Administrative Law Judge and Acting Director of the Office of Administrative Law Jeff Masin. By letter of August 13, 2003 to all counsel, he advised that Judge Clark was then on leave of absence and unable to complete the hearing or to issue an initial decision. Counsel were then advised that the matters were reassigned to my chambers, pursuant to *N.J.A.C.* 1:1-14.13(b).[1]

[1] It should be noted that prior to Judge Clark's involvement with the matter, the cases were originally scheduled to be heard by then Administrative Law Judge M. Kathleen Duncan. Then Judge Duncan resigned the position as an

Follow my initial review of the case files, I followed up Judge Masin's letter with one of my own addressed to counsel on August 25, 2003, reiterating the reassignment to my office and advising that I had received, as part of the case file, a motion for summary decision issued by Camden. The purpose of the letter was also to apprise the parties that because of the extended period of time between the appeals being taken and the matter now coming before me for judicial decision, I would give them the opportunity if they wished to have either an in-person conference or a telephone conference should the situation in the case change. Thereafter, I was advised by counsel that their preference would be to have me address the motion for summary decision, to which I have asceeded. I have closed the record in a manner most reasonable.

THE FACTS AND PROCEDURAL HISTORY

These cases arise from respondent, Camden City Board of Education's appointment of respondent Charles Highsmith (hereinafter "Highsmith") to the position of Assistant Superintendent for Administration and Support Services and Director for Curriculum and Instruction, Pre-K to 5. Both petitioners, Farmer and Stephenson, also applied for the position of Assistant Superintendent for Administration and Support Services and Director for Curriculum and Instruction. Petitioners originally filed separate petitions in this matter; however, pursuant to an Order by Administrative Law Judge Kathryn A. Clark, these matters were consolidated on June 13, 2002.

On February 13, 2001, the Board posted an opening for the position of Assistant Superintendent for Administration and Support Services and Director for Curriculum and Instruction. Four individuals applied. The minimum qualifications included, among other things, that the applicant have a valid New Jersey School Administrator's Certificate, a minimum of five years administrative experience in a public/private education setting at Principal's or higher level, and a demonstrated expertise in managing diverse educational programs. Additionally, the posting indicated that each applicant was responsible for providing the

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administrative law judge and has since served as Director, Office of Controversies and Disputes, Department of Education.

appropriate documentation in support of each application prior to the application deadline. The application deadline was March 12, 2001.

The Board contends that Highsmith was recommended first by the interview committee, Farmer was recommended second, and Stephenson was recommended fourth.[2] All four names were submitted to the Superintendent, consistent with Abbott regulations, who then selected a candidate from the submitted names.[3] In accord with the Committee's recommendations, the Superintendent recommended Highsmith to the Board, who was then duly appointed.

Petitioners contend that Highsmith was not in possession of a New Jersey School Administrator's Certificate prior to the March 12, 2001 application deadline. However, petitioners Farmer and Stephenson did possess the requisite certification. It appears that Highsmith may have obtained a Provisional New Jersey School Administrator's Certificate on June 1, 2001, nearly three months following the application deadline date. Despite Highsmith's failure to timely possess the requisite requirements for the position, his appointment was confirmed on June 25, 2001 by the Board.

As a consequence of Highsmith's appointment, Farmer filed a petition challenging Highsmith's "unlawful appointment." Farmer's petition requested that Highsmith's appointment be rescinded and other just and equitable relief, including appointment to the position, be awarded.[4] Stephenson also filed a petition, requesting that the Highsmith appointment be declared null and void and that Stephenson be appointed to the position. Stephenson's petition also sought back pay, front pay interest, damages and reasonable attorney's fees. Since the filing of these petitions, Highsmith has resigned from his position as Assistant Superintendent for Curriculum and Instruction, effective June 30, 2002. The position was restructured as part of a Central Administrative Reorganization and currently remains vacant. The Board contends that the position of assistant superintendent has since been significantly restructured. The job description has been modified, and the position has been separated into two positions.

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[2] The first interview committee ranked the applicants in this manner.
[3] *N.J.A.C.* 6A:24-1.1 – 9.6.
[4] The Board alleges that Farmer's salary would not have increased on account of her receiving the promotion.

The Board has petitioned for summary decision based on the arguments that the Commissioner of Education ("Commissioner") lacks the requisite power to afford petitioners the relief they seek, namely the power to order appointment to the position of assistant superintendent and award monetary damages. Furthermore, the Board contends that the issues presented by the petitioners are now moot, because Highsmith has resigned, Farmer has retired, and the position of Assistant Superintendent has been significantly restructured so that it essentially no longer exists.

Standard for Granting Motion for Summary Decision

Summary decision is available in the administrative process pursuant to *N.J.A.C.* 1:1-12.5, which provides that summary decision is appropriate when:

> the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must be 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).]

The summary decision rule is substantially the same to that of the summary judgment rule provided by the New Jersey Rules of Court, *R.* 4:46-2. *Contini v. Bd. of Ed. of Newark*, 286 *N.J.Super.* 106, 121 (App. Div. 1995) (recognizing that the summary decision standard in administrative proceedings is substantially similar to that of New Jersey Court Rule 4:46-2). *R.* 4:46-2 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.
>
> [*R.* 4:46-2.]

The New Jersey Supreme Court in *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995) has indicated that in the analysis of a motion for summary judgment, a motion judge is required to consider "whether the competent evidential material presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party." *Id.* at 540. Therefore, where a moving party demonstrates by competent evidential material that no genuine and material issue of fact exists, the Court must grant the motion for summary judgment. Similarly, the rules governing administrative proceedings provide that 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." *Borough of Lincoln Park Bd. of Ed. v. Bd. of Ed. of the Town of Boonton*, EDU 5944-02, Initial Decision (April 2, 2003) <http://lawlibrary.Rutgers.edu/oal/search.html>, *modified*, Comm'r. (May 15, 2003) <http://www.state.nj.us/njded/news/info.ntm>. 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 filed with the application. *Ibid.*

In my view, in the matter *sub judice*, there are no genuine and material facts at issue and respondent's motion should be granted as a matter of law.

Authority of the Commissioner of Education

The jurisdiction of the Commissioner to hear controversies and disputes arising under school law is set forth in *N.J.S.A.* 18A:6-9, which provides that the Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State Board or of the Commissioner. The Commissioner is charged with the duty of supervising State schools and enforcing the rules prescribed by the State Board. *In the Matter of the Bd. of Educ. of City of Trenton*, 176 *N.J Super.* 553, 563 (1980) (citing *N.J.S.A.* 18A:4-23). "The Commissioner has long had significant responsibility and sweeping remedial powers for enforcing equal protection in the administration of the public education laws." *Balsley v. North Hunterdon Regional Sch. Dist. Bd. of Educ.*, 117 *N.J.* 434, 442 (1990). This is a judicial function, and in reviewing the administrative and managerial acts of boards of education, the

Commissioner is constrained to keep within the proper limits of judicial inquiry. *Boult v. Bd. of Educ. of the City of Passaic*, 1946 *S.L.D.* 7, 11. Generally, if the board of education acts within the authority conferred upon it by law, courts are without power to interfere in its actions or decisions in matters involving the exercise of discretion, in the absence of clear abuse. *Id.* at 12. The Commissioner should not interfere with local boards in the management of their schools unless they violate the law, act in bad faith, or abuse their discretion in a shocking manner." *Id.* at 13. When a school board acts within its authority, its decision is entitled to a presumption of correctness that will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. *Thomas v. Bd. of Educ. of the Township of Morris*, 89 *N.J.Super.* 327, 332 (App. Div. 1965).

In the present case, the petitioners could have properly requested the Commissioner to review the actions of the Board to determine whether the appointment of Highsmith was arbitrary, capricious, or unreasonable. However, the petitioners, instead, seek to have the Commissioner usurp the power of the Board and award appointment and/or damages for the Board's actions.

The Commissioner Does Not Have the Authority to Order Appointment to a Position.

The Board of Education and not the Commissioner is lodged with the authority to make appointments. The Board has the authority to appoint officers and employees. *N.J.S.A.* 18A:27-4.1 provides that "[a] board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board." The Legislature has expressly vested local school boards with the power to employ, promote, transfer, dismiss, and to adopt appropriate rules in connection therewith, subject to specific statutory provisions. *Dunellen Bd. of Educ. v. Dunellen Educ. Assoc.*, 64 *N.J.* 17, 23 (1973). Case law suggests that the board of education has the *ultimate* authority to promote. *Bd. of Educ. of the Township of North Bergen v. North Bergen Federation of Teachers*, 141 *N.J.Super.* 97, 103 (App. Div. 1976)

(emphasis added); *see also Lally v. Clark Bd. of Educ.*, 96 *N.J.A.R.*2d (EDU) 784, 787 (recognizing the board's "ultimate authority to make appointments").

While the Commissioner is provided broad supervisory power over schools, the authority sought by petitioners is not appropriate in this context. The Commissioner's power appears to be more of a remedial and supervisory nature. It has been recognized that the authority needed by the Commissioner must be sufficient to implement solutions to problems. *Deardon v. Bd. of Educ. of the City of Trenton*, 96 *N.J.A.R.*2d (EDU) 321, 328-29. However, the Commissioner's scope of review is limited to an evaluation of whether the school board has a reasonable basis for their conclusions. *Kopera v. Bd. of Educ. of the Town of West Orange*, 60 *N.J.Super.* 288, 295 (App. Div. 1960). The Commissioner must determine whether the action under review is violative of the law, and if so must then take the proper corrective action. *Id.* at 296. However, the Commissioner should not substitute his own judgment for that of those who made the initial evaluation but, instead, should determine whether they had a reasonable basis for their conclusions. *Ibid.*; *see also Boult v. Bd. of Educ. of the City of Passaic*, 1946 *S.L.D.* 7, 13 (the opinion of the Commissioner states that "it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on manners which are by statute delegated to the local boards").

The authority of the Commissioner does not comport with the relief sought by the petitioners. In the instant case, the petitioners are not alleging that the Board engaged in discriminatory practices or vindictive termination. Rather they appear to be asking the Commissioner to assume the responsibility for hiring personnel. This request exceeds the statutorily granted authority of the Commissioner and usurps that of the Board of Education. Therefore, the Board's motion for summary decision should be granted.

The Commissioner Lacks the Authority to Award the Payments of any Damages other than Lost Earnings or Restoring an Increment, Which Has Been Improperly Withheld.

The Commissioner has authority to award money damages. However, the Commissioner is limited in the monetary damages that he may award. It has been consistently held that the Commissioner cannot award punitive damages. *Dunn v. Elizabeth Bd. of Educ.*, 96 *N.J.A.R.*2d (EDU) 279, 281 (citing *North Bergen Fed. of Teachers Bd. of Ed. of Bergen*, 1975 *S.L.D.* 461, 467). Additionally, the Commissioner may not award counsel fees or legal costs. *Ibid.* (citing *Balsley v. North Hunterdon Bd. of Ed.*, 117 *N.J.* 434, 442-43 (1990)). However, the Commissioner may award lost earnings or may restore an increment that has been improperly withheld. *Ibid.* (citing *McLean v. Bd. of Ed. of Glen Ridge*, 177 *S.L.D.* 311. 314; *Mith v. Bd. of Ed. of Hamilton*, OAL Dkt. No. EDU 5468-87 *adopted in part and rejected in part on other grounds*, Comm'r. (April 21, 1998)).

In the present case, Farmer seeks back pay for the year that she contends she was unlawfully denied the position. Stephenson, as well, seeks "as a minimum" front pay and back pay for respondents' wrongful conduct. As the facts have been presented, it appears that Farmer was recommended second to Highsmith and Stephenson was ranked last among the four applicants. Therefore, Farmer contends that, but for the unlawful appointment of Highsmith, she would have been appointed to the position of assistant superintendent. Stephenson, on the other hand, does not appear to be alleging that he would have otherwise been appointed. Rather, the money damages he seeks seem to be more punitive in nature. He seeks such damages on account of respondents' "wrongful conduct." As noted, the Commissioner cannot award punitive damages. *Ibid.* (citing *North Bergen Fed. Of Teachers Bd. of Ed. of Bergen*, 1975 *S.L.D.* 461, 467). Therefore, Stephenson is not entitled to any relief, and summary decision should be granted in favor of respondents.

Additionally Farmer has failed to establish that she was entitled to the position. As noted above, the Commissioner lacks the authority to appoint her to the position, and it logically follows that she should not be entitled to back pay. Despite the fact that she was recommended

second to Highsmith by the interview committee, she was not necessarily entitled to appointment based entirely on her rank within the applicants. Although the Board is obligated to consider the recommendation of the superintendent, it is not bound by that recommendation. *Rotondo v. Board of Education of Carlstadt*, 92 *N.J.A.R.*2d (EDU) 376, 377; *see also Primka v. Jamesburg Borough Bd. of Educ.*, 93 *N.J.A.R.*2d (EDU) 91, 93 (finding that the Board if not bound by the recommendation of the superintendent). Therefore, Farmer has failed to sufficiently show that she would have been appointed but for Highsmith's appointment. Moreover, the Board contends that she would not have earned a higher salary than she did in her previous position even if she had been appointed to the position. As such, respondent's motion for summary decision should be granted.

The Issues Presented by Petitioners Are Now Moot.

The Board contends that this matter should be dismissed because it is now moot based on the fact that Farmer has retired, Highsmith has resigned from the position, and the position has been significantly restructured and essentially no longer exists. An action is moot when it no longer presents a justiciable controversy because the question has become academic or when a determination of the controversy will have no practical effect. *Victoria v. Woodbridge Bd. of Educ.*, 1982 *S.L.D.* 1. It is well established that questions that have become moot or academic prior to judicial scrutiny generally have been held to be an improper subject for judicial review. *Anderson v. Sills*, 143 *N.J.Super.* 432, 437 (Ch. Div. 1976). The *Anderson* court reasoned that courts will not decide cases in which the issue is hypothetical and a judgment cannot grant relief. *Ibid.* The court went on the state that it is the premise of the Anglo-American judicial system that a contest engendered by genuinely conflicting self-interests of the parties is best suited to developing all relevant material before the court; therefore, when a change in circumstances occurs that creates doubt concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot. *Ibid.*

Similarly, the Commissioner of Education also does not decide moot cases. *J.B. v. Asbury Park Bd. of Ed.*, 1988 *S.L.D.* 2303; *Weehawken Educ. Assn. v. Weehawken Educ. Assn. v. Weehawken Bd. of Ed.*, 1978 *S.L.D.* 924. An event renders a controversy moot where it

precludes a court from granting effective relief. 2 *Am. Jr. 2d* Administrative Law 524 (6th ed. 1990).

In the present matter, the Board argues that the action is moot because there is no controversy. Highsmith no longer occupies the position of assistant superintendent. Without the authority to appoint one of the petitioners to the position, the petitioners' remedy would otherwise be removal, which would be unnecessary at this point. Furthermore, petitioner Farmer has since retired. Even if the Commissioner had the requisite authority to make such an appointment, Farmer is unavailable to be appointed to the position, and Stephenson has failed to establish any concrete entitlement to the position. Finally, the Board has changed the position of assistant superintendent, modifying the job description and separating it into two distinct positions. *See Nichols v. Bd. of Educ. of Jersey City*, 65 *N.J.Super.* 45, 49 (1961) (finding that petitioner's request for appointment or reinstatement could not be ordered because the position was presently non-existent and the issue was therefore moot). [5]

Finally, petitioner's challenge to the contention that these issues are moot on account of a public policy argument should be denied. Petitioners have failed to show that respondents engaged in any actual wrongdoing. The fact remains that Highsmith was appointed to a position that he apparently was not qualified to hold. However, the circumstances surrounding this appointment are unclear, and petitioners have failed to substantiate any allegations of intentional evasion of certification requirements.

Based upon the foregoing, I **CONCLUDE** that the respondent, Camden City Board of Education, has established that there are no genuine issues of material fact and that it is entitled to prevail as a matter of law. Accordingly, its motions for summary decision in these matters be and are hereby **GRANTED**. The Commissioner does not have the authority to appoint either petitioner to the position, nor does he have the authority to award the monetary damages sought by the petitioners. Finally, the issues presented by both petitioners are moot, because there is no justiciable controversy.

[5] The Commissioner could consider whether the restructuring of the position by the Board was arbitrary, capricious, or unreasonable. *Thomas v. Bd. of Educ. of the Township of Morris*, 89 *N.J.Super.* 327, 332 (App. Div. 1965). However, petitioners are not contending that the restructuring of the position was inappropriate action by the Board.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

11/17/03
DATE

Steven Reback
STEVEN C. REBACK, ALJ

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

11/17/03
DATE

Mailed to Parties:

NOV 21 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

DR. WILMA J. FARMER,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND ANNETTE D. KNOX, SUPERINTENDENT,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
PAUL STEPHENSON,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND ANNETTE D. KNOX, SUPERINTENDENT, AND: CHARLES HIGHSMITH,	:	
RESPONDENTS.	:	

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law have been reviewed. In accordance with *N.J.A.C.* 1:1-18.4, the Board submitted an "exception" requesting correction of the Administrative Law Judge's (ALJ) statement, at page 4 of the Initial Decision, that Charles Highsmith was "confirmed" by the Board on June 25, 2001. The Board notes that, although Highsmith had been recommended by the Superintendent, only the Board can appoint, and the Board's action in June 25, 2001 was its

first and only official appointment of Highsmith, rather than the "confirmation" of an earlier Board action. Petitioners did not reply to the Board's submission.[1]

Upon careful and independent review of the record, the Commissioner concurs with the ALJ that summary decision is properly granted in favor of the Board. Accordingly, the Petitions of Appeal filed in this matter are dismissed for the reasons expressed in the Initial Decision.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 12/23/03

Date of Mailing: 12/30/03

[1] Petitioner Stephenson's and Respondent Highsmith'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 November 21, 2003 and their exceptions were filed on December 15, 2003 and December 19, 2003, respectively, outside the 13-day period prescribed by regulation. Such exceptions, therefore, were not considered in the Commissioner's determination of this matter.

[2] To the extent the Initial Decision might suggest otherwise, the Commissioner clarifies that determination of Highsmith's qualification is unnecessary to resolution in this matter and is not reached herein.

[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.*

IN THE MATTER OF WENTFORD GAINES,:

JERSEY CITY COMMUNITY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, BOARD OF TRUSTEES,	:	DECISION
HUDSON COUNTY.	:	
_____	:	

December 23, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
WENTFORD GAINES	:	
Jersey City Community Charter School	:	**SEC Docket No.: T36-03**
Board of Trustees	:	
Hudson 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:12-33 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, Wentford Gaines was appointed to the Jersey City Community Charter School in December 2001; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between December 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order against Mr. Gaines June 9, 2003, via regular and certified mail, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the October training sessions; and

WHEREAS, Respondent responded to the Order by letter stating that he registered to attend the October 21, 2003 training session in Atlantic City; and

WHEREAS, Mr. Gaines did not attend the training in October 2003; and

WHEREAS, the Commission notified him by letter dated June 12, 2003, that the Commission would discuss this matter at its October 28, 2003 meeting, and if he did not attend training by that time, he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that this failure to attend board member training from December 2001 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through October; and

WHEREAS, the Commission finds that if Mr. Gaines fails to attend by the end of **January 2004**, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Gaines violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends, but remove him from the board if he fails to attend one of the January 2004 training sessions.

Dated: October 29, 2003

Paul C. Garbarini, Chairperson

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, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View 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.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on October 28, 2003.

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT36-03.doc)

AGENCY DKT. NO. 436-11/03

IN THE MATTER OF WENTFORD GAINES,:		
JERSEY CITY COMMUNITY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, BOARD OF TRUSTEES,	:	DECISION
HUDSON 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 removal of 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 *N.J.A.C.* 6A:28-1.6; and

Whereas, *N.J.S.A.* 18A:12-33 requires new school 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 Jersey City Community Charter School in December 2001; and

Whereas, the above-named Board member was duly apprised of the training requirement via the New Jersey School Boards Association's (NJSBA) "candidate kit," together with correspondence to him dated January 3, 2003 and February 19, 2003; and

Whereas, the NJSBA conducted seven training sessions between December 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, the last training session to fulfill his requirement was held in March 2003; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on June 9, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the October 2003 training sessions; and

Whereas, the above-named Board member responded to the order by letter stating that he had registered to attend the October 21, 2003 training session in Atlantic City; and

Whereas, the above-named Board member did not attend the training in October 2003; and

Whereas, the Commission notified him by letter dated June 12, 2003 that it would discuss this matter at its October 28, 2003 meeting and, if he did not attend the training session by that time, he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

Whereas, the Commission finds that this failure to attend board member training from December 2001 until April 2003 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, at its meeting on October 28, 2003, the Commission recommended that the above-named Board member be suspended from the Board until he attends the January 2004 session and removed if he fails to attend the January 2004 session, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on November 12, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, neither the above-named school official nor anyone on his 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 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 suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event he fails to complete the training session in January 2004, the above-named Board member shall be summarily removed from office as of that date.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/23/03

Date of Mailing: 12/31/03

* 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.

686-03

686-03SEC

IN THE MATTER OF CHAWN	:	
CHARLTON, GATEWAY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL BOARD OF TRUSTEES,	:	DECISION
HUDSON COUNTY.	:	
	:	

December 23, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
CHAWN CHARLTON	:	
Gateway Charter School	:	**SEC Docket No.: T32-03**
Board of Trustees	:	
Hudson 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:12-33 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, Chawn Charlton was appointed to the Gateway Charter School in June 2001; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted eight training sessions between June 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order against Ms. Charlton on June 9, 2003, via regular and certified mail, directing her to Show Cause why she had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the October training sessions; and

WHEREAS, Respondent provided no response to the Order; and

WHEREAS, the Commission notified her by letter dated June 12, 2003, that the Commission would discuss this matter at its October 28, 2003 meeting, and if she did not attend training by that time, she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that this failure to attend board member training from June 2001 to April 2003, well beyond the one year required by law, constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through October; and

WHEREAS, the Commission finds that if Ms. Charlton fails to attend by the end of **January 2004**, the Commission finds that it would be appropriate to have her removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Charlton violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend her until she attends, but remove her from the board if she fails to attend one of the January 2004 training sessions.

Dated: October 29, 2003

Paul C. Garbarini, Chairperson

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, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View 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.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on October 28, 2003.

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT31-03.doc)

AGENCY DKT. NO. 431-11/03

IN THE MATTER OF CHAWN	:	
CHARLTON, GATEWAY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL BOARD OF TRUSTEES,	:	DECISION
HUDSON 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 removal of 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 *N.J.A.C.* 6A:28-1.6; and

Whereas, *N.J.S.A.* 18A:12-33 requires new school 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 Gateway Charter School in June 2001; and

Whereas, the above-named Board member was duly apprised of the training requirement via the New Jersey School Boards Association's (NJSBA) "candidate kit," together with correspondence to her dated January 3, 2003 and February 19, 2003; and

Whereas, the NJSBA conducted eight training sessions between June 2001 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

Whereas, the last training session to fulfill the requirement was held in March 2003; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on June 9, 2003, the Commission issued an Order to Show Cause why she had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the October 2003 training sessions; and

Whereas, the above-named Board member provided no response to the Order; and

Whereas, the Commission notified her by letter dated June 12, 2003 that it would discuss this matter at its October 28, 2003 meeting and, if she did not attend the training session by that time, she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

Whereas, the Commission finds that this failure to attend board member training from June 2001 until April 2003 constitutes a violation of *N.J.S.A.* 18A:12-33; and

Whereas, at its meeting on October 28, 2003, the Commission recommended that the above-named Board member be suspended from the Board until she attends a January 2004 session and removed if she fails to attend by the end of January 2004, memorializing such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on November 12, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no response was submitted; 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 suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event she fails to complete a training session during January 2004, the above-named Board member shall be summarily removed from office as of the date of the final session offered that month.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/23/03

Date of Mailing: 12/31/03

* 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.

687-03

BLOOMFIELD EDUCATION ASSOCIATION, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioning Education Association alleged the Board violated *N.J.S.A.* 18A:28-8 when it unilaterally changed the retirement/resignation date of one of its members, Benedict Salamone, from October 1, 2001 to September 4, 2001, thus depriving the member of his full salary for the month of September. Salamone had notified the Board well in advance of the 60-day written notification requirement.

The ALJ determined that there were no cases that specifically addressed the problem as factually laid out in this matter. Once formal action was taken by the Board to accept the retirement/resignation date, only very unusual circumstances would allow rescission. The ALJ concluded that by unilaterally altering the date on the basis of alleged educational continuity, the Board did deprive Salamone of his full salary for the month of September, in essence reducing his income by having him accept a pension payment in lieu of salary. The ALJ found as a matter of equity Salamone was entitled to the difference between his pension payment for the month of September 2001 and his full salary for the month from the Board.

The Commissioner adopted the Initial Decision with modification, finding resolution compelled as a matter of law. The Commissioner determined that unilaterally changing petitioner's termination of active employment date, thereby purporting to retire him prematurely and involuntarily, was tantamount to an unlawful discharge. The Commissioner noted that *N.J.S.A.* 18A:28-8, governing the resignation of tenured individuals, must be read *in pari materia* with *N.J.S.A.* 18A:6-10, which specifies the circumstances under which a tenured individual may be dismissed. The Commissioner directed the Board to pay Salamone his full salary for the month of September 2001, less the amount of pension payment received by him for that month.

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.

December 29, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

CROSS MOTIONS FOR SUMMARY DECISION

OAL DKT. NO.: EDU 8308-01

AGENCY DKT. NO. 466-11/1

BLOOMFIELD EDUCATION ASSOCIATION

Petitioner,

v.

BOARD OF EDUCATION OF BLOOMFIELD,

Respondent.

Sanford Oxfeld, Esq., for petitioner
(Oxfeld & Cohen, P.C., Attorneys)

Joseph DeFuria, Esq., for respondent
(Gaccione, Pomaco & Beck, Attorneys)

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

STATEMENT OF CASE

Benedict Salamone, a teacher in the Bloomfield School District, decided, after 40 years of service to resign his position effective October 1, 2001. He notified the Board in writing by letter dated July 9, 2001 that he intended to retire on September 30, 2001.

At its meeting of July 17, 2001, the Board of Education of Bloomfield excepted and approved Salamone's resignation and resignation date.

The Board of Education of Bloomfield on August 28, 2001 unilaterally changed Salamone's retirement date from September 30, 2001 to September 4, 2001.

Mr. Salamone's argues that by unilaterally moving up his retirement date, the Board violated his tenure rights since he was deprived of his full salary for the month of September.

PROCEDURAL HISTORY

This matter was received by the Office of Administrative Law on or about November 29, 2001 and cross-motions for Summary Decision were received early in January 2003.

The Petition of Appeal as originally filed was in three Counts of which only Count 1 remains contested. Count 2 is dependent upon the argument in Count 1 that a teaching staff member cannot have his tenure rights violated unilaterally while Count 3 involved a different employee and has been resolved.

FACTS

The pertinent facts in this matter are not in significant dispute.

Benedict Salamone began his employment with the Bloomfield Board of Education in September 1961. During the entire time of his employment, he taught either English or Reading.

By letter dated July 9, 2001, Mr. Salamone wrote to Thomas Dowd, the Superintendent of Schools in Bloomfield that he would be retiring as of September 30, 2001. His notification was approved by the Board on July 17, 2001. Mr. Salamone intended to return to his job on September 4, 2001 but having returned from vacation on that day, the received notification that the Board had approved his resignation but his resignation was to be effective on September 1, 2001.

The letter to Mr. Salamone indicated that the Board at its August 28, 2001 meeting had changed his resignation date to accommodate a replacement teacher who was available as of September 5, 2001.

Telephone conversations and e-mail exchanges did not alter the Board's position.

Mr. Salamone went to the Division of Pensions in Trenton and requested that his retirement be effective August 1, 2001 to prevent a lapse in his health insurance. After an unsuccessful grievance arbitration, a petition of appeal was filed with the Department of Education and subsequently forwarded to the Office of Administrative Law for disposition. Petitioner and respondent agreed that the sole issue presented in this matter is the appropriateness/legality of the Board of Education unilaterally changing Salamone's requested resignation date.

THE LAW

Petitioner rightfully points out that *N.J.S.A.* 18A:28-8 requires only that he gives sixty day written notice of his intention to relinquish his position. The statute reads in full as follows:

> Any teaching staff member, under tenure of service, desiring to relinquish his position should give the employing Board of Education at least sixty-days written notice of his intention, unless the Board shall approve of a release on shorter notice and if he fails to give such a notice, he shall be deemed guilty of unprofessional conduct and the Commissioner may suspend the certificate for not more than one year.

Salamone's letter exceeded the sixty-day requirement and was accepted by the Board of Education.

The Board concedes that Salamone's resignation with a date of September 30, 2001 was approved.

The Board's position in this matter is as follows:

". . . Continuity of classroom instruction was a compelling educational interest, and this was maintained by hiring a replacement for Mr. Salamone to begin at the commencement of the school year, in September, rather than having Mr. Salamone teach the class for one month and to then immediately replace him as of October 1st with a new teacher. The Board's goal of maintaining educational continuity in the classroom was in the best interest of the children, and was not an attempt to benefit the Board in any way, in its capacity as an employer."

Petitioner contends that *N.J.S.A.* 18A:6-10 which reads in pertinent part as follows:

> No person shall be dismissed or reduced in compensation (if he is tenured) except for inefficiency, incapacity, unbecoming conduct, or other just cause and then only after a hearing held pursuant to the sub-article by the Commission, or a person appointed by him to act in his behalf after a written charge or charges, of the cause or causes of the complaint, shall be profit against such persons signed by the person or persons making the same, who may or may not be a member or members of the Board of Education and filed and proceeded upon as in this sub-article provided.

The essence of the arguments by both sides is that, according to petitioner, there is no restriction on his choice of retirement date although the Board believes that the educational continuity of the students and their best interests allows the Board to in fact unilaterally alter Mr. Salamone's chosen retirement date.

DISCUSSION

The Collective Bargaining Unit between the Bloomfield Education Association of which Salamone is a member and the Bloomfield Board of Education is silent with respect to acceptance or alteration of a submitted retirement date.

There are no cases which specifically address the problem as factually laid out in this matter.

The sixty-day notice required pursuant to *N.J.S.A.* 18A:28-8 is undoubtedly intended to provide the Board with an adequate amount of time to seek a replacement for the retiring or resigning teaching staff member. Although the statute allows for a shortening of the sixty-day time period for the acceptance of a notice, it amounts to no more than a restriction on the conduct of the tenured teacher for it provides a penalty in the event the notice is not timely. It does not however, preclude a retirement nonetheless nor does it mandate any action by the Board of Education which if not undertaken would warrant a penalty.

There are some general rules culled from prior cases that afford some guidance in this matter.

In *Hanley v. Board of Education of Township of East Brunswick*, 1988 *S.L. D.* 1149 read in conjunction with *In The Matter of Fisher v. The Board of Education of City of East Orange* 1988 *S.L.D.* 31 confirmed that an effective resignation must be unambiguous and voluntary to end up in a relinquishment of the position.

As a general rule, an employee may rescind a resignation prior to its formal acceptance by the Board of Education. *Kozak v. Board of Education of Waterford Township*, 1976 *S.L.D.* 633. Formal acceptance does require a motion or resolution by the Board. *Lippincot v. Board of Education of the Borough of Riverton*, 1990 *S.L.D.* 639.

Once formal action is taken by the Board only very unusual circumstances will allow the resignation to be rescinded. *Evaul v. Board of Education of the City of Camden*, 35 *N.J.* 244 (1961).

The Board's argument in this matter would have been more compelling had they not accepted Salamone's notice of retirement. The notice given by Salamone was in accordance with his statutory responsibility, which in theory and actually in practice gives the Board sufficient time to seek a replacement. The Board not only sought the replacement but once they found the replacement, they "unilaterally" altered their agreement with Salamone with not even the slightest consideration of how that alteration may affect Salamone. Equitably speaking, I see little to refute the argument that this conduct by the Board was patently unfair. It is however, not prohibited by statute or regulation nor precluded by agreement in the Collective Bargaining Contract.

Anger, aggravation, irritation and disappointment experienced by Salamone are understandable responses but not a basis for compensation in this matter. However, there is some validity to the creative argument that Salamone has lost the difference between what he received in pension for the month of September and what he would have received in salary for that month had his retirement date not been unilaterally altered. No charges, no hearing, no notice, no loss of salary. In a nutshell, that is Salamone's contention with respect to the purported violation of his tenure rights.

If the Board did not want to accept Salamone's purposed retirement date contained in his notice, they could have at very minimum discussed it with him at the time he submitted. The interest of the children and the continuity of their education were no different then than it was when they found a replacement for Mr. Salamone. Although it might seem quite logical to require a teacher's retirement to take place at the least disruptive time to the students, that most likely being in September, or at the end of the school year, there is no statute, regulation or agreement mandating such logic.

The facts of this case as applied to Mr. Salamone and the Board are situationally unique. The principal that the Board can unilaterally move up a retirement date would fall in the category of ludicrous if examined from the standpoint of an attempt by a Board to

move up a retirement date for example, six-months. An analysis of a Board's attempt to so alter a retirement request leads to the conclusion that it is simply inequitable. Salamone followed all of the mandates required of him in order to retire. He has no obligation to either explain his chosen retirement date nor give a reason for why he chose it. Most disturbing in the factual context of this matter, is that the Board did accept not only Salamone's resignation, but also the date that he chose. By unilaterally altering that date, with what appears to be a pretextual contention that educational continuity would benefit from the unilateral change, they did deprive Salamone of his full salary for the month of September, in essence reducing his income by having him accept a pension payment in lieu of salary.

The Board's action was equitably wrong. A wrong shall have a remedy.

ORDER

It is so **ORDERED** that the Board of Education of Bloomfield should pay to Benedict Salamone the difference between his pension payment for the month of September 2001 and his full salary for the month.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

NOV 18 03

DATE

JEFFREY A. GERSON, ALJ

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

11/18/03

DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 19 2003

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NO. EDU. 8308-01
AGENCY DKT. NO. 466-11/01

BLOOMFIELD EDUCATION ASSOCIATION,	:	
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 charge that the Administrative Law Judge's (ALJ) determination in this matter was premised solely on "sympathy" for Mr. Salamone because he found the result here "inequitable and unfair." (Board's Exceptions at 1) However, as the ALJ recognized, there is no law, regulation or bargaining agreement which prohibited the Board's actions in this regard. The Board argues that it is the responsibility of the OAL to interpret and apply the laws of the State. The Board's actions here were not violative of any law or regulation. To the contrary, the Board asserts, *N.J.S.A.* 18A:28-8, which was enacted to protect boards of education by requiring teachers to provide sufficient notice of their intent to resign/retire so as to permit boards to secure replacements, specifically authorizes such action by a board.[1] As such, the Board urges the Commissioner to reverse the decision of the OAL. (*Id.* At 2)

[1] The Commissioner notes that *N.J.S.A.* 18A:28-8., **Notice of intention to resign required,** specifies:

In reply, petitioner contends that the fundamental issue to be resolved here "is the ability of a Board of Education to assign a termination date for a tenured teacher, without the teacher's consent and without the filing of tenure charges." (Petitioner's Reply Exceptions at 2) Petitioner charges that the Board's reliance on language in *N.J.S.A.* 18A:28-8 in support of its action is misplaced, professing

> [c]learly the phrase indicating that the Board may approve release on shorter notice contemplates that the individual giving the notice must first have requested a period shorter than the 60 days set for[th] in the statute. It is the Board of Education's prerogative to then "approve" a release on shorter notice if it so desires. If the Board does not so approve, it can seek to have the teacher's certification suspended for up to one year. It must be emphasized that the statute does not give the Board of Education the right to "grant" release on shorter notice. In short, if the teacher makes a request to resign with shorter notice, the Board of Education has the right to either approve or not approve, but the statute in no way contemplates the Board of Education of its own accord giving a teacher a shorter period of notification than the teacher requested. (Petitioner's Reply Exceptions at 2-3)

Here, petitioner argues, Mr. Salamone submitted notification of his intention to leave the District on October 1, 2001, by letter dated July 9, 2001, in full compliance with the requisite statutory notification period. The Board accepted such notification, pursuant to its terms, on July 17, 2001. At no time did Mr. Salamone request a reduced notification period but, rather, the Board, subsequently, unilaterally changed his termination date. Petitioner contends that the impropriety of such an action is readily apparent when *N.J.S.A.* 18A:28-8, which is solely applicable to tenured individuals, is read *in pari materia* with *N.J.S.A.* 18A:6-10, **Dismissal and**

> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.

reduction in compensation of persons under tenure in public school systems, which, in pertinent part, specifies:

> [n]o person shall be dismissed or reduced in compensation [if he is tenured] except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to the 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 the complaint, shall be preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of the Board of Education, and filed and then proceeded upon as in this sub-article provided.
> (Petitioner's Reply Exceptions at 4)

Such an examination, petitioner opines, evidences that there are only two ways that a board of education and a tenured teacher can permanently sever their employment relationship, *i.e.*, the tenured teaching staff member can submit a letter of resignation pursuant to *N.J.S.A.* 18A:28-8 or the board can file tenure charges against the teaching staff member pursuant to *N.J.S.A.* 18A:6-10. (*Ibid.*) As it is undisputed that Mr. Salamone provided the requisite notice, the law is clear that the only way he could have been forced to leave his employment is by the filing of tenure charges, which never happened in this matter. (*Id.* At 7) Petitioner, therefore, submits that the decision of the ALJ should be affirmed.

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 improperly deprived petitioner of his full salary for the month of September 2001, he provides the following modification. Notwithstanding that there is no statutory provision which specifically addresses the effect of retirement/resignation notifications and that prior case law deals with situations where individuals sought, under various circumstances, to rescind their retirement/resignation notification subsequent to acceptance of such notifications by their boards of education rather than the question of unilateral action by a

board as occurred here, the Commissioner concludes that foundational precepts contained in these prior decisions of the Commissioner compel the outcome of this case as a matter of law.

Initially, it is well-established in school law that in the absence of statutory provisions dealing with the effect of resignations and their rescission or modification, principles of contract law are applicable. *Cutro v. Hazlet Township Board of Education*, 94 *N.J.A.R.* 2d (EDU) 402, *affirmed with modification* by the State Board of Education, 97 *N.J.A.R.* 2d (EDU) 557. The provisions of *N.J.S.A.* 18A:28-8 require tenured teaching staff members desiring to relinquish their position to give the employing board of education written notice of their intent to resign at least 60 days prior to their intended departure date. It is by now well recognized that upon acceptance of that letter of resignation/retirement by the board the teaching staff member does not have a right to unilaterally rescind the resignation. *See F. Rupert Belles v. Wayne Township Board of Education*, 1938 *S.L.D.* 556; *Kozak v. Waterford Township Board of Education*, 1976 *S.L.D.* 633; *Cutler v. Board of Education of the Township of Parsippany-Troy Hills*, 1990 *S.L.D.* 725. Ordinary principles of contract law compel the conclusion that the Board is similarly bound by the accepted terms of the resignation. Thus, petitioner's tendered notification of retirement, by letter dated July 9, 2001, with an effective date of October 1, 2001, was legally binding on both parties upon acceptance of its proffered terms by the Board on July 17, 2001, and could not thereafter be unilaterally rescinded or modified. *See Cutro,* supra; *Lisette R. Delgado v. BOE of the City of Union, Hudson County*, 93 *N.J.A.R.* 2d (EDU) 744; *Ronald Fischer v. Board of Education of the City of East Orange, Essex County*, 1988 *S.L.D.* 31. Therefore, the Board's subsequent action on August 28, 2001, unilaterally changing petitioner's termination of active employment date, thereby purporting to retire him prematurely and involuntarily, was tantamount to an unlawful discharge.

The Commissioner specifically rejects the Board's contention that *N.J.S.A.* 18A:28-8 provided authorization for its August 28 action. Rather, he concurs with petitioner that *N.J.S.A.* 18A:28-8, governing the resignation of tenured individuals, must be read *in pari materia* with *N.J.S.A.* 18A:6-10, which specifies the circumstances under which a tenured individual may be dismissed. To find otherwise would render meaningless tendered notification of retirement/resignation and the Board's acceptance thereof, as the Board would be free to unilaterally alter the agreement prior to the effective date, thereby serving to eviscerate the tenure protections guaranteed these individuals by law.

Accordingly, the Initial Decision of the OAL is adopted as modified herein. The Board is hereby directed to pay Mr. Salamone his full salary for the month of September 2001, less the amount of pension payment received by him for that month.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/29/03

Date of Mailing: 12/31/03

[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.*

688-03

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN CROWELL,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF TRENTON, MERCER COUNTY.	:	DECISION
	:	

December 23, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4580-02

AGENCY DKT. NO. 192-6/02

CITY OF TRENTON BOARD
OF EDUCATION, MERCER COUNTY,

Petitioner,

v.

JOHN CROWELL

Respondents.

Thomas W. Sumners, Jr., Esq., for petitioner (Sumners George, attorneys)
Michael T. Barrett, Esq., for respondent (Bergman & Barrett, attorneys)

Record Closed: November 5, 2003 Decided: November 5, 2003

BEFORE **ROBERT S. MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 18, 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 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.

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 5, 2003
DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

November 12, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 13 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

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SUMNERS GEORGE
A Professional Corporation
849 West State Street
Trenton, NJ 08618
(609) 393-6604
Attorneys for Petitioner, Trenton Board of Education

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2003 NOV -5 A 10:49

	: BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY
IN THE MATTER OF TENURE CHARGES AGAINST JOHN CROWELL, BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY	: AGENCY DOCKET NO. 192-6/02 : OAL DOCKET NO. EDUTH 4580-02S
	: ***SETTLEMENT AGREEMENT***

WHEREAS, this Settlement Agreement is entered into by and between the Petitioner, Board of Education of the City of Trenton, Mercer County, New Jersey, and the Respondent, John Crowell.

WHEREAS, the Respondent is a tenured teacher within the meaning of the education Laws and regulations covering the State of New Jersey employed by the Petitioner. On June 17, 2002, the Petitioner certified tenure charges against the Respondent seeking his dismissal from his teacher's position. The tenure charges were filed by the Petitioner with the Commissioner of Education's office on June 28, 2002. On July 12, 2002, the Respondent filed an Answer to the tenure charges denying the allegations set forth in the tenure charges.

WHEREAS, on July 18, 2002, the tenure charges were transmitted by the Commissioner to the Office of Administrative Law and assigned to Administrative Law Judge Robert Miller to conduct a plenary hearing. The hearing was commenced on April 23, 2003 before ALJ Miller and a settlement conference was conducted between the parties resulting in the within agreement.

WHEREAS, the tenure charges against the Respondent involve the following three separate incidents which occurred during the 2000-2001 and 2001-2002 school years:

1. On June 11, 2001, it is alleged that Trenton Central High School student, Tameka Jones, after receiving her failing grade and the possibility that she might not graduate, told Respondent that she would do anything to increase her grade. Respondent replied, "Would you have sex with me every day?" Respondent acknowledges that he made the statement but it was intended to be a joke, albeit an inappropriate joke. There is only one student who is available to testify regarding this statement and she has acknowledged in her statement, and it would be confirmed in her testimony, that Respondent may have been joking.

2. On January 3, 2002, it is alleged that Respondent forcibly removed the headband of a student and used it to wipe the chalkboard. It is further alleged that when the student attempted to retrieve the headband, the Respondent kicked him several times in front of other students. Respondent claims that he did not forcibly remove the headband. He also claims that when the student grabbed a calculator from his shirt pocket, he grabbed the student's hand to prevent his pocket from tearing and in response, the student kicked him in the ankle. Respondent claims that he attempted to defend himself by putting his foot out to stop the student from kicking him. The student who claimed to be the victim of Respondent's conduct is not available to testify. In addition, only one of three other possible witnesses is available to testify.

3. On February 13, 2002, it is alleged that the Respondent kneed a student three times when she returned to the classroom after being dismissed for being disruptive. Respondent claims that he never kicked the student with any part of his body but as she attempted to punch him, he lifted his knee for protection. A disorderly conduct complaint was filed against Respondent by the student's mother in Trenton Municipal Court. A

hearing was conducted and a Municipal Court judge dismissed the complaint based upon his finding that the victim's story was not credible and that Respondent's action was done in self defense. Although the student victim is available to testify, there are no other witnesses available to substantiate her allegations.

WHEREAS, the petitioner feels this settlement is appropriate because the strength of it's case may be effected by the unavailability of many of the witnesses as set forth above who it intended to produce at the hearing and that a municipal court trial related to the above mentioned February 13, 2002 charge alleging assault against a student resulted in a dismissal of simple assault charges against Respondent on the grounds that he acted in self-defense.

WHEREAS, Respondent contends that the allegations against him, separately and together, do not constitute unbecoming conduct on the grounds that they can not be supported by facts based upon a preponderance of evidence, and even if there may be some factual support for the allegations, they do not constitute unbecoming conduct as defined by law, and moreover, if it was determined that some of his conduct was not consistent with the law or district policy, his tenure would not be terminated when he had not previously been disciplined as a principal beyond a written warning, or even during his prior experience in the School District as a teacher and assistant principal, over the course of his 20 years of employment in the District; and

WHEREAS, It is now the desire of both parties to resolve any and all issues and disputes in this proceeding because of the uncertainty of the outcome should this matter proceed to hearing. In consideration for the mutual promises and covenants contained herein, the parties agree as follows:

1. The Respondent will be reinstated to his former position as a tenured teacher upon the approval of this settlement agreement by the Commissioner of Education.

2. The parties also agree and understand that based upon the needs of the Petitioner, the Respondent's assignment may change from the assignment that he held at the time the tenure charges were certified, provided that such change is consistent with the laws and regulations of the State of New Jersey, policies and practices of the Petitioner, and the collective bargaining agreement between the Petitioner and the Trenton Education Association.

3. In accordance with state tenure laws, the Respondent was suspended without pay for 120 days following certification of the tenure charges. The parties agree that this period of suspension without pay shall be deemed to be a disciplinary suspension without pay and may be treated as a disciplinary suspension by the Petitioner for purposes of the Respondent's employment record with the Petitioner.

4. It is agreed that the Respondent's acceptance of this disciplinary suspension without pay does not constitute an admission of guilt by him to any of the allegations set forth in the tenure charges or an acknowledgment that he engaged in any wrongdoing of any kind, including that set forth in the tenure charges. Respondent has entered into this settlement agreement due to the uncertainty of the outcome and in an effort to dispose of this matter in a way that will allow him to return to work.

5. Respondent acknowledges that he is not entitled to any back pay as a part of this settlement agreement, nor is he entitled to have any of his attorney's fees paid by the Petitioner.

6. Respondent understands that the Commissioner, pursuant to NJAC 6:11-3.6 has the authority to refer tenure decisions to the State Board of Examiners for possible revocation of certification

7. This agreement constitutes a full and final settlement of all claims in dispute, which were raised, or could have been raised, in this matter. Both parties waive any rights to any further appeals with respect to this matter, or any other proceedings to contest the matters which were raised in this proceeding, or could have been raised, except that either party may file an appropriate action to enforce the terms of this settlement agreement.

8. The parties agree that this settlement agreement will be incorporated as part of an Initial Decision issued by the Honorable Robert Miller, ALJ, and will be presented to the Commissioner of Education to accept as a final decision in this matter.

9. The Respondent by signing this agreement below represents and warrants that he has had an opportunity to review this agreement with his attorney, Michael T. Barrett, Esq., Bergman and Barrett, and warrants that he is satisfied with the services of Mr. Barrett and his firm and with the representation that he has received from the Trenton Education Association.

10. This agreement is entered into voluntarily, without duress and of free will and that there are no agreements between the parties other than that which are set forth herein.

11. The representatives of the Petitioner signing this agreement represents and warrants that they are authorized by the Petitioner to enter into this agreement based upon a

public action approving the agreement by the Petitioner and their signatures bind the Petitioner to the terms set forth herein.

Joyce M. Kersey, President
Trenton Board of Education
Petitioner

10/16/03
Date

Melvin L. Wyns, Board Secy.
Trenton Board of Education
Petitioner

Michael T. Barrett, Esq.
Respondent's Attorney

9-26-03
Date

John Crowell
Respondent

OAL DKT. NO. EDU 4580-02
AGENCY DKT. NO. 192-6/02

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN CROWELL,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF TRENTON, MERCER 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 of the Settlement Agreement and the charges certified by the District, as well as the written statements in evidence appended thereto and respondent's Answer to such charges, the Commissioner is compelled to reject such agreement, since he cannot be satisfied that it meets the *Cardonick* standards for settlement of tenure matters. *In re Cardonick*, 1990 *S.L.D.* 842, 846.

It is well-established that, having once taken up the burden of tenure charges, the District 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 S. 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.) Specifically, the Commissioner finds that the charges delineated

herein are of a serious nature, involving allegations of two separate instances of corporal punishment against students in January and February 2002, respectively, and an allegation that respondent propositioned a female student in his classroom in June 2001, telling her that she could graduate if she slept with him every night. Although the District asserts that the "strength of [its] case may be [affected] by the unavailability of many of the witnesses***and that a municipal court trial related to the above mentioned February 13, 2002 [corporal punishment] charge alleging assault against a student resulted in a dismissal of simple assault charges against Respondent on the grounds that he acted in self-defense" (Settlement Agreement at 3), the Commissioner is simply not persuaded that the District lacks the ability to go forward. The proposed agreement indicates that there is at least one witness on each of the charges "available" to testify, including the victim in one of the corporal punishment charges. The record further contains written documentation of two investigative reports of the school principal, Ms. Dawson, which involved her interviewing of respondent with respect to each of the two corporal punishment incidents, and in one of these incidents there is an incident statement of a teaching staff member. Presumably, availability of these school personnel should be assured. Moreover, the outcome of a charge in municipal court would not foreclose establishment of unbecoming conduct in this forum based on the identified conduct largely because of the significant difference in the required burdens of proof in the respective forums, *i.e.*, beyond a reasonable doubt vs. preponderance of the credible evidence.

Particularly troubling here is that the proposed Settlement Agreement appears to contemplate respondent's reinstatement to his position and, concomitantly, a return to his instructional duties. Given the serious nature of the charges filed by the District, the Commissioner cannot approve any agreement which contemplates respondent's unconditioned

return to the classroom absent successful adjudication of the charges without *detailed elaboration* as to how this result serves the public interest.

Accordingly, the within Settlement Agreement is rejected and this matter is remanded to the OAL for further action consistent with this determination.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/23/03

Date of Mailing: 12/31/03

* 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.*